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The Reports of Sir Edward Coke

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The Reports of Sir Edward Coke Kt., in English, Compleat in Thirteen Parts: The Sixth Part of the Reports of Sir Edward Coke Kt., Her Majesty's Attorney General

Sir Edward Coke

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Part of the Law Commons

The Sixth PART of the
R E P O R T S
O F

Sir Edward Coke Kt.

Lord Chief Justice of ENGLAND.

O F

Divers Resolutions and Judgments given with great Deliberation, by the Reverend Judges and Sages of the Law, of Cases and Matters in Law which were never resolved or adjudged before: And the Reasons and Causes of the said Resolutions and Judgments, during the most happy Reign of the most Illustrious and Renowned Queen *ELIZABETH*, the Fountain of all JUSTICE and the LIFE of the LAW,

With REFERENCES to all the BOOKS of the *COMMON LAW*, as well Antient as Modern.

*Neminem oportet esse legibus sapientiozem.
Non aliunde floret Resp. quam si legum Vigeat Auctoritas.*

In the *SAVOT*:

Printed by E, and R. NUTT, and R. GOSLING, (Assigns of *Edw. Sayer* Esq;) for D. Browne, J. Walthoe, B. Lintot, R. Gosling, W. Pears, L. Ward, W. Innes, J. Osborn, L. Woodward, F. Clay, L. Cotton, R. Williamson and A. Ward.

M DCC XXVII.

T O T H E

R E A D E R.

EX quo quintam Relationum mearum partem in lucem ediderim, quidam Juris nostri Municipalis imprimis studiosus a me petiit, ut scrupulum ipsi in hoc eximerem, quod in Præfatione in secundam Relationum mearum partem asseruerim, " Si antiquæ celeberrimæ hujus Insulæ leges cæteris omnibus (humanas dico) non præcelluissent, fieri non poterat, quin ex tot victoribus, Dominisque, cum penes singulos esset, sive Romani, sive Anglosaxones, sive

SINCE the Publishing of the fifth Part of my Reports, a good Student of the Common Laws desired to be satisfied, in one special Point, in my Epistle to the second Part of my Reports, where I affirmed, " That if the ancient Laws of this noble Island, had not excelled all others (speaking of human) it could not be but some of the several Conquerors and Governors thereof, that is to say, the Romans, Saxons, Danes, or Normans, and especially the Romans, who (as they

Prof. 2. Co. Rep.

To the READER:

“ they justly may) do
 “ boast of their Civil
 “ Laws, would (as every
 “ of them might) have
 “ altered or changed the
 “ same.” And (saith
 he) some of another Pro-
 fession are not persuaded,
 that the Common Laws of
 England are of so great
 Antiquity, as there su-
 perlatively is spoken. True
 it is, that the said Pe-
 riod was my own Opini-
 on, but not out of my own
 Head: For it is the Judg-
 ment of that most reverend
 and honourable Judge, Sir
 John Fortescue Knight,
 Chief Justice of Eng-
 land in the Reign of
 King Henry the Sixth;
 who (besides his pro-
 found Knowledge in the
 Law, being also an excel-
 lent Antiquary in his
 Book intituled, De Politica
 administratione & Legi-
 bus Civilibus florentissimi
 Regni Angliæ Commen-
 tarius, cap. 17. saith thus.

Pref. & Co. Rep.

“ The Realm of England
 “ was first inhabited of
 “ the Britons, next after
 “ them the Romans had
 “ the Rule of the Land,
 “ and then again the Bri-
 “ tons possessed it; after
 “ whom the Saxons in-
 “ vaded it, who chang-
 “ ing the Name thereof,
 “ did for Britain, call it

“ Dani, five Normanni,
 “ & potissimum Romani,
 “ qui (quod jure possint)
 “ de suo Jure Civili glo-
 “ riantur, has immutaf-
 “ sent, vel antiquassent.”
 Præterea (addidit) non-
 nullos alterius esse profes-
 sionis, qui non inducun-
 tur ut facile credant Mu-
 nicipalia Angliæ Jura tam
 profundæ esse antiquitatis,
 quam ibidem rei augendæ
 gratia dicatur. Verum
 sane hoc est, comprehen-
 sionem illam meam fuisse
 opinionem, non tamen ex
 meo sensu depromptam,
 sed ex judicio Spectatissi-
 mi & Honoratissimi Ju-
 dicis Johannis Fortescue,
 Ordinis Equestris, qui
 regnante Henrico sexto e
 supremo Angliæ tribunali
 jus dixit, & præter eximi-
 am juris prudentiam in
 antiquitatis notitia excel-
 luit, in libello cui titulum
 fecit, De Politica admini-
 stratione & Legibus Civi-
 libus florentissimi Regni
 Angliæ Commentarius, cap.
 17. hæc habet. Consuetudi-
 nes Angliæ antiquissimæ
 sunt, & per quinque nati-
 ones vicissim usitatæ & ac-
 ceptæ. Regnum Angliæ pri-
 mo per Britannos inhabi-
 tatum est, deinde per Ro-
 manos regulatum, iterumque
 per Britannos, ac deinde
 per Saxones possessum, quæ
 nomen

To the READER.

consensi & subscripsi, &c.

“ Mercians have consented
 “ and subscribed. I Æ-
 “ thelswith Queen have
 “ consented and subscri-
 “ bed, &c.”

Aliud etiam diploma ex
 sacris scriniis, ante Nor-
 mannorum etiam adven-
 tum, de verbo ad ver-
 bum proponam, quo quæ-
 stioni secundæ directæ sa-
 tisfiat. Ego Ethelredus
 totius Albionis Dei provi-
 dentia Imperator cuidam
 dilectissimo mihi ministro,
 cui parentelæ nobilitas Ul-
 fric indidit nomen, pro
 fidissimo, quo mihi affabi-
 liter obsecundatus est obse-
 quio, quandam ruris par-
 ticulam, viz. duas Man-
 sas & dimidium in loco
 ubi solicolæ Æt Dunmal-
 ton appellant, in perpetu-
 am concedo hæreditatem,
 quatenus ille bene perfuatur
 ac prospere possideat,
 quamdiu hujus ævi incolat-
 um vitali flamine rota-
 bilique meatu percurrere
 cernitur, & post istius la-
 bilis vitæ excessum, cui-
 cunque sibi libuerit suc-
 cessori relinquat. Sit au-
 tem prædictum Rus qua-
 dam communi terra situm,
 liberum ab omni mundiali
 obstaculo, cum omnibus quæ
 ad ipsum locum pertinere
 dignoscuntur, tam in mag-
 nis quam in modicis rebus,
 campis, pascuis, prætis,

I have here set down an-
 other Charter of Record
 made also long before the
 Conquest, de verbo in ver-
 bum, for a direct Answer
 to the second. “ I Ethel-
 “ red by God’s Providence
 “ Emperor of all Albion,
 “ do grant to my well-be-
 “ loved Servitor, whose
 “ Nobility of Parentage
 “ hath given Ulfric for
 “ Name, for the faithful
 “ Service wherewith he
 “ hath courteously served
 “ me, a certain Parcel of
 “ Land, that is to say, two
 “ Manses and an half, in
 “ a Place where the Inha-
 “ bitants call Æt Dun-
 “ malton, in perpetual In-
 “ heritance, that he may
 “ well enjoy and prospe-
 “ rously possess the same, as
 “ long as he is seen to run
 “ the Race of this Life
 “ with vital Breath, and
 “ may leave the same to
 “ what Successor he please,
 “ after his Departure from
 “ this transitory Life. Let
 “ the said Land situated
 “ in a certain Common, be
 “ free from all worldly Im-
 “ pediment, with all which
 “ are known to belong to the
 “ said Place, as well
 in

To the READER.

nomen ejus ex Britannia in Angliam mutaverunt; ex tunc per Danos idem regnum parumper dominatum est, & iterum per Saxones, sed finaliter per Normannos, quorum propago regnum illud obtinet in præfenti. Et in omnibus nationum harum, & regum eorum temporibus, regnum illud eisdem, quibus jam regitur, consuetudinibus continue regulatum est. Quæ si optimæ non extitissent, aliqui Regum illorum, justitia, ratione, vel affectione concitati, eas mutassent, aut omnino delevisent, & maxime Romani, qui Legibus suis quasi totum orbis reliquum judicabant. Similiter & alii Regum prædictorum, qui solum gladio regnum Angliæ possiderunt, quo & potentia simili, ipsi Leges ejus exinasse voluerunt. Neque vero tantorum temporum curriculum Leges Civiles, in quantum Romanorum, inveteratæ sunt, neque Venetorum Leges, quæ super alias antiquitate divulgantur, quorum tum insula, in initio Britonum, inhabitata non fuit, sicut nec Roma condita, nec ullorum mundi regnorum Deicolarum leges tanto ævo inolitæ sunt: Quare, non bonas, immo non optimas esse

“ England: After them,
 “ for a certain Time, the
 “ Danes had the Domini-
 “ on of the Realm, and
 “ then Saxons again, but
 “ last of all the Normans
 “ subdued it, whose De-
 “ scent continueth in the Go-
 “ vernment of the King-
 “ dom at this present. And
 “ in all the Times of these
 “ several Nations, and of
 “ their Kings, this Realm
 “ was still ruled with the
 “ self-same Customs, that it
 “ is now governed withal:
 “ Which if they had not
 “ been right good, some of
 “ these Kings, moved ei-
 “ ther with Justice, or with
 “ Reason, or Affection,
 “ would have changed them,
 “ or else altogether abolished
 “ them, and especially the
 “ Romans, who did judge
 “ all the Rest of the World
 “ by their own Laws. Like-
 “ wise would other of the
 “ aforesaid Kings have
 “ done, which by the
 “ Sword only possessing the
 “ Realm of England,
 “ might by the like Power
 “ and Authority have ex-
 “ tinguished the Laws
 “ thereof. And touching
 “ the Antiquity of the same,
 “ neither are the Roman
 “ Civil Laws, by so long
 “ Continuance of antient
 “ Times confirmed; nor
 “ yet the Laws of the Ve-
 “ netians,

To the READER:

“ netians, which above all
 “ other are reported to be
 “ of most Antiquity, foras-
 “ much as their Island in
 “ the Beginning of the
 “ Britains was not then
 “ inhabited, as Rome then
 “ also unbuilded, neither the
 “ Laws of any Nation of
 “ the World which worship-
 “ peth God, are of so old
 “ and antient Years:
 “ Wherefore the Contrary is
 “ not to be said nor thought,
 “ but that the English Cu-
 “ stoms are very good, yea
 “ of all other the very best.”

*Anglorum consuetudines, si-
 cut non dicere, ita nec sus-
 picari fas est.*

And albeit, I had so
 good a Warrant for the said
 Assertion (for every Man
 that writes ought to be so
 careful of setting down
 Truth, as if the Credit of
 his whole Work consisted
 upon the Certainty of every
 particular Period;) yet was
 I right glad to hear of any
 Exception, to the End that
 such as were not persuaded,
 might either be rightly in-
 structed, and the Truth con-
 firmed; or that I might up-
 on true Grounds be convert-
 ed, and the Error reform-
 ed: I desired to know some
 particulars, as many as they
 would (for Generalities ne-
 ver bring any Thing to a
 Conclusion.) At length (for
 this was remembred when
 I had almost forgotten it)
 their great Desire was to

Licet vero hujus asser-
 tionis tam locuples sit mi-
 hi Author (quilibet enim
 Scriptor adeo anxie sit
 sollicitus, ut ad verita-
 tem dicat, perinde ac si
 totius operis fides, unius-
 cujusque periodi fide ni-
 teretur) exceptionem tam-
 en quamcunque factam
 fuisse lætus audivi, ut
 qui non inducti erant ut
 crederent, edocerentur,
 & veritas confirmaretur;
 vel ut ego ex solidis
 fundamentis in viam re-
 vocarer, & Error corri-
 geretur. Petii autem ut
 particularia aliqua, quot-
 quot voluerint, propone-
 rent (Generalia enim
 conclusionem nunquam
 conficiunt.) Tandem vero
 (cum hoc mihi ex memo-
 ria fere excidisset) voto
 illis

To the READER.

illis imprimis erat, ut testimonia aliqua producerentur, quibus probaretur Jus Municipale, in his quatuor seorsim causis ante Normannicam victoriam, ut hodie se habet, viguisse. ¶ Primum, Reginam, Regis confortem, ex Jure Municipali personam esse quæ in Jus vocaret & vocaretur, quæ daret & acciperet per se, Regis consensu non adhibito. ¶ Secundo, eum qui jure optimo terras tenet, eandem cum bonis amittere debere, si esset Feloniæ reus peractus aut exlex declaratus, & inde hæredes hæreditate excludendos. ¶ Tertio, Mulierem prodicionis minoris convictam, ad palum ligatam cremandam esse. ¶ Quarto, an priscae Angliæ Leges Appellationes ad sedem Romanam in causis Ecclesiasticis admitterent.

Ubi primum hæc quæstiones propositas esse viderim, responsa directa & demonstrativa se mihi obtulerunt. Ad primum ecce tibi Diploma antiquum ante Normannorum ingressum in hæc verba. *Regnante in perpetuum Domino nostro Jesu Christo. Ego Æthelwith Regina, Deo largiente,*

see some Proofs, that the Common Law in these four particular Cases was before the Conquest, as now it is:

¶ First, that the Queen, being Wife to a King regnant, was a Person Sole by the Common Law to sue and be sued, to give and take, &c. solely without the King.

¶ Secondly, that a Man seized of Lands in Fee-simple, shall forfeit his Lands and Goods by Attainder of Felony, or by Outlawry, and that thereby his Heirs should be disinherited. ¶ Thirdly, that a Woman being attainted of Petit Treason should be burnt. ¶ Fourthly, whether the antient Laws of England did permit any Appeal to Rome in Causes Spiritual or Ecclesiastical.

Co. Lit. 133. a.
Seld. Tit. of Honor. 85.
Sitz. Nonabili:
ty 9.
4 Co. 23. b.
9 Co. 47. a.
Co. Lit. 3. a.
Plowd. 231. a.
Seld. Epinomis
11.

I had no sooner seen these Questions, but instantly I found direct and demonstrative Answers to the same. For the first, behold an ancient Charter made long before the Conquest, which followeth in these Words.
“ Our Lord Jesus Christ
“ reigning for ever. I Æ-
“ thelwith Queen of the
“ Mercians by God’s Grant,

This Æthelwith was Wife to Burgfred K. of the Marches, and it appeareth, that King Burgfred was alive at this Time, for he was a Witness to this Grant: And the Law continueth so to this Day.
Seld. Epinomis
11.

To the R E A D E R.

“ with the Consent of my
 “ Baldermen, will give by
 “ Grant to Cuthwolph my
 “ most faithful Servitor, a
 “ certain Piece of Land,
 “ being part of my peculiar
 “ Power (that is to say) a
 “ Piece of Land of fifteen
 “ Manses, in a Place which
 “ is called Laking, for his
 “ Obedience, and payable
 “ Money in this Manner,
 “ that is to say, a Thou-
 “ sand five Hundred Skill-
 “ ings of Silver and Gold,
 “ or fifteen Hundred Sicles,
 “ that he may have, possess,
 “ and enjoy at his Pleasure,
 “ as long as he liveth; and
 “ after his End, and Limit
 “ of his Days, he may leave
 “ it to whomsoever he will,
 “ for everlasting Power and
 “ perpetual Inheritance.
 “ And this my Donation is
 “ covenanted in the Year of
 “ our Lord’s Incarnation
 “ DCCCLXVIII. the
 “ first Indiction. And we do
 “ charge all secular Powers,
 “ in the Name of God the
 “ Father, the Son, and the
 “ Holy Ghost, to observe the
 “ aforesaid inviolate. These
 “ Witnesses subscribing and
 “ consenting thereunto,
 “ whose Names here reci-
 “ ted are underwritten. I
 “ Ethelred King of the
 “ West Saxons have con-
 “ sented and subscribed. I
 “ Burghred King of the

Merciorum, cum consensu
 meorum seniorum, conce-
 dens donabo Cuthwulfo fi-
 delissimo ministro aliquam
 telluris partem meæ pro-
 priæ potestatis, id est,
 terram xv. manentium in
 loco qui dicitur Laking,
 pro ejus hujusmodi obedi-
 entia atque pecunia placabi-
 bili, hoc est mille quin-
 gentis solidis argenti &
 auri, vel quindecies cen-
 tum siclis, ut habeat &
 possideat quam diu vivat,
 perfruaturque voluntarie,
 & post finem illius termi-
 numque dierum, liberam
 relinquat cuicumque volue-
 rit in sempiternam pote-
 statem hæreditatemque per-
 petuam. Et hæc do-
 natio pacta est anno
 Dominicæ incarnationis
 DCCCLXVIII. Indic-
 tione prima. Et præcipimus
 omnibus sæculi potestati-
 bus, in nomine Dei, Pa-
 tris, & Filii, & Spiri-
 tus Sancti, hæc supra-
 dicta inviolata servare.
 His testibus subscriben-
 tibus & consentientibus,
 quarum nomina postreci-
 tata conscribuntur. Ego
 Ethelred Rex Occiden-
 talium Saxonum consensi
 & subscripsi, &c. Ego
 Burghred Rex Mercio-
 rum consensi & subscripsi.
 Ego Ethelswith Regina

To the READER.

“ in great Matters, as in
 “ small, in Fields, Pastures,
 “ Meadows, Woods: Expedi-
 “ tion, Building of
 “ Bridge and Castle being
 “ excepted. Such as shall
 “ diminish and violate this
 “ my Gift (which I wish
 “ may be far from the
 “ Minds of all the faithful)
 “ let them have their Part
 “ with them, of whom it
 “ shall be reſounded, De-
 “ part from me ye curſed
 “ into everlaſting Fire,
 “ which is prepared for
 “ Satan and his Angels,
 “ unleſs they do make A-
 “ mends by lawful Satis-
 “ faction, obtaining Par-
 “ don by due Penance to-
 “ wards God. Whereaſ that
 “ which Man’s Memory
 “ doth overpaſs, the dili-
 “ gent Search of Writing
 “ doth preſerve: This is to
 “ be notified to the Readers,
 “ that the ſaid Land came
 “ to the Diſpoſition of my
 “ Right, by the Crime of a
 “ certain Man’s unſpeak-
 “ able Preſumption, where-
 “ with boldly and felon-
 “ ouſly he hath not abhorred
 “ to incumber himſelf,
 “ which Man his Parents
 “ named Ethelſig albeit he
 “ hath diſcredited his
 “ Name by a foul Fault:
 “ And by me (as is afore-
 “ ſaid) the ſaid Land is
 “ beſtowed upon my reve-

ſylvis; exceptis iſtis tri-
 bus, expeditione, pontis
 arcive conſtructione. Hanc
 vero meam donationem
 (quod opto abſit a fide-
 um mentibus) minuentibus
 atque frangentibus, fiat
 pars eorum cum illis de
 quibus econtingat, Dif-
 cedite a me maledicti in
 ignem æternum qui para-
 tus eſt Satanæ & ſatel-
 litibus ejus, niſi prius
 digna Deo pœnitentia ve-
 niam legali ſatisfactione
 emendent. Nam quod ho-
 minis memoria tranſiit,
 literarum indago reſer-
 vat. Unde hoc legenti-
 bus eſt intimandum, quia
 hoc præſatum rus per cu-
 juſdam viri infandæ præ-
 ſumptionis culpam, qua
 audacter furtive ſe obli-
 gavit, non abhorruit, cui
 nomen Ethelſig parentes
 indidere, licet ſædo no-
 men deboneſtaverit flagi-
 tio, ad mei juris deve-
 nit arbitrium atque per
 me reverendo, ut jam ante
 præſatus ſum, collatum
 eſt miniſtro, cujus culpæ
 notam Anglica relatione
 hic ratam duximus eſſe no-
 tandum.

Hic erat ille fundus
 Dij per þe land
 foris-

To the READER.

forisfactus apud Dunmal-
 þorþorþæt Dunmal-
 ton, quem Æthelfigus fo-
 ton, þe Æðelrige fo-
 risfecit Æthelredo Regi in
 þorþorþæt Æðelnes Cýnning
 manus: Hoc erat ideo qd'
 to handa : Ðæt þær Ðen þ
 ille furatus est Æthelwini
 þe þorþorþæt Æþelþing
 Porcos Æthelmeri filii Se-
 rþin Æþelmeþer þuna
 natoris. Tunc adequita-
 Æalþermanr. Ðarþon
 runt ejus famuli, & abstu-
 þir Men to 7 tu-
 lerunt furto sublata ex Æ-
 gon vt Ðe rþic of Æ-
 thelfigi domo, & ille erupit
 þelrig þur, 7 he of-
 in ſylvam, & homines il-
 bearr to þuda, 7 Man
 lum fugaverunt inde. Atq;
 þim aþlýnde þa. Anð
 homines detulerunt Æ-
 Man þeþeþt Æðel-
 thelredo Regi illum fun-
 þes Cýnning þat land,
 dum & ejus bona. Tunc
 7 þir æpa. Ða þorþ-
 donavit ille iſtum fundum
 þana þe þ landa Hapar
 Hawafo ſuo famulo in per-
 þir Man on ece
 petuam hæreditatem. Et
 ynþe. Anð þulþric
 Wulfricus Wulfruni filius
 þulþþunr þune þir
 tenuit poſtea ab illo per-
 rþþan æt þim þe-
 mutatione cum illis quæ
 þirþo Mis Ðam Ðe þim

“ *rend Servitor. The Man-
 “ ner of whoſe Fault we
 “ thought good to note here
 “ in Engliſh.*

“ *This was the Land* Seld. Epinomis
 “ *forfeited at Dunmal-^{11.}
 “ ton that Ethelſig for-
 “ feited to King Ethel-
 “ red’s Hands. It was
 “ ſo then, that he ſtole
 “ Ethelwin’s Swine, who
 “ was Son to Ethelmere
 “ Ealderman; then his
 “ Man did ride to him,
 “ and took the Things
 “ ſtolen out of Ethelſig’s
 “ Houſe, but he burſt out
 “ to the Woods, and Men
 “ outlawed him, and Men
 “ brought to King Ethel-
 “ red his Lands and his
 “ Goods. Then gave he
 “ that Land to his Servant
 “ Hawes for a perpetual
 “ Inheritance. And Wul-
 “ fric, ſon to Wulfrun,
 “ after had it of him in
 “ Exchange for other
 “ Lands that pleaſed him
 “ better: And this was
 “ with the King’s Leave.
 “ and with the Teſtimony
 “ of his Wiſe Men.*

“ *This*

To the R E A D E R.

“ This Donation was
 “ made in the Year from
 “ the Incarnation of our
 “ Ld. DCCCCXCV. the
 “ VIII. Indiction, in the
 “ XVII. Year of the said
 “ King. This Charter was
 “ written with the Consent
 “ of them whose Names
 “ are hereunder written.
 “ I Ethelred King of
 “ Englishmen have con-
 “ stantly consented and
 “ ratified this Donation
 “ under the Sign of the
 “ Holy Cross. I Alfric by
 “ God’s Grace elected unto
 “ the Archbishoprick of
 “ Canterbury, have esta-
 “ blished this Gift with
 “ the Sign of the Cross;
 “ &c.”

ipsi gratiora erant, cum
 ȝepemep pær, be þe
 Regis venia & ejus pru-
 Cynnngſ leaf, ȝ hſ
 dentum testimonio.
 pſtrens ȝepitener.

Acta est hæc præfata do-
 natio Anno ab Incarnatione
 Domini nostri 995. Indicti-
 one octavo, Anno vero Reg-
 ni præfati Regis 17. Scripta
 est hæc cartula his consen-
 tientibus qui subternotantur.
 Ego Æthelredus Rex Ang-
 lorum præfatum donationem
 sub sigillo Sanctæ Crucis
 indeclinabiliter consensi at-
 que roboravi. Ego Ælfricus
 Dei gratia electus ad Ar-
 chiepiscopatum Dorobernen-
 sis Ecclesiæ ejusdem donum
 Crucis taumate stabilivi.
 Ego Aelfhell Wintoniensis
 Ecclesiæ Episcopus designa-
 vi. Ego Aescwith Dorcensis
 Episcopus Ecclesiæ adnota-
 vi. Ego Athulf Hereforden-
 sis Ecclesiæ Episcopus im-
 posui. Ego Vulfsig Scirbur-
 nensis Ecclesiæ Episcopus
 conclusi. Ego Athelwerd
 Dux. Ego Aelfric Dux. Ego
 Aelfhelm Dux. Ego Leoffig
 Dux. Ego Leofwin Dux.
 Ego Aelfwerd Abbas. Ego
 Aelfsige Abbas. Ego Leofric
 Abbas. Ego Brithelm Ab-
 bas. Ego Wlſgar Abbas. Ego
 Athelmer Minister. Ego
 Ordulf Minister. Ego Aelf-
 sige Minister. Ego Brith-
 wolde Minister. Ego Milf-
 heb

To the READER.

beb Minister. Ego Vulfric Minister. Ego Wlfgot Minister. Ego Leofric Minister. Ego Athelric Minister. Ego Leofric Minister. Ego Wlfmer Minister. Ego Friena Minister.

Ad tertium Caius Julius Cæsar (qui ante Christum natum annis jam MDC. transactis) prodit. De morte Mariti si compertum est, uxorem igni atque omnibus tormentis excrutiatam interficiunt, ut hodie in usu est, apud nos.

Ad quartum & postremum, autoritate Parliamentaria Anno 10 Regis Henrici secundi, qui fuit Domini MCLXIV. sancitum est. De appellationibus si emerferint ab Archidiacono debet procedi ad Episcopum, ab Episcopo ad Archiepiscopum, Et si Archiepiscopus defuerit in iustitia exhibenda, ad Dominum Regem perveniendum est extremo, ut præcepto ipse in Curia Archiepiscopi controversia terminetur: Ita quod non debeat ultra procedi absque assensu Domini Regis. Et

Touching the Third, Cæsar in his Commentaries Lib. 6. pag. 68. (who wrote before the Incarnation of Christ, above 1600 Years past) affirmeth, That if the Wife be suspected of the Death of her Husband, Et si compertum est, igni, &c. interficiunt: That is, and if she be found Guilty of the Death of her Husband, which is Petit Treason, the Wife is burnt to Death, as she is (in that Case) at this Day.

For the Last, by an Act of Parliament holden in the tenth Year of King Henry the Second, which was in Anno Domini 1164. it is enacted as followeth. "As concerning Appellations if any shall arise from the Archdeacon, they must proceed to the Bishop, from the Bishop to the Archbishop: And if the Archbishop do fail in doing Justice, it must lastly come to the King, that by his Precept the Controversy may be ended in the Archbishop's Court, so that there ought not

See in the Preface to the 3^d Part of my Reports out of Cæsar's Com. *Disciplin' Druidum in Britannia reperta, atq; inde in Galliam translata, &c.* Seld. Janus Angl. 17.

Seld. Janus Angl. 72. Rog. Hovenden. f. 303.

To the READER.

" not to be any Proceeding
 " farther without Assent of
 " the King." And that
 this amongst many other
 might not taste of Innovation,
 the Record saith,
 " This Recognition or Re-
 " cord was made of a cer-
 " tain Part of the Customs
 " and Liberties of the Pre-
 " decessors of the King, to
 " wit, of King Henry his
 " Grandfather, and of o-
 " ther Kings, which ought
 " to be observed in the
 " Kingdom, and hold of all
 " for the Dissentions and
 " Discords often arising be-
 " tween the Clergy and
 " our Lord the King's Ju-
 " stices, and the Peers of
 " the Realm: And all the
 " Archbishops, Bishops,
 " Abbots, Priors, Clergy,
 " with the Earls, Barons,
 " and all the Nobles, &c.
 " have sworn and assured-
 " ly promised in the Word
 " of Truth, with one Con-
 " sent to keep and observe
 " the said Recognition to-
 " ward the King and his
 " Heirs in good sooth with-
 " out evil Meaning for e-
 " ver." But herein I per-
 suaded my self, that every
 Man that had advisedly
 and with an equal Mind
 read Caudrey's Case, pub-
 lished in my last Reports,
 would therewith in this
 Point have been satisfied.

hoc inter alia, ne novum
 videretur, in ipso auto-
 grapho subjungitur. Fac-
 ta est hæc Recognitio sive
 Recordatio cujusdam partis
 Consuetudinum & Liberta-
 tum antecessorum Regis, vi-
 delicet, Henrici Avi sui,
 & aliorum, quæ observari
 debeant in Regno, & ab
 omnibus teneri propter dis-
 sensiones & discordias sæpe
 emergentes inter Clerum &
 Justiciarios Domini Regis,
 & Magnates Regni. Et
 hanc recognitionem sive
 recordationem omnes Archi-
 episcopi, Episcopi, Abba-
 tes, Priores, Clerici, cum
 Comitibus, Baronibus, Pro-
 ceribus cunctis, &c. jura-
 verunt & firmiter in verbo
 veritatis promiserunt una
 voce tenendas & observan-
 das Domino Regi & hære-
 dibus suis bona fide, &
 absque malo ingenio in
 perpetuum. Ego autem
 hac in re mihi persuadeo,
 quod quicumque con-
 siderate & æquo animo
 causam Caudrei in Re-
 lationibus meis postremis
 legerit, sibi abunde fa-
 tisfactum putet. Nec pos-
 sum non agnoscere, me
 minime expectasse, ut
 Theologus aliquis ejus-
 modi responsonem pro-
 cedere voluerit, cujus-
 modi in lucem prodiit,
 idque duabus de causis.

Primum,

To the R E A D E R.

Primum, quod Veritatis & Charitatis lineas tranfiliendo, convitiis & calumniis a quæftione omnino alienis fit referta. Ingenium igneum & Salamandrinum Theologos minime decet; & Convitia effulminata ex ore effervescente, quod se, animi inquieti fræna spumantia mordendo, lancinat, quæque odii femina & lites in perpetuum ferendi caufas fuggerunt, labiis Theologicis sunt indigniffima. Certo fcio nec Syrtes quibus firmum solum non subest, nec sepimenti ex carduis, paliuris, & spinis ad bases, macerias vel mænia idonea esse, illi præfertim qui sublime & *Theologi Catholici* nomen longe lateque patens sibi arrogat. Qui responfionem ex conscientia & charitate molitur ut alteri parti perfuadeat, argumenta ejus & rationes repeteret, & Categorice atque Christiane *ad idem* responderet, nullis convitiis in eum evibratis quem in suam sententiam perducere studet, aut studere debet. Tyrones in Dialectica convitiari solent (ut incitiæ notam subterfugiant) cum argumentum in illos con-

And I must freely acknowledge, that I never expected, that any Divine would have attempted to have made such an Answer to that Case, as lately hath been published, for two Causes. First, for that it is (exceeding all Bounds of Truth and Charity) full of Maledictions and Calumniations, nothing pertinent to the State of the Question. It becometh not Divines, to be of fiery and Salamandrine Spirits: Neither are bitter Invectives foamed out of an hot Moubh, ever fretting it self upon the Bit of Discontentment (the Seeds of Hatred, and Means of making Controversies immortal) beseeming the Lips of any Man of that Profession. Sure I am, that neither Quick-sands having no steadfast Ground, nor Quicksets of Brambles or Briars, are fit either for Foundations, or for Fences or Defences, especially for him that usurpeth the sublime and broad-spreading Name of the Catholick Divine. He that will make any Answer out of Conscience and Charity, to persuade the adverse Party, should repeat his Authorities, his Arguments, his Reasons, and categorically and christianly Answer the Matter ad idem; without any

Father Parsons
the Jesuit.

To the READER.

any Invektive against the Person, whom his End is (or should be) to convert to his Opinion. Young Sophisters are wont to rail (and by that Means keep themselves from a Nonplus) when they are not able to answer the Argument inforced against them. Secondly, for that (as I published in my Epistle to the Reader) I dealt only with the Municipal Laws of England, as a Subject proper to my Profession.

Expect not from me (good Reader) any Reply at all, for I will not answer unto his Invektives, and I cannot make any Reply at all to any Part of his Discourse. True it is, that Calumniation be great Motives of Revenge, and consequently of Breach of Charity, and of God's Commandment: And therefore David pray'd, Redime me a calumniis hominum, ut custodiam mandata tua. But it is far unbeseeming a Man of my Vocation, Convitium convitio regerere, for that were Lutum luto purgare. And God hath left a Precedent of a Judge, (who also was the first Reporter of Law) that he was Mitissimus super omnes homines qui morantur in terra: Whose Example all Judges

tortum declinare nesciant. Secundo, quod in Epistola ad Lectorem jam præfatus fuerim, mihi rem esse cum Municipali Angliæ Jure, quod mei professionis proprium est subjectum,

Responsum a me ne expectes velim (Candide Lector) calumniis enim & contumeliis ejus minime respondebo; & nullum ad ejus commentationes responsum referre visum est. Verum est, calumnias vindictam provocare, & inde charitatem & Divina mandata violare, ideoque David precatus est, Redime me a calumniis hominum, ut custodiam mandata tua. Mei autem loci homine plane indignum est, Convitium convitio regerere: Illud enim est lutum luto purgare. Deus ipse exemplar Judici proposuit, qui & ipse primus erat Juris Relator, Mitissimus super omnes homines qui morantur in terra. Ad cujus exemplum Judices singuli, et si
indies

To the READER.

indies irritentur, quantum possunt se conformare debent. Hic illi & de illo tantum hac in causa dicam, *Ille didicit maledicere, ego maledicta contemnere.* Causa cur responsionem reddere non possum, hæc est, ego tantum textum retulerim, & quasi unum consensum & concentum antiquarum hujus Regni Legum, quæ comprobatæ omnium seculorum successive, tam universali consensu in Parliamentis, quam judiciis & spectatissimorum Judicum & Juris nostri Prudentum sententiis in ordine judiciario, quæ ex jurejurando & conscientia tulerunt.

Annum, Paginam, Caput, & alia certa indicia, ad faciliorem inventionem, adnotavi. Plura etiam attexere poteram, nisi causæ illius Relatio (quæ sane perlonga est) plus nimio sua prolixitate excurreret. Cum librum introspicerem, semper expectans aliquod ad rem responsum, in Authore tandem deprehendi summam Juris hujus Regni, de quo agebatur, ignorantiam cum summa audacia, quod plerumque fit, conjunctam: At per

(though they be provoked every Day) ought as much as they can to imitate and follow. This only will I say in this Cause, to him and of him, Ille didicit maledicere, & ego maledicta contemnere. The Cause that I cannot reply is, for that I have only reported the Text, and as it were the very Voice of the antient Laws of this Realm, proved and approved in all Successions of Ages, as well by universal Consent in Parliaments, as by the Judgments and Resolutions of the reverend Judges and Sages of the Common Laws, in their judicial Proceeding, which they gave upon their Oaths and Consciences.

I quoted the Tear, the Leaf, the Chapter, and other certain References for the ready Finding thereof. And I could have added more, if the Report of that Case (being very long, as it is) should not have been drawn to an extraordinary Prolixity. But when I looked into the Book, ever expecting some Answer to the Matter; in the End I found the Author utterly ignorant (but exceeding bold, as commonly those Qualities concur) in the Laws of the Realm, the only
Subject

To the READER.

Subject of the Matter in Hand, but could not find in all the Book any Authority out of the Books of the Common Laws of this Realm, Acts of Parliament, or any legal and judicial Records quoted or cited by him for the Maintenance of any of his Opinions or Conceits: Whereupon (as in Justice I ought) I had Judgment given for me, upon a Nihil dicit, and therefore cannot make any Replication. For his Divinity and Histories cited by him, only published in the said Book Ad faciendum populum, (but how truly and sincerely his own Conscience knowing, he thought it best for the salving of his Credit to conceal his Name) I will not answer, for then I should follow him in his Error, and depart from the State of the Question, whose only Subject is the Municipal Laws of this Realm.

I have (good Reader) brought this sixth Work to a Conclusion and published it for thy private Instruction, for the publick Good and Quiet of many, and for preventing of Danger, the Daughter of Error. I confess that Englishmens Actions have been renowned in the Ear of the whole

totum librum ne vel testimonium quidem ex Juris nostri Municipalis Codicibus, Statutis Parliamentariis, aut scriptis legalibus & judiciariis ab ipso prolatum, in suæ opinionis firmamentum comperi: Adeo ut (Justitia ipsa judicante) pro me sententia lata sit ex formula *Nihil dicit*, ideoque responsum reponere non licet. Ad Theologica & Historica ab illo prolata in eodem Libro, solummodo *Ad faciendum populum* (quam vere & sincere ipse sibi conscius, ut fidem sane tueretur, nomen reticere consultissimum putavit) haudquaquam Responsum referam: Hoc enim esset ipsum errantem consecrari, & a questione proposita, quæ in Jure nostro Municipali versatur, longe aberrare.

Jam sexto huic operi (Benevole Lector) supremam manum imposui, & ad tuam privatam informationem, bonum publicum, plurimorum securitatem, & periculum avertendum, quod ex errore enascitur, in lucem edidi. Res gestas Anglorum

To the READER.

lively expressing and true Application of the same. In reading these and other of my Reports, I desire the Reader, that he would not read (and as it were swallow) too much at once; for greedy Appetites are not of the best Digestion; The whole is to be attained to by Parts; and Nature (which is the best Guide) maketh no Leap, Natura non facit saltum. And true it is that Seneca saith (as in another Place I have said) Quo plus recipit animus, hoc se magis laxat: The Mind, the more it suddenly receiveth, the more it loseth, and freeth it self. A cursary and tumultuary reading doth ever make a confused Memory, a troubled Utterance, and an uncertain Judgment. If these or any other of my Works may in any Sort (by the Goodness of Almighty God, who hath enabled me hereunto) tend to some Discharge of that great Obligation of Duty wherein I am bound to my Profession, and give Directions for the Establishment of Inheritances, Possessions, and Interests, in Peace and Quietness, I shall reap some Fruits of

rius explicetur, & verius applicetur. In his meis Relationibus legendis a Lectore contendo, ut non multa simul legeret (& quasi deglutiret) avidi enim appetitus non optime digerunt. Univerfum per partes apprehendendum, & Natura, quæ Dux optima, saltum non facit, Verum est illud Seneca (quod alibi protuli).

*Quo plus recipit animus,
hoc se magis laxat.*

Desultoria & tumultuaria lectio memoriam confusam, elocutionem impositam, & judicium incertum reddit. Si hoc vel aliud quodcunque ex meis opusculis quovis modo (Dei optimi Maximi propitia benignitate, qui mihi ad hæc facultatem suppeditavit) ad fidem quam merito professioni meæ debeo liberandam faciant, & ad hæreditates, possessiones, & sua cuique jura in pace & securitate constabilienda dirigant; aliquem vitalis arboris fructum mihi decerpam. Voti enim compos ero, & cumulate mihi pro suscepto labore satisfactum erit. Scopum enim,

To the R E A D E R.

enim, quem mihi propo-
fui, attingi.

*the Tree of Life; for my
Desire shall be accomplish-
ed, and I shall receive suf-
ficient Recompence for all my
Labours, for their true and
final End shall be effected.*

*Accipe, quo semper finitur Epistola verbo,
Et vigeant jura, & (Lector amice) Vale.*

Where

To the READER:

rum in universo Orbis terrarum theatro celeberrimas fuisse agnosco; ac præclarius gestas quam descriptas, quod Historia, quæ ornate narraret, destituimur: Leges etiam Anglorum præstantissimas esse agnosco; multo tamen præstantiores quam videri possint ulli oculo (nisi quis Dioptica linea in eas intueatur) quia Styli splendor & Orationis compositæ ornataeque lumen absit, quæ nunquam majori quam hodie pretio, Prudentes nihilominus scientiæ mysteria amplectentur, licet exiliori scribendi genere proponantur, nec pretiosas & nobiles gemmas recusabunt, quamvis vilioribus thecis recondantur.

Particularium causarum & exemplorum Relatio dilucidissima est docendi Methodus, & recta Juris ratio & regula: Sic enim Divinum Numen, cum judiciarias Leges per Moysen promulgaret, exemplis docuit pro Legibus, ut videre est in *Exodo*, *Levitico*, *Numeris*, & *Deuteronomio*. Glossographi itidem, ut regulam Juris Civilis illustrent, sæpe numero regulam ad exemplum revocant, ut cla-

World, but far better done than they have been told, for want of a good History; and their Laws most excellent, but far better than they seem to any Eye (unless he can look in the visual Line) for want of good Stile, and fair falling Sentences (which never were at so high a Price as now they bear) but wise Men will embrace the Secrets of Skill, though they be written with an evil Pen, and will not refuse precious Jewels, though they be brought in a plain and homely Receptacle.

The Reporting of particular Cases or Examples is the most perspicuous Course of Teaching, the right Rule and Reason of the Law: For so did Almighty God himself, when he delivered by Moses his judicial Laws, Exemplis docuit pro Legibus, as it appeareth in Exodus, Leviticus, Numbers, and Deuteronomy. And the Glossographers, to illustrate the Rule of the Civil Law, do often reduce the Rule into a Case, for the more

Where Services intire shall be apportioned.

Hill. 36 Eliz. in the Court of Wards.

*Resolutions by the two Chief Justices and
the whole Court of Wards, concerning
Apportionment of intire Services.*

BRUERTON'S Case.

LORD and Tenant of three Acres of Land by Homage, Fealty, annual Service of a Hawk, and Suit of Court, the Tenant makes a Feoffment in Fee of one Acre, the Feoffee shall hold by Homage, Fealty, a Hawk, and Suit of Court by the Common Law, For (a) *Quæ in partes dividi nequeunt, solida a singulis præstantur*, and therewith agree the Books in 2 E. 2. *Avowery* 184. 5 E. 2. *ibid.* 206. 11 E. 3. *Avowery* 101. 24 E. 3. 73. a. 34 *Aff. p.* 15. 22 E. 4. 36, 37. 29 H. 8. *Tenures* 64. and Tit. *Avowery*. And no Difference as to this Purpose between intire Services annual, as Suit, a Hawk, &c. and not annual, as Homage, Fealty, Heriot, &c. And as to Heriot, vide 34 E. 3. (b) *Heriot* 1. And the Statute of West. 3. of (c) *Quia Emptores terra-*rum cannot extend to intire Services to hold *pro* (d) *particula*, because such Services are not divisible, and by Consequence each shall hold by the Whole, as he shall hold by the Common Law. But in the Case of Suit, the Stat. of (e) *Marlbridge, cap.* 9. has altered the Law in two Cases: 1. In Case of Coparceners and their Vendees by Equity, as appears by the Register and *F.N.B.* 159. a. & b. where the Writ recites, *Cum de communi consilio regni nostri provisum sit, si hereditas aliqua, de qua unica secta debetur, ad plures*

8 Co. 105. b.
10 Co. 108. a.

(a) Co. Lit.
149. b.

(b) 8 Co. 105. a.
106. a.
(c) Co. Lit.
148. a.
(d) 2 Inst. 507.
Plowd. 240. a.
Postea 1. b.

(e) 2 Inst. 116,
117, 118, 119,
120. Plow. 240. b.
F.N.B. 159. d.

heredes vel ad alios per venditionem devolvatur, &c. 2. The Stat. provides, *Et si plures feoffati fuerunt de hereditate aliqua, de qua unica secta debeatur, Dominus unicam sectam habeat, &c.* But that is meant when the Ten't who holds by Suit enfeoffs others severally, viz. one of one Part, and another of another Part, &c. in certain; there *Dom' habebit nisi unicam sectam*; and he who doth the Suit shall have Contribution for his Charge against the others, and that appears by the Stat. of *Marlebridge*, and the Register, and *F. N. B. 159. b.* But if the Tenant who holds by Suit in feoffs many jointly, that is out of the Stat. as to Contribution, for without express Agreement he shall not have Contribution. But yet all the joint Feoffees shall do but one Suit, as they shall pay or deliver but one Hawk, or other yearly intire Service, and therewith agrees *F. N. B. 162. c.* But if the Tenant makes a Feoffment of the Moiey or third Part in Common, and not in Severalty, it is out of the Purview of the Stat of *Marlebridge*: For when the Possession is intire and undivided, there cannot be Contribution, and therewith agrees *F. N. B. 162. d.* (That Tenant in Common shall do several Suit, and several Service.) As Feoffee of the Moiey or third Part is out of the Statute of *Quia Emptores terrar'* to hold *pro (a) particula*, as it is held in *29 H. 8. Bro. Tit. (b) Tenures. 2.* Altho' the Tenancy and every Part of it is held and charged with intire Services; yet therein observe this Difference, between the Act of the Tenant by the Severance and Parcelling of the Tenancy to others (for that shall give Benefit to the Lord who is a Stranger to it) (c) *Res inter alios actæ nemini nocere debent, sed prodesse possunt*, and the Act of the Lord himself to take any Parcel of the Tenancy, shall turn to his Prejudice; for by his Acceptance of any Part of the Tenancy, all the said yearly intire Services are gone and extinct; and therefore if one holds his Land of his Lord by the yearly Service, of a Hawk, Horse, or the like; if in such Case the Lord purchases Part of the Tenancy, such (d) intire Services are gone, because such Service cannot be severed or apportioned. And forasmuch as he has discharged Part by his own Act, the whole intire Service is gone, in the same Manner as if he had released his Seigniori in Part of the Tenancy, all the Seigniori by his own Act is gone. And therewith agrees e) *Lit. 49. a. 5 E. 2. Avowry 206. 3.* Another (f) Difference was taken between the said intire Services, and other the like, which are only for the sole Benefit of the Lord, and are a Charge to the Tenant, as the Services to render an Hawk, an Horse, a Pair of gilt Spurs, &c. and intire Services which are for the (g) Benefit of the Commonwealth, or for the Defence of the Realm, or for the Advancement of Religion, and the Service of God, or for Works of Devction, Piety, or Charity,

(a) Antea 1. 2.
2 Inft. 503.
Plowd. 240. a.
(b) 29 H. 8.
Br. Tenure 64.

(c) Co. Lit. 152. b.
1 Sid 93.
Postea 51. b.
Hard. 385.

(d) 8 Co. 105. b.
106. 2. Mo. 207.
Co. Lit. 149. a.

(e) 5e St. 222.

(f) 10 Co. 108. b.

(g) Co. Lit.
149. a.

or for the Advancement of Justice: In such and the like Cases, altho' the Lord purchases Parcel; yet the intire Services remain. As if the Tenant holds by (a) Knight's Service, which is an entire Service to be done by the Body of a Man (for Escuage is but a Penalty for not doing of it) in this Case because it is for the Defence of the Realm, and *pro bono publico*, altho' the Lord purchases Parcel of the Tenancy, yet the Service shall remain, and therewith agrees *Littleton, lib. 2. c. Rents, fol. 49.* The same Law of (b) Castlegard, Cornage, and the like. *Vide 11 H. 7. 12. b. Quia pro defensione regni*; so if one holds of his Lord to make a Bridge, repair a Highway, or to make a Beacon (which Tenures you may see in 11 H. 7. 12. b. and 24 H. 8. *Br. Tenures* 53.) Altho' the Ld. in such Case purchases Parcel, the whole Service remains, *quia pro bono publico*. So if one holds to (d) marry a poor Virgin yearly, as the Tenure is in 24 H. 8. *Br. Tenures* 53. *quia opus Charitatis*; so if the Tenure be to find a (e) Preacher in such a Church, or to provide the (f) Ornaments of such a Church, as the like Tenure is in 35 H. 6. 6. b. *quia opus devotionis & pietatis*. So where the Tenure is to assist the (g) Sheriff, or to be High (h) Const. of *England*; for these are for the Advancement of Justice, for the Determination of divers Cases doth belong to the Court of the Constable and Marshal, and the Sheriff is the Minister of Justice. *Vide 11 Eliz. Dier* 285, and 16 E. 3. *Avowry* 93. Or if the Tenure be *ad custodiend'* (i) *Recorda Domini Regis*, as the Abbot of St. *Bartholomew* in *Smithfield* held, as appears *inter Recorda in Turre London.* 7 R. 2. *membran. 15. in dorso, quia ista concernunt administrat' justitiæ.* But if the Tenure be to be (k) Carver, or But-ler, or Cook, &c. to the Lord, or to cover the Ld's Hall, or to attend upon him at some principal Feast, &c. in such Cases, by the Purchase of Parcel, all is extinct, for these are for the only Benefit of the Lord himself. 4. Another Difference was taken between intire Services, when the Doing of the Services by one Tenant of Part shall serve for all, and he who doth it shall have Contribution; and when every several Tenant shall do the several intire Services. As in the Case of Suit in the Cases aforesaid, one only shall do it, and the others shall make Contribution. And therefore there, if any Parcel comes to the Lord, although it be by Discent, which is an Act in Law; yet all the Suit is gone, for there wants Contribution as well when Part comes by Act in Law, as when it comes by the Act of the Party, and therewith agrees 34 *Affijè* 15 & 35 H. 6. *Execution* 21. But if Parcel descends to the Lord, where the Tenure is by a Hawk,

(a) 8 Co. 105. b.
Co. Lit. 149. a.(b) Co. Lit.
149. a.(c) Co. Lit.
149 a. Br. Te-
nure 109.(d) Co. Lit.
149. a.(e) Co. Lit.
149. a.(f) Co. Lit.
149. a.(g) Co. Lit.
149. a.(h) Dyer 285.
pl. 39. Kelw.170. b. 171. a. b.
Co. Lit. 106. a.149. a. 165. a.
Jenk. Cent. 236.(i) Co. Lit.
149. a.(k) 8 Co. 106 a,
105. b.(l) Co. Lit.
149. a.

Co. Lit. 149. a.

Br. Apportionment 2.

a Horse, &c. there it is otherwise, because there every Parcel is severally holden by a Hawk, a Horse, &c. and therefore no Contribution shall be in such Cases. But (as it has been said) every several Feoffee shall hold by a Hawk, a Horse, &c. 5. Another Difference, as to intire Services, where the Lord comes to part by a meer Act in Law, and in Part by the Act of the Party, and namely when the original Act is the Act of the Party, as Recovery in a *Cessavit* of Parcel of the Tenancy, all the intire Services, which are only for the Benefit of the Lord as Suit, Grain of Wheat, a Horse, &c. are gone and extinct, and therewith agree 40 E. 3. 40. F. N. B. 209. a.

Where

Where the Parol shall demur
for the Nonage of the De-
mandant, and where the
Tenant shall have his Age.

Pasch. 35 Eliz.

In the Common Pleas.

MARKAL'S Case.

IN the Case of one *Markal* it was moved, Whether in a *Formedon* in Remainder by an Infant, of a Remainder limited to his Father, and his Heirs (whose Heir he is,) The Tenant without any Plea pleaded might pray that the Parol might demur for the Nonage of the Demandant. And 3 *E. 3.* Age 72 was cited that the Parol should demur; and it was objected, that although 8 *E. 3.* 59. be to the contrary, yet the Reason which (a) *Herle* there gives, upon which he grounds his Opinion, is against Law. For he saith, That when the Infant has recovered in his *Formedon* in Remainder, that he shall not be in Ward. And it is apparent in a *Formedon* in the Reverter brought by the Heir of the Donor, the Tenant may pray that the Parol may demur without any Plea pleaded. And therewith agree 18 *E. 3.* Age 11, and 12 *E. 2.* *ibid.* 145. But at last the Record of a Judgment was shewed *Pasch* (b) 4 *Eliz.* where the Case was, that a *Scire facias* to execute a Fine brought by the Heir within Age of him in the Remainder in Fee which Remainder was limited to his Grandmother and her Heirs; the Tenant prayed that the Parol might demur for the Nonage of the Demandant. And after many Arguments and great Deliberat. it was adjudged, that the Prayer of the Ten't should not be allowed, but that he should answer presently. And for the better understanding of the true Reason of this Judgment, the Rules of the Common Law as to this Purpose are first to be observed; and then what Alteration any Stat. has made in such Case. And as to the first it is to be known, that every real Action either is possessory, that is to say,

3 Bullf. 139.

(a) Dy. 137. b. pl. 27.

(b) Mo. 16, 35
1 Anderf. 24.
pl. 52. Dall. 37.
pl. 4. Dall. in
Kelw. 204.
pl. 5. Dall. in
Ash. pl. 5.
N. Bendl. 121.
pl. 152.

(a) 1 Rol. 141.
Cr. Jac. 467.

of his own Possess. or Seisin, or Ancestrel, *sc.* of the Seisin or Possess. of his Ancestor. And generally in all real (a) Actions, which an Infant brings of his Possess. altho' he has the Land by Descent, and altho' the Tenant pleads the Deed or Warranty of his Ancestor, the Parol shall not demur for his Nonage, for by the Presumption of Law, the Granting that the Parol shall demur, for the Nonage of the Demandant, is in Favour, and for the Benefit of the Infant, lest for Want of good Intelligence of his Estate, and of the Truth of the Matter he should be prejudiced of his Right which descended to him from his Ancestor, and therefore the Law in such Case will rather suffer a Delay, than hazard the Right of the Land, the Possess. whereof his Ancestor had, by Negligence or otherwise lost. But when his Ancestor dies seised, and the Land descends to the Infant, and he enters and takes the Explees and Profits, in this Case it would be a Prejudice to the Infant that he should lose his Possess. which he had, and should be thereof delayed till his full Age: But when only a bare Right descends to him he is not at any such Prejudice. And therewith agrees 12 E. 4. 17. in a Writ of *Entre sur (b) disseisin* of a Disseisin done to the Infant himself; and 41 E. 3. Age 39 in a Writ of Right (c) of a Deforcem. to an Infant himself of Land which he had by Descent. So in Escheat and *Cessavit*, and Writ of Right *sur disclaimer* brought by an Infant, because he has the Seigniori in Possess. which by Escheat, Cesser, or Disclaimer he loses, and his Ancestor had not any Right to the Land, for this Cause the Parol shall not demur for his Nonage. So in a Writ of (d) *Mesne* brought by an Infant, because the Cause of the Action and Wrong begins in the Time of the Infant himself. 21 Edw. 3. Age 85. *Tempore Edw.* 1. Age 119. 7 Edw. 2. Age 140. and as to Actions Ancestrel, there are two Sorts of them; one called *Ancestrel Rightful*, because nothing descends from the Ancestors but a bare Right; the other called *Action (e) Ancestrel possessory*, because the Ancestor died in Possess. and the Land itself descended. In all Cases when a bare Right in Fee-simple descends from any Ancestor (who once was in Possess.) to an Infant) there in any Action Ancestrel brought by him, the Tenant without any Plea pleaded, may pray that the Parol demur. As if an Infant brings a *Writ of (f) Right* as Heir to his Ancestor, and alleges the Explees in his Ancestor, the Tenant (without any Plea) may pray that the Parol demur. So if an Infant brings a *Formedon* in (g) *Reverter*, as Heir to the Donor, for there he demands Fee-simple of the Seisin of his Ancestor, and there he ought to alledge the Explees in the Donor; and therewith agree 18 Edw. 3. Age 11. 12 Edw. 2. *ibid.* 145. But in *Formedon* in

(b) 1 Rol. 141,
143. Dy. 137.a.
(c) 1 Rol. 137,
141. Dy. 137.a.

(d) Dy. 137. pl. 25
1 Rol. 138, 139,
142. 9 Co. 87.a.

(e) Dy. 137. pl.
23. 2 Inst. 240,
247

(f) Dyer 107.
pl. 22 1 Rol.
137. a. 1.

(g) 1 Rol. 137,
Dy 137. pl. 22.

In (a) Rem'r, altho' he demands Fee-simple, yet because his Ancestor, to whom he is Heir, was never seised, nor took any Explees) and therefore in such Case he shall alledge Explees only in the particular Tenant who has the Estate on which the Remainder depends, for this Cause the Tenant (without Plea) cannot pray that the Parol demur, forasmuch as the Rem'r never was in the Possess. of any of his Ancestors, and the Demandant himself will be the first in whom it will vest, and that will have Seisin of the Land in Demand; and that was the true Reason of the said Judgm. And it is not called *Action Ancestrel Rightful*, because the Action descends, but because the Right descends from the Ancestor, for which an Action of the Seisin of his Ancestor is given to the Heir. And therefore if an Infant aliens within Age, and dies within Age, and his Heir brings a Writ of *dum (b) fuit infra etatem*, the Tenant may pray that the Parol demur, and yet the Action doth not descend, for it doth not lie for him who aliened, because he died within Age, and the Writ saith *dum fuit infra etat'*. So if the Heir within Age brings a Writ of *Non compos (c) mentis*, the Tenant may pray that the Parol demur, and yet a bare Right and no Action descends. *Vide 30 Edw. 3. 7*, In all (d) Actions Ancestrel possessory, as in *Cosnage, Besaiel, Aiel, &c.* where the Ancest. died seised, there the Ten't can't (without Plea pleaded) pray that the Parol demur for the Nonage of the Demand. But at the Com. Law, in such Actions, if the Tenant had pleaded a Feoffm. or other Act of the Ancestor in Bar, by which it appeared, that either nothing, or but a bare Right at most descended, which makes it equivalent to an Action Ancestrel rightful, there the Tenant on such Plea pleaded, may pray that the Parol demur; and the Demandant for the Tenderness of his Age, and in Respect whereof the Law presumes Want of Understanding in him, shall not be hazarded to try that which may perpetually bar him; and that the Com. Law was such, well appears by the Stat. of (e) *Gloucester, cap. 2.* For there it appears, that in *Cosnage, Besaiel, Aiel, &c.* brought by an Infant, the Tenant in Answering alleges a Feoffment, or pleads some other Thing, or the Inquest was delayed till the Age of the Infant, &c. that now he shall answer as if he were of full Age. But this Act extends only to Writs of *Cosnage, Besaiel, and Aiel*, 8 *Edw. 3. 36.* against the Opinion in 34 *Hen. 6. 3.* that it extends to other Actions (f) 45 *Edw. 3.* in a *Quid juris clamat* by an Infant, the Defendant said, that his Ancestor by Deed demised to him for Life, without Impeachment of Wast and Saving, &c. and because the Plaintiff being within Age cannot confess a Deed within Age, it was adjudged, that he should attend till his full

(a) Dyer 133.
pl. 2. 138. pl. 27.
28. 8 E. 3. 59.
1 Rol. 137.
Moor 35.
1 Anderf. 24.
2 Inst. 291

(b) 1 Rol. 146.
2 Inst. 291.
Dyer 104. pl. 10.
137. pl. 25.

(c) Dyer 137.
pl. 25. 2 Inst.
291. 1 Rol. 147.
(d) Dyer 137.
pl. 25. 2 Inst. 291.

(e) 2 Inst. 290.
291. Dyer 137.
pl. 26.
6 E. 1. cap. 2.

(f) 43 E. 3. 52.
Co. Lit. 320 b.
9 Co. 85. b.
3 Bullfr. 157.
1 Rol. 138.

Age, 6 *Edw.* 3. 48. agreed on the like Plea pleaded in Wast by an Infant; for during his Nonage he shall not be Party to try the Deed of his Ancestor in such Cases. In a *Formedon* in (a) Descender in which the Demandant shall not recover the mere Right, but a limited Estate *per formam doni* of the Seisin of the Donee, the Parol shall not demur by the Prayer of the Tenant, but he shall be answered within Age, unless something be pleaded against him, to which he cannot be Party to try within Age; and therewith agree 8 *Edw.* 3. 9. 12 *Edw.* 4. 17. 34 *H.* 6. 3. 40 *Ed.* 5. 42 *Edw.* 3. 13 *Edw.* 3. *Formedon* 96. 3 *Edw.* 2. *ibid.* 133. But in (b) Assise, and Assise of Mortancestor brought by an Infant, because there is a Jury the first Day, and the Jury inquire of Circumstances, the Parol on any Plea pleaded shall not demur, 8 *Ed.* 3. 36. And it is to be known, that the Stat. of (c) *Westm.* 1. c. 47. takes away the Age as well on the Part of the Tenant as of the Demandant in a Writ of *Entrie sur disseisin* to the Ancestor, if fresh Suit was made, as it is adjudged in 24 *Ed.* 3. 46. For in such Case because a bare Right descended to the Heir at the Com. Law, the Parol demurr'd for his Infancy. But the said Act is taken strictly, and doth not extend to any other Action than a Writ of *Entrie sur disseisin*, 46 *Ed.* 3. Age 75. But at the Com. Law, if the Grandfather was disseised, and brought an Assise and died pending the Writ, and afterwards the Father brings a Writ of *Entrie sur disseisin*, and pending the Writ the Father also dies, in that Case in a Writ of *Entrie* brought by the Son of the Disseisin done to his Grandfather, the Parol shall not demur for the Nonage of the Son, for the speedy and fresh Pursuit which has been made, and therewith agrees 10 *Ed.* 3. 58. And it is to be observed that in all real Actions at the Common Law, if the Tenant (d) was within Age, and in by Descent, that he should have his Age, 21 *Edw.* 4. 7, 8. in a (e) *Scire facias* on a Fine, 47 *Edw.* 3. 7. in (f) Error, if he be Tenant. *Vide* 8 *Edw.* 4. 19. 13 *Edw.* 3. Age 7. in *Formedon* in Descender. 45 *Edw.* 3. Age 40. in *Aiel*, unless the Action be grounded on his own Wrong, as in (g) *Cessavit* of his own Cesser, 2 *Ed.* 2. Age 132. 9 *Ed.* 3. 50. 14 *Ed.* 3. Age 88. *Vide* 28 *Ed.* 3. 99. 31 *Ed.* 3. Age 54. adjudged. And unless it be in a (h) *nuper obiit*, when he claims as Heir from the same Ancestor. *Vide* 7 *Ed.* 3. 13. 4 *Ed.* 2. Age 137. 9 *Ed.* 2. *ib.* 142. 13 *Ed.* 2. *ib.* 146. *Vide* 5 *Ma.* 136. (i) in *Bassett's* Case; for a *nuper obiit* is principally brought to try the Privy of the Blood, and unless it be in a (k) *Partitione facienda*, because both are in Possession. *Vide* 9 *H.* 6. 6. 10 *H.* 4. 5. and 8 *Edw.* 3. and unless it be in (l) *Attraint*, 9 *H.* 6. 46. for the Mischief of the Death of the Petty Jury. So that the Law favours the Ten't within Age, who has the Possession by Descent more than the Demandant, who has but a Right by Descent. But the said Act of *Westm.* 1. takes away the Age of the Tenant in a Writ of *Entrie sur disseisin* in the *Per*, as is afore said

And

(a) 1 *Roll.* 137.
341.

(b) 1 *Roll.* 140.
141. *Dy.* 137. a.
2 *Inft.* 291.
(c) 3 *E.* 1.
cap. 47. 2 *Inft.*
257, 258.

(d) *Cr. Jac.* 392.
Moor 847.
(e) 3 *Bulltr.* 141.
(f) 3 *Bulltr.* 134
135, 136, 137.
138, 139, 140.
Jac. 392.
(g) 1 *Roll.* 138.
141. 2 *Inft.* 401.
8 *Co.* 44. b.
Dyer 137. pl. 25.
9 *Co.* 87. a.
Raym. 118.
(h) 1 *Roll.* 143.
(i) 3 *Bulltr.* 136.
Dyer 136, &c.
Dall. in *Kilw.*
205. *Jenk. Cent.*
212. *Moor* 35
(k) *Co.* 1. i.
171. a. *Hob.* 179.
1 *Roll.* 138.
(l) 3 *Bulltr.* 135.
136, 237, 140.
Cr. Jac. 392. 393.
2 *Roll.* 137.

PART VI. MARKAL'S Case.

And the Statute of *Westm.* 2. *cap.* 40. ousts the Age of the Vouchee being the Husband's Heir, in a *Cui in vita*, and in *Sur cui in vita*. But both these Statutes are taken strictly, as appears by many Books; and by these Differences, and the Causes, and the Reasons of them you will better understand your Books, which are almost infinite, and *prima facie* seem to disagree, and by these Differences may be well reconciled. *Vide* 8 *E.* 3. 10. if the Parol ought to demur for the Nonage of the Infant, altho' the Tenant would answer, yet the Court ought to award that the Parol demur. So when the Tenant vouches one as Heir within Age, he may pray that the Parol demur. But in such Case he ought to plead more certain; for there he ought to shew how Cofin. *Vide* 7 *Edw.* 6. *Dyer* 79. 16 *Ed.* 3. *Tit. Age*, & 15 *Edw.* 4. 46 *Edw.* 3. 25 & 31 *Edw.* 3. *Voucher* 54. In Dower, if the Tenant vouches the Heir within Age in Favour of Dower, he ought to shew a Deed. *Vide* 11 *Edw.* 3. *Voucher* 13. 40 *Edw.* 3. 5. 50 *Edw.* 3. 25. 10 *Edw.* 3. 31.

13 E. 1. cap. 40.
2 Rol. Rep. 246.
1 Co. 15. a.
4 Co. 50. a.
17. b.
2 Inst. 455,
2 Leon. 148.
18 E. 4. 16. a. b.
Br. Age 43.
Fitz. Age 2.
46 E. 3. Age 76.
7 E. 2. Age 139.
8 E. 2. Judgment 249.
14 H. 7. 18. b.
19. a.
6 E. 3. 216. b.

Hill.

Hill. 40 Eliz.

In the Exchequer.

Sir JOHN MOLYN'S Case.

2 Inst. 500.
 8 Co. 77. a.
 9 Co. 131. a.
 2 Rol. 502.
 Hard. 468.
 Lane 7.
 Poph. 138.

2 Rol. 502, 514.
 Dav. 4. a.
 1 Co. 47. a.
 27 H. 8. Br.
 Parliament 77.
 B. N. C. 92.

KING *Edw. 3.* Lord, the Abbot of *Westminster* Mesne, and *C.* Tenant of the Manor of *Chippenham* in the County of *Buck.* The Tenant was attainted of Treason, and after Office found thereof, King *Edw. 3.* by his Letters Patents granted over the said Manor to Sir *John Molyns*, and his Heirs, *Tenendum de nobis, Hæredibus & Successoribus nostris & aliis Capitalibus Dominis feodi illius, per servitia inde debita, & de jure consueta:* Of whom, and how this Land should be held, was the Question. And it was objected that in this Case the Tenure should be of the King, for three Reasons; 1. Because the Words of the *Tenendum* are, *per servitia inde debita, & de jure consueta;* which Words could not either revive, or create a Tenure to the Mesne; for by the Attainder the Mesnalty was extinct, and therefore at the Time of the King's Grant, *nulla servitia fuer' debita & de jure consueta,* for all Services were extinct: and therefore as in 27 *H. 8. Br. Parl. 77.* it is said, That if the King has Land by Forfeiture of Treason, thereby all Tenures are determined, as well of the King as of others; and there, if this Land be afterwards given to another by Parliament, saving to all others their Rights, Rents, Services, &c. there the Seigniories of common Persons are not revived; for no Seigniorie was *in esse, tempore secundi actus facti.* So in the Case at Bar, *tempore consecutionis Literarum patentium,* there was no Seigniorie, or Service *in esse,* and therefore of Necessity the said Manor ought to be held of the King; but the Words ought to have been, *per servitia ante Proditionem, or ante Artincturam, inde prius debita, &c.* 2. In this Case an express Tenure is reserved to the King; for the *Tenendum* is, *Tenendum de Nobis, &c.* and therefore it ought to be held of the King; and forasmuch as

one and the same Land cannot be immediately held of many, therefore these Words *& aliis capitalibus Dominis, &c.* are void, and the first Words, *viz. Tenend' de Nobis* shall stand. 3. Divers Offices and Licences of Alienation, and other Records were shewed to the Court, by which it appeared that the Law had been always so taken, that the said Manor was held of the King *in Capite; & consuetudo est optima interpretis Legum.* As to the first, it was answered and resolved by the Barons of the Exchequer, that the Words are (a) sufficient to create a Tenure in the Mesne, as it was before the Treason; for so is the King's Meaning, and it is consonant to Equity, *viz.* that the Mesne who did not offend, should not lose his Services; and therefore the Grant shall be taken beneficially for the Honour of the King, and for the Relief of the Mesne; and the Words of the *Tenendum* cannot have any other reasonable Construction; and as to this Point they strongly rely'd on the Book in 33 *Hcn. 6. 7. a.* where *Pristot* saith, That if the (b) King seizes any Lands by Forfeiture of Treason, grants the same Lands to another by these Words, *Tenendum de capitali Domino per servitia debita & consuetia*, That the same Lands are held of the Chief Lord, as it has been adjudged; and therewith agrees 8 *E. 3. 283. Vide* (c) 46 *E. 3. Petition 19. & * 17 E. 3. 59. b.* And as to the Case of 27 *H. (d) 8.* it was answered and resolved, that it was not like this Case; for a Saving cannot save that which is not *in esse.* But in the said Book it is further said, *viz.* Here are not Words of Gift, or Reviving) but in the Case at Bar, the King's Grant doth in Judgment of Law amount to the reviving of the ancient Seigniorie. Note the Gravity of the ancient Sages of the Law, to construe the King's (e) Grant beneficially for his Honour, and the Relief of the Subject, and not to make any strict or literal Construction in Subversion of such Grants. As to the second Point, it was resolved, That all the Words of the *Tenendum* in the Case at Bar might well stand; for the said Manor shall be held of the King as Lord Paramount, and of the Abbot as Mesne, *viz.* of the Mesne immediately, and of the King by a Mesne, as it was held before the Attainder, and that was the honourable Intention of the King, and stands well with the Words: For as the Barons said, divide the Words of the *Tenendum* into two several Cases, and then join them together, and the Case would be without any Difficulty; First, if the *Tenend'* had been, *de nobis hæred. & succ. nostris per servitia inde debita, & de jure consueta*, the Tenure shall be of the King immediately. 2. If the Words had been *De Capital' Dom' feodi illius per servitia inde debita, & de jure consueta*, the immediate Tenure shall be of the Abbot, as it was before, then join them

(a) 8 Co. 56. a. b.
9 Co. 131. a.
11 Co. 11. b.
2 Rol. 502.

(b) 2 Rol. Rep. 148.
2 Rol. 502.
B. N. C. 113.
2 Inst. 501.
Ley de Gardes & Liveries 4.
B. Tenures 3.
(c) 9 Co. 131. a.
2 Inst. 501.
Lit. Rep. 43.
(d) 27 H. 8.
Br. Parliament 77.

1 Co. 47. a.
2 Rol. 502.
Antea 4. a. 9. b.
B. N. C. 92.
Lit. Rep. 43.
* 11 Co. 73. b.
74. a. b.
2 Inst. 501.
(e) 2 Rol. 3. 4.
A. B. 200.
1 Co. 49. a.
Postea 7. a. 56. a.
8 Co. 77. a.
56. a. b. 166. b.
9 Co. 30. a.
123. a.
10 Co. 67. b.
11 Co. 11. a.
2 Inst. 496,
497.
3 Bulst. 6.
Keilw. 175. a.
198. a.
3 Leon. 243.
2 Sid. 141.
Plowd. 32. a.
126. a. 143. b.
Hard. 500.
Fitz. Grant 29.
Br. Exemption 9.
(f) 2 Rol. 502.

together,

together, as in the Case at Bar, and the Tenure shall be of the Abbot immediately, and of the King as Lord Paramount. As to the said Offices, Licences and other Records, the Barons said, That forasmuch as by Construction of Law on the said Letters Patents, it appears that there is no immediate Tenure of the King, although it has been otherwise found in Offices, or admitted in Licenses, or other Records, that cannot alter the true Tenure, which originally appears (to them as Judges) of Record. And it was said, *Quod licet consuetudo est magnæ auctoritatis nunquam tamen præjudicat veritati.*

4 Co. 12. 2.

Pasch. 43 Eliz.

In the Exchequer.

WHEELER'S Case.

Co. Lit. 77. b.

(a) Ley de Gards, &c. 3. Lit. Rep. 48.

(b) 29 H. 8. Br. Livery 57. Ley de Gards, &c. 3. 9 Co. 123. a. b. 2 Rol. 502. Plowd. 240. (c) Ley de Gards, &c. 3. 9 Co. 123. a. b. 2 Rol. 502.

KING H. 8. by his Letters Patents *ex certa scientia & merito motu* granted Lands in Fee, *Tenendum de Nobis & Heredibus nostris per servitium unius* (a) *Rose rubee annuatim ad Festum Nativit' S. Johan' Baptistæ solummodo pro omnibus & omnimodis aliis servitiis.* And it was adjudged in the Exchequer, that it was a Tenure by Socage in Chief. But it was objected, 1. That if the King grants Lands in Fee, and reserves (b) nothing, the Patentee should hold by Knights Service *in Capite.* The same Law if the King grants Lands by express Words (c) *absque aliquo inde reddendo,* Or if he grants Lands without any Reservation, the Tenure should be of the King by Knights Service for the Incertainty, and so it is held in 33 H. 6. 7. a. 2. It was objected, That in the Case at Bar the Tenure could not be by the Service of a Rose only *pro omnibus aliis servitiis,* according to the Words of the *Tenendum,* for to every Tenure there ought to be Homage, or Fealty at least; then forasmuch as the Tenure cannot be by a Rose only, the King is deceived in his Grant. 3. Forasmuch as a Service above the Rose, ought to be of Necessity, by

by Construction of Law added to the Tenure; the best and highest Service should be taken and added for the King, and that is Knights Service, for the Uncertainty: Yet it was resolved, that forasmuch as Fealty is incident to every Rent-Service, the Law annexeth Fealty to the said Rent, and then these Words, *scil. pro omnibus (a) aliis servitiis*, is to be intended of other Services which the Law doth not imply or add to it, so that the Tenure shall be by a Rose and Fealty, and that is the favourable (b) Construction of the Law, as near the King's Intent as may be. And by this Construction the said Words *pro omnibus aliis servitiis* have some Effect, and shall not be rejected as idle, and of no Force. And *Priest* said 33 H. 6. 7. a. That if the King grants Land, and reserves any special Rent, the Tenure shall be such as he reserves, be it Socage or other.

(a) Ley de
Gards, &c. 6.
(b) 10 Co. 67. b.
2 Rol. 200.
2 Inst. 498. 497.
3 Bullt. 6.
8 Co. 77. a.
56. a. b. 166. b.
11 Co. 11. a.
Kelw. 175. a.
198. a.
3 Leon. 243.
2 Sid. 141.
Plowd. 32. a.
2 R. 3. 4. a. b.

126. a. 143. b. Hard. 500. Fitz. Grant 29. Br. Exemption 9. 1 Co. 49. a.
Postea 56. a. 9 Co. 30. a. 123. a. Antea 6. a.

Resolutions and Differences when a Bar in one Action shall be a Bar in another.

Mich. 40 & 41 Eliz.

In the Common Pleas.

FERRER'S Case.

Between (a) *Ferrers* and *Arden* these Points were resolved: 1. When one is (b) barred in any Action real or personal, by Judgment on Demurrer, Confession, Verdict, &c. he is barred as to that or the like Action of the like Nature for the same Thing for ever. For * *Expedit rei publ. ut sit finis Litium*. But there is a Difference between real Actions and personal Actions. For in (c) a personal Action, as Debt, Accompt, &c. the Bar is perpetual, for the Pl.

(a) Cr. El. 667.
668.
Co. Entr. 38.
Nu. 31.
(b) Doct. pl. 65.
* 8 Co. 37. b.
98. b.
9 Co. 79. b.
Co. Lit. 103. a.
(c) Postea 46. a.
Doct. placit. 65.
Latch. 193.

Przf. ad 8 Rep. 10. Moor 478. pl. 633. 12 E. 4. 13. a. b. 4 C. 43. a.
caus. or

cannot have an Action of an higher Nature, and therefore in such Case he has no Remedy but by Error or Attaint. But if the Demandant be (a) barred in a real Action by Judgment on a Verdict, Demurrer, Confession, &c. yet he may have an Action of an higher Nature, and try the same Right again, because it concerns his Freehold and Inheritance. As if a Man be barred in an (b) Assise of *Novel disseisin*, yet upon shewing a Descent, or other special Matter he may have an Assise of *Mortancester, Aiel, or Besaiel, Entrie sur disseisin* to his Ancestor. So it was said, if a Man be barred in a *Formedon* (c) in Descender, he may have a *Formedon* in Reverter or Rem'r, for that is an Action of an higher Nature; for therein the Fee-simple is to be recovered, according to the Opinion in (d) *Robinson's Case* in the 5th Part of my Reports f. 33. And if any one be (e) barred by Judgment in any real Action of the Seisin of his Ancest. or of his own Possess. he may have a Writ of Right, in which the Matter shall be tried and determined again. But a Recovery or Bar in an Assise, (f) is a Bar in every other Assise, and in a Writ of Entry in the Nature of an Assise; for both are of his own Possess. and of one and the same Nature between the same Parties. So a (g) Bar in a Writ of *Aiel*, is a Bar in a Writ of *Besaich, or Castnage, &c.* for these are Ancestrel, and of one and the same Nature, & sic de cæteris. So that the Law has provided greater Safety and Remedy for Matters of Freehold and Inheritance than for Debts and Chattels; for there once barred always barred, (as it has been said) unless it be in a special Case, as appears in the said *Robinson's Case. Vide F.N.B. 5. N. 30 Aff. p. 5. 4 Ed. 3. Estopp. 133. 5 Aff. p. 1. 11 Ed. 3. Entre 56. 12 Ed. 4. 13. a. b. 2 R. 3. 14. a. b. 33 H. 8. Action sur le Case Br. 105. 29 H. 8. Br. Det. 174.* But in a (h) *Formedon* in Descender, if the Demandant be barred by Verdict or Demurrer, yet the Issue in Tail shall have a new *Formedon* in Descender on the Construct. of the Stat. of *Westm. 2. c. 2.* So if he be barred in a Writ of (i) Error on the Release of his Ancestor, his Issue shall have a new Writ of Error, for he claims in not only as Heir, but *per form' domi*; and by the Statute shall not be barred by (k) feigned Pleading, or false Pleading of his Ancestor, so long as the Right of the Intail remains; and therewith agree to *Hen. 6. 5. 3 El. Dier (l) 188.* Sir *Ralph Rowlet's Case.* Another (m) Difference is in real Actions or personal, between a Plea to the Action of the Writ, and a Plea to the Writ, for if the Demandant or Plaintiff has (n) mistaken his Action, so as the Plea of the Tenant goes to the Action of the Writ, as *Formedon* in the Remainder, where it should be *Formedon* in Reverter, such Action without Judgment upon Verdict or Demurrer, &c. doth not bar the Demandant of his rightful Action; and therefore if the Demandant (o) in such Case be Nonsuit, or the Plea be discontinued

(a) Doct. pl. 95.
(b) Doct. pl. 75.
12 E. 4. 13. b.
4 Co. 43. a.
Cr. Car. 465.
466, 467.

(c) Doct. pl.
65, 66.

(d) 5 Co. 32. b.
33. a. Cr. Jac.
15, 394.

(e) Doct. pl. 66.
Cr. Jac. 464,
465, 466, 467.

(f) Doct. pl. 66.
Cr. Jac. 465.
Godb. 271.

(g) Doct. pl. 66.
2 Rol. Rep. 14,
15, 17.

(h) Doct. pl. 66.

Dy. 371. pl. 6.
1 Mod. 207.

(i) Doct. pl. 66.
Co. Lit. 393. b.

(j) Doct. pl. 66.
Godb. 320.
Cr. El. 388.

(k) Doct. pl. 66.
(l) Dy. 188. pl. 8.
Co. Lit. 20. a.

392. b. Cr. El.
388.

(m) Doct. pl. 66.
(n) Doct. pl. 66.
4 Co. 39. b. 40. a.

Cr. El. 668. j.
2 Vent. 165.
(o) Doct. pl. 66.
5 Co. 33. a.

ned

nued, he may bring his rightful Action; and therewith agree 27 *E.* 3. 84. 6 *H.* 4. 4. 2 *R.* 2. *Estoppel* 210. 4 *E.* 3. 54. But (a) if the Plea be but to the Writ, so that the same Nature of Writ remains, in such Case altho' the Plea to the Writ be adjudged against the Demandant upon Demurrer or Verdict, &c. yet he shall maintain the same Writ again; for the Judgment extends but to the Writ, and therewith agrees 3 *E.* 3. *Estoppel* 134. 30 *Aff.* p. 8. Another Difference in real Actions, between such Persons as have not the meer Right in them, but a qualify'd Right, altho' they be barred in real Actions (without making them Parties who have Interest) it shall not bind the Successor, as (b) Parson, Prebendary, &c. For in such Case in a new Action of the same Nature against the Successor, he shall falsify; and the Recovery don't make any Discontinuance but the Successor may enter. Otherwise of an Abbot, Bishop, and such like, who have the whole Fee-simple in them, in such Cases the Successor at the Com. Law shall not falsify in a *Sci. fa.* or new Action of the same Nature. The same Law when Recovery is had against them, for it hath been adjudged that in a Writ of Right against a (c) Parson, who after the Mise joined made Default, and Judgment was given against him, yet the Successor had a *Juris utrum*, because he had not the meer Right, nor had prayed in Aid of the Patron and Ordinary. The same Law of (d) Ten't in Tail; *Vide* 8 *E.* 3. 28, 29. 19 *H.* 6. 39. 7 *H.* 4. 20. 4 *H.* 7. 2. 12 *H.* 8. 8. 10 *H.* 6. 5, 6. 15 *E.* 3. *Fauxer de Recovery* 43. *F. N. B.* 49. *R.* And if a Parson, Vicar, or Prebendary, &c. lose by Default in a real Action, he himself may have a *Juris utrum*; for that is his Writ of Right, as it is said in the Register, 32. *b.* And it would be against Reason that he should not have any Remedy, and especially it being the Right of the Church, which is favoured in Law. And it is to be observed, that when any one brings an Assise of *Novel disseisin*, *Mortdancester*, Writ of *Entry sur disseisin*, or any other real Action, and is barred by Judgment upon Demurrer, or Verdict, &c. the Demandant and his Heirs are not only barred of the same Action, but also as long as the Record of the Judgment stands in Force, he and his Heirs are barred of their Entry, and are put to their Action of an higher Nature; *Vid.* 25 *H.* 8. (e) *Dy.* 5. And where it is said in the Books that Privies shall not (f) falsify in the Point tried, that is as much as to say, that they shall not falsify in a *Sci. fa.* on the same Judgment. or in any other Writ of the same Nature. But he may bring an Action of an higher Nature, and therein try the Matter again, as it hath been said before. But in *Robinson's Case*, forasm. as the Def. in the first Action gave the Pl. &c. an Act'n a Execut. and Peradvent. the Pl. at the Time

(a) Doct. pl. 66.

(b) Cr. Jac. 467.

(c) F. N. B. 50. d.

(d) Cr. Jac. 467

(e) Dy. 5. pl. 1.

(f) 1 Sid. 55.

5 Co. 33. a.
Antea 7. b.
Cr. Jac. 15.

Time he brought his Action as Administrator, did not certainly know of the Will, forasmuch as (as it is said in 27 H. 6. *Estoppel* 273.) he may be made Executor unknown to him; for this Cause there in the said *Robinson's* Case it was adjudged for Pl. Note Reader, at the Com. Law, if one had suffered a Recovery against him in any real Action by Default (if he was lawfully summoned, and no Error was in the Proceeding) he had not (the Case of an (a) Infant only excepted for the Tenderness of his Years, and Defect of Understanding) any Remedy but by Writ of Right: And that was the Cause that (b) Ten't in Tail, Ten't by the Curtesy, Ten't in Dower, or Ten't for Life after Recovery by Default, had not any Remedy until the Stat. of *West.* 2. (c) c. 4. gave them a Writ of *Quod ei desorceat*, the Words of which Act are; *Cum temporibus retroactis aliquis amisisset terram suam per default, non habuit aliud recuperare quam per breve de Recto, quod eis competere non potuit qui de mero Jure loqui non poterint, veluti tenentes ad term' vite &c. provijum est quod de cetero non sit eor' defaulta tam prejudicialis, quin statum suum si jus habeant recuperare possint per aliud breve quam per breve de Recto, &c.* Nota, If a Man loses in an Affise, the Ten't is not put to his Writ of Right, but may have an Affise of *Mortd'ancestor*, 5 *Aff.* 1. Nor is a (d) Recovery in an Affise a Bar in a *Formedon* in the Reverter, as it is held in 6 H. 4. 2. Note the Stat. saith (*per defaultam*) and that cannot be (e) in Affise; for the Affise shall be awarded. If a Recovery be against one by Default, or upon a Plea of the Bailiff in Affise, the Def. upon Release, &c. (*Vide West.* (f) 2. c. 25.) may have Certificate, and so relieve himself, F. N. B. 181. 26 *Aff.* 5. *Regist. Judic.* 11. b. If the Husband had suffered a Recovery by Default against him and his Wife, the Wife had not any Remedy but a Writ of Right, and that appears by the Stat. of *West.* (g) 2. c. 3. *In casu quando Vir amisserit per default Tenement' quod fuit jus uxor' sue, dur' fuit quod uxor post mort' viri non habuerit aliqd' aliud recuperare quam per breve de Recto.* And the same Act gave a *Cui in vita* to the Wife in such Case, and a Writ of Entry to him in the Rev'n upon a Recovery had by Default, or Render against the Ten't for Life, &c. *Vide F.N.B.* 8. b. If such particular Ten'ts lose by Action tried in a real Action at this Day it seems they are without Remedy, and therewith agree 50 E. 3. 7. *Vide Temp. E.* 1. *Estoppel* 171. *Vide Regist.* 171. § 235. & *vide Litt.* Chapter *Releases* 112. b. That if the Ten't for Life, where the Rem'r was over in Fee, had suffered a Recovery, that he in the Remainder before the said Statute was without Remedy; and the Reason of the Strictness of the Common Law in such Case was to take away the Multiplicity and Infiniteness of Suits, Trials, Recoveries, and Judgm. in one and the same Case, and therefore in the Judgm.

(a) 2 Rol. Rep. 18.

Cr. Jac 467.
(b) F. N. B. 155. b.

(a) 2 Rol. Rep. 16.

2 Inst. 347,
348. &c.
F. N. B. 155. b.
Co. Lit. 331. b.
354. b. 335. a.

(c) Doct. pl. 65.

(e) 2 Rol. Rep. 15, 16.

(f) 2 Inst. 409,
410, &c.
F. N. B. 181. f.
182. a.

(g) 2 Inst. 342,
343, &c.
Co. Lit. 356. a.
280. a. b. 355. b.

and Policy of the Law, it was thought more profitable to the Commonwealth, and more for the Honour of the Law, to leave some without Remedy (as is aforesaid) and to put others to their Writ of Right; without any Respect of Coverture, &c. than that there should not be any End of Actions and Suits. *Vide* the Judgment in *Rediff. & post disseis. F. N. B.* 188 & 190. And the Punishment inflicted by the Law, on him who should disseise him who is in by Judgment of the Law in such Case; and the *Register* 206, 208. For as it hath been well said (a) *Interest reipub. ut sit finis litium*; otherwise great Oppression might be done under Colour and Pretence of Law; for if there should not be an End of Suits then a rich and malicious Man would infinitely vex him who hath Right by Suits and Actions; and in the End (because he cannot come to an End) compel him (to redeem his Charge and Vexat.) to leave and relinquish his Right, all which was remedied by the Rule and Reason of the ancient Com. Law; the Neglect of which Rule (by Introducing of Trials of Rights and Titles of Inheritance and Freehold in personal Actions; in which there is not any End or Limitation of Suits) hath therewith introduced four great Inconveniencies. 1. Infiniteness of Verdicts; Recoveries and Judgments in one and the same Case. 2. Sometimes Contrarieties of Verdicts and Judgments one against the other. 3. The Continuance of Suits for 20, 30, and 40 Years, to the utter Impoverishing of the Parties. 4. All this tends to the Dishonour of the Common Law, which utterly abhors Infiniteness; and Delaying of Suits, wherein is to be observed the Excellency of the Common Law, for the Receding from the true Institution of it introduces many Inconveniencies, and the Observation thereof is always accompanied with Rest and Quietness the End of all humane Laws. *Vide Reader in my Preface to the 4th Part of my Reports, f. 1. b.* for the Inconveniencies which ensue on the Breach of any of the ancient and fundamental Rules of the Com. Law. And by all these Differences and Reasons you will better understand your Books, in 8 *Ed.* 2. *droit* 35. 4 *Ed.* 3. *droit* 31. 3 *E.* 3. 16. 7 *Ed.* 3. 19. 8 *Ed.* 3. 54. 9 *Ed.* 3. 13. 18 *Ed.* 3. 31, 35. 18 *Ed.* 3. *Estoppel* 221. 30 *Ed.* 3. 19. 13 *Aff. p.* 1. 17 *Aff. p.* 27. 27 *Aff. p.* 21. 28 *Aff. p.* 14. 30 *Aff. p.* 8. 30 *Aff.* 51. 31 *Aff.* 28. 32 *Aff.* 13. 31 *Aff.* 14. 33 *Aff.* 5. 19 *Ed.* 3. *Estoppel* 227. 40 *Ed.* 3. 21. 42 *Ed.* 3. 44 *Ed.* 3. 45. 45 *Ed.* 4. *Br.* 589. 7 *Hen.* 4. 15. 3 *Hen.* 6. 15. 22 *H.* 6. 27. 7 *Ed.* 4. 19. 2 *R.* 3. 14. 10 *H.* 6. 5. 37 *H.* 6. 31, 32. 12 *Ed.* 4. 13. 9 *H.* 7. 23. 21 *H.* 7. 24. 29 *H.* 8. *Br. Det* 174. 33 *H.* 8. Action sur le Case *Br.* 105. 7 *Ed.* 6. *Estoppel Br.* 162. 23 *Eliz.* *Dier* 371. *Braeton, lib.* 4. *fol.* 262. Note, Reader, at the Common Law,

(a) Post. 45. a.
11 Co. 69. a.
Hardr. 128.
Godbolt 242.
3 Bullstr. 98.

Præf. ad 8 Rep.
pag. 10.

Co. Lit. 238 b.
2 Inst. 153, 154.

if Land had been conveyed out of the Degrees, so that the Demandant could not have a Writ of Entry in the *per*, or *per & cui*, the Demandant was put to his Writ of Right; for no Writ of Entry in the *post* was at the Common Law, and the Reason thereof was as hath been said, *quod sit finis litium*, and that he who had Right should take his Remedy by Writ of Entry, before there should be more than two Alienations, and all this appears by the Statute of *Marlebridge cap. 29. Vide F. N. B. 192. 7 Ed. 3. 25. & 325. 17 Ed. 3. 69. 22 Ed. 3. 1. 7 H. 4. 17, &c.*

Co. Lit. 238 b.
2 H. 3 c. 29.

Where a Writ shall be brought by
Journeys Accompts.

Hill. 45 Eliz. Rot. 36.

I N T H E

C O M M O N P L E A S.

SPENCER'S Case.

*W*illiam Spencer, and Mary his Wife brought a *Formedon* in the Descender against *John Dalby*, who vouched *R. S.* the Demandant counterpleaded the Voucher specially, and shewed, that the same Demandant *alias prosequutus fuit a Formedon* in the Descender against the same Tenant for the same Land, and had Judgment against him by Default upon *Grand cape*, which Judgment was reversed by a Writ of *Disceit* brought by the Tenant, because the Summons was not duly made, and that this Writ was brought by Journeys Accompts, *viz. per dietas computat.*

computat. And the Demandants *alterius dicunt*, that *præd'* R. S. *qui, &c. nec aliquis antecessorum suorum* cuius *hæres ipse est unquam aliquid habuerunt in tenementis præd' cum pertinen' in Dominico, reversione, nec in servitiis post donum præd' usq; diem impetrationis præd' primi brevis, ita quod præd' J. Dalby, aut aliquem antecessorum suorum inde seoffasse potuit, & hoc petit qd' inquir' per patriam* and *J.D.* demurred on the Counterplea. And in this Case 2 Points were resolved by the Court. i. A Difference was taken when the first Writ abates by Default of the Demandant himself; as by his Misinformation of the Tenants Name, or of the Town, &c. for there the Demandant shall never have a Writ by Journeys Accompts, as the Books are in 48 *Ed.* 3 21. 14 *H.4.* 23. a. 32 *H.6.* 28. *Vide* 19 *Ed.* 3. *Brief* 244. But where the Writ abates for Default of the Clerk; as where it abates for false *Latin*, or Variance, or Want of Form, &c. there the Demandant shall have the Benefit of a new Writ by Journeys Accompts, because it was the Fault of the Clerk of the Chancery, and not the Fault of the Demandant himself, as the Books are agreed in 26 *Ed.* 3. *Quare Imped.* 163. 25 *Ed.* 3. 54. 38 *Ed.* 3. 5. 14 *H.* 4. 23. 22 *H.6.* 62. 13 *H.4.* *Executors* 118. *pari ratione* when the Writ abates for Want of good Summons, for that is the Fault of the Sheriff; and not of the Demandant, and therefore it was resolved that in such Case the Demandant shall have a new Writ by Journeys Accompts. *Vide* 4 *Ed.* 3. 130. 8 *Ed.* 3. 377. 42 *Ed.* 3 16. 22 *Ed.* 3. 15. 14 *H.6.* 4. 46 *Ed.* 3. 14. 21 *H.6.* 8. 22 *H.6.* 62. 11 *H.6.* 42. But 41 *Ed.* 3. 2. 7 *H.4.* 8. & 22 *H.6.* 46, &c. are contrary. And so an old Question in our Books well resolved. If a Writ abates for Non-tenure of the whole, the Demandant shall not have a new Writ by Journeys Accompts, because the first Writ was begun without Cause; and without any probable Colour of Cause; and therewith agrees 33 *H.6.* But a *Præcipe* of a Manor being abated by Nontenure of Parcel, the Demandant shall have a Writ by Journeys Accompts, because the Tenant was Tenant of the Residue for which the new Writ is brought; and it is hard to compel the Demandant to know in whom the Estate of every Part of the Manor is, and therewith agrees 4 *Ed.* 3. 159. So if the *Præcipe* be abated by Jointenancy of the Part of the Tenant, because every Jointenant is seised of the Whole, and may occupy the Whole; he shall have a new Writ by Journeys Accompts 17 *E.* 3. 39. 38 *E.* 3. 16. 33 *H.6.* 2. 41 *E.* 3. 4. A judicial Writ shall never be purchased by Journeys Accompts, as it is held in 22 *H.6.* 62. 27 *E.* 3. 84. & 45 *E.* 3. Tit. *Journeys Accompts* 10. And the Reason is, be-

Cr. Jac. 590.
32 H. 6. 28. d.

Cr. Jac. 517.

cause a judicial Writ shall never abate for Form, 4. H. 6. 3. 4. Also a Man shall never have a Writ by Journeys Accompts in other Court than the first Writ was, as it is held in 8 E. 3. 386. 8 Aff. p. 8. 18 Ed. 2. *Fstoppel* 262. A Writ by Journeys Accompts ought to be brought of the same Quantity that the first Writ contained, as it is adjudged in 13 H. 4. 12. a. And regularly a Writ of Journeys Accompts doth not lie but between those who are Parties to the first Writ, as where one of the Plaintiffs dies, or one of the Defendants. *Vide* 8 E. 3. 428. 10 E. 3. 498. 8 H. 5. 6. a. 7 H. 6. 17, 24, 25. 15 E. 3. *Journeys Accompts* 14. 43 E. 3. 16. 48 E. 3. 22. 33 H. 6. 3. 21 H. 6. 46. And no Writ shall be brought by Journeys Accompts but where the first Writ is served, and returned of Record, 14 H. 6. 7. But in no Case where there is a sole Plaintiff or Demandant, and he dies, there his Heirs or Executors shall never have a Writ by Journeys Accompts, although it be in (a) *Quare Imped.* where the Death after the six Months is peremptory, as appears in 19 E. 2. *Darreine presentment* 21. *F.N.B.* 32. c. 10 E. 3. 16. *Dennis de la Rivers Case*. 2. It was resolved in the Case at Bar, that a Writ newly brought by Journeys Accompts is *quodammodo* (b) a Continuance of the first Writ; and therefore if it be (c) against Executors, they ought to plead fully administrated the Day of the first Writ purchased, 21 H. 6. 9. 13 H. 4. *Execution* 118. 9 E. 4. 5. b. Costs of the first Writ shall be recovered. See the *Book of Entries* 382. b. And therefore it was resolved in the principal Case, that the Tenant cannot vouch on Cause after the first Writ, and afterwards by Assent the Tenant pleaded in Bar. *Vide Dier* 36 H. 8. 55. If the Pl. be made (d) a Knight, the Writ shall abate, and it seems he shall not have a Writ by Journeys Accounts, for it is his own Act. Note Reader, I conceive it is requisite to expound to you these Words, Journeys Accompts. 1. When a Writ is purchased by Journeys Accompts it is said in the Replication (reciting the former Writ that the same abated, and shew all in Certainty) *super quo*, the Demandant *per* (e) *dietas computat' recenter tulit quoddam aliud breve, &c.* For the Alledging of Journeys Accompts is always either by Way of Counterplea to oust the Tenant of Voucher, as in the Case at Bar; or by Way of Replication, as it is more commonly to oust the Tenant to plead Nontenure, or Jointenancy, or any other Plea which arises on Matter after the Date of the first Writ. See the *Book of Entries*, Tit. (f) *Journeys Accompts* 382. b. And Journeys Accompts, or by Accompt of Days, 1. *recenter*, and with Diligence. *Vide Braeton*, lib. 4. fol. 176. where he saith, *Esto qd' propter aliquem defectum cadit primum breve sum forte inepte sit conceptum, vel alio modo vitiosum qd' stare*

Ltrw. 260.
Salk. 393.
Comb. 428.

(a) B.N.C. 410.
Br. Journeys
Accompts 23.
Br. Qu. Imp. 160
Cr. El. 174.
Dyer 55. pl. 7.
(b) Doct. pl. 170.
(c) 2 Rol. Rep.
204. Hob. 2 5.
248. Cr Jac. 588
589, 590 Br.
Assets inter
mains 4. 2 H. 4.
21. a b. Fitz.
Journeys Ac-
compts 4. Br.
Journeys Ac-
compts 8.
(d) Dy. 55. pl. 7.
7 Co 27. b.
32 H. 6. 29. b.
1 E. 6. c. 7.

(e) 2 Inst. 567.

(f) 2 Inst. 567.

non possit, & disseisitus incontinenti impetrare incipiat aliud breve, &c. By which it appears, that the second Writ ought to be brought in reasonable and convenient Time to be discussed by the Justices; for which Cause the Demandant ought always to put in certain the Time of the Abatement of the first Writ, so that it may appear to the Court if the later Writ was purchased by Journeys Accompts, 5 Ed. 2 Inf. 567. 3. 203. acc. Vide 18 Ed. 3, 24. & 32 Ed. 3. Journeys Accompts 16. that fifteen Days were allowed.

Pasch. 25 Eliz.

Between Crosby and Gentleman in the Kings Bench, divers Points were resolved concerning Judges of Courts.

GENTLEMAN'S Case.

IT is to be observed, that the Words of a Writ of Right directed to the Lord of a Manor are, *Præcipimus tibi, quod (a) plenum rectum teneas A. de B. de uno messuagio, &c.* And the Words of a Writ of Jusficies are, *Rex vic' S. Salutem. Præc' tibi quod (b) Jusficies A. quod juste & sine dilacione reddat B. 20 l. &c.* and so of other Writs which are Vicountel. So the Writ of Right (c) Close is directed to the Lord of the Manor; *Præcipimus tibi quod secundum consuetudinem Manerii, &c. plenum rectum teneas, &c. de uno messuagio.* And the Writs are in the same Words when they are directed to the Bailiffs of a Manor, &c. And upon the Words aforesaid it was objected, that in such Cases the Lord, or the Bailiffs, or the (d) Sheriff, are Judges, for they have Authority by the K's Writ, and the Writs are directed to them, and not to the Suitors, and therefore it was said, That the Difference is when the Plea is in ancient

(a) F.N.B. f.1.
G. Reg. Orig.

1. a.
(b) F.N.B. f.119.
H. Reg. Orig.

139. a.
(c) F.N.B. f.11.
G. Reg. Orig.
9. a.

(d) 6 E. 4. 3. b.
pl. 9.

Court-Baron
County-Court.
(a) 4 Co. 33. b.
3 Co. 60. b.
2 Co. 48. b. 49. a.
Godb. 49.
1 Rol. 543.
Cro. El. 792.
Cro. Jac. 582.
4 Inst. 266, 268.
7 E. 4. 23. a.
3 Mod. Rep.
171. 12 H.
7. 16. 7. Co.
Lit. 58.
(b) 31 E. 3. Re-
turn. 17.
(c) 44 E. 3. 11. a.

(d) Supra.

(e) Co. Lit. 260 a
(f) 3 Mod. Rep.
171.
(g) Co. Lit.
117. b. 289. b.

(h) F. N. B. 17.
1. 18. h.
(i) Reg. Orig.
1. 2.

Demesne, Court-Baron, or County Court without Writ, there the (a) Suitors are Judges; but when the Writ is directed to the Lord, or Bailiffs, or Sheriff, by which they only are commanded to do Right and Justice to the Parties, there they are Judges. Also it was said, that by Force of *Justicies* a Plea may be held in the County above 40 s. and therefore it is Reason that other Judge should be appointed than the Suitors, who *de communi jure* are Judges of small Things under 40 s. And to this Purpose are some Opinions in *temp. Edw. 1. Tit. Det. 177. 21 Edw. 4. 66. b. § (b) 21 Hen. 6. Tit. Return 17. 21 H. 6. 34. a. 44 Ed. 3. 10.* where (c) *Finchden* holds, where the Admeasurement of Dower is made before the Sheriff, the Sheriff is Judge. But on good Consideration of all the Books it was resolved, that in none of the said Cases, the Lord of a Manor, or the Bailiffs, or Sheriff are Judges; but be the Plea held by Writ, or without Writ, the (d) Suitors are Judges. And the Reason why the Writ shall be directed to the Lord, or Sheriff, &c. is because the Court Baron is the Lord's Court, and the County-Court is the Sheriff's Court, and therefore it is great Reason that the Writ should be directed to him to whom the Court belongs, to the End he see 2 Things performed: 1. To hold his Courts that Justice and Right be therein done to the Parties. 2. That he be answered the Profits of his Court which belong to him. But in Case when they hold Plea by Force of the King's Writ, it doth not change the Nature nor the Jurisdiction of the Court: For as these without Writ are not Courts of Record, so when the Plea is held by Writ, the (e) Courts are of the (f) same Nature; for upon a Judgment given in both Cases, a Writ of (g) false Judgment lies, and not a Writ of Error: But if the Writ which is of Record should constitute a new Judge, *viz.* the Ld. in the one Case, and the Sheriff in the other, then the Authority of the Judge being by the K's Writ, which is of Record, the Court as to this Purpose would be also of Record *quod est perspicue falsum*. For without Question, as it appears by the Register (h) *F. N. B.* and all the Books a Writ of false Judgment lies in such Case, although the Plea be held by Writ. Also the K's Writ cannot alter the Jurisdiction of a Court-Baron, County, Hundred, &c. which are all Courts by the Com. Law, and have Judges authorized and appointed in them by the Law, and therefore all Things determined in those Courts ought to be determined by the Judges of the same Courts; but it is true, the K. may create a new Court, and appoint new Judges in it; but after the Court is established and created, the Judges of the Court ought to determine Matters in it; and therefore neither the Lord of ancient Demesne, nor of a Court Baron, nor the Sheriff in the County-Court, &c. when the Plea

Plea is held by Writ of Right, Justicies, (a) Admeasurement, &c. are Judges, but the Suitors, who are by the Com. Law the Judges of the Court. And therewith agree the Books in 34 H. 6. 35. 39 H. 6. 5. a. 7 E. 4. 23. a. 6 E. 4. 3. b. 12 H. 7. 16, &c. And observe well the Words of the Writ in the Register, 10. b. *Rex sectatoribus Cur' J. Manerii de G. quæ est de antiquo Dominico Coronæ Angliæ, ut dicitur, Salutem. Cum secundum legem & consuetudinem infra maneria, quæ de hujusmodi antiquo Dominico Coronæ Angliæ existunt hætenus, ut dicitur, usitat' in placitis in Curia eorundem Maneriorum pendentibus, cum ad iudicium inde reddendum sit placitarum, sectatores hujusmodi Curie ad iudicia in placitis inde reddend' licite procedere debeant & consueverunt totis temporibus retroactis.* And there it appears, that the Plea did there depend by a Writ of Right Close, &c. *Vobis mandamus, &c. ad iudicium inde reddendum cum omni celeritate procedatis, &c.* by which it appears, that altho' the Plea is held there by Writ, yet the Suitors are only Judges. It appears also by the said Books, That in an Hundred Court the Suitors are Judges, and so the Law well resolved in a Case, wherein there was Variety of Opinions in our Books. But in some Case, the Sheriff is Judge by Parliament, as in (b) Redifficin by the Statute of *Merton, c. 3.* And all his Proceeding, by Force of that Act, is of Record; and a Writ of Error lies on a Judgment given against him, &c. *Vide 44 E. 3. 10.* In a Court of (c) Pipowders the Steward is Judge, 6 H. 4. 3. acc. 7 E. 4. 23. a. In (d) the Lect the Steward, and in the Tourne the Sheriff is Judge, 10 H. 6. 7. 7 H. 6. 12. 12 H. 7. 15. In the Court of (e) Marshalsea, the Steward and Marshal of the King's House are Judges, 19 E. 4. 8. b. *F. N. B. 241. B. 20 E. 4. 16. b. 7 H. 6. 30. 4 H. 6. 8. Artic. super Chartas, (f) cap. 3.*

(a) 4 Inst. 266.

(b) 4 Inst. 266.

(c) 4 Inst. 272.

(d) 1 Rol 541,

542.

(e) 1 Bullf. 210.

10 Co. 72. a. 75. a.

Cro. Jac. 314.

(f) 6 Co. 21. a.

10 Co. 69. b.

1 Bullf. 208,

209, 210, 211,

212. 3 Keb. 335.

Cr. El. 501.

2 Inst. 547.

548.

Pasch. 27 Eliz.

In the Common Pleas.

MORRICE'S Case.

Between *Smith* and *Morrice*, the Case was such, Two Jointenants are with Warranty, and Partition was made between them by Judgment in a Writ of *Partitio facienda*, by Force of the Statute of (a) 31 H. 8. cap. 1. And it was adjudged that the Warranty remain'd because by the King's Writ they are compellable by the Statute, (to which every one is Party) to make Partition, and the Party has pursued his Remedy according to the Act, and therefore none can have Wrong by the Operation of the Statute, to which every one is Party: But if they had made Partition by Deed, by Consent, after the said Act, altho' they were compellable by Writ to make Partition, yet forasmuch as they had not pursued the Statute to make Partition by Writ, therefore such Partition doth remain at the Common Law, and by Consequencethe (b) Warranty is gone, as it is agreed in 29 E. 3. Tit. *Warranty* 70. And it was resolved, that after the said Statute, although now Jointenants are compellable to make Partition by Writ as Coparceners are, yet they may not make Partition by (c) Parol as Coparceners may by the Common Law; and the Reason was, because the Statute doth not extend to any Partition, but by Writ *de Partitio facienda* only, but leaves all other Partitions as they were before. And it was said, if there are two Jointenants with Warranty, and the one disseises the other, and the Disseisee brings an Assise, and on his Prayer has Judgment to recover in Severalty, in this Case the Warranty is gone: for although he has Partition by Judgment, yet he who is bound by the Warranty is not Party, or privy, or consenting to it, as he is when the Partition is made by Force of the Act of Parliament.

(a) O. Benl. pl. 20, 21. Godb. 84. pl. 97. Co. Ent. 410. Rastal's Ent. 450. Hob. 179. Co. Lit. 169. a. 187. a. 2 Bulstr. 104. Cro. El. 759. Dy. 128. pl. 58.

(b) Hob. 25. Co. Lit. 165. b. 187. a. Kelw. 16. b. Moor 203. (c) 2 Rol. 225. Co. Lit. 169. a. 187. b. 1 And. 50. Dy. 179. pl. 43. 350. pl. 20. Godb. 94. Moor 29. Leon. 103. Cro. El. 95. Lit. Sect. 250. 3 E. 4. 9. a. (d) Co. Lit. 127. a.

liament. Note Reader, although some Books are, that Judgment shall be given to hold in (a) Severalty in the Case of Jointenants, as 10 E. 3. 40. & 10 Aff. p. 17. yet I conceive it will be hard in Law to maintain the Judgment: For 1. the Plaintiff in Affise ought to recover according to (b) his Complaint, and that is of nothing in several. 2. He ought to recover in the Affise by View of the Recognitors, and they have not the View of any Thing in Severalty, 3. It will be to the Plaintiff's Prejudice as well for the Survivor, as for Warranty and the like: And therewith agreeth 21 Aff. p. 35, where the Case was adjudged not upon any Opinion at the Affises but upon Adjournment into the *Com. Pleas*, and there adjudged that the Plaintiff should recover generally, although the Plaintiff himself prayed, that the Judgment might be, that he should hold in Severalty; for the Prayer of the Party will not alter the Judgment of the Law in such Case.

(a) 19 H. 6. 45.
Br. Jointenants
43.
Br. Partit. 16.

(b) Co. Lit.
167. b.

Hill. 29 Eliz.

Cases of Pardons.

THE general Pardon of 28 Eliz. pardons all Felonies, & *Inf.* 234.
 &c. In which Burglary was excepted. In this Term it was asked all the Judges of *England*, If the Attainder of one for Burglary be excepted? And it was objected, that by the Attainder and Judgment the Offence of Burglary which was but Matter in Fact, is now altered by the Judgment, and become of Record, and thereby the Offence utterly extinct; and then it is not (by the Name of Burglary) excepted, and by Consequence he who is so attainted of Burglary shall be pardoned. But it was resolved, That the Attainder was excepted; for if the Burglary be excepted, altho' it doth not appear to the Eye of the Law, but stands in Doubt, and is left to Trial, whether it be Burglary or not, *a fortiori*, when the Burglary appears of Record by Judgment of Law, it shall be excepted. And it was said, That the Burglary was not extinct,

Hale's pl. Cor.
251.
3 Inf. 234
238.

extinct, but had received such Judgment. (by which it is manifest) as the Law requires, which Judgment. so long as it remained in Force, the Offender cannot be called in Question for the Burglary, because the Course of the Law has had its End; but that don't prove but that the Offence of Burglary remains, as in 20 *Aff. p. 7.* (a) *A.* was bound in a Stat. of 20 *l.* to *B.* *B.* sued Execution, and the Land of *A.* was delivered to *B.* in Execution until he had levied the 20 *l.* and afterwards *B.* made a Defeasance to *A.* by Indenture, that if *A.* paid him 8 *l.* at a certain Day, that then the Recognizance, viz. the Stat. of 20 *l.* should be void: And it was adjudged that altho' the Stat. was executed, yet the Defeasance of the Stat. is sufficient in Law to defeat as well the Stat. as the Execution upon it; for the Stat. is the Foundation of the whole, and therefore if that is defeated, all which is built upon it shall be defeated also. So in the principal Case, altho' the Jury have found the Prisoner Guilty of Burglary, and thereupon he has Judgment: Yet the Offence of Burglary is the Foundation of the whole, and therefore if that is excepted, the whole Proceeding upon it is excepted. Also see in my last Reports, where by the Exception of the Offence in the general Pardon, all (b) Dependents upon it are also excepted. And yet if a Man (c) be attainted of Felony by Judgment, Outlawry, or Abjuration, and afterwards the King pardons generally the Felony, it is nought worth, but the Reason thereof is not because by the Attainder the Felony is extinct, but because the King is not truly informed (as he ought to be) of the true State of the Case, for peradventure if he had been informed of the (d) Truth, and of all the Proceedings, he would not have pardoned it. *Vide 9 E. 4. 28. a. & 19 E. 3. Coron. 124. 11 H. 4. 16, 41. Stam. 102. b.* But if a Man be (e) attainted of Felony, and the King pardons the Attainder, and the Execution of it also, this Pardon shall be disallowed, because the King don't pardon the Felony by express Words, as it is adjudged in 8 *H. 4. 22. b.* which proves that the Felony remains. But 33 *H. 8. 50.* (f) If Murder or Petit Treason be made High Treason, thereby the Murder or Petit Treason is extinct, for High Treason doth (g) drown every less Offence. *Vide M. 6 & 7 Eliz. Dyer 235.* (b) If a Man kills his Master, and Petit Treason is pardoned by the general Pardon, and Murder is excepted, he shall be discharged, for Petit Treason is Murder, and more. *Vide 20 Eliz. 135 Dyer.* One *Burton* Parson of *Isbuck* in *Leicestershire* was deprived, anno 12 *Eliz.* for (i) Adultery committed anno 11 *Eliz.* And afterwards by the general Pardon 2 *April 13.* the Offences of Adultery *inter alia* were pardoned before the 14th Day of *Feb.* then last past, and it was said that before the Pardon, *Crimen adulterii præd' transivit in rem judicat'*, and therefore the Sentence remained

(a) Br. Defeat. 7.
Br. Debt. 133.

(b) Latch. 81, 141.
5 Co. 47. a.
49. b.
Palm. 412.
Hob. 82.
Cro. El. 72.
3 Inst. 236.
(c) Stam. Cor. 102. b.
3 Inst. 238.
Latch. 181.
Owen 87.
(d) Stat. 13. R. 2. cap. 1.
12 Co. 18.
(e) Fitz. Chart. 26.
Br. Coron. 24.
Br. Chart. de Pardon 13.
Br. Appeal 27.
(f) Dyer 50. pl. 47. 5.
(g) Stile 347.
(h) Dyer 235. pl. 19.
(i) 3 Inst. 238. Hob. 293.
Larch. 22, 141.
1 Sid. 164, 168.
Palm. 412.
Owen 87.
Cro. El. 41, 789.

in Force; and it was strongly urged that the Sentence should not by the Relation of the said Pardon be made void, but at the most voidable, and therefore until it be reversed by another Sentence the Deprivation stood in Force; and he who was after his Deprivation admitted, instituted, and inducted, remained Parson till the first Sentence by another be annulled; but it was answered and resolved, that the said *Burton* who was deprived, by Force of the said Pardon, is now become Parson again without any Sentence, declaring the said Deprivation to be void; for by the Pardon, the Adultery, which was the Cause and Foundation of the Sentence, is discharged, and by Consequence all, that stands or depends upon the same Foundation, is also discharged. And no Laches was in the Parson, or Fault in Pleading; for at the Time of the Sentence he had not any Matter in Discharge, but it came *ex post facto*, by Relation of the general Pardon, and by Judgment in Law, and therefore the Validity of it shall be discussed by the Judges of the Law, and the Party deprived shall not be driven to a Suit in the Ecclesiastical Court to have Redress there. So it seems if one be attainted of Felony, and afterwards by Relation of a general Pardon the Felony is pardoned, that he shall be discharged, for he has not any Remedy by Error, or otherwise to reverse the Attainder.

Cro. El. 417
789.
9 Co. 119. b.
Hob. 82, 293.
Moor 132.

Plowd. 491. 31

Trin. 36 Eliz.

In the King's Bench.

ARUNDEL's Case.

John Arundel Esquire was indicted of the Murder of one *William Parker*, and the Murder was alledged to be done *apud Civitat' Westmonast' in Comitatu' Midd'*, viz. *in quadam platea ibidem vocat' Kingstreet in Parochia sancte Margarete in eodem Comitatu' Midd'*: And to this Indictment *Arundel* pleaded Not guilty, and for the Trial of this Issue a Jury was returned *de Viceneto civitatis Westmonaster'*, and the Jury found the Defendant Guilty. And it was shewed in Arrest of Judgment that the Venue ought to have been out of the Parish, and not

Moor 594, 595.
Golds. 133.
Co. Lit. 125. a. b.
3 Inst. 137.
2 Rol. 620, 621.
Cro. Car. 164,
165.
1 Bullst. 126,
127, 128.
1 Brownl. 190.
1 Jones 171.
Yelv. 187.
1 Siderf. 19

Hard. 18. 2 Rol. Rep. 271. Godb. 335. Cro. Jac. 308.

out of the City. And upon this Doubt all the Justices met at *Serjeants Inn*, and after many Arguments, 1. They resolved, That every (a) Trial should be out of such Place, which by Presumption of Law can have the best and most certain Knowledge of the Fact, as in 22 E. 4. (b) *Vifne* 27. If Trespass be brought in a (c) Town, and no such Town be pleaded, the Venue shall come out of the Body of the County, but if Trespass be brought in (d) two Towns, and no such Town be pleaded as to one of them, the Venue shall be out of the other Town; for that is the most certain. And if Trespass or any other Action be brought in (e) a Manor, &c. the Venue shall come out of the Manor: But if the Manor be alledged to be in (f) a Town, there because the Town is more certain than the Manor (for that may extend into many Towns) the Venue shall come out of the Town, as it is held in 6 Hen. 7. 3. b. 11 Hen. 7. 22. b. 9 Ed. 4. 3. a. 3 Ed. 4. 26. & 39 Hen. 6. Tit. *Transgres.* 93, &c. So in the principal Case because the Parish shall be intended to be more certain than the City, for this Cause the Venue shall be rather of the Parish than of the City. And although a Parish is a Place uncertain, and may comprehend divers Towns, as it is held in 4 Ed. 4. 41. 5 Ed. 4. 20, 125. 22 Ed. 4. 2. 35 Hen. 6. 30. 22 Hen. 6. Yet when a Parish is alledged to be in a City, there the Venue shall come out of the (g) Parish, 1 Ed. 3. 8. 7 H. 6. 38. and it shall be intended that the Parish is less than the City. And afterwards it was awarded that the Trial was insufficient, and a new *Venire facias* awarded to try the Issue again, for his Life was never in Jeopardy.

(a) 7 Co. 1. b.
11 Co. 25. b.
Hard. 18.
1 Bulst. 127.
(b) 1 Bulst. 127.
(c) Co. Lit. 125 b
1 Bulst. 127.
Cro. El. 32, 201.
(d) Co. Lit.
125. b.
1 Bulst. 127.
(e) Palm. 390,
391.
Co. Lit. 125. b.
Cro. Jac. 302,
303. Yelv. 187.
Cro. Car. 17.
312.
1 Jones 320.
Godb. 257.
1 Bulst. 127.
2 Rol. 621.
(f) Lane 89.
Co. Lit. 125. b.
1 Bulst. 127.
2 Rol. 621.
(g) Co. Lit.
125. b.
Cro. Car. 150,
151, 164, 165.
Cro. Jac. 263,
308, 340, 341.
11 Co. 25. b.
2 Inf. 669.
Godb. 335.
Moor 559.

Mich. 36 & 37 Eliz.

In the King's Bench.

TREPORT'S Case.

Poph. 57.
1 Jones 305.
2 Jones 99, 137.
1 Rol. Rep. 299.
Raym. 142.

IN an *Ejectione firmæ* the Plaintiff declared on a Lease made by A. and B. and on Not guilty pleaded, the Jurors gave a special Verdict, viz. That A. was Tenant for Life, the Remainder to B. in Fee, and that they both by Indenture did join in a Lease to the Plaintiff, and that A. the Ten't for Life was alive; and whether this should be adjudged in Law, the Lease of both or not, the Jury doubted; and

and it was resolved, That presently by the Delivery of the Deed it is the Lease of *A.* during his Life, (a) and the Confirmation of *B.* and after the Death of *A.* it is the Lease of *B.* and the Confirmation of *A.* according to the Opinion of *Dyer* and *Brown*, *Mich. 6 & Eliz. (b)* 234, 235. And because the Plaintiff had declared on a joint Demise of *A.* and *B.* it was adjudged against the Plaintiff. It was also held *per Curiam*, That if (c) Lessee for Life, and he in Remainder or Reversion in Fee make a Feoffment by Deed, each of them gives his Estate, *viz.* Lessee for Life his Estate by Livery, and the Fee-simple doth move and pass from him in Remainder or Reversion. But if it was by Parol, then it shall be the Feoffment of him in Remainder or Reversion, and the (d) Surrender of Lessee for Life, for otherwise nothing would pass by Parol. And it was held by them, That in the Case at Bar, although the Lease was by Deed indented, it should be no (e) Conclusion; for when the Deed enures by passing of an Interest (as in the Case it doth) it should not be taken for any Conclusion, no more than the Lease for Years of Lessee for Life by Deed indented shall be an Estoppel after his Death, because at the Commencement it took Effect by Way of passing of an Interest. And *Popham* Chief Justice said, If Tenant for Life, and he in Reversion make a Gift in Tail rendring Rent, the Lessee should have the Rent during his Life; for the making of a greater Estate is not any Forfeiture, because he joins with him in Reversion. And if Tenant for Life, and he in Reversion had made a Feoffment by Deed at the Com. Law, (g) the Feoffee should hold of the Lessee for Life during his Life. *Nota bene.*

(a) 1 Rol. Rep. 402.
Lit. Rep. 36.
Doct. pl. 93.
Lane 59.
Cro. Car. 285; 406.
Raym. 142.
27 H. 8. 13. a.
2 Rol. 64.
Poph. 57.
Moor 72.
2 Bulst. 44.
Co. Lit. 45. a.
Winch. 44.
1 Co. 76. a.
(b) 1 Bulst. 44.
Co. Lit. 45. a.
Cro. Car. 285.
Dyer 234, 235; pl. 18.
Moor 72.
(c) 1 Co. 76. b.
Raym. 142.
(d) 1 Co. 77. a.
Raym. 142.
Dy. 358. pl. 48.
(e) Co. Lit. 45. a.
Winch. 44.
Dyer 257. b.
(f) Poph. 57.
(g) Co. Lit. 214. a.

Mich.

Mich. 36 & 37 Eliz.

In the King's Bench.

EDEN'S Case.

NOTE, Mich. 31 & 32 Eliz. Rot. 365. In the King's Bench in Trespas *Quare Clausum fregit apud Marzbam in Com' Norf'*, by Thomas Eden, and William Franklyn against Edward Brown, the Def. pleaded that the Queen was seised in Fee in Right of her Crown, and by her Letters Patents under the Great Seal, bearing Date at *Welden in Com' Essex*, &c. *concessit tenement' præd' in quibus, &c. cuidam A. B. &c.* The Pl. took Issue, *quod non concessit tenement' præd' per prædictas literas patentes.* And this Issue was tried in the County of Norfolk where the Land lay, and not where the Letters Patents bore Date, and the Jury found for the Pl. And it was moved in Arrest of Judgment, That it ought to have been tried where the Letters Patents bore Date; & *non allocatur per Curiam*; for the Letters Patents being Matter of Record, and shewed to the Court under the Great Seal, cannot be denied, nor can the Party plead *Nul tiel (a) record*, against them being shewed under the Great Seal, and therefore the Effect of the Issue of *(b) Non concessit* is, That the Queen had nothing in the Land, or that the Tenements did not pass by the Letters Patents, in which Cases it shall be tried where the Land lies; and so it was adjudged. *Vide 8 Eliz. 253. Dy. 3 Mar. 129. 17 Eliz. 342.*

(a) Doct. pl.
397, 308. 352.
Hard. 158.
2 Sid. 145.
Cro. Jac. 375.
Plowd. 231. b.
232. a.
Co. Lit. 125. b.
260. a.
Hob. 156.
(b) Hard. 158.
Hob. 147, 156.
Co. Lit. 125. a.
260. a.
4 Co. 71. b.
Doct. pl. 308.
2 Cro. 376.

Hill.

Hill. 37 Eliz.

In the Common Pleas.

COLLIER'S Case.

Between (a) *Collier* and *Walker*, the Case was such; A Man has Issue a Daughter, and by his Will in Writing devises Part of his Land to his Daughter, and the other Part to his Wife for Life, with the Profits whereof she should bring up his Daughter, and that after his Death it should remain to his Brother, paying to one twenty Shillings, and to others small Sums, amounting to 45 s. in all, and that the Land was of the Value of the three Pounds *per Annum*. And it was adjudged, that the Brother had the Fee-simple. And this Difference was taken and resolved in this Case, That if the Devise had been to the Brother of the Land, to the Intent that with the Profits he should educate his Daughter, or of the Profits of the Land pay to one so much, and to another so much, that is but an Estate for Life; for he is sure to have no Loss. So if Land be of the Value of three Pounds *per annum*, and he devise that he shall pay for it 20 Shillings, or 30 Shillings, or 40 Shillings, or 50 Shillings *per annum* to another, it is but an Estate for Life; for he may pay it out of the Profits, and is sure to have no Loss. But in this Case at Bar, after the Payment he may die before Satisfaction; and therefore it is a Fee-simple; and the Law doth intend that the Devise was for his Benefit, and not for his Prejudice. And by this Difference you will better understand the Books in 4 E. 6. (c) *Estates* 78. 29 H. 8. *Testament* 18.

(a) Cr. El. 378;
Swinb. 113
(b) 3 Keb. 96.
1 Mod. Rep. 263.
Lit. Rep. 259.
Cro. El. 204,
205, 497, 498.
Carr. 226,
2 Jones 107.
1 Vent. 227.
Dyer 371. pl. 5.
Br. N. C. 125.
Co. Lit. 9. b.
Hob. 65.
Cro. Jac. 416,
527, 600.
Godb. 280, 281.
2 Rol. Rep. 80.
Moor 464, 852,
853.
3 Bullt. 194.
Bridg. 85, 138.
3 Co. 21. a.
2 Leon. 114.
Cro. Car. 158,
159, 369.
Latch. 9.
O. Benl. 24, 25.

(c) 3 Co. 21. a.
Cro. Jac. 416,
527. Co. Lit. 9. b.
3 Bullt. 194.

Swinb. 118. Cro. El. 205.

Hill.

Hill. 41 Eliz.

In the King's Bench.

WILD'S Case.

Moor 397.
Goldsb. 139.
Bridg. 85.
Swinb. 120.

Hill. 37 Eliz. in *Ejectione firmæ* between *Richardson* and *Tardly* in the *King's Bench*, on Not guilty pleaded, the Jury gave a special Verdict to this Effect. Land was devised to *A.* for Life, the Remainder to *B.* and the Heirs of his Body, the Remainder to *Rowland Wild and his Wife, and after their Decease to their Children, Rowland and his Wife* then having Issue a Son and a Daughter; and afterwards the Devisor died, and after his Decease *A.* died, *B.* died without Issue, *Rowland* and his Wife died, and the Son had Issue a Daughter, and died; if this Daughter should have the Land or not, was the Question; and it consisted only upon the Consideration what Estate (*a*) *Rowland Wild* and his Wife had, *viz.* If they had an Estate-tail, or an Estate for Life, with Remainder to their Children for Life; and the Case for Difficulty was argued before all the Judges of *England*; and it was resolved, That *Rowland* and his Wife had but an Estate for Life with Remainder to their Children for Life, and no Estate-tail. And in the (*b*) Construction of this Will the Judges did first consider the Judgment of the Common Law, If the Conveyance had been made by the Devisor in his Life. And, 2. The Reason and Cause that the Judgment shall not be according to the Rule of Law: And it was resolved, without Question that at the Common Law they had but an Estate for Life, the Remainder to their Children for Life. Then what shall be the Reason and Cause to give them an Estate-tail by Construction in this Case? It will be answered, the Intent of the Testator. But it was resolved, that such (*c*) Intent ought to be manifest and certain, and not obscure or doubtful: For at the (*d*) Com. Law Lands were not devisable (but only by Custom, and that in antient Cities and Boroughs, Houses and small Things) but by the Stat. of 32 & 34 H. 8. all Lands according to the Purview thereof are devisable, which Stat.

were

(a) Bridg. 85, 86.
Cro. El. 10, 121.
Cro. Jac. 416.
1 Vent. 227.
1 Bullf. 62, 220.
3 Keb. 42, 95,
97.
Lane 57.
(b) Carr. 5.
Cro. El. 696.

(c) Cro. El. 696,
742.
2 Sid. 26.
Cro. Jac. 416.
Cro. Car. 369.
(d) Lit. sect.
167.
1 Rol. 608.
Co. Lit. 111. a.

were made to the great Disadvantage (a) of Heirs at the Com. Law by Wills for the most Part made in Extremity of Sickness, and that utterly against the Rule and Reason also of the Com. Law, for the ancient Com. Law did favour him whom the Com. Law made Heir, because he was to sit in the Seat of his Ancestor, and to serve the K. and Commonwealth in as good Estate as his Ancestor did. And therefore it appears by *Glanvile*, who was Ch. Justice in the Time of *H. 2. lib. 7. cap. 1. fol. 44.* That every Freeman without the Assent of his Heir might dispose of a reasonable Part of his Lands with his Daughter in Frankmarriage, for the Advancement of his Blood, or to any Servant in Recompence of his Service, or in Frankalmoigne to any religious House to have divine Prayers made for him. But all that he ought to do in (b) Health, and not in Extremity of Sickness, to the End that such Gifts should not be made more out of Rage and Fury than of good Discretion, and so his Gift might exceed Measure. But if any such Gift which was made in Time of Sickness shall be good and firm in Law, the Consent and Confirmation of his next Heir was requisite to it. Also if a Man who had Lands by Descent, had Issue many Sons, he could not have given any of this Land to any of his younger Sons without the Consent of the Eldest, to the End that the Father, who for the most Part bore most (c) Affection to the youngest Son should not disinherit the eldest. But of his Land which he had acquired by his own Purchase, he might have given a Part to his younger Sons; and if he had not any Issue, he might have given all of it to whom he pleased. And all this appears in *Glanvile*, by which it appears, that the ancient Com. Law did respect the Heir at Com. Law. Then in the Case at Bar, forasmuch as by the Judgment of the Com. Law on the like Words in a Conveyance, it would be but an Estate for Life, the Remainder to their Children for Life, thence it follows, that the Intent and not the Words only of the Devisor ought to make it an Estate-tail in this Case. Then this Intent ought to be manifest and certain, and so expressed in the Will: And in this Case no such Intent appears; for peradventure his Meaning was to agree with the Rule of the Law; and therefore this Difference was resolved for good Law, That if *A.* deviseth his Lands to *B.* and to his Children or Issues, and he hath not any Issue at the Time of the Devise, that the same is an Estate-tail; for the Intent of the Devisor is manifest and certain that his Children or Issues should take, and as immediate Devisees they cannot take, because they are not *in rerum natura*, and by Way of Remainder they cannot take, for that was not his Intent, for the Gift is immediate, therefore there such

(a) Co. Lit. 111. b. Cr. Car. 359, 450. Vaugh. 262, 267 268. 1 Sand. 185. Dall. 13. pl. 22. Lane 57. Moor 774.

(b) 1 Rol. 608. b. B. 1.

(c) Cr. Car. 369.

1 Vent. 227, 231
1 Bulstr. 62.
Lit. Rep. 8, 259.
346, 347. 3 Kcb.
42, 53, 97, 99.
Swinb. 120.
Carter 183.
Cr. El. 121, 374.

Words shall be taken as Words of Limitation, *scil.* as much as Children or Issues of his Body; for every Child or Issue ought to be of the Body, and therewith agrees a Case, *Trinit. 4 Eliz.* reported by Serjeant *Bendloes*, where the Case was, that one devised Land (*a*) to Husband and Wife, and to the Men-Children of their Bodies begotten, and it did not appear in the Case that they had any Issue Male at the Time of the Devise; and therefore it was adjudged that they had an Estate-tail, to them and the Heirs Males of their Bodies: But if a Man devises Land to *A.* and to his Children or (*b*) Issue, and they then have Issue of their Bodies, there his express Intent may take Effect, according to the Rule of the Common Law, and no manifest and certain Intent appears in the Will to the Contrary. And therefore in such Case, they shall have but a joint Estate for Life. But it was resolved, that if a Man, as in the Case at Bar, devises Land to Husband and Wife, and after their Decease to their Children, or the Remainder to their Children, in this Case although they have not any Child at the (*c*) Time, yet every Child which they shall have after, may take by Way of Remainder, according to the Rule of the Law; for his Intent appears that their Children should not take immediately, but after the Decease of *Rowland* and his Wife.

(a) 1 Bullst. 219.
O. Benl. 30.
1 And. 43. pl. 110
1 Vent. 227. 231.
3 Keb. 53. 97.
Lit. Rep. 347.
Owen 148.
Moor 397.
(b) Cr. El. 743.

(c) Moor 220.

Mich. 41 & 42 Eliz.

Sir EDWARD CLERE'S Case.

Moor 476. 567.
Cr. El. 877.
Co. Ent. 128.
Cr. Jac. 31.
Co. Lit. 111. b.
Hert. 35. Jenk.
Cent. 260.
Hardr. 396.
3 Keb. 538.
Lit. Rep. 288.
21. Hob. 160.

IN an Affise by *Parker* against *Sir Edward Clere* Knight, of Lands in the County of *Norfolk*, the Case in Effect was such, *Clement Harwood* seized of three Acres of Land, each of equal Value, held *in Capite*, made a Feoffment in Fee of two of them to the Use of his Wife for her Life, for her Jointure, and afterwards made a Feoffm. by Deed of the 3d Acre, to the Use of such Person and Persons, and of such Estate and Estates as he should limit and appoint by his last Will in Writing, and afterwards by his last Will in Writing,

he devised the said 3d Acre to one in Fee (under whom the Pl. claimed. And whether this Devise was good for all the said 3d Acre, or not, or for 2 Parts of it, or void for the Whole was the Question. And in these Cases 4 Points were resolved by *Popham* Chief Justice, and Baron *Clark* Justices of Assise of the said County, upon Conference had with the other Justices: 1. If a Man seised of Lands in Fee makes a Feoffment to the Use of such Person and Persons, and of such Estate and Estates as he shall appoint by his Will, that by Operation of Law the Use doth vest in the (a) Feoffor, and he is seised of a qualified Fee, that is to say, till Declaration and Limitation be made according to his Power. *Vi- de Lit. fol. 109. a.* When a Man makes a Feoffment to the Use of his last Will, he has the Use in the mean Time. 2. If in such Case the Feoffor by his Will limits Estates according to his Power reserved to him on the Feoffment, there the Estates shall take Effect by Force of the (b) Feoffment, and the Use is directed by the Will; so that in such Case the Will is but declaratory: But if in such Case the Feoffor by his (c) Will in Writing devises the Land it self, as Owner of the Land, without any Reference to his Authority, there it shall pass by the Will, for the Testator had an Estate devisable in him, and Power also to limit an Use, and he had Election to pursue which of them he would, and when he devised the Land it self without any Reference to his Authority or Power, he declared his Intent, to devise an Estate as Owner of the Land by his Will, and not to limit an Use according to his Authority; and in such Case, the Land being held *in Capite*, the Devise is good for 2 Parts, and void for the 3d Part. For as the Owner of the Land he cannot dispose of more; and in such Case the Devise cannot take Effect by the Will for 2 Parts, and by the Feoffment for the 3d Part; for he made his Devise as Owner, and not according to his Authority, and his Devise shall be of as much Validity as the Will of every other Owner having any Land held *in Capite*. 3. If a Man (d) makes a Feoffm. in Fee of Lands held *in Capite*, to the Use of his last Will, although he devises the Land with Reference to the Feoffment, yet the Will is void for a 3d Part: For a Feoffment to the Use of his Will, and to the Use of him and his Heirs is all one. 4. In the Case at Bar, when *Clement Harwood* had (e) conveyed 2 Parts to the Use of his Wife by Act executed, he could not as Owner of the Land devise any Part of the Residue by his Will, so that he had no Power to devise any Part thereof as Own. of the Land, and because he had not (f) Elect. as in the Case put before, either to limit it according to his Power, or to devise it as Owner of the Land (for in the Case at Bar as Owner of the Land (having conveyed two Parts to the Use of his Wife *ut supra*) he could not make any

(a) 1 And. 246.
Moor 280, 493,
516, 567. Hob.
349. Co. Lit.
111. b. 271. b.
10 Co. 85 b.
Lit. Rep. 288,
321.
Cro. Car. 39.
(b) 2 Brown. 52.
1 Bullstr. 200.
Cr. Car. 39.
10 Co. 86. a.
Co. Lit. 111. b.
Cr. Eliz. 878.
Cr. Jac. 31.
Jenk. Centr. 260.
Hob. 160.
Moor 262, 567.
(c) Moor 262,
567. Co. Lit.
111. b. 271. b.
Cr. Car. 39.
Hob. 160.

(d) Cr. El. 878.
Co. Lit. 112. a.
Hob. 160.
Moor 516.

(e) Cr. Fl. 877.
Co. Lit. 111. b.

(f) Moor 646.

Devise, therefore the Devise ought of Necessity to enure to a Limitation of an Use, or otherwise the Devise shall be
 (a) utterly void; and Judgment was given accordingly for the Plaintiff for the whole Land so devised. And afterwards on the said Judgment Sir *Edward Clere* brought a (b) Writ of Error in the *King's Bench*, *sed non prevaluit*, but the Judgment was affirmed.

(a) Cr. Jac. 31.
 Cr. El. 878.
 Hob. 160.
 (b) Cr. Jac. 31.
 Cro. El. 277.

Hill, 37 Eliz. Rot. 416.

In the King's Bench.

PACKMAN'S Case.

Wilson brought an Action on the Case on Trover against *Packman*, and the Case was such; A Man died intestate, and the Ordinary committed Administration to a Stranger, and afterwards the next of Kin of the Intestate sued a Citation in the Spiritual Court, to have it repealed; pending which Suit, the Administrator to defeat the Plaintiff in the Spiritual Court of the Effect of his Suit, sold the Goods of the Intestate to the Defendant: And afterwards the Letters of Administration are revoked by Sentence, and the first Sentence annulled and made void, and afterwards Administration was committed to the Plaintiff. And it was resolved that the Action did not lie: And thereupon the Plaintiff discontinued his Action: And in this Case a Difference was taken between this Suit by Citation, which is to countermand or revoke the former Letters of Administration, and (a) an Appeal, which always is to reverse a former Sentence, for the Appeal doth suspend the former Sentence; otherwise of a Citation: And in this Case so far as the (b) first Administrator had the absolute Property of the Goods in him without Question, he might give them to whom he pleased. And although the Letters of Administration be afterwards countermanded, and revoked, yet that cannot defeat the Gift, But if the Gift be by (c) Covin, it shall be void by the Statute of (d) 13 *Eliz.* against a Creditor, but it remains good against the second Administrator; and if an Administrator (e) waste the Goods, and afterwards Administration is committed to another,

Cr. El. 459, 460.
 Mo. 396.
 Co. Ent. 37. b.
 nu. 30. 3 Keb.
 206, 207.
 1 Mod. Rep. 63.
 (e) Palm. 412.
 3 Bulstr. 73.
 1 Rol. Rep. 226.
 5 Co. 21. b.
 2 Jones 67.
 3 Keb. 282.
 Cr. El. 460.
 (b) Pl. Com.
 279. a.
 (c) Moor 396.
 (d) 10 Co. 56. b.
 13 El. cap. 5.
 Co. Lit. 3. b. 76. a.
 290. 2. b. 3 Co.
 80, 81. a. 1 Co.
 60. a. Co. Ent.
 162. a. Cr. Jac.
 270, 271. Yelv.
 196, 197.
 1 Brownl. 111,
 112. Cr. El. 234,
 643, 810.
 Dyer 295. pl. 17.
 351. pl. 23.
 1 Leon. 47, 308.
 2 Leon. 8, 223.
 3 Leon. 57.
 Lane 47, 103,
 Raft fraudulent
 Deeds 1,
 Raft. Ent. 207. b,
 Moor 638. Doct. pl. 220. Latch 222. (e) Cr. El. 460, Latch 268.

yet any Debtee (a) shall charge him in Debt; and if he pleads the last Administration committed to another, the other may reply that before the second Administration committed he had wasted the Goods. *Vide* 17 *Eliz. Dy.* 339. (b) the like Case, and 34 *H. 6.* 14. *a. b.* Administration may be granted on (c) Condit. and it was holden in such Case, if such Administrator before the Condition broke, gives away the Intestate's Goods, and afterwards the Condition is broke, yet the Gift stands good. And observe Reader, a manifest Difference between this Case, and the Case of 17 *Eliz.* For in our Case the Administration granted was lawful, and the Gift also lawful, and the Donee claimed in under the first Administration, which the second Administrator did intend to countermand and revoke; but in the Case of 17 *Eliz.* the second Administrator who obtained the second Administration by Covin, had with the Defendant in the Action, without any Recital of the first Administration, did release to the Defendant by Covin to bar the Plaintiff of his Execution: It is there adjudged, that the said sd Letters of Administration being by Sentence reversed, and declared to be void, the Defendant who was Party to the Covin being in Execution should not have an *Audita Querela*. But that is not to be likened to our Case, for there the Defendant claimed by the second Administration, which is declared to be void, and the first always in Force, so that the second Administration was never lawful; but in our Case the first Administration was lawful, until it was countermanded, and so a Difference. *Nota bene.*

(a) Latch 168;
267, 268.
Noy 86 r Sid. 57;
1 Keb. 114. pl. 16
Cro. Car. 88, 89;
Hob. 49, 266.
Cr. El. 460.
5 Co. 34. a.
(b) 3 Co. 78. b.
8 Co. 135. b.
143. b. Cr. El.
460. 2 Keb. 12.
(c) 1 Rol. 968.
Fitz. Admini-
strator 3.

Hill. 38 Eliz.

In the King's Bench.

GREGORY'S Case.

Moor 599, 412.
 (a) 2 Init. 685.
 Godb. 169.
 Cr. Car. 172.
 1 Rol. Rep. 91.
 2 Rol. Rep. 175,
 410, 423.
 Palm. 495, 542.
 1 Co. 25. b.
 8 Co. 137. b.
 11 Co. 59. a.
 62. b. 64. b.
 12 Co. 8. Cr.
 Jac. 121, 481.
 Moor 412, 600.
 1 Jones 186.
 Lit. Rep. 213.
 Dyer 50. pl. 3.
 Hob. 173.
 (b) Mo. 412, 600.
 4 Leon. 98.
 Stile 91, 331.
 Cr. El. 600.
 (c) Mo. 247, 412.
 1 Rol. 537.
 Cr. El. 76, 77.
 3 Inft. 194.
 Godb. 390.
 Stile 381, 382.
 (d) Mo. 421, 600.
 4 Leon. 98.
 1 Rol. Rep. 51.
 2 Rol. Rep. 231.
 11 Co. 38. b.
 12 Co. 98.
 Dyer 236. pl. 24.
 Cro. Car. 112,
 113, 146. 1 Jones
 193. Hert. 101.
 Hutt. 99. Cr. Jac
 53, 85. 179, 538.
 Stile 323, 430.
 Cro. El. 137.
 1 Vent. 8.
 Palm. 386.
 Cawly 82.
 Jenk. Cent. 228. Plowd. 208. a. b. 4 Inft. 65, 164, 165. Lit. Rep. 170. Callis Lect. 248, 249.
 (e) Co. Lit. 73. a. 11 Co. 39. a. Lit. Sect. 99.

Gregory brought a Writ of Error against *Blasfield*, and the Case was, that *B.* brought a Plaint in the Court of *Ludlow* (which is a Court of Record) against *G. tam pro Domina Regina, quam pro seipso*, on the Statute of 4 & 5 Ph. & Ma. cap. 5. (which see in *Rastal, Drapery* 135.) which prohibits that none shall weave any woollen Cloth or Kerfies, unless he hath been Apprentice, or exercised the Trade, &c. by seven Years, upon Pain of Forfeiture of such Cloth, or the Value of it, the Penalty to be recovered by Action, Bill, Plaint, or Information in any Court of Record, in which no Effoin, Protection, &c. And three Errors were assigned. 1. That the said Branch of the Act was abrogated and taken away by the Stat. of 5 Eliz. cap. 4. *Sed non allocatur*. For *inspecto Statuto*, they both stand together. And it was said that a (a) later Statute in the Affirmative shall not take away a former Act; and *eo potius* if the former be particular, and the later general. The second Error assigned was, that the Plaintiff by the Stat. of 18 Eliz. cap. 5. ought to have sued by (b) Original, or by Information, and so was it adjudged, *Hill. 30 Eliz.* in this Court between *Woodson* (c) and *Clark*, where the Defendant was sued by Bill upon the Stat. of 23 H. 6. of Sheriffs, and adjudged the Action did not lie. The 3d Error was, that although *Ludlow* be a Court of Record, yet it is not such a Court as is intended by the Statute, for several Reasons: 1. The Courts intended by the Statute, *propter excellentiam*, are the (d) 4 Courts of Record at *Westm.* which are general Courts of Record, and therefore it shall be in general Speech so intended; as *Escauge* is either incertain, or certain; incertain is *servitium militare*; and certain is *servitium socæ, quia quemadmodum certitudo scutagii facit socagium, ita incertitudo facit servitium militare*: And *Littleton* faith, If a Man speaks generally (e) of *Escauge*, it shall be

intended

intended (*secundum excellentiam*) in common Speech; of the most excellent Service, and that is Knight's Service for the Defence of the Realm, and not *de servitio facta*. And 10 E.

4. 11. a. b. If it be spoken (a) of Proof generally, although there are many Proofs in Law, yet it shall be intended of the best Proof; and that is by Jury. And 20 H. 6, 17: If it be spoken generally of the Feast of St. (b) *Michael*, where there are two Feasts; it shall be intended of the most worthy and notorious Feast. And 37 H. 6. 29. b. 25 H. 6. 8. and 13 H.

4. 4. b. If Speech be of *J. S.* generally, it shall be intended of (c) the Father, or of the eldest Son, for they are the most worthy. And with the Case at Bar in Effect agrees *Mich. 6. & 7 Eliz. (d) fol. 236.* where any Court of the Queen of Record; shall be intended one of the four eminent and most excellent Courts at *Westminster*.

2. If the Act shall be intended according to the Letter, *scil.* (in any Court of (e) Record; then the Court of *Oyer* and *Terminer*, *Gaol-Delivery*, *Sewers*, *Sheriffs Turn*, *Leet*, *Pipowders*; and others; will be within the Act; for these and many others are Courts of Record. Then it being left to the Construction of the Law;

the Rule is, (f) *quod verba equivoca & in dubio posita; intelliguntur in digniori & potentiori sensu.* 3. The ancient Usage in all such popular Actions or Informations has been that although the Informer *tam pro Domina Regina quam pro seipso* exhibits the Information, yet if the Defendant pleads a special Plea; the Queen's Attorney shall only reply. And it was intended by the Makers of the Act; that the Suit should be in such Court where the Queen's Attorney may attend, for the Benefit the Queen shall have by such Suit; and that is in the four Courts of Record at *Westminster*. And for these two last Errors the Judgment was reversed:

(a) 4 Co. 74. b;
5 Co. 108. a;
11 Co. 39. a.
Hob. 93. 217.
1 Rol. Rep. 222;
261. 2 Rol. Rep.
40. 2 Rol. 595;
1 Sid. 313.
3 Bulstr. 55.
2 Brownl. 57.
Cr. Jac. 188. 232
381. 488. Cr.
El. 723. Moor
113. nu. 253.
180. 181. nu. 322;
845. nu. 1140.
888. nu. 1250.
Perk. Sed. 791.
3 Inst. 98. Br.
Condition 151.
(b) 11 Co. 39. a;
Hob. 32. 20 H. 6.
23 a. 31. con. 71.
(c) 11 Co. 39. a;
(d) Cr. Car.
112; 146. Hurt;
99. 4 Inst. 164;
165. Mo. 600;
1 Rol. Rep. 51.
Stile 430. Litt
Rep. 170. 12 Co.
98. Dyer 236.
pl. 24. Jenk.
Cent. 288.
(e) Plow. 208. b.
Cr. El. 530.
(f) Co. Lit. 73. d
(g) 1 And. 49.
Cr. Jac. 538.

Pasch. 38 Eliz.

In the King's Bench.

MICHELBORN'S Case.

- (a) Cr. El. 502.
 1 Bulltr. 208,
 215, 217.
 4 Inst. 130.
 (b) 4 Co. 46. a.
 6 Co. 12. a.
 10 Co. 69. b. 74. a.
 208, 209, 210.
 3 Keb. 335.
 2 Inst. 547, 548.
 3 Inst. 134.
 Cr. El. 502.
 1 Bulltr. 208,
 209, 210, 211,
 212. 2 Leon.
 160. 5 E. 4. 119. a.
 Br. Action sur
 le Stat. 38, 49.
 10 H. 6. 13. a.
 Reg. 185. a.
 191. b. F. N. B.
 241. b. Ralt.
 Ent. 433. a.
 (c) Cr. Jac. 314.
 Cr. El. 502.
 1 Sid. 180.
 (d) 1 Bullit. 208,
 209, 213. 10 Co.
 76. a. Cr. El.
 502.
 (e) 10 Co. 69. b.
 (f) 10 Co. 74. b.
- IN a Writ of Error between (a) *Baptist* and *Michelborn*, the Case was, That an Action of Trespass on the Case on Trover and Conversion, within the Verge, was brought in the Court of *Marshalsea*, where none of the Parties was of the Household, and upon Judgment given, a Writ of Error was brought in the King's Bench. It appears by *Britton* (who wrote in 5 E. 1.) fol. 1. and by *Fleta*, lib. 2. cap. 3, 4, 5, &c. that the Jurisdiction of the *Marshalsea* at the Com. Law was doubtful; and therefore the Statute of 28 Edw. 1. *Articuli super Chartas*, cap. 3. (b) set it certain; for the Preamble is of what Pleas they ought to hold; and therefore it is enacted, That they shall not hold Plea of Freehold, viz. where the Freehold will come in Debate, nor of Debt nor of Covenant, nor of Contract made between the K's People, but only (which are Words exclusory, and exclude all other Pleas, but only these which follow) viz. of Trespass done within the House (viz. where both (c) Parties are of the Household) and of other Trespass done within the Verge (viz. when one of the Parties is of the Household) and so it has been always expounded. And therefore in the King's Bench, *Mich.* 32 H. 6. Rot. 47. In Error between *Read* (d) and *Purchase* in Trespass in the *Marshalsea*, no other Error was assigned, but only that none of the Parties were of the King's House, and the Judgment for this Error was reversed, and therewith agree 10 H. 6. 13. a. 7 H. 6. 30. b. 19 Ed. 4. 8. b. 20 Ed. 4. 16. b. 22 Ed. 4. 31. Vide 4 H. 6. 8. b. F. N. B. 241. b. Vide (e) the Diversity of Courts in his Chapter of *Marshalsea*. And the Words of the said Act are further, and of Contracts and Covenants that one of the King's House shall have made with another of the same House, and in the same House, and no other where. So that for the Nature of the Actions they only hold Plea in (f) three, viz. Trespass, Contract, and Covenant, and of no Action which concerns the Realty. And for Persons in Trespass within the Verge, it is sufficient if one be of the King's House, but in Contract and Covenants both

both, *ſc.* the Pl. and Def. ought to be of the Houſhold. And it was obſerved, that the Stile and Title of the Court of Marſhalſea is, *Placita, &c. Aulae Hoſpitii Dom' Regis cor' Senefchallo & Marſchal' Dom' Regis, &c.* whereby it appears that one of the Parties to the Pleading in the ſaid Court, ought at leaſt to be of the King's Houſhold; for otherwiſe it can't be ſaid *Placita, &c. Aulae Hoſpitii, &c.* And *vide* a Bill which paſſed both Houſes of the Lords of Parliament, and of the Commons, *anno 1 Rich. 2.* By which it is declared, That of antient Times their Jurisdiction was no other, nor had been but of Felony, Treſpaſs done within the Verge, and after their Venue, and of Covenant and Debt; due and made between the King's Servants and thoſe who followed the Court; and that Lords and others who have Franchiſes may have their Franchiſes as well within the Verge as out of it, *&c.* To which the King answered, Let the Marſhal have ſuch Jurisdiction as before this Time hath been reaſonably uſed; and if any will plead in ſpecial, let him complain to the Steward of the King's Houſe, and Right ſhall be done him. So that although it be not an Act of Parliament, it is a good Declaration of the Law by (a) both Houſes of Parliament. *Vide* a private Act for the City of London (b) 30 E. 1. remaining in the Treafury, by which it is enacted, That where before the Steward and Marſhal (the Court being often near the City of London, ſome Enqueſts are taken of Treſpaſs and other Things done within the ſaid City, betwixt ſome of the City only, and between them and Foreigners jointly, or betwixt Foreigners, and of which Treſpaſs and other Things to the Steward and Marſhal, by Reaſon of the Verge, the Conuſance doth belong, That all ſuch Enqueſts ſhall be taken within the City of London, and not elſewhere, *&c.* By which it appears, that this Act (made within two Years of the ſaid Act of *Articuli ſuper chartas*) doth not take away the ſaid Act, nor give them more Authority than they had before: But the Purview of the Act only is; That ſuch Things done in London, whereof the Conuſance doth appertain to them, ſhall be tried within the ſaid City, and not elſewhere. Obſerve the ſaid Declaration 1 Rich. 2. doth agree in Effect with the Act of *Articuli ſuper chartas*; and afterwards in the principal Caſe it was reſolved that the (c) Judgment ſhould be reverſed, *ſed inſpecto Recordo non* (d) *intratur.*

(a) Co. Lit.

159. b.

(b) 10 Co. 70. a.

(c) 1 Bullſt. 208.

(d) 1 Bullſt. 210.

Paſch.

Pasch. 40 Eliz.

In the King's Bench.

BUTLER and GOODALE'S Case.

(a) Moor 540. Cr. Eliz. 590, 591.
 2 Brownl. 55.
 3 Keb. 194, 195.
 Goldsb. 169.
 (b) 21 H. 8. c. 13.
 Raft. Ent. 599.
 pl. 5.
 Sav. 32.
 3 Keb. 108.
 2 Brown. 54, 45.
 a Bullt. 18.
 * 3 Keb. 47.

Between (a) Goodale Informer, *tam pro se*, &c. on the Statute of 21 H. 8. of Non-residency, and Butler, Parson of *Downham* in Norfolk; on a special Verdict it was resolved by the Court, that the Parson ought to abide on his Rectory, *viz.* the Parsonage-house, and not in another House; altho' it be within the same Parish; for the Statute intended, not only for serving the Cure, and for Hospitality, but also for the maintaining of the Houses and Habitation of the Parson, not only for himself, but also for his Successors, that they also may keep Hospitality there. And there it was agreed, that lawful * Imprisonment without Covin, is a good Excuse of Non-residency, so if there be not any Parsonage-house there; for, (c) *Impotentia excusat Legem*; and these Cases are excepted out of the Act by Construction of Law: And note, that it was held in the Exchequer, *Trin. 39 Eliz.* That (d) Sicknes without Fraud, was also a good Excuse; *viz.* If the Patient remove by Advice of his (e) Physician, *bona fide*, for better Air, and for Recovery of his Health.

(c) 1 Co. 98. a.
 4 Co. 11. a.
 5 Co. 22. a.
 6 Co. 68. a.
 9 Co. 73. a.
 10 Co. 139. b.
 Co. Lit. 29. a.
 Hard. 387.
 (d) 3 Keb. 47.
 2 Bullt. 18. 1 Vent. 245: (e) 3 Keb. 194. 2 Bullt. 18.

Mich.

Mich. 40 & 41 Eliz.

In the Court of Wards,

AMBROSIA GORGE'S Case.

THE Case of *Ambrosia* Daughter and Heir of *Dowglas* 2 And. 207.
 Wife of Sir *Arthur Gorge*, Daughter and Heir of Vis- Moor 737.
 count *Bindon*, was such; The Viscount *Bindon* was seised
 of divers Manors in Tail, fundry of them held by Knights
 Service *in Capite*, and had Issue the said *Dowglas*, who
 married Sir *Arthur Gorge*, and by him had Issue the said
Ambrosia; *Dowglas* died in the Life of her Father, and af-
 terwards the Viscount died; all which was found by Office,
 and that *Ambrosia* was Heir apparent to her Father, and of
 the Age of seven Years; and afterwards *Ambrosia* of tender
 Years, and *infra annos nubiles* was married by her Father
 to *Francis Gorge*, Son of Sir *Thomas Gorge*; and afterwards
 Sir *Arthur* took another Wife, and had Issue a Son; and
 afterwards the Husband of *Ambrosia* died, the said *Ambro-*
sia being yet *infra annos nubiles*, viz. of the Age of ten
 Years; and in this Case two Questions were moved: 1. If
 a Daughter be such an Heir apparent to her Father, that
 during his Life she shall not be in Ward to the King? And
 it was objected, That his Daughter is not such an Heir ap-
 parent that the Father shall have the Wardship of her; but
 ought to be such Heir apparent, that during the Life of the
 Father, shall continue his Heir apparent; but a Daughter is
 not such Heir; for a Son may be born, or another Daugh-
 ter may be born. And it was said, That of Land in (a) Bor- (a) Co. Lit.
 ough-English, or Gavelkind, the Son cannot endow his Wife 35. b.
ex assensu patris, because by Possibility he will not continue 3 Co. 38. a.
 Heir. So it was said, That the Father shall have the Ward-
 ship of his Son and Heir apparent of Land in (b) Borough- (b) Moor 739.
 English held by Knights Service, because by Possibility he Cr. Car. 412.
 will not continue Heir. But at length, after great Deliber- (c) 3 Co. 38. a.
 ation, it was resolved by the two Chief Justices, *Popham*, Co. Lit. 84. a.
 and *Anderson*, and *Periam* Chief Baron, That (c) the Fa- 2 And. 207.
 ther shall have the Wardship of his Daughter and Heir ap- Ley Gards,
 parent &c. 7.

AMBROSIA GORGES'S Case. PART VI.

- parent so long as she shall continue his Heir apparent; and therewith agree the Books in 31 *Ed. 1. Gard* 154. 8 *Ed. 2. Tres.* (a) 235. *F. N. B.* 143. o. J. 2. It was resolved, that when the Father has Issue a Son, that then the Daughter shall be in Ward to the King; for then the Son was his Heir apparent and not the Daughter. 3. It was resolved, That the (b) Queen should, notwithstanding the said Marriage, have the Wardship of the said *Ambrosia*; for it was no compleat Marriage, because to every Marriage there ought to be Consent: For (c) *consensus, non concubitus facit matrimonium, & consentire non possunt ante (d) annos nobiles.* And on Conference had with the Civilians, it was agreed, That after such Marriage if the Husband dies, and the Wife marries again, it shall not be said Bigamy. And the Book in the 30 *Edw. 1. Gard.* (e) 156. That if the (f) Ancestor marries his Heir *infra annos nobiles*, and dies, the Lord shall recover the Body of the Infant, because the Heir may disagree. *Temp. E. 1. ibid.* 128. and 12 *E. 1. ibid.* (g) 138. (which is misprinted, viz. seven Years for fourteen Years) *acc.* And no Difference, as to this Purpose, between Disagreement to the Marriage at the Age of Consent, and Death before the said Age; for when the Heir is married by his Father *infra annos nobiles*, and Disagreement is had, there clearly the Lord shall have the Ward. *Pari ratione* it was held by all, when such imperfect Marriage is dissolved by Death, *infra annos nobiles*, the Lord shall have the Wardship, (h) 7 *Hen. 6. 11. b.* by *Babthorp* accorded in the Case of Death. And it was agreed in this Case, That the Grandfather shall not have the Wardship of the Son within Age, the Father being dead in his Life, and that the Statute of *Prærogativa (i) Regis, cap. 6.* is but an Affirmance of the Common Law; for the Law is such in the Case of a Common Person, as appears by the Books aforesaid.
- (a) Moor 738, 739.
2 *Anderf.* 207.
- (b) 9 *Co.* 132.
a. b.
Moor 742.
Ley Gards,
&c. 7
- (c) *Co. Lit.* 33. a.
- (d) *Dyer* 143.
pl. 56.
7 *H. 6.* 11. b.
- (e) Moor 740.
- (f) *Co. Lit.*
79. b. 84. a.
- (g) Moor 740.
- (h) Moor 740.
- (i) Moor 740.
Co. Lit. 79. b.
Stamf. P. 2.
rog. 26.

Trin. 41 Eliz.

I N T H E

K I N G ' S B E N C H .

P A W L E T *Marquess of Winchester's Case.*

THE late Marquess of *Winchester*, as it was supposed, made his last Will and Testament in Writing, and thereby did devise divers Manors, Lands, and Tenements of great Value to his reputed Sons, and made them Executors. And further devised, that divers Manors, Lands, and Tenements of great Value also should be sold by them; and bequeathed also divers Legacies of Plate, Monies, &c. And this Will was endeavoured to be proved in the Prerogative Court by the reputed Sons. And because it appear'd by divers Witnesse, and by many notorious Circumstances, that the said Marquess being sick, & *multa proventus senectute*, was not of sane and perfect Memory, such as the Law requires at the Time of the Making of the said supposed Will (for by Law it is not sufficient that the Testator be of Memory when he makes his Will, to answer familiar and usual Questions, but he ought to have a disposing Memory, so that he is able to make a Disposition of his Lands with Understanding and Reason; and that is such a Memory which the Law calls sane and perfect Memory) upon this Matter a Suggestion was framed in the Name of the now Marquess, as Son and Heir, to have a Prohibition out of the *King's Bench*, supposing that he was not of sane Memory at the Time of the Making of his Will, which Matters the now Marquess had pleaded in the Spiritual Court, in Stay of the Probate of the said Will. And it was moved in Court by the Attorney General, of Counsel with the Marq. to have a Prohibit. generally to stay all the Proceedings in the Ecclesiast. Court, as well for the Legacies and Bequests in the Personalty, as for the Lands, and the Reason and Ground

Heti. 120.
2 Bull. 211.
Orph. Leg. 27,
28,
of

Pawlet *Marquess of Winchester's Case*. PART VI.

Hetl. 120.
 Hob. 290.
 Hard. 131.
 Cr. Jac. 346.
 2 Bullst. 210, 211.
 1 Rol. Rep. 27,
 358.
 2 Rol. Rep. 431.
 Cr. Car. 94,
 115, 166, 391,
 396.
 Moor 873.
 2 Rol. 315,
 316.
 Stil. 228.
 Yelv. 92.
 1 Jones 355.
 Vide Salk. 552.
 Comb. 46, 170.

of this Motion was, That forasmuch as the Will concerning the Land, and the Testament concerning the Goods are mixed together in one Will, if the Ecclesiastical Court should proceed concerning the Testament of the Goods, it would prevent and prejudice the Trial in this Court: For if he were of sane Memory at the Time of Making of the Testament of the Goods, he could not be of *non sane* Memory at the Time of Making of the Will of the Land, both being made at one and the same Instant; and the Com. Law ought to determine what shall be said sane and perfect Memory at the Time of the Making of the Will concerning the Land; and therefore the Prohibition shall be general, *quod fuit concessum per totam Curiam*. And the Attorney-General cited a Case between *Lloyd and Lloyd*, Mich. 38 & 39 *Eliz.* in this Court, where it was ruled accordingly *in terminis terminantibus*, and that no Consultation should be granted for any Part, till the Matter be tried in this Court, *quod nota*. And therefore a Prohibition was granted generally by the Rule of the whole Court. *Et postea partes concordaverunt.*

Mich.

Mich. 41 & 42 Eliz.

In the King's Bench.

READ'S CASE.

IN TRESPAS *Quare clausum fregit* by *William Read, Esq;* Moor 574. against *William Armingier Gent.* Nu. 792. The Defendant justified, That *A. Wheatley Esq;* was seised in Fee, and leased to him for Years, and justified; The Plaintiff replied, That the Lady *Gresham* was seised in Fee, and died seised, and the Land descended to the Plaintiff, and maintained his Count, without that, that *Wheatley* leased to the Def. upon which the Defendant demurred. And it was objected that the Seisin in Fee was traversable and not the Lease, for he alledged a Freehold in a Stranger: And if in Trespas, the Defendant saith, that the Place where, is the Freehold of *A.* and he by his Commandment, &c. The Commandment is not traversable: If the Plaintiff claims by a Stranger, for the Freehold being alledged in a Stranger, that ought to be answered. But it was adjudged that the Traverse was good: And there is a great Difference between the said Cases, for in the one Case the Pleading is, that at the Time of the Trespas supposed it was the Freehold of *A.* But in the Case at Bar the Defendant pleads, that long Time before the Trespas *Wheatley* was seised, &c. and so seised, demised. And that may be true, and that the Lady *Gresham* did disseise him, and a Descent was cast: So that it is not alledged, That *Wheatley* was seised in Fee at the Time of the Trespas (as in the other Case) and then the most material Thing to be traversed is the Lease. *Vide* 4 E. 6. *Traverse Br.* 372. That in this Case the Seisin in Fee is traversable. *Vide Br. Traverse* 217. 21 H. 7. 23. & 26. 7 E. 4. 2. b. 8 H. 6. 34. 38 H. 8. *Traverse* 26. 21 Eliz. *Dyer* 365. 14 Eliz. *Dyer* 312. 26 H. 8. 4. 22 E. 4. *Replie.* 59. 7 E. 3. 11. 2 E. 4. 11, and it seems upon all the said Books, that the one or the other in many Cases is traversable at the Pleasure of the Plaintiff. *Vide* 3 E. 4. 17. *Vide* 15 H. 7. 3. 16 H. 6. *Double Plea* 83. In Trespas the Defendant

Dy. 112. pl. 48;

Doct. pl. 352.

Moor 574.
Cr. Car. 174.
586.
Cr. El. 288.
Doct. pl. 363.

Cr. Jac. 681;

Godb. 427.

(a) Doct. pl. 365.
 (b) Doct. pl. 364.
 Cr. Jac. 44, 681.
 Cr. El. 754.
 Doct. pl. 365.

Defendant pleaded, That *A.* was seised, and enfeoffed *B.* who enfeoffed *C.* who enfeoffed *D.* whose Estate the Defendant had, the Plaintiff may traverse (*a*) which of them he will, 18 *E.* 4. 26. In Trespass the Def. (*b*) pleaded, that *F.* was seised, and enfeoffed *B.* who enfeoffed the Defendant: The Plaintiff said that *R.* was seised, and died seised, and the Land descended to him, and traversed, *absque hoc*, that *F.* enfeoffed *B.* and it was adjudged a good Traverse, and so is 21 *H.* 7. 33. And that is true in all Cases where the Defendant doth not claim by any mean Conveyances from the Plaintiff himself, for then that is traversable.

Hill. 41 Eliz.

I N T H E

KING'S BENCH.

HELLYAR'S *Case*.

Moor 551, 552.
 Cr. El. 650, 651.
 Yelv. 221.
 3 Keb. 467.
 Lit. Rep. 15.
 Doct. pl. 365.
 2 Ventr. 212.
 Cr. Car. 324,
 494, 581.
 Cr. Jac. 221,
 299.
 2 Bulst. 1, 2.
 2 Rol. Rep. 87.

Hellyar Plaintiff in Replevin against *Whitier*, the Defendant made Conufance as Bailiff to Sir *John Harbert* Master of Requests, because *Richard Arch* was Prebendary of *T.* and 1 *E.* 6. leased the Land, where, &c. to *John Arch* for ninety Years, who 2 *Eliz.* granted the Term to *Johan Arch*, who 35 *Eliz.* granted it to *Sadlier*, who granted it to Sir *John Harbert*, and made Conufance for Damagefeazance. The Plaintiff confessed the Assignment to *John Arch*, *prout*, &c. But further said, that *Johan* took to Husband one *Tarre*, who 9 *Eliz.* granted the Term to the Pl. and traversed the Grant made to *Sadlier*, upon which the Avowant demurr'd. And it was adjudged, that the Traverse made the Bar to the Avowry insufficient. And *Popbam* Ch. Just. delivered the Reason thereof, because a Lease for

for Years cannot be gained but by lawful Grant; and therefore when one claims a Lease for Years, and the other claims by an elder Grant, there he shall not (a) traverse the later Grant, but the other Party shall traverse the elder Grant, or shew how he came to it again to enable the second Grant. But it is otherwise in Case of a Feoffment; for there if the other Party claims by a former Feoffment, he ought to confess and avoid the later Feoffment as by Disseisin, &c. For a Disseisor may gain an Estate in Fee, but none can gain an Estate for Years, but by lawful Conveyance and so is the Difference. And when he claims by a former Assignment of a Term, it will be impertinent to traverse, *absque hoc*, that he after that assigned his Interest; for per-adventure he assigned all his Interest, and yet had nothing. *Vide 2 Ed. 6. Br. 66. Tit. (b) Confess and Avoid.*

(a) Cr. Jac. 681.
Cr. Cat. 32. 299.
45 4. 581. Moor
5, 55, 539. Yelv.
221. 1 Sid. 2.
Dyer 312. pl. 10.
2 Bulltr. 1.
1 Sand. 22. Cr.
El. 651. Doct.
pl. 365 Kelw. 45

(b) Cr. Car. 581.
Yelv. 221.

Trin. 41 Eliz.

In the King's Bench.

RUDDOCK'S Case.

IN this Term between *Rasing* and (a) *Ruddock* in a Writ of Error, the Case was; In a Replevin against six one avows and the other five make Conusance as Bailiffs to the first, for an Amercement for the Breach of a By-law in a Leet, and there Judgment was given against them, and the Plaintiff recovered his Damages and Coits, upon which the six brought a Writ of Error in this Court. In Bar of which the now Defendant pleaded the Release of one of the five, upon which the now Pl. demurr'd in Law. And it was objected, That forasmuch as it sounds only in the Personalty, in which no Summons and Severance lies, therefore the Release of one shall bar all the others; and the Writ of Error and Attaint will follow the Nature of the Action upon which they are founded; *viz.* (b) If Summons and Severance lies in the first Action, it will lie also in the Writ of Error and Attaint, as it is agreed in (c) 34 H. 6. 42. So is it in a Writ of Champerty, it will follow the Nature of the first Action, as it is agreed in 47 Ed. 3. 6. l. *Vide 26 Hen. 8. 3. l. in Attaint, & 35 Hen. 6. 19. l. by Fortescue.* But it was answered and resolved, That it is true, when in the Writ of Error the Plaintiffs shall recover any personal

(a) Cr. El. 643.
Cr. Jac. 117.
Yelv. 209.
Jenk. Cent. 271.
3 Bulltr. 111.
Hard. 50.
Palmer 152.
1 Rol. Rep. 246.

(b) Cr. El. 324.
Co. Lit. 130. a.
(c) 34 H. 6. 33 b.

Comb. 94.

(a) Cr. El. 649.
Cr. Jac. 616.

(b) Cr. El. 448.
649. 2 Rol. 133.
Co. Lit. 129 a.
Cr. Jac. 19.
10 Co. 135. a.

(c) Cr. El. 469.
Cr. Jac. 117, 616.

(d) Cr. El. 649.
Hob. 304.
(e) Cr. El. 649.
Yelv. 209.

Thing, as if they were barred in an Action of Debt, Trespass, &c. for the Release of the one shall not bar the others, but when the Ground of the Action is a joint Interest which may be released. But when divers are charged in a joint Action and condemned, there they have not any Interest, but they are charged jointly, then when they bring a Writ of Error to discharge themselves, the Release of one cannot bar the other; for they have not any joint Interest or Benefit, but a joint Charge and Burthen, which cannot be released or discharged, unless by the Plaintiff who has the Interest and Benefit of it. And this Difference is taken and (a) agreed in 2 H. 4. 16. a. b. viz. when Two are to recover a personal Thing, there the Default of the one is the Default of both; but when they are to discharge themselves of a Personalty, there the Default of one is not the Default of both. And 15 Ed. 3. Severance 23. (b) in *Audita Querela*, the Nonsuit of one shall not grieve the other; for he is but to discharge himself of a Burthen and Charge. But it may be objected, that in the Case at Bar they shall be restored to the Damages and Costs which they have lost in the first Action, and therefore they have a personal Interest which may be released; which Objection might be made in the *Audita Querela*, for there they shall be restored to the Value of the Goods which were taken in Execution. But forasmuch as by common Intendment the Execution is done of Goods which the Defendants have in Severalty, and therefore there is no Reason that the Release of one shall bar the others. And none will deny but when six are condemned in Damages and Costs, and they before Execution bring a Writ of (c) Error, there the Release of one shall not bar the others, for they sue only to discharge themselves; and by Consequence the Suing of Execution afterwards will not alter the Case, unless Execut. be made of the Goods which they have in Jointure or in Common, and that will make a Question. And as to the Book in 7 H. 4. 45. b. where in Appeal four Men were outlawed, and they 4 join'd in a Writ of Error, and 2 made Default, it is agreed that it should be the Default of all; for it was their Folly that they did join themselves in one Writ, who might have had several. But in the Case at Bar they were compelled to join in one Writ, and so no Folly in them. And *Poph.* Ch. Just. said, that it was the Pl's Folly in a personal Action to join with one who would release. But in the Case at Bar no Folly can be imputed to the Def. for the Pl. might name which of them he would, and omit which of them he pleased; and he said, by this Way he might by Confederacy join one with them who would release all Errors to him. *Vide* (d) 35 Hen. 6. 19. a. If Damages be recovered against divers in a Writ of Conspiracy, and one of them brings an Attaint, it is much debated if the Writ be well brought, or if all ought to

to join. And there it is objected, if all ought to join, then by the Nonfuit or Release of one of them the others would be barred. And there *Forrescue* Chief Justice said, That the Nonfuit or Release of the one would not hurt the others, no more than in *Audita Querela*, or *Scire facias* upon Release. And by the Rule of the Book they ought to join in Attaint; so in the Case at Bar the Law compels the Defendants to join in the Writ of Error, not to reap any Benefit, but to discharge themselves of a Charge imposed upon them. And forasmuch as the Law can do no Wrong, therefore the Release of one who could not be omitted in the Writ of Error, shall not in this Case hurt the others. And so it was adjudged. *Vide (a) 29 Aff. p. 35.*

(a) Cr. E. 649.

Pasch. 42 Eliz.

In the Common Pleas.

SHARP'S Case.

IN Replevin between (a) *Sharp* and *Swan* the Case was such; *Michael Sharp* being Tenant in Tail of certain Lands within the County of *Suffex*, the Remainder over, came upon the Land with the Plaintiff, and entered into the House which was built upon it, and said to him, *Brother, (b) I here demise unto you my House as long as I live, paying twenty Pound by Year to me, and finding me my Board and Washing, and Keeping of a Horse*: And whether this amounted to a Lease of the House and Land was the Question. And it was agreed by the whole Court, that it was no Lease, for it wanted (c) *Livery*; for to every Livery is requisite, either an Act which the Law adjudges Livery, or apt Words which amount to it; for the Delivery of the Deed of Feoffment is an Act; but the Law doth not adjudge it a Livery, because it has another Effect, *viz.* to make the Charter his Deed. But if he delivers a Turf or (d) *Twig*, or other Thing which cometh off the Land, or the Ring of the Door, &c. in the Name of Seisin, it is a good Livery. So if one saith, *Enter into this Land, and enjoy it during your Life*, it is a good Livery; for it is a Delivery of the Land it self; and such Livery is good when he doth it off the Land, if the Land be (e) within

(a) Moor 458.
Cr. El. 482.

(b) 2 R6l. 7.

(c) 2 Rol. 7. 1.
2 Sand. 97. Co.
Lit. 48 a. 56. b.
Owen 44.
9 Co. 237. b.(d) Co. Lit. 48. a.
9 Co. 137. b.
Poph. 49.
Perk. 43. a.(e) Cr. El. 482.
Co. Lit. 48. b.
2 Rol. 6, 7.

View; *a fortiori* when he is upon the Land. So in the Case at Bar, when he saith, *I do here demise unto you my House for the Term of your Life*, this is a good (a) Beginning, if he makes an actual Livery accordingly, or if he uses apt Words which may amount to as much, but without Livery it amounts but to a Lease at Will, no more than when one delivers a (b) Charter of Feoffment upon the Land; the Deed imports that he gives and grants the Land to the Feoffee and his Heirs, but it doth not amount to a Livery, but it is the Beginning, *viz.* the Delivery of the Deed which comprehends the Land and the Estate, &c. but all this amounts but to an Estate at Will without Livery; *a fortiori* in the Case of a Lease, or other Estate of Freehold or Inheritance by Parol. And it was agreed, that the Case of the Delivery of the Charter upon the Land, has been adjudged to amount to no Livery. *Vide* (c) 38 *Aff. p.* 2. (d) 39 *Aff. p.* 12. where such Words were intended were used as were apt, 27 *Aff. p.* 61. By which Books it appears, that after the Feoffor has delivered the Charter of Feoffment upon the Land, if he saith to the Feoffee, Hold and enjoy this Land, or House according to the Deed, this is a good Livery. So 41 *E.* 3. 17. *b.* After the Feoffor has delivered the (e) Charter upon the Land, if he saith, Enter into this Land, (f) God give you Joy thereof, that amounts to a Livery. *Vide* 43 *E.* 3. *Feoffments* (g) 51. 35 *H.* 8. *Br. Tit. Feoffments* 74.

(a) Co. Lit. 48. a.

(b) Ow. 44. Co. Lit. 56. b. 57. a. 9 Co. 136. b. 137. a. b. Cr. Jac. 80.

(c) Fitz. Feoffment 38. Br. Feoffment de terres 33.

(d) Br. Feoffment de terres 28. Fitz. Feoffment 35.

(e) Co. Lit. 48. a. Cr. Jac. 80.

(f) 2 Rol. 7. (g) Palm. 34. 9 Co. 137. b.

Trin. 43 Eliz.

The Case of Soldiers.

THIS Term all the Judges of *England* met to consider upon the Statutes of Captains and (a) Soldiers; for divers Soldiers after they were pressed and going towards *Ireland* to serve against the Rebels there, and before they did serve in the War, did depart and withdraw themselves. And it was resolved by them, that the Statute of 18 *H. 6. c. 19.* was now of little Force; for the (b) ancient Manner of Retaining Soldiers, to which the said Act doth refer is now utterly changed; for then Knights or Gentlemen did covenant with the King to serve him in the War for so long Time, with such a Number of Men; and the Soldiers made their Covenants with their Captains, as appears by many Precedents in the Excheq. and as appears by the Preamble and Body of the said Act. And the Stat. of 2 *E. 6. cap. 2.* extends only when a Soldier departs after he has served the King in his War. But it was resolved, That the Statutes of (c) 7 *H. 7. cap. 1.* & 3 *H. 8. cap. 5.* which are all of one and the same Effect, and penned in the same Words, were perpetual Acts, and were not made only for the Reigns of the said several Kings, as it seemed to *Rastal* in his Abridgments of the Statutes: For this Word [King] includes all his (d) Succession; for the King dies not in Respect of his politick Capacity, and a Gift to the King enures to his Successors. And according to this Resolution divers Soldiers were attainted and executed. *Vide 4 Eliz. Dier 211. Cbe-ster's Case*, the Opinion of all the Justices of both Benches, that the Stat. of 7 *H. 7. cap. 1.* has Continuance, against the Opinion of *Rastal*.

(a) Jenk. Cent. 271. 2 And. 151. Cr. Car. 71, 72. Hutt. 134.

(b) Co. Lit. 71. a. Molloy 93. 3 Inst. 86.

(c) Rastal Cap- tains 5. 3 Inst. 73.

(d) Plowd. 176. b. 457. 2. Finch Ley 21. a. 2 Inst. 742. 3 Inst. 6. 86. 4 Inst. 352. Co. Lit. 9. b. Jenk. Cent 209, 271. Yelv. 15. B. N. C. 207. Dyer 92. pl. 18.

Pasch. 43 Eliz.

In the Exchequer.

The Viscount MOUNTAGUE'S Case.

A *Nichony* Viscount *Mountague* seised of divers Manors in Fee, held in *Capite*, by Indenture 4 *Reginæ nunc*, did covenant with *William Brown* and *William Denton* to suffer them before the Feast of *Easter* next following, to recover against him the said Manors by a common Recovery, which Recovery should be to the Use of himself for Life, and afterwards to the Use of *B.* in Tail, and afterwards to the Use of *C.* in Tail, and afterwards to the Use of *B.* in Fee, with Power of Revocat. and Declarat. of new Uses by any Writing in his Life, &c. or by his last Will, &c. and that the Recoverers should stand seised to the new Uses so declared; the Queen licensed the said Viscount to alien the said Manors to the said *William* and *William*, and their Heirs (without any Mention of Declaration of any Use in the Licence) and afterwards the Recovery was had accordingly, And afterwards 34 *Eliz.* the Viscount by his last Will revoked the first Uses and Estates, and declared, that presently after his Death *C.* should have the said Manors in Tail, with divers Remainders over, and died. And if by Reason of this Revocation and new Limitation, the Queen should have in this Case a Fine for (a) Alienation, was the Question in the Exchequer. And on Conference had with *Popham* and *Anderson* Chief Justices, and divers other Justices, it was adjudged in the Exchequer, That the Queen should not have a Fine (b) for Alienation in this Case. And in this Case two Points were unanimously resolved, 1. That although no Use was mentioned in the Licence, and the Licence was only to alien to *Brown* and *Denton*, and although the Estate of the Land was transferred to others, so as the Queen was not apprized of her very Tenant, yet forasmuch as it was executed by Act of Parliament, viz. 27 *Hen. 8.* of Uses; and an Act of Parliament to which every one is Party can do no Wrong, and every Alienation

(a) Co. Lit. 43. a.

(b) 2 Rol. Rep. 404.

nation without Licence is a Wrong to the King; for this Cause when the King gave Licence to alien to *Brown* and *Denton*, and the Statute executed the Possession in others, there shall not be any Fine due to the King for this Execution of the Estates by Force of the said Act of Parliament. And the Proviso of the said Act of 27 H. 8. was well explained, by which it is provided, *That the King's Highness shall not have, demand, or take any Advantage or Profit for or by Occasion of the Executing of any Estate, only by Authority of this Act to any Person, &c. which now have, or on this Side the 1st of May, 1536, shall have any Use or Uses, Trusts or Confidences in any Manors, &c. holden of the K's Highness by Reason of any Primer Seisin, Ouster le maine, Fine for Alienation, Relief and Heriot, but that Fines for Alienation, &c. shall be paid to the King's Highness, &c. for Uses, Trusts and Confidences to be made and executed in Possession by Authority of this Act, after and from the said 1st of May, of Lands, &c. holden of the King, in such like Manner and Form to all Intents and Purposes, as hath heretofore been used and accustomed by the Order of the Laws of this Realm.* And forasmuch as every Use ought to be raised, either by Covenant out of the Estate of the Covenantor, or by Feoffment, Fine, &c. (by Transmutation of Possession) out of the Estate of the Feoffees, Conusees, &c. in the one Case or in the other, but one Fine shall be paid to the King: For if the King's Tenant who holds *in Capite*, intends to alien to *I. N.* to the Use of *I. D.* and thereupon if he purchases a Licence to alien to *I. N.* and accordingly he aliens to *I. N.* to the Use of *I. D.* which Use is not mentioned in the Licence, in this Case he shall pay but one Fine, for it is but one Alienation. And the said later Part of the Proviso concerning Fines to be paid for Execution of Uses in Possession after the first Day of *May 1536*, is to be intended of Uses raised by Covenant, or of Uses declared upon Fine, Feoffment, &c. when no Licence to alien to the Feoffee or Conusee is obtained. And it was said, that if the said Proviso had not been, that no Fine for Execution of an Use upon a Covenant should be paid to the King, because he was in by Force of an Act of Parliament, which cannot, (as hath been said) do Wrong, for Remedy of which the said Proviso was made. 2. It was resolved in the Case at Bar, when the Viscount had Licence to alien to *Brown* and *Denton*, and accordingly he suffered a Recovery, which Recovery was to the said Uses, with Power of Revocation and Alteration. In this Case, although he alters the former Uses, and declares new, and thereby alters the Queen's Tenant, yet forasmuch as the Queen has given Licence to alien to *Brown* and *Denton*, out of which Alienation all

8 Co. 85. 2.

The Viscount MOUNTAGUE's Case. PART VI.

the Uses, as well future as present, as out of one and the same Fountain, arise, and they all spring out of the Recovery as out of one Root; for this Cause there needs no new Licence for Limitation of any new Use rising out of the said Recovery. *Vide Cole's Case, Plow. Com. 401.* And in this Term another Case was adjudged in the Exchequer, and 'twas such: *Richard Smith* being seised of Lands held *in Capite, anno 6 Eliz.* levied a Fine thereof without Licence, which Fine was to Uses contained in certain Indentures; that is to say, to the Use of himself for Life, and afterwards to the Use of his first Son in Tail, and afterwards to the Use of his second Son in Tail, with divers Remainers over, with a Proviso that it should be lawful for him to limit by Writing the same Lands to the Use of any Wife he should after marry for her Life in Name of her Jointure; and that the said Fine should be to the said Use, &c. The said Alienation is pardoned by the Act of 13 *Eliz.* Then he marries *Dorothy*, and afterwards, *anno 31 Eliz.* by Writing limits the same Lands, according to the same Proviso to the said *Dorothy* for her Life, and dies, after whose Death she took to Husband Sir *William Mounson*, and it was adjudged that for the said Limitation to *Dorothy* no Fine should be paid to the Queen, *causa qua supra.* Which Case being openly adjudged, I have reported, to the Intent the King's Officers in these Cases should take heed that the King be not deceived of an ancient Flower of his Crown by any Device or Intention more than duly by Law ought to be.

Trin.

Trin. 44 Eliz.

In the King's Bench.

GREEN'S Case.

John Green brought an Action of Trespass against *W. Baker* Yelv. 7.
and others, for breaking his Close, and carrying away his Cr. El. 679.
 Hay and Corn at *Cosington* in the County of *Somerset*. The Co. Ent. 686.
 Def. pleaded Not guilty; and the Jurors found a special Nu. 23.
 Verdict to this Effect. *Thomas Lord Pawlet* was Tenant 2 Rol. 369.
 for Life of the Manor of *Cosington*, to which the Advowson
 of the Church of *Cosington* was Appendant, the Remainder
 to *J. Brent* Esq; in Fee, which Rectory was a Benefice
 with Cure. The Lord *Pawlet* 6 Aprilis 1574. presented to
 the said Church one *J. Durston*, who was thereunto admit-
 ted, instituted and inducted, and did not read the (a) Arti- (a) 5 Co. 122. b.
 cles according to the Statute of 13 Eliz. cap. 12. For which 2 Jones 19.
 Cause 10 Martii 1583, at the Suit of the said *Thomas Lord* Cr. El. 680.
Pawlet, he was deprived by Sentence declaratory before 2 Rol. Rep. 3.
 the Bishop; from which Sentence he appeal'd to the Arches; 1 And. 62, 63.
 and it was further found, That no Notice was given by Yelv. 7.
 the Ordinary to the Patron of the said Deprivation. The Cawly 22.
 Lord *Pawlet*, 7 Martii 28 Eliz. died. The Queen *jure*
Prærogativæ suæ Regiæ, by her Letters Patents, 30 Junii
 28 Eliz. by Title of Lapse (and so expressed in the Patent)
 presented *William Baker*, one of the Def. who was admit-
 ted, instituted and inducted. *Durston* 5 Octob. 34 Eliz.
 died; and afterwards 1 Maii 1597, the said *John Brent* pre-
 sented *John Green* now Pl. who was admitted, instituted
 and inducted, and entred into the said Rectory, and *Baker*
 and the other Def. in his Right, and by his Commandment
 did enter upon the Pl. into the said Close, being Parcel of
 the Glebe of the said Rectory, and took the Hay and Corn,
 &c. And if the Entry of *Baker* was lawful or not was the
 Question; and after many Arguments it was adjudged for the
 Pl. And in this Case five Points were resolved. 1. Altho'
 the Patron was Party to the Suit in which the declaratory
 Sentence was had, and thereby took Notice that *Durston*
 did not read the Articles according to the said Stat. of 13 E-
 liz. yet after such Notice lapse shall not incur; but Notice of
 not

(*) Goldsb. 35, not reading of the Articles ought to be given him by the Ordinary, and after such Notice the Lapse shall be accounted; for the Stat. saith, *Notice given by the Ordinary*; and such Notice ought to have two Qualities, 1. It ought to be given by a Person certain, and that is by the Ordinary; for if any other of his own Head gives Notice to the Patron, it is not material. 2. The (a) Notice ought to be certain and particular; and therefore it is not sufficient for the Ordinary in such Case to give Notice that the Presentee has not read the Articles and subscribed generally, but he ought particularly to inform the Patron that he has not read the Articles, &c. for which Default he is deprived, and that thereupon it belongs to the Patron to present; for *notitia dicitur a noscendo*, & *ex vi termini* ought to be special, & *notitia non debet claudicare*; and therewith agrees 22 *Eliz. Dy.* 369. 2. That the Church is (b) void presently by the Stat. of 13 *Eliz.* without any declaratory Sentence; for it is enacted by the Stat. that he shall be *ipso facto* deprived, and that the Admission, Institution and Induction shall be merely void in Law; and an Avoidance by Act of Parliament need not have any (c) Sentence declaratory. But it is enacted by the same Stat. that no Lapse shall incur without Notice given, and yet the Church is void: For if such Parson libels against any of his Parishioners for Tithes, (d) they may plead against him the not Reading of the Articles, as it was adjudged in a Prohibition, *Trin.* 30 *Eliz.* between (e) *Maurice* and *Eaton*. 3. That if the Queen in her Letters Patents of Presentation (f) mistakes her Title, as if she has Title to present in Respect she is very Patron, and she presents *ratione* (g) *Lapsus*, such Presentation is void; for the Queen is deceived in her Presentation. So 17 *Eliz. Dy.* 339. a Presentation obtained (h) from the Queen (pending a *Quare Impedit*) in Deceit of the Queen is void; *a fortiori*, when the Queen has not Title to present by any Means, and she presents (as in the Case at Bar) *ratione Lapsus*, it is utterly void, in the same Manner as if the Queen presents, and afterwards (i) repeals her Presentment, and yet the Ordinary institutes and inducts him. 4. That in such Cases altho' the Bishop admits, institutes and inducts the Incumbent, yet the Church doth (k) remain void, and the rightful Patron is not put to a *Quare Impedit* to remove such Incumbent. And so it was held, that if the Ordinary (l) collates within the six Months, and his Clerk is inducted, yet the rightful Patron is not put out of Possession, nor put to his *Quare Impedit*, but may present, as it was adjudged in *Furden's Case* in a Writ of Error in the King's Bench, *Mich.* 29 & 30 *Eliz.* for the Church of (m) *Aylesham*, where the Pleading was, that the Ordinary *usurpando contulit*: For no Church can be full but by Presentation, or rightful Collation. 5. It was resolved,

Postea f. 50. 3. (m) 1 Anderf. 62.

That

That if a common Person (a) usurps upon the King, and his Clerk is admitted, instituted and inducted, the King is put to a (b) *Quare Impedit*, and cannot present till the Incumbent be removed by Judgment. But in such Case the common Person by double or treble Usurpation by several Persons doth not gain the Inheritance of the Advowson out of the King, for that is permanent, and is not in such Case de-vested out of the King. And so was it adjudged, *Pasch. 25 Eliz.* Between *Pescod* and *Tardly* (c) in the Common Pleas for the Vicaridge of *Newton Valence*, but the Plea begun, *Mich. 21 & 22 Eliz.* Rot. 2218. But as to the Presentation he is put out of Possession, for that is (d) transitory, and he cannot remove the Incumbent but by *Quare Impedit*, and so are all the Books to be intended, 4 E. 3. *Quare Impedit* 33. 18 E. 3. 16. 43 E. 3. 14. 47 E. 3. 4. Br. *Quare Impedit* 39. F. N. B. 36. 1 H. 7. 19. 18 Eliz. *Dyer* 351. 18 E. 3. *Quare Impedit*. 151. And with this Distinction they are well reconciled. And it is to be observed, that the Statute of *Westm. 2. cap. 5.* saith, *Cum aliquis jus presentandi non habens, presentaverit ad aliquam Ecclesiam (cujus presentatus sit admissus) ipse qui est verus patronus per nullum aliud breve recuperare potuit advocacionem suam, quam per breve de Resto.* By which it appears, that without a Presentation the very Patron cannot be put out of Possession. And vide 6 Ed. 3. Although the Admission, Institution and Induction be in Time of Peace, (e) yet if the Presentation be in Time of War, all shall be avoided. But vide (Reader) the Case in 17 E. 3. 64. Altho' Plenarty (f) by Collation doth not put him who has (g) Title to present out of Possession, as it has been twice adjudged, yet Plenarty by Collation will put him who has Title to collate out of Possession, as appears by the said Book, which is ruled in the Point. And vide (g) 11 H. 4.

(a) Cro. El. 241, 519.
 Cro. Jac. 54.
 123, 385.
 2 Rol. 349, 371.
 Moor 338.
 Hob. 242.
 Owen 7, 8.
 4 Leon. 118.
 2 Rol. Rep. 7.
 1 Mod. Rep. 277.
 Postea 49. b.
 (b) F. N. B. 36.
 2 Rol. 372.
 Co. Lit. sect.
 133. a. 344. b.
 (c) Moor 338.
 Hob. 242.
 Yelv. 91.
 Owen 43.
 1 And. 81.
 Cr. Jac. 123.
 124.
 (d) Poph. 198.
 Postea 50. a.
 (e) Vaugh. 54.
 1 Mod. Rep. 230.
 6 E. 3. 41.
 1 Co. 99. b.
 2 Co. 93. a.
 F. N. B. 31. l.
 Darrein Presentment 4.
 7 E. 3. Darrein Presentment 2.
 2 Rol. 351.
 Co. Lit. 249. b.
 18 E. 2. *Quare Impedit* 175.
 6 E. 3. 44. b.
 1 Jones 428.
 (g) Postea 52. a.

Mich. 3 Jacobi,
In the Common Pleas.

B O T H Y ' S *Case.*

IN Debt upon a Bond by *Botby* against *Smith*, which begun *Hill. 1 Jacobi*, Rot. 725. The Condition was, *That if the Defendant deliver to the Plaintiff one Obligation of the Sum of ten Pounds, wherein the Plaintiff stood bound with one T. to the Defendant, for Payment of five Pounds, and also if the Defendant do acknowledge Satisfaction of a Judgment upon the said Bond, and also deliver true Notes of all Bills of Charges, as do concern the same that then, &c.* The Defendant pleaded in Bar, *quod non fuer' aliquæ Billæ Misarum pro S concernen' sect' præd'*, and did not answer, *ad residuum conditionis*, pretending that he need not, inasmuch as they were collateral Acts, and no Time was limited when they should be performed. And it was adjudged against the Def. for he ought to have performed the Residue of the Condition in convenient Time, and that without any Request. And the Difference was taken and agreed, when the Act by the Condition of a Bond, to be performed to the Obligee is of its Nature a transitory Act (as Payment of Money, Delivery of Charters, and the like) and no Time is limited, although a Place be expressed; there the Act ought to be performed in convenient Time. And when the Act to be performed is of its own Nature local, without express Limitation of any Place. But in such local Acts there is a Difference; for when the Concurrence of the Obligor and the Obligee is requisite, there the Obligor shall have Time to do it during his Life, if the Obligee doth not hasten it by Request. But when the Act is local, and the Obligor may perform it for the Benefit of the Obligee in his Absence, there the Obligor ought to do it in convenient Time. In this Case at Bar there are Examples of both; for first, the Delivery of the Bond is transitory, and therefore the Oblig. ought to have delivered it in convenient Time. 2. Altho' the Acknowledgem. of Satisfact. be local, yet

Co. Lit. 208. a.
1 Rol. 436.

1 Rol. 436.
Moor 472.
Cro. El. 798.

Co. Lit. 208. b.

Co. Lit. 208. a. b.
1 Rol. 436.

yet it may be performed in the Absence of the other Party; and therefore in both those Cases the Obligor ought to perform the Acts in convenient Time without any Request. But when the Act is of its own Nature local, and to be done to the Obligee, and to the Performance thereof, the Concurrence of the Obligor and Obligee is requisite, there the Obligor shall have Time to perform it during his Life, unless he be hastned by Request, as before is said. As if a Man be bound in a Bond to enfeof the Obligee of the Manor of *D.* without Limitation of any Time, there forasmuch as the Estate ought to pass by Livery and Seisin, so that there ought to be a Concurrence of both Parties, and the Obligor cannot do it without the Obligee, and it cannot be done but upon the Land, the Obligor has Time during his Life, if the Obligee doth not hasten it by Request made to the Obligor: For it is not reasonable, that the Obligee may make Request upon the Land when he will; for then the Obligor will be forced to stay always upon the Land, which will be inconvenient; but in such Case the Obligee ought to make Request to the Obligor, and appoint a certain Time when the Feoffment shall be made unto him. But there is a Difference in such Case between the Concurrence of the Obligor and a Stranger, and of the Obligor and the Obligee; for if I be bound to you to enfeof a Stranger, and no Time is limited, altho' the Concurrence of the Obligor and the Feoffee is requisite, yet the Obligor shall not have Time to perform it during his Life, but he ought to do it in convenient Time; for in such Case the Obligor has taken upon him to do it to a Stranger, and may do it without the Concurrence of the Obligee. But when the Obligee himself is Party, and the Act cannot be done without his Concurrence, there its reasonable that the Obligor should have Time during his Life, unless the Obligee hastens it by his Request: For in such Case the Obligor doth not take upon him for the Obligee, who is Party to the Deed, as he doth in the other Case for the Stranger. But it was said, if the Concurrence of a Stranger, and of the Obligee be requisite, in such Case, the Obligee being a Party he ought to hasten it by Request. As if I be bound to you that *F. S.* shall enfeof you without Limitation of any Time, *F. S.* shall have Time during his Life, unless you hasten it by Request. Also it was resolved, That when the Act which the Obligor by the Condition ought to do, doth not in any Manner concern the Obligee, nor his Benefit, but is to be done by the sole Act or Labour of the Obligor himself, and no Time is limited in the Condition in which it shall be performed; there the Obligor has Time during his Life; and the Performance thereof cannot be hastned by Request. As if I am bound to you that I will go to *Rome*, or *Jerusalem*, &c. In the same Case, and all such

Co. Lit. 208. b.
Cro. El. 798.
Hard. 10.
Bridgm. 40, 41.

Hob. 51.
8 E. 4. 14. a. b.
Co. Lit. 208. b.
209. a.
2 Co. 79. b.
1 Rol. 439.

5 Co. 23. b.
3 Bullstr. 30.
Co. Lit. 209. a.
1 Rol. Rep. 196.
Dyer 139. pl. 32.

Co. Lit. 208. b.

Moor 183.

Co. Lit. 208. b.

Co. Lit. 208. b.

Cases,

Cases, the Obligor has any Time during his Life to do it: So when the Act to be done by the Condition is to be done by the sole Act or Labour, or Industry of a Stranger; which in no Manner concerns the Obligor, Obligee, or any other Person, and no Time is limited when it shall be done, it is sufficient to the Obligor, if the Act is done in his Life-time who ought to do it. As if I am bound to you upon Condition that *J. S.* shall go to *Rome*, or *Jerusalem*, &c. or that such a Student in Divinity in the University of *Cambridge*, shall preach at *Paul's Cross*, or such a Student of the Law in the Inner Temple, shall argue a Matter in Law in *Westminster Hall*; in these, and the like Cases, no Time being limited, they have Time to do it during their Lives, and the Performance thereof cannot be hastned by Request. And by these Differences and Reasons you will better understand your Books, which *prima facie* seem to disagree, viz. 33 *H. 6.* 48. *Hillary's Case*, 21 *E. 4.* 39, 42. 22 *E. 4.* 25: *Sir James Harrington's Case*, 9 *E. 4.* 22. 15 *E. 4.* 30. *Lit. fo.* 77, 79. 9 *H. 7.* 16. 3 *Mar. Dyer* 139. 14 *Eliz. Andrew's Case*, 8 18 *Eliz.* 354. 44 *E. 3.* 9. 27 *H. 8.* 1.

Trin. 2 Jacobi;

In the King's Bench.

FITZ-WILLIAM'S Case.

IN Trespafs for breaking his Clofe called *Gamespark* in *Essex*, by *John Fitz-William*, againft *William Fitz-William*, Efquire, now Knight, on Not guilty pleaded, the Jurors gave a fpecial Verdict, which was of great Prolixity. In which Cafe thefe Points were refolved. 1. That where-as *Sir William Fitz-William*, Father of the Pl. and Def. was feifed of the Manor of *Gamespark* amongft others, viz. to him, and *Anne* his Wife, and to the Heirs Males of the Body of the Father; and afterwards the Father, by Deed indented and inrolled bargain'd and fold the faid Manor to one in Fee, who fuffered a common Recovery, in which *Sir William* the Father was only vouched, and he vouched over the common Vouchee: *Sir William* the Father and *Anne* having Iflue; the Def. the elder Son, and *John* the Pl. the younger, died. It was adjudged, that altho' *Sir William* the Father was only vouched, and not *Anne*, yet the Eftate-tail was barred, for the Caufes and Reafons alledged in *Cuppledick's Cafe*, *Pafch.* 44 *Eliz.* in the third Part of my Reports, fol. 6. 2. Where the faid Recovery was to divers Ufes declared by certain Indentures, viz. to the Ufe of *Sir William* the Father for Life, and afterwards to the Ufe of the faid *Anne* for Life, and fix Months after her Deceafe and afterwards to the Ufe of *William Fitz-William* the Defendant in Tail, and afterwards to the Ufe of the faid *Anne* and her Heirs in Fee, with this Proviso following; *Provided always, That it fhall be lawful to, and for the faid Sir William and Dame Anne; at any Time or Times hereafter, and from Time to Time; during their joint natural Lives, at their free Will and Pleafure, by any their Deed or Writing by the faid Sir William and Dame Anne, fealed and publifhed in the Prefence of three credible Witnefs, at the leaft, to alter, change, determine, revoke, or make void,*

Moor 681.

Co. Lit. 372.b.

2 Rol. 395.

FITZ-WILLIAM'S Case. PART VI.

void, all, or any of the Use or Uses, Estate or Estates, in these Presents before declared or mentioned, or limited of the same Premises, or any Part of them; And that at all Times, from and after such Time as the said Sir William and Dame Anne shall by any such Deed or Writing so express and declare their Pleasure and Mind to be to alter, &c. That then, and from thenceforth, such of the said Estate and Estates, Use and Uses herein declared, as shall be so declared to be altered, &c. shall cease, determine and be void. And that then, and from thenceforth, the said Recovery and Recoveries shall be, and all and every Person and Persons, &c. shall thercof stand and be seized to the Use of such, and those Person or Persons, and to and for such and those Use and Uses, and in such Manner and Form, as by such Deed or Writing, &c. as is aforesaid, shall be declared or limited only, and not to any other Person or Persons, Use and Uses. And afterwards the said Sir William and Dame Anne by their Writing indented, by them sealed, subscribed and published in the Presence of three credible Witnesses, reciting the said Indenture, the Uses, and the said Power, did revoke the said Use and Estate in Tail, limited to William Fitz-William now Defendant, and the Remainder limited to Dame Anne in Fee, saving the Use and Estate limited to himself for his Life, the Remainder to the Wife for Life; and by the same Writing declared, That the said Recovery should be to the Use of the said Sir William Fitz-William for Life, the Remainder to the Lady Anne for her Life, and six Months after, and afterwards to the Use of John Fitz-William the Pl. in Tail, and afterwards to the Use of Sir William Fitz-William the Father in Fee, with the like Power of Revocation, as before; and afterwards Sir William the Father and Anne died; and whether the Revocation, and new Declaration, and Limitation of the said new Uses were good, and effectual in Law, was the Question; and it was strongly urged that the new Declaration of Uses was not sufficient in Law for two Reasons. 1. Because the Revocation and Limitation (as this Proviso is penned) cannot be in one and the same Deed; for in that three Times are to be observed, *tempus revocandi, tempus cessandi veteres usus, & tempus declarandi novos usus*. The Act of Revocation ought to be by Writing, sealed and published in the Presence of three Witnesses; and then comes the second Time, *viz. And that at all Times from and after such Time as Sir William and Anne by any such Writing so express and declare, &c.* So that there is a Distinction of Times, *viz. from and after such Time, &c.* the former Uses shall cease; and after they are ceased, then follows the third Time, *And that then, and from thenceforth, viz. after the Time of the Cesser, the said Recovery shall be, &c. to such Uses as by any such Deed or Writing, &c. shall be declared and limited.* In which Case (*by such Deed*) which is as much as to say, *per hujusmodi,*

injunctum, or *confimile scriptum*, it ought to be like in all Circumstances as to be their joint Writing, to be sealed and published as the other; but cannot be in the same Deed; for the first Deed is finished when it is sealed and published, and after that nothing can be added to it; for that by the Publishing is completed, and its Time past: Then after that Time the Time of the Cesser ought to pass, and then comes the Time to declare new Uses, so that it is not possible that the Declarat. of the new Uses can be in the Deed of Revocation but it ought to be in another Deed. And it is much enforced by this Word (*shall be*) which is the future Tense; and thereby it appears, that the Revocat. ought to be past before the new Declarat. shall be made; for the Words are, *shall be declared or limited*. And it was said, that these and the like Powers by which the Estate or Interest of Strangers shall be changed or charged, shall be taken strictly, because they extend to the Defeating or Change of the Estate of a 3d Person, and as to that a Judgm. was cited *Trin. 30 El.* in Replewin between *Leaper Pl.* and *Richard Wroth Def.* where the Case was; *H. Earl (a)* of *Suff.* conveyed the Manor of *Burnham in Essex* to the Use of himself for Life, and afterwards to the Use of the Countess of *Suff.* for Life, with divers Rem's over, with Proviso, that it should be lawful for the Earl to make Leases for 21 Years, rendering, &c. And afterwards the Earl, *viz. 3 Apr. 8c.* made a Lease of the said Manor for 21 Years, to begin at the Feast of *S. Mich.* the Archangel then following; and altho', the Power was general to make Leases for 21 Years, without being restrained to make them in Possession or any Number of them, but indefinite to make Leases for 21 Years, yet it was adjudged that the said Lease was void for 2 Reasons. 1. If by the said Power he might make any (*b*) future Lease, or Lease in Rev'n, then he might make a Lease for 21 Years in Possession, and afterwards infinite Leases for 21 Years in Reversion, which would be contrary to the Meaning of the Parties, and then the Expressing of one and twenty Years was in vain, and by such Construction the Text and Letter of the Proviso would be idle and vain. The second Reason was, because forasmuch as this Proviso gave Power to charge the Estate of three Persons with Terms of one and twenty Years, such Proviso should be taken strict, and should not be extended beyond the Letter and Meaning of the Parties. And if I am bound or contract with you to make a Lease to you for one and twenty Years indefinitely, the Lease ought to be made to begin presently, and not *in (c) futuro*. 2. It was objected, that although *ex indulgentia Legis*, the Law in divers Cases will in Construction consider two distinct Times in one Instant (which Truth is not any Time) yet no Case can be put, that by any Construction three Times may be admitted in one Instant. And therefore it was said, that this

(a) 2 Rol. 261.
1 Brownl. 149.
Cr. El. 5.
1 Leon. 35.
3 Leon. 130, 144
4 Leon. 65.
Yelv. 222.
2 Rol. Rep. 170.
Moor 494, 199.
Cro. Jac. 319.
Poph. 9.
Raym. 132.
Larch. 269.

(b) Cr. Jac. 5.
319. Yelv. 222.
1 Brownl. 148,
149. Poph. 9.
2 Rol. Rep. 407.
1 Vent. 246.

(c) 2 Rol. Rep.
402.

Case differeth from *Digges's Case* published by me in the 1st Part of my Rep. f. 174. for there was but 2 Times which well stood with the Learning of Instants, and with the Case of the Fine there put. But put the Case there are 3 Conufors of a Fine, and that the Conufee renders to one of the Conufors for Life, or Years, a Rent, and grants the Rev'n to another of the Conufors for Life, or Years, rendering Rent, and by the same Fine grants a Rev'n in Fee, or in Tail, to the 3d Conufor; it was said that such Fine should not be received, because that an Instant cannot be more than 2 Times. 2. It was said, that in *Digges's Case* the Uses were raised by Covenant out of the Estate of the Covenantor, which may be more easily determined again in his Possession, than when Uses are raised out of a Recovery, by which there is a Transmutation of Possession, and all the Estate devested out of him who limits and declares the Uses. But it was answered and resolved by the whole Court, That the ancient Uses in the Case at Bar were revoked and the new Uses well declared in the (a) same Deed: For 1st in Judgment of Law there were not in this Case but 2 Times concurrent in one Instant, *viz.* the Time of the Ceasing of the former Uses, and the Declarat. of the new; for although the Revocation and the Ceasing of the former Uses are distinguished in Words; yet in Truth they are one: For the Use which is revoked ceases, and the Use which ceases is revoked. 2. It was resolved, That altho' no Use ceases till the Writing of Revocation is sealed and published, and after the Sealing and Publication thereof nothing can be added to it, yet it well stands with the Words of the Proviso, and the Intention of the Parties, that the new Declarat. may be in the same Deed; for both being contained in one and the same Writing, first its Operation shall be to make a Destruct. of the former, and *eo instante* a Creation of the new Uses; and this Word (*such*) more properly extends to the same Writing in which the Revocat. is, than to another; for (*by such Writing*) is as much as to say, *per idem vel hujusm' scriptum*; and so it shall be taken in this Case. And this Word (*shall be*) shall be said future in Respect of the Indenture, and in Judgment of Law subsequent also to the Revocation altho', these Clauses are contradictory, and *ex diametro pugnant.* for the one destroys and the oth. creates, yet the Construct. of the Law (which delights in making Reconcilement) makes a good Accord betwixt them. For to the Intent that the new Uses shall be created, the Law adjudges that the Clause of Destruct. shall have the (b) Priority, although both be contained in one and the same Deed, and take Effect by one and the same Delivery. And as to the Difference as to Ceasing of the Estate moved in *D's Case* (where the Use was raised by Covenant) and this Case where the Use was declared upon a Recovery, it was resolved

(a) Moor 682.
Hob. 313.
7 Co. 174. a.
10 Co. 144. a.
3 Keb. 510.
1 Sid. 343.
Winch 83.
Co. Lit. 237. a.
2 Rol. 263.
Hob. 313.

(b) 1 Co. 76. a.
b. 174. b.

resolved that it was all one, when he who makes the Revocat. is seised or possessed of the Land for the Reason and Cause given in *Diggs's Case*; for it was agreed in that Case, that the best Construction of the Statute of 27 H. 8. of Uses, is to make them subject to the Rules of the Com. Law which are certain and well known to the Professors of the Law, and not to make them so extravagant that none shall know any Rule to decide the Questions which arise upon them, which will produce Incertainty the Cause of infinite Troubles, Controversies and Suits, which agrees with the Resolution in (*a*) *Dillon and Frein's Case*, in the first Part of my Reports, fo. 137. b. and in *Butler and Baker's Case* in the third Part of my Reports, fo. 25. and in *Cholmeley's Case* in the second Part, fo. 50. where it is resolved, that although Uses at the Common Law might have ceased without Claim, yet now the Use is transferred to the Possession; for the Pleading is, *vigore statuti, &c. de usibus in possess. transfereendis*. So that now after the Statute to such (*b*) Qualities to which Estates at the Common Law are subject, to such Qualities Uses after they are transferred into the Possession are subject; for the Use is transferred and incorporate in the Possession, which agrees with the Resolution in this Case. And on the same Reason it has been adjudged, That if a Man bargains, and sells his Lands to another and his Heirs by Deed indented and inrolled, with Proviso, that if such Act is done, that the Bargain and Sale shall be void; and afterwards the Bargainor takes a Wife, and afterwards the Proviso is broken, before Entry the Husband dies, and it was adjudged that the Wife should not be endowed; for although the Estate of the Bargainee vests by the Statute of 27 H. 8. by Execution of the Estate of the Land to the Use raised by the Bargain and Sale, yet forasmuch as the Husband did not re-enter, he had not any Estate in the Land, whereof the Wife might be endowed.

(a) Co. Lit. 23. a.

(b) 1 Co. 137. b.
138. a. 2 Co.
53. b. 54. a.
Co. Lit. 23. a.

Trin. 3 Jac.

In the Common Pleas.

The Bishop of BATH'S Case.

Cr. Jac. 71, 72.

IN Replevin between *Bellamy* and *Fish* Defendant, *Fish* made Conufance as Bailly to *William* Lord *H.* for Damage-fealance; the Plaintiff faid, That before the Lord *W. H.* had any Thing, the Bishop of *Bath* and *Wells* was feifed of the Manor of *Blackford*, whereof, &c. in his Demefne as of Fee in the Right of his Bifhoprick; and afterwards the laft of *September*, 18 *H. 8.* by Writing made a Leafe to *Elizabeth Cofin*, Widow, and *Robert Cofin* her Son, of the faid Manor for 60 Years, a die confectionis ejufdem fcripti, abfq; impetitione vafli, with Refervation of Rent: And further *provisum fuit per idem fcriptum, qd' fi præd' Eliz. & Robert' infra dict' termin' 60 annor. obierint qd' tunc ftatim & immediate poft deceffum eorundem E. & R. & eor' alterius diutius viven. bene liceat præfato Epifcopo & Succefforib' fuis, in manerium præd' cum pertinen' reintrare.* The faid *Elizabeth* died, and *Robert* furvived her; the Bifhop died, and another is elected and confecrated, &c. who the laft of *Auguft*, 22 *H. 8.* by Writing demifed the faid Manor to one *Clark*, habend' & occupand' manerium præd' eidem *Clark* *Executoribus & Assignatis fuis, cum poft five per mortem furfum reddit', vel forisfacturam præd' Rob. Cofin acciderit vacare,* for threefcore Years, with Confirmation of the Dean and Chapter. And afterwards the Bifhop granted the Reverfion of the faid Manor to the faid Lord *W. H.* and the Tenant attorned, and afterwards *Robert Cofin* within the faid firft threefcore Years died, and the fecond Leffee died, and the Intereft of the fecond Leffee came to the Plaintiff, and the Defendant demurred on the Bar to the Avowry. The Queftions in this Cafe were two. 1. Whether the fecond Leafe fhould ever commence. 2. Admitting it fhould commence when it fhould commence. As to the firft it was objected, inasmuch as the fecond Leafe is limited

Co. Lit. 300, b.

limited to commence on one of three Accidents, that is to say, when the former Lease shall determine by Death (a) or Surrender, or Forfeiture; if none of these Accidents happen, that the second Lease which is to commence on one of them should never commence: For it was said, suppose that the Lessees had survived the first Term without any Surrender or Forfeiture, the second Term should never commence, for the Term ought to commence at the Time that the Lessor himself limits it, and at no other Time; and if the Commencement be uncertain, or on an Accident which never happens, or on contingent, or a Condition impossible, the Lease is void: For every Lease for Years ought to have (b) a certain Beginning, Continuance and End. *Vide Say's Case, Pl. Com. 270. 14 H. 8. 10. b. 21 H. 7. 38. b. 2 Mar. Br. Leases 67. 2.* It was objected, That if the second Lease should commence at all, it should commence by the (c) Death of the Lessees, for this Accident happened, and not the other two, and by their Deaths it could not commence, for by the Death (as this Case is) it could not commence in Possess. for the said Proviso in the first Lease doth not make the Lease void on the Death of the Lessees, but gives Re-entry to the Lessor and his Successors. So that till Re-entry notwithstanding the Death of the Lessees the Lease continues. And therefore, forasmuch as the second Lease is to commence after the Avoidance of the first Lease by the Death of the Lessees, for this Cause, either it shall never commence, or the Term of the second Lease shall commence from the Time of the Death of the Survivor of the Lessees, As to the first, it was answered and resolved, That it is true, that every Lease for Years ought to have (d) a certain Beginning, but that is to be intended when it is to take Effect in Interest or Possession, then the Commencement ought to be certain; for a Lease for Years may be made on Condition, or contingent Precedent; as if I (e) grant to you, that if you pay me twenty Pounds at *Michaelmas* next following, that you shall have my Manor of *D.* for one and twenty Years; now it is uncertain whether it will commence or not, and in the mean Time till the Payment of the Money it is not any Lease, but it is sufficient that the Commencement be certain when it is to take Effect in Interest or Possession. So it is true, that the Continuance of it ought to be certain, but that is to be intended either when the Term is made certain by express Numbering of Years, or by Reference to Certainty, or by Reducing it to Certainty by Matter *ex post facto*, or by Construction in Law, by express Limitation. As first if a Lease be made for twenty-one Years or any

(a) Cr. Jac. 71.
2 Rol. Rep 357.
Godb. 419.

(b) Co. Lit. 45. b.
Plowd. 272. a.
Carter 148.

(c) Cr. Jac. 71.

(d) Co. Lit. 45. b.
1 Rol. 848, 849.

(e) 1 Rol. 849.
Co. Lit. 45. b.
Pl. Com. 272. a.

Carter 148.

other certain Term, &c. it is good for the certain Enumeration at the first. 2. By Reference to Certainty; as if one lease the Manor of *D.* to *I. S.* for (*a*) as many Years as *I.* has in the Manor of *S.* and he has a Term for ten Years, *I. S.* shall have the like Term. So if a Lease be made to another during the *b*) Minority of *I. G.* and he is of the Age of ten Years, now this is a good Lease for eleven Years, if *I. G.* shall so long live. But if the Wife of *I.* be great with Child with a Son, and a Lease be made until the Issue *in ventre sa mere* shall come to full Age, this is not a Lease for Years; for at the Time when the Lease is to take Effect, it is uncertain when the Son will be born, and by Consequence the Commencement, Continuance and End thereof is uncertain, And when a Lease for Years shall be made good by Reference, the Reference ought to be to a Thing which has express Certainty at the Time of the Lease made, and not to a possible or casual Certainty. And therefore if (*c*) I have a Rent of twenty Shillings *per annum* in Fee issuing out of *Bl.* Acre, payable yearly at the Feast of *Easter*, and I grant the same Rent to you till you shall have received of the same Rent one and twenty Pounds, in this Case you shall have this Rent for 21 Years, for it has Reference to an express Certainty, *viz.* to a yearly Rent which is twenty Shillings *per annum* in certain. But if a Man (*d*) leases Lands of the Value of twenty Shillings *per annum* till one and twenty Pounds be levied of the Issues and Profits, it is but a Lease at Will without Livery; for it is not certain that the Land shall be every Year of one annual Value. And so it was resolved, *Pasc. 24 El. per totam Curiam in Communi Banco.* When a Lease shall be made good by Matter *ex post facto*, It was resolved, if a Man makes a Lease from the Feast of *St. Mich.* for as many Years as *I. S.* shall (*e*) name, in this Case, if *I. S.* name a certain Term (in the Life of the Lessor) it is a good Lease by Matter *ex post facto*. So it is of all Leases which are to commence on a Condition precedent. And as to *Potkins* Case in (*f*) 14 *H. 8. 10. b.* which was cited by the Counsel on both Sides in this Case, where the Case was, That *Potkin*, 10 *H. 7.* demised a Wood to the Defendant to commence at the Feast of *St. Michael* next following, *pro term. unius anni* (*g*) & sic de uno anno in annum, *quoadiu ambabus partibus placuerit*, and there two Justices against two. It was now resolved, *per totam Curiam*, that in such Case after three Years *at maximum*, it was but a Lease at Will, because beyond that the Term has not any certain Continuance or Determination; and on the Matter is no other, than if one demises Lands for such Term as (*h*) both Parties shall please, this is but a Lease at Will, because the Term is altogether uncertain. But if a Man leases his Land for Years, it is a good Lease

(a) 1 Rol. 849.
Co. Lit. 45. b.
2 Rol. Rep. 402.
1 Bullf. 219.
(b) Pl. Com.
273. a.

(c) 1 Rol. 845.
Pl. Com. 273. b.
Co. Lit. 42. a.
B. N. C. 462, 468

(d) 1 Rol. 845.
B. N. C. 462.
3 Bullf. 300.
3 Leon. 157.

(e) 1 Rol. 849.
Co. Lit. 45. b.
Plowd. 13. a.
372. b. Cr. Eliz.
561. Moor 479.
1 Co. 155. b.
(f) 1 Rol. 851.
14 H. 8. 10. b.
Palm. 203.

(g) 1 Rol. Rep.
287. 1 Bullf. 190
3 Bullf. 158.
Co. Lit. 45. b.
1 Rol. 851.
Noy 143.
1 urw. 214.
alk. 413, 414.

(h) 1 Rol. 851.

for 2 Years, because it shall be taken good for such a Number with which at least the plural Number will be satisfied, and that is with two Years. It was also resolved, That it is usual when the (a) K's Lease is doubtful, whether it be good or not, and another is to take a Lease of the same Lands, he will make his *Habendum* to commence (if any former Lease be) *Et c.* after the End or Determinat. of the former Lease, and if there be no Lease, then from such a Feast for a certain Number of Years, and (God forbid) but that these Leases shall be good and effectual; for in the Judgment of Law it has a Commencement sufficiently certain; for in the Eye of the Law the former Demise is either good or void, and therefore in the K's Case which is stronger than the Case of a common Person, such Lease has by Construct. of Law a Commencement certain enough. So if *A.* (b) reciting that *B.* has a Lease for Years, demises the Land to *C.* for Years, to commence after the End or Determinat. of the former Lease, and in Truth there is not any former Lease, the Lease to *C.* shall commence presently; for in Judgment of Law, a void Limitation of a Commencement, and no Limitat. is all one. As to the 2d Objection, it was resolved, that in Construct. of Law on the Commencement of Leases, the strongest shall be taken against the Lessor, and most beneficially for the Lessee. And in this Case it is true, that the first Lease cannot determine by the Death of the Lessees, because on their (c) Deaths a Re-entry is given; so that till Re-entry the Lease cannot determine by their Deaths, and forasmuch as there was not any Re-entry in Truth, the first Lease determined by Effluxion of Time, and not by (d) Death, Surrender, or Forfeiture. But the Words of the *Habendum* of the 2d Lease, are not only *cum per mortem, Et c. vacari contigerit, sed cum post, sive per mortem, Et c. vacari contigerit*; and altho' the first Lease doth not become void *per mortem*, yet certain it is that it becomes void, (*viz.* by Effluxion of Time) *post mortem* of the Lessees; forasmuch as both died before the Determination of the Lease, and as has been said, the strongest Construction shall be taken against the Lessor, and the most beneficial for the Lessee, and that is, that the second Lease shall commence either after the Re-entry by Force of the Proviso, if any be, and if there be none, then after the Determination and End of the 1st Term. And *Wrotlesley's Case* in *Pl.* 192.a. was cited, (f) where a Woman Lessee for Years took Husband, and the Wife dy'd, and he in Rev'n leased the Land for Years to commence after the Term demised to the Husband, where in Truth the first Demise was made to the Wife, and by Act in Law transferred

(a) 4 Co. 35 b.
38 H. 6 37. b.
8 Co. 166. b.
6 Co. 55, 56. a.
Plowd. 192. a.

(b) O. Benl. 35.
Pl. 143. 2 Rol. 52.
55. pl. 5. 682.
B. N. C. 395.
Carr. 148, 149,
150, 151, 152,
153, 154, 155,
156, 157. Cr.
Car. 399, 502.
Hob. 73, 128,
129. Co. Lit.
46. b. 4 Co. 74. a.
Dyer 93. pl. 28.
116. pl. 70.
1 Rol. 849.
1 And. 3. pl. 5.
3 H. 6. Br.
Leases 62.
(c) Cr. Jac. 71.
(d) Cr. Jac. 72.

(e) Cr. Jac. 72.

(f) Carr. 149.
Dyer 178. pl. 37.

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to the Husband; and yet by reasonable Construction it was there resolved, that the Land was by the Woman demised to the Husband to make the Lease have a good Commencement. It was also agreed in this Case, that the second Lease did vest presently in Point of Interest, and did not depend in Contingency, to take Effect in Possession, or at the End of the former Term, if by none of the three Accidents the first Lease became void in the mean Time; and which of them should first happen, the Lease should commence; for it was resolved, that if a Man (*a*) makes a Lease for Years to commence after the Surrender, Forfeiture, Determination or End of a former Lease, in this Case the Lessee has not any Election to have the second Lease either on the Surrender or Forfeiture, or End as he shall elect, but which of them shall first happen, the second Lease which before consisted in *interesse termini*, shall begin in Possession. And therefore suppose that in such Case the first Lessee surrenders to the Lessor, the second Lessee cannot elect that his Lease shall comence after the Expiration of the Term, but presently by the Surrender his Lease comes in Possession, and from that Time the Years of the second Lease shall incur; for these Words (which of them shall first happen) are implied in Law.

(4) Lit. Rep. 370.
2 Sid. 165, 166.

Raymond 82.

Trim.

Trin. 3 Jacobi,

In the King's Bench.

The Dean and Chapter of Worcester's Case.

THE Dean and Chapter of Worcester were seized of the Manor of *Hambleton* in Fee in Right of their Church, of which Manor one *Henry Gardiner* was a Copyholder for Life of certain Land whereof the antient Rent was eight Shillings and eight Pence, payable at four Days of the Year, viz. Quarterly, and Heriotable at the Death of the Tenant, the Copyholds of which Manor were grantable by the Custom of the Manor for three Lives. The Dean and Chapter, *anno* 24 *Eliz.* by Deed indented under their common Seal demised the said Lands to the said *Henry Gardiner* and his Assigns for the Lives of *John, Richard, and Margaret Gardiner*, and the Survivor of them; and afterwards the Dean died, the Successor and the Chapter enter'd to avoid this Lease, and the Quest. was, whether this Lease was to be avoided by the Stat. of (a) 13 *Eliz. cap.* 10. or not? And it was argued that this Lease should be avoided for four Reasons. First, That the said Lease was made for the (b) Lives of others, in which Case it might happen that there might be an Occupant who would not be subject to Wast, no more than Tenant by Statute-Merchant, or Tenant by (c) Elegit, &c. who come in by the Law without any Demise. *Vide* 16 *Ed.* 3. *Wast* 100. 21 *Ed.* 3. 26. For although there is not any express Clause of Restraint of Leases without Impediment of Wast, as in the Statute 32 *Hen.* 8. *cap.* 28. yet such Lease is against the Intent and Equity of the said Statute of 13 *Eliz.* for as it appears by the Preamble, The Statute was made against unreasonable Leases; and it is unreasonable that a Lessee should at his Pleasure commit Wast and Destruction, which is against the Commonwealth, for *Interest Reipublicæ ne sua re quis male utatur*. Also it appears by the Preamble, That the Stat. was made against Decay of Spiritual Livings; and therefore if Dean and Chapter make a Lease for Life, the Rem'r for Life, the Rem'r for Life, this Lease is not warranted by the said Act because it is dishonorable

(a) 3 Co. 6. b.
Moor 459. 593.
nu. 802.
1 Leon. 306.
Sav. 128, 129.
4 Co. 76. a.
Doct. pl. 337.
1 Rol. Rep. 151,
152, 154, 161,
168, 171, 403.
Cr. Car. 259.
Cr. Jac. 76.
Cr. El. 18. 230.
10 Co. 60. b.
2 Rol. Rep. 169.
1 Jones 263, 264.
Vaugh. 197,
204.
2 Co. 46. b.
11 Co. 67. a.
Co. Lit. 43. a.
44 a. 301. a.
342. a.
Goldsb. 171.
5 Co. 14. a. b.
1 Brownl. 182.
3 Keb. 108.
3 Bullstr. 291.
(b) Cr. Jac. 76.
Cr. Car. 95.
(c) F. N. B. 58. b.
Reg. Orig. 75. a.
2 Rol. 826.
Co. Lit. 44. b.
Cr. Eliz. 95. a.

nishable

The Dean and Chap. of Worcester's Case. PART VI.

nishable of Wast. 2. It was objected, That this Land had not been (a) usually demised; for a Demise in this Case is to be intended of a Demise at Common Law, and not a customary Demise, whereof the Common Law doth not take any Notice. 3. That the antient Rent was not reserved, nor was the Benefit which the Copyhold Estate yields to the Lord, (b) reserved; for the Heriot thereby is lost; and it was not the Intent of the Act, that any Prejudice of any Benefit which is of Continuance, as doubling of the Rent, every 3 or 4 Year, or a Heriot, or other Benefit at the Death of every Tenant should be lost. 4. The Rent reserved was not (c) payable as it accustomedly had been paid; for now it is reserved to be paid every half Year at two Feasts, where it was payable at four Feasts of the Year before. And it was said that it was more beneficial for them in Reversion, to have it payable at four Days of the Year, than at two Days; and all beneficial Incidents to the Rent are to be reserved: And to that Purpose the Lord *Mourjoy's* Case was cited, which you may see in the fifth Part of my Reports; for by the same Reason where the Rent has been reserved at two Days, it may now be reserved at one Day which will be prejudicial to them in Rev'n in Hindrance of Hospitality, which the Stat. (as appears by the Preamble) intended to advance. As to the first, it was answered and resolved, That a Dean and Chapter, &c. are restrained by the Equity of the said Act to make Leases dispensable of Wast, for the Causes alledged on the other Side. But it was also resolved, That an (d) Occupant should be punished for (e) Wast, because he has the Estate of the Lessee for Life; For the Statute of *Gloucester, cap. 5.* gives an Action of Wast against him who holds in any Manner for Term of Life or Years, and an Occupant holds for Term of Life; but Tenant by Statute Merchant, Statute Staple, or (f) Elegit, do not hold for Life, or Years; and therefore they are out of the Statute. And therefore Leases for the Lives of others, are within the said Act of (g) 32 *H. 8. cap. 28.* concerning Leases made by Tenant in Tail, as well as they are within this Act of 13 *Eliz.* As to the second Objection it was answered and resolved, That the said Estate granted by (b) Copy was in Judgment of the Com. Law an Estate at Will; and without Question, Lands which have been accustomed to be demised at Will by those who have the Inheritance of the Lands, rendering Rent, are Lands accustomedly letten to farm within the said Act. And according to this Resolut. was the Opinion of the whole Court of Com. Plea, *Pasch. 3 Jacobi. Vide Heydon's Case* in the third Part of my Reports. As to the third Objection it was answered and resolved, That the said Act of 13 *Eliz.* doth not avoid the Lease, if the (i) accustomed Yearly Rent or more be reserved;

(a) Cr. Jac. 50, 76.

(b) 2 Rol. Rep. 407. Cr. Jac. 76. Palm. 106.

(c) Cr. Jac. 76, 77. Co. Lit. 44. b. 5 Co. 5. b.

(d) Moor 363, 664. 2 Bulst. 11, 12, 13. Bridgm. 27. Cr. Car. 477. Cr. El. 58, 721. 2 Brownl. 202. Vaugh. 187, 188, 189, 190, 191, 192, 193, 194, 195, 196, 198, 200, 201, 202, 203, 204, 205. (e) Vaugh. 204. 2 Rol. 826. Co. Lit. 41. b. 42. b. 54. a. 2 Inst. 301. 10 Co. 98. a. Plowd. 556. b. (f) F. N. B. 58. h. 2 Rol. 826. Reg. Orig. 75. a. (g) Moor 759. Cr. Jac. 76, 77. Co. Lit. 44. b. (h) Raym. 167. 3 Co. 8. a. Moor 759. 2 Jones 29. Co. Lit. 44. b. Cr. Jac. 76, 77. Degge 106, 107. i) Co. Lit. 44. b. Cro. Jac. 76, 77.

reserved; and so far as much as the said Heriot was not an annual Thing, nor a Thing depending on the Rent, it is sufficient if (a) the yearly Rent be reserved. As to the fourth Objection it was also answered and resolved, That it is sufficient if the accustomed Rent be reserved Yearly at one Time; for the Words of this Act are, *whereupon the accustomed yearly Rent or more shall be reserved*; And therefore if the Rent be Yearly reserved, the Statute is satisfied, by Reason of this Word (*Yearly*) and so there is a Difference between this Case and the Lord Mountjoy's Case; for there wanted the Word (*Yearly*) which explains the Intention of the Makers of the said Act of 13 *Eliz.*

(a) Co. Lit. 44. b.
2 Rol. Rep. 171,
407.
Ley 72, 73.
Degge 107.
Cr. Jac. 76, 77.
Cr. Car. 17.
3 Bulstr. 291.
3 Keb. 107, 108.
5 Co. 5. b.

Pasch. 3 Jac. Rot. 980.

In the Common Pleas.

BELLAMY'S Case.

Walker brought Trespass against *Bellamy* for carrying away his Goods, &c. The Def. conveyed to himself a House by Feoffment, and justified for Damage-feasance; the Pl. pleaded a Lease made to one of this House for Years by the Feoffor by Deed indented, before the Feoffment, which the Lessee did assign to him; the Def. confessed the Lease, but said, that the Lease was on Condition that he should not let or assign over his Lease without Licence by Deed of the Lessor, and alledged that the Lessee without Licence did assign to the Pl. the Pl. pleaded the Licence of the Lessor to the Lessee by Deed, without saying (a) *hic in cur. prolat.* and for that Cause the Def. did demur in Law. And although of Necessity the Licence ought to be by Deed, and the Reason and Cause that Deeds are shewed to the Court is, because it belongs to the Judges to adjudge of the (b) Sufficiency or Insufficiency of them; yet it was resolved, that the Pl. need not shew it in this Case for 3 Reasons. 1. Because the Pl. doth not (c) claim by the said Deed of Licence any Interest in the House, but Licence is meer collateral to the Interest of it, and pleaded only to excuse the Forfeiture of the Lease, and is not like a Release or Confirmation for they transfer their Right. 2. A good Difference was taken

Cr. Jac. 102.
1 Rol. 471.

(a) Stil. 193.
Cr. Jac. 70, 102.

(b) Co. Lit. 35. b.
121. b. 225. a.
9 Co. 25. a.
10 Co. 92. b.
Hob. 1 7.
(c) Cr. Jac. 102,
103.
Plowd. 149. a.
Yelv. 201.
Cro. Jac. 70.

taken and agreed when a Deed is requisite *ex institutione Legis*, and when *ex provisione hominis*; for when it is requisite *ex institutione Legis*, there it ought to be shewed in Court; although it concerns a collateral Thing, and transfers or conveys nothing. As if the Major or Commonalty of London have an Estate for the Life of *J. S.* if in the Case the Major and Commonalty attorn to the Grantee of the Reversion, the Law requires that it should be by Deed; for notwithstanding the Grantee doth not claim in by them who attorn, and that an Attornment is but a Consent, yet in Pleading, the Deed of Attornment ought to be shewed, for the Deed is requisite *ex institutione Legis* in such Case. But when a Deed is requisite *ex provisione hominis*, there the Provision of Man shall not change the Judgment of Law in such Case; As if a Man makes a Lease for Years of Land to *A.* on Condition that he shall not assign it over but by Deed only, and not by Parol, in this Case *ex provisione hominis*, the Assignment ought to be by Deed, but because *ex institutione Legis*, a Deed is not necessary to the Assignee, he may plead the Assignment without shewing the Deed. And if the King's Fermor brings a *(a)* *Quo minus* in the Exchequer, he ought to *(b)* alledge that he is the King's Fermor to enable him to sue there; but he need not shew it to the Court, for that is meer collateral to the Action. 3. In the principal Case the Licence was *(c)* executed, and had not Continuance. *Vide 6 Rich. 2. Monstrance des Faits 157. 28 Hen. 8. 29 Dyer. 18 Ed. 3. 56. 44 Ed. 3. 22. 45 Ed. 3. 28. 18 Hen. 4. 11 Hen. 4. 39. 8 E. 3. 19. 18 E. 4. 12. 40 Ed. 3. 10. Plowd. Com. 149. 21 Hen. 7. 9. per Frowike. 43 Ass. p. 24. 8 Ass. p. 11. 24 Ass. p. 2. 20 Ass. p. 19. 24 E. 3. 52.*

(a) 2 Rol. 159.
 Plowd. 208. 2.
 Dy. 328. pl. 9.
 2 Inst. 551.
 4 Inst. 112.
(b) Doct. pl. 87.
(c) Cr. Jac. 103.

Hill. 3 Jacobi,

In the King's Bench.

HENRY FINCH'S Case.

THomas Moon brought a Replevin against Daniel Crat, and Thomas Baldwin, who made Conufance as Bailiffs to Henry Finch, Esq; because the Place where, &c. was Parcel of the Manor of Eastwell, whereof the Lady Finch was seised in Fee, and by her Deed dated 6 Eliz. did grant to the said Henry Finch her younger Son, an Yearly Rent of 20l. *exeunt. de prædict. Manerio de Eastwell inter alia per nomen maneriorum de Eastwell, Otterplea, Potbery, & Seton, & messuagiorum, terrarum, tenementorum, & hereditamentorum dictæ Katherine, situat. jacen. & existen. in parochiis de Eastwell, Westwell, & Challock in Com. Kanc. aut alibi in eodem Com. dict. Maneris sive eorum alicui quoquo modo spectant. vel pertinent.* to the said Henry Finch, and the Heirs of his Body, payable at the Feasts of the Annunciation and St. Michael, by even Portions, with Clause of Distress, &c. And for Rent arrear they made Conufance. The Plaintiff prayed Oyer of the Deed, which was entred in *hæc verba, & habuit*, and said, that *præter & ultra* the said Manors of E. O. P. and S. and the Premises appertaining to the said Manors, the said Lady Finch at the Time of the Granting of the said Rent, was also seised of one Acre of Land in Fee in Challock aforesaid, and died seised, which descended to Sir Moile Finch as her Son and Heir; and that the said Henry Finch had abated in the said Acre, and so continued seised by Abatement: Upon which the Defendants did demur in Law. And the Question was, whether the said Acre of Land (which was not Parcel, nor appertaining to the said Manors) was by the Words aforesaid charged with the said Rent, or not; or whether the said Manors and the Land thereunto belonging should be only charged, or not. And after many Arguments at the Bar, and the Case well debated at the Bench, It was adjudged,

2 Rol. 51.
Yelv. 82.
Co. Ent. 590.
nu. 9.
1 Brownl. 184.
185.
Winch. 91, 92.
2 Brownl. 53.
2 Rol. Rep. 261.
Hob. 175.

That

(a) 2 Rol. Rep. 261. Winch. 91, 92. Hob. 175.

(b) Lit. Rep. 208.

(c) Lit. Rep. 208. Winch. 74.

(d) 1 Brownl. 135. Yelv. 82. Lit. Rep. 210.

(e) 11. Co. 3. b. 10 Co. 133. a. Co. Lit. 146. b. (f) Co. Lit. 223. b.

That the said Rent was not issuing out of the said Acre of Land, but (a) only out of the said Manors and Land appertaining to them. And the chief Reason and Cause of their Judgment was, because in this Case there is but one Grant, and one and the same Sentence; for there is not a full Period nor an End of the Sentence, before the Conclusion of these Words (*aut (b) alibi, &c.*) And the Difference is between two distinct Sentences importing several Grants, and one and the same Sentence; as if the Grant had been *Dedi & Concessi annualem redditum 20l. excurt de manerio de D. & terris & tenementis meis in D. S. & D. in Com. K. & de terris & tenementis meis alibi in eodem Com. dict. Manerio spectant. & pertin.* In that Case there are two Sentences, and each one may well stand by it self, for there is a Repetition *De terris & tenementis*, which amplifies and enlarges the Lands and Tenements, out of which the Rent shall issue; but in the Case at bar there is not any Repetition or Enlargement of Lands or Tenements after the *aut (c) alibi*; but the *aut alibi* doth not enlarge the Grant of the Rent to issue out of other Lands or Tenements, but enlarges the Towns or Places, in which the Lands before charged extend; as if he had said, *in parochia de E. W. & C. aut alibi in Com. K. dict. maner. spect. seu pertin.* for *hæc verba in hoc casu transposita idem significant*: Also, altho' this Conjunction disjunctive (*aut*) in this Case amounts in Law to a Copulative; yet it was well observed that (d) (*aut*) was never put for the Beginning of a Sentence, but always as a Continuance of a former Sentence, in the same Manner as (*una cum*) conjoins the Matter subsequent to the Matter precedent. Also here in the principal Case, these Participles *spectan. & pertinen.* in Construction agree to these Words *Mesug. terr. tenement. & hereditament.* for there are no other Nouns to which they can properly agree; but as it has been said, if there had been after the (*aut*) any new Iteration, or Mention of Lands or Tenements, with which these Participles *spectan. & pertinen.* might agree in true Construction, then there might be a Difference.

Note Reader, although (e) *Mala grammatica non vitiat instrumenta*, yet in expositione instrument. mala (f) *grammatica, quoad fieri possit, vitanda est.*

Mich. 3 Jacobi,
IN THE
KING'S BENCH.

Sir ANTHONY MILDMAJ'S Case.

THIS Term, the Case on a special Verdict in an Action of Trespass, done at *Newton* in the County of *Norfolk*, between *James Hethersall*, Lessee of *Humphrey Mildmay*, Esq; Pl. against *Sir Anthony Mildmay* Knight, Def. (which was *mutatis mutandis* all one with (a) *Corbet's* Case reported by me in the first Part of my Reports, f. 84.) was argued at the Bar, as it had been in sundry Terms past; and was also argued by the Judges: And this was adjudged against the Pl. according to the Judgment given in *Corbet's* Case. And in this Case some Points on great Consideration were resolved, which were not moved in *Corbet's* Case: I. That all these (b) Perpetuities were against the Reason and Policy of the Common Law; For at Common Law (c) all Inheritances were Fee-simple, as *Littleton* saith, lib. i. cap. *Estate-tail*; and the Reason thereof was, that neither Lords should be defeated of their Escheats, Wards, &c. nor the Farmers or Purchasers lose their Estates or Leases, or be evicted by the Heirs of the Grantors or Lessors; nor such infinite Occasions of Troubles, Contentions and Suits arise. But the true Policy and Rule of the Common Law in this Point, was in Effect overthrown by the Stat. *de (d) Donis conditionalibus*, made Anno 13 E. 1. which established a general Perpetuity by Act of Parliament, for all who had or would make it, by Force whereof all the Possessions of *England* in Effect were entailed accordingly, which was the Occasion and Cause of the said and divers other Mischiefs. And the same was attempted and endeavoured

Cest Case commenced Hill. 45. El. Rot. 439.

(a) 1 Co. 83. b. Moor 601, 632, 633.

Co. Ent. 678. nu. 21.

10 Co. 37. a. 42. b.

2 Anderf. 134. Cr. Car. 479. Winch. 55.

3 Keb. 177. 4 Leon. 246.

(b) 10 Co. 42. b. Cr. Jac. 697, 698.

(c) Co. Lit. 19. b. (d) 10 Co. 37. a.

Doct. & Stud. lib. i. cap. 27,

28, 29, 30, 31, 32.

Plowd. 13. b. 53. b. 59. a.

160. b. 178. b. 235. b. 246. a.

250. b. Maxel's Case,

ibid. 3. a. Præfat. ad

4 Co. i. b. 1 Co. 44. b.

48. a. 88. a. 96. a. 5 Co. 14. b.

11 Co. 72. a. 383, 410, 417.

Savil 67, 88. 60. a. 224. a. 262.

F. N. B. 211. b. 362, 441. 2

103. a. b. 131. b. 2 Co. 46. b. 3 Co. 8. a. 85. b. 88. b. 89. a. 4 Co. 4. b.

6 Co. 41. a. 7 Co. 21. a. 32. a. 41. a. 8 Co. 35. b. 72. b. 9 Co. 105. a.

12 Co. 81. 1 Rol. Rep. 48, 153, 155, 162, 385. 2 Rol. Rep. 197, 317, 318,

1 Leon. 83, 212. Rastals Entr. 360. b. &c. Hob. 293. 2 Inst. 332, &c.

Poph. 34, 128. Cro. Car. 42, 43, 45, 533. Co. Lit. 18. b. 19. a. b. 24. a.

327. b. Carter 23. Latch. 67. Godb. 308, 567. O. Benl. 163. Vaugh. 365.

3 Bulstr. 186. Ver. Nat. Br. 100. a. 143. b. Rastal Tail 1. Lit. sect. 13,

Anderf. 11, 14.

to be

(a) Godb. 303. to be remedied at divers Parliaments; and divers (a) Bills were exhibited accordingly (which I have seen) but they were always on one Pretence or other rejected. But the Truth was, That the Lords and Commons knowing that their Estate-tails were not to be forfeited for Felony or (b) Treason; as their Estates of Inheritances were before the said Act, (and chiefly in the Time of H. 3. in the Barons War) and finding that they were not answerable for the Debts or Incumbrances of their Ancestors, nor did the Sales, Alienations or Leases of their Ancestors, bind them for the Lands which were entailed to their Ancestors, always rejected such Bills: And the same continued in the Residue of the Reign of E. 1. and of the Reigns of E. 2. E. 3. R. 2. H. 4. H. 5. H. 6. and till about the (c) 12 Year of E. 4. When the Judges on Consultation had amongst themselves, resolved, That an Estate-tail might be doct and barred by a Common Recovery; and that by Reason of the intended Recompence, the Common Recovery was not within the Restraint of the said Perpetuity made by the said Act of 13 E. 1. By which it appears, That many Mischiefs arise on the Change of a Maxim, and Rule of the Common Law, which those who altered it could not see, when they made the Change; For (d) *Rer' progress. ostendunt multa, quæ in initio præcaveri seu prævideri non possunt.* 2. It was resolved, That it was (e) impossible and repugnant, that an Estate-tail should cease as if the Tenant in Tail was dead, (had he Issue or no) for an Estate-tail cannot cease, so long as it continues; but here his Intent was to continue the Estate-tail; and to cease it in Respect of the Party offending only, and not as to any other, which is impossible repugnant and against Law; For every Limitation or Condition ought to defeat the (f) whole Estate, and not to defeat Part of the Estate, and leave Part not defeated; and it cannot make an Estate to cease *quoad unam personam*, and not *quoad alteram*: But an (g) Act of Parliament may make an Estate cease as if one were dead, 21 H. 8. that by the Acceptance of a second Benefice, the first shall be void as if he were dead, and in 10 Eliz. Dyer 274. (b) there is Restitution by Parliament with a *Quoad*. So the Policy of the Common Law may make a *Quoad*, as in 22 Eliz. Dyer 369. (i) a Marriage *infra annos nobiles*, is perfect *quoad dotem*, and *quoad* other Purposes it is but *inchoatum & imperfectum*. So if two are jointly and severally bound in a Bond, and Judgment is given against one, by which it is become of Record as to one, but as to the other it remains a Writing as it was before: But no Condition or Limitation framed by the Parties Words in his Deed, can make one and the same Estate in any Lands (k) cease as to

(b) Godb. 303.
Co. Lit. 392. b.
26 H. 8. c. 13.
33 H. 8. c. 20.

(c) 10 Co. 37. a. b.
1 Co. 131. b.
Co. Lit. 361. b.
372. b.

Godb. 308.
Hard. 209.
1 Bulstr. 159.
12 E. 4. 19,
20, 21.

(d) 11 Co. 69. a.
12 Co. 48.
2 Inf. 26.
Hawk. Max.

311. 452.
(e) 1 Co. 84. a.
85. b. 130. a.
Moor 364.
Cr. Jac. 697,
698.

8 Co. 17. a.
(f) 1 Co. 85.
4 Co. 119. b.
1 Rol. 471.
Cr. Jac. 398.

(g) Cr. El. 379.
Co. Lit. 27. a.
Raym. 355.
1 Co. 87. b.

13 Co. 64.
8 Co. 1.
(h) Raym. 355.
Dyer 274.

pl. 40, 41.
1 Jones 460.
1 Keb. 265,
606.

Cro. Car. 543.
(i) Dyer 369.
pl. 48, 49.
1 Leon. 54.

(k) Moor 364.
544. 632, 633.
1 Co. 86. b.
87. a. 130. a.

138. b.
8 Co. 17. a. b.
Cr. El. 379.
Raym. 355.

one Person, and be in *esse* as to another, or cease for one Time, and revive afterwards (as a Rent (*a*) newly created may.) And none can have an Estate in Tail, but Parties in Estate *secundum formam doni*. 3. It was resolved, that if a Man makes a Gift in Tail on Condition, that he shall not suffer a (*b*) Com. Recovery, that this Condition is repugnant to the Estate-tail, and against Law. For there are divers Incidents to an Estate-tail. 1. To be dispunished for (*c*) Wast. 2. That his Wife shall be (*d*) endowed. 3. The Husband of a Woman Tenant in Tail after Issue, shall be Tenant by the (*e*) Curtesy. 4. That Tenant in Tail may suffer a common Recovery, and thereby bar the Estate-tail, and the Reversion or Rem'r also. And these inseparable Incidents which the Law annexes to an Estate-tail, cannot be prohibited by Condition. And therefore if a Man makes Gift in Tail on Condit. that the Donee shall not commit Wast, or that his Wife shall not be endowed, or that the Husband of a Woman Tenant in Tail after Issue shall not be Ten't by the Curtesy, or that Tenant in Tail shall not suffer a common Recovery, these Conditions are repugnant and against Law, because by the Gift in Tail, he tacitly enables him to commit Wast, that his Wife shall be endowed, and to suffer a common Recovery. And therefore it is repugnant to restrain it by Condition, for that would be to give Power, and to restrain the same Power in one and the same Deed. And as to the Case of Dower, *vide* 22 E.3. 19. *Accord*, 17 El. *Dier* 343. the Earl of (*f*) *Arundel's* Case. And altho' a com. Recovery is but a common Assurance, yet by the Law every Ten't in Tail has Power to suffer it to bar as well the Estate-tail, as the Rev'n or Rem'r over; and such Act in Respect of the intended Recompence, is not restrained by the Stat. *de Donis conditional'* as it has been said. But Ten't in Tail by a com. Recovery has *potestatem alienandi*, notwithstanding the said Stat. As if a Man (*g*) before the said Stat. had made a Gift to one and to the Heirs of his Body, in this Case *post prolem suscitatum*, he had by the Com. Law *potestatem alienandi*, and therefore in the same Case, if the Donor add such a Condition, that after Issue the Donee should not alien, it was resolved that the Condition in such Case had been repugnant, because after Issue, by the Common Law, the Donee had *potestatem alienandi*, and then in one and the same Deed to give him Power *post (b) prolem suscitatum potestatem alienandi tacite* by the Law, and in the same Deed to restrain him of that Power, is repugnant and against Law. *Pari ratione* after the Stat. if a Man makes a Gift in Tail, on Condit. that he shall not suffer a common Recovery, it is repugnant; for by the Gift in Tail he has given Power *implicite* to suffer a Recovery. So if a Man makes a Proviso, That Warranty and Assets shall not bar the Issue in Tail,

(a) 1 Co. 87. a.
130 a. b. 5 E. 2.
Dower 143.
Perk. Sect. 327.
Plow. 156. a.
10 H. 7. 13. b.
12 E. 3. com. it.
11. 22 E. 3. 19. a.
14 Leon. 83.
8 Co. 17. b.
(b) Hob. 170.
9 Co. 128. a. b.
10 Co. 37. a. 38. b.
39. a. Co. Lit.
2. 3. b. 224. a.
2 Brownl. 67.
1 Rol. 418.
Cart. 23.
(c) 2 Brownl. 67,
10 Co. 39. a.
1 Rol. 418.
2 Rol. 82. 6.
Lit. Sect. 34.
Co. Lit. 27. b.
2 Inst. 302.
9 Co. 139. a.
Dr. & Stud. lib. 2.
cap. 1. F. N. B.
59. b. 1 E. 3.
Wast 12.
10 H. 6. 1. b.
(d) 2 Brownl. 67.
10 Co. 38. b.
1 Rol. 418.
Co. Lit. 224. a.
Dy. 343. pl. 57.
(e) 10 Co. 38. b.
Co. Lit. 224. a.)
1 Rol. 418.
2 Brownl. 67.
(f) Jenk. Cent.
242. 3 Co. 34. a.
10 Co. 37. a. 40. a.
(g) Co. Lit.
224. a.

(h) Co. Lit.
224. a.

(a) Co. Lit.
224. a. 1 Rol. 418
10 Co. 39. a.
13 H. 7. 24 a.

(b) Co. Lit.
146. b. 7 Co.
38 b. Dy. 227.
pi. 43.

(c) Co. Lit.
223. b.
1 Rol. 418.

(d) Co. Lit.
223. b.

(e) Co. Lit.
224. a. b. Br.
Condit. 239.
11 H. 7. 11. a.

(f) Co. Lit.
224. a.

(g) Co. Lit.
223. a. 4 Co. 3. b.
Hob. 170. Br.
Condit. 82, 135.
Dr. & Stud. 39. a
123. a. 21 H. 7.
8. a. Br. Prero-
gative 102.
21 E. 4. 47. a.
Plowd. 77. a.
L. r. Sect. 360.
11 H. 6. 33. b.
1 H. 7. 10. b.
13 H. 7. 23. a.

or that a collateral (a) Warranty shall not bar the Issue, or the Donor, these Provisoes are against Law and repugnant, 6 Eliz. Dier 227. a Proviso good at the Beginning, by Consequence may become Repugnant, as if a Man by his Deed grants a Rent for Life (b), Proviso that he shall not charge his Person, this is a good Proviso, yet if the Rent is arrear and the Grantee dies, his Ex'ors shall charge the Person of the Grantor in an Action of Debt; for otherwise they would be without Remedy, and therefore now it is become repugnant, and by Consequence void. But it was resolved, that if a Man makes a Gift in Tail, on (c) Condit. that he shall not alien, this Condition to some Intent is good, and to some void. And therefore if he makes a Feoffm. in Fee, or any other Estate, by which the Rev'n is wrongfully discontinued, the Donor shall enter for the Condition broken; for every Act which is prohibited by the Law, or which doth Wrong, a Man may prohibit by Condit. Vide 10 H. 7. 11. a. but (as it has been said) if in (d) such Case, the Donee suffers a common Recovery, the Condit. by the Law cannot extend to it, *causa qua supra*. In the same Manner as a Deed of Feoffm. to Husband (e) and Wife in Fee, on Condit. that they shall not alien, it is a good Condit. to restrain a Feoffm. or Alienation by Deed, for that is wrongful, but not to restrain an Alienation by them both by Fine, for that is lawful and incident to their Estate. So if a Man enfeoffs an (f) Infant in Fee, on Condition that he shall not alien, it is a good Condition to restrain an Alienation during his Minority, for that is wrongful, but not to restrain him to alien, when he is of full Age, for that is repugnant to his Liberty, which the Law gives him, in Case of Fee-simple; and with these two Cases agree 10 H. 7. 11 a. & 13 H. 7. 23. a. and so you will better understand your Books in 33 Aff. p. 11, 24. 11 H. 6. 6. 21 H. 6. 50, 55. 10 H. 7. 11. a. 11 H. 7. 6. b. 13 H. 7. 23. a. 21 H. 7. 11. a. b. And it is to be observed, that before the Reign of E. 4. it was not resolved, as hath been said, that a common Recovery should bar the Estate-tail, and the Reversions and Remainders depending thereupon: And therefore the said old Books which speak of Alienations made by Tenant in Tail, cannot be intended but to restrain Discontinuance and Alienations which did Wrong, and not to prohibit a common Recovery, the Operation of which was not then known, and which till the Reign of E. 4. was not in Use. And the Reason of Littleton, lib. 3. Cap. Condit. fol. 84. a. was well observed, who saith, That if a Man makes a Feoffment on Condition, that the Feoffee shall not (g) alien to any, the Condition is void, because when a Man is enfeoffed of Land, or Tenements, he has Power to alien them to any Person by the Law: For if such Condition should be good, then the Condition would oust him of the whole Power, which the Law gives him, which would be against Reason, and therefore such Condition is void; all which

which are the very Words of Mr. *Lit.* the Reason of which agrees intirely with the Resolut. of this Point in this Case. And it was said, that the Law favours Estates-tail in Possess. and doth not regard Rem'rs or Rev'ns expectant on the Estate-tail. For it was adjudged in *Capel's Case*, as appears in the first Part of my Reports, That if (a) Tenant in Tail suffers a common Recovery, it shall bar not only the Estate-tail, and Rem'r or Reversion, but the Rent also that he in Rem'r or Reversion has granted. So it was adjudged in *12 El.* between *Terling and Trafford* in the K's Bench (b), That a Rem'r or Rev'n expectant on an Estate-tail is no *Affers* to the Heir in Debt on a Bond made by his Father. So *Hill. 14 El.* it was resolved by all the Just. of the Com. Pleas in *Copwood's Case* (c), That if there be Tenant in Tail, the Rem'r to the right Heirs of *I. S.* and Tenant in Tail suffers a common Recovery, *I. S.* being then alive, it shall bar the Rem'r which was in Abeyance and Consideration of the Law. 4. Where the Proviso is, *That if when and as often as the the said Anthony Mildmay, &c. shall be fully and finally resolved and determined, and shall advisedly, determinately and effectually devise, conclude and agree, or enter into any Communication, Promise, or Covenant whatsoever, or shall advisedly attempt, procure, go about, or assent to or for any Act or Acts, Thing or Things, for or touching any Bargain, Sale, Discontinuance, Alienation, Conveyance or Assurance to be had or made of any of the said Manors, &c. whereby any Estate, &c. may, should or might in any wife, or by any means be undone, discontinued, &c. and the same Bargain, &c. or shall advisedly and effectually attempt, procure, go about, to or for any Act or Thing for or touching any Bargain, Sale, Discontinuance, &c. and the same Bargain, or any other open Matter, &c. shall attempt, go about, cause, &c. by Acknowledgment of any Note of any Fine, or any Warrant or Warrants of Attorney for any Recovery or Voucher, or by Acknowledgment of any Deed, or by any other Act or Acts, Thing or Things whatsoever in Deed or in Law, &c. That then immediately after such Time of such Procuring, Attempting, or Going about in Form aforesaid, and before any such Bargain, Sale, Discontinuance, &c. had, made, &c. or done, the said Use and Uses, Estate and Estates, &c. shall from Time to Time cease as only in Respect, and having Regard to such Person or Persons so attempting going about, &c. in such Sort as if such Person or Persons, &c. were naturally dead and no otherwise.* It was resolved, That these Words (*Attempt*), &c. or (*go about*) &c. or (*enter into Communication*) &c. are Words uncertain, and void in Law, and God forbid that the Inheritances and Estates of Men should depend upon such (d) Uncertain. for it is true, *Quid (e) misera est servitus, ubi jus est vagum; & qd' non definit in jure quid sit comatus, ne quid est a going about, &c. or Communication*

(a) Mo. 154, 155
&c. 345, 410, 400
150, 151, &c.
Cr. Car. 103.

1 Ander. 282.
Goldsb. 4, 6, &c.
Jenk. Cent. 250.
1 Co. 61. a.

127. b. 128. a.
Winch 41.
Cr. Jac. 592.

2 Co. 52. b.
2 Rol. Rep. 221.
Palmer 139.

2 Rol. 396.
10 Co. 57. b.
Cr. El. 718.

Noy 10.
3 Keb. 288 289.
Popham 5, 6.
Moor 158.

(b) 1 Rol. Rep.
234, 357.
2 Rol. Rep. 129.

1 Rol. 269.
Pottea 58. b.
(c) 2 Rol. Rep.
217, 221.

Palm. 139.
1 Co. 136. a.

(d) 1 Co. 85. a.
Cr. Jac. 698.
(e) 12 Co. 52.
1 Mod. Rep. 214.

nication: And therefore the Rule of Law decides this Point
 (a) *Non efficit conatus nisi sequitur effectus*: And the Law
 (b) rejects *Conations and Goings about* as Things incert. which
 cannot be put in Issue. For if one who is bound with such
 Perpetuity goes to (c) Counsel learned, to know whether he
 might alien Part for Payment of his Debts, or for Advance-
 ment of his younger Children, or for any other needful Use,
 is that a Breach of the Proviso or not? Or if the Heir or o-
 ther in Rem'r who knew not of the Proviso, & *qui habet ju-
 stam ignorantiam*, thinks that he may levy a Fine, and
 thereupon a Note of a Fine is drawn, &c. and before it be
 recorded, he knows of the Proviso, and then all is cancelled,
 is that a Breach of the Proviso? And an hundred such like
 Questions, where nothing is done, may arise, which the
 Eye of the Law never saw, but of late Times are invented; and
 such Proviso is full of Cruelty, and against the Freedom and
 Liberty of a Freeman: For this (as if he had Bolts of Iron
 on his Legs) restrains him *to go about*; and also it seals up
 his Lips, and deprives him of the Use of his Tongue; for
 it restrains him to enter *into Communication*. And in the
 said Books aforesaid, where the Alienation of Tenant in Tail
 is restrained, no Mention was ever made of Restraining a
 Going about, or entering into Communication to alien, for
 that was then thought so idle, that there is not any Touch of
 any such Matter in any of the said Books, or in any other
 Book of the Law. And in the Case of (d) *Ricbil* reported by
Lit. l. 3. c. Warrant 162. *Ricbil* restrained his Sons from alien-
 ing, and not from going about, or entering into Communicat.
 of aliening, and yet if he could have restrained the Going-
 about, &c. it had avoided one of the Causes, that his Conve-
 yance was against Law. For *Littleton* saith, That if the (e) ist
 Son aliened the Tenements in Fee, then is the Freehold and
 Fee-simple in the Alience, and in no other, &c. then how
 can it by any Reason be, that such Rem'r should commence
 its Being and its Essence immediately after such Alienation
 made to a Stranger, who had by the same Alienation the Free-
 hold and Fee-simple? But if Just. *Ricbil* could have restrained
 the *Going about* or *entering into Communication*, or the
 Making of a Charter of Feoffm. or a Note of a Fine, &c. he
 might have avoided the principal Cause, for which his Conve-
 yance was insufficient in Law. And in the same Manner it
 may be said of the Conveyance of (f) *Thirning* Ch. Justice,
 reported in 21 *H 6. 33. b.* And it was said, that a *Going about*,
 or *entering into Communication* was not issuable. Farther it
 was said, if a Man makes a Gift in Tail on Condition that
 he shall not make a Feoffment, it is a good Condition;
 but if the Condition be that he shall not make a
 Charter of Feoffment, that is not good, for that with-
 out Livery, (as *Littleton* saith *fol. 15.*) amounts but

(a) 1 Rol. Rep.
226. 11 Co. 98. b.
(b) Cr. Jac. 697.
698. 10 Co. 38. b.
(c) Moor 633.

(d) Lit. Sect. 720
2 And. 135. 138.
1 Co. 88. a.
139. a. 131. b.
1 Rol. Rep. 485.
Co. Lit. 377. b.

(e) Co. Lit.
378. b. Lit.
Sect. 722.

(f) Co. Lit.
377. b. 10 Co.
38. b.

(g) Moor 632,
633, 634.

to a Tenancy at Will, which Tenant in Tail cannot be restrained from making. So if a Man makes a Gift in Tail, on Condition that he shall not make a Lease for (a) his own Life, it is void and repugnant; but if a Man makes a Lease for Life or Years, on Condition that he shall not alien or lease the Land, it is good. For at the Com. Law, Lessee for Life or Years might commit Wast, which was *ad exhereditationem* of the Lessor, and therefore there was a Confidence betwixt the Lessor and Lessee, and therefore the Lessor might (b) restrain the Lessee from aliening or demising to another, in whom perhaps the Lessor had not such Confidence. And therefore it is reasonable, that when he who has the Inheritance makes a Lease for Life or Years, that he may restrain such particular Tenants from aliening or demising for the Benefit of his Inheritance. But when a Man makes (c) a Gift in Tail (which is an Estate of Inheritance, and by Possibility may continue for ever) and thereby makes the Donee chief Owner of the Land, he cannot restrain him from making any lawful Act or Estate which doth no Wrong to any, and which by Law he may do of the same Land. So it is for the same Reason, if a Man makes a Gift in Tail of a Manor, on Condition that he shall not make any voluntary Grant of any Lands by Copy according to the Custom of the Manor, &c. it is not good. But if he makes a Lease for Years or Life with such Condition, it is good, *causis quas supra*. And by these Differences you will better understand your Books in 21 H. 6. 33. b. 8 H. 7. 10 b. 11 H. 7. 6. b. 13 H. 7. 23. a. Lastly, the Intent of the Stat. 27 H. 8. (as appears by the Preamble) was to restore the ancient Com. Law, and to root out and extinguish all subtle Inventions, Imaginations and Practices of Uses which had introduced many Mischiefs and Inconveniences mentioned in the Preamble. And that was very good and necessary for the Commonwealth: For the Com. Law has certain *d* Rules to direct the Estates and Inheritances of Lands, and therefore it is without any Comparison better to have Estates and Inheritances directed by the certain Rules of the Com. Law, (which has been an old, true and faithful Servant to this Commonwealth) than by the incertain Imagination and Conjecture of any of these new Inventors of Uses, without any approved Ground of Law or Reason. *Note Reader*, this Judgment agrees with the former Judgments, as well in (e) *Corbet's Case*, as the Cases between *Humble* and (f) *Cholmeley*, and *Germin* and (g) *A- spot* there cited, and with the Judgment in (h) *Dillon* and *Frein's Case*. And in this Case it was observed, That in the said Proviso found at large by the special Verdict, there are more than a thousand Words, where in our Books when Tenant in Tail was restrained from Alienation;

(a) Co. Lit.
223. b. 10 Co.
39. a. 1 Rol. 418.

(b) 4 Co. 119. b.
Hob. 170. Co.
Lit. 223. b.
Moor 11, 881.
1 Leon. 3. Cr.
El. 26. 1 And.
123. 3 Leon. 67.
4 Leon 5.
(c) Co. Lit.
223 b. Cont.

(d) Co. Lit. 233
379. b.
(e) Mo. 601. 633.
2 Ander. 134.
Cr. Car. 479.
1 Co. 83. b.
2 Co. 42. b.
3 Keb. 177.
4 Leon. 216.
Winch 56.
(f) Cr. El. 378.
1 Co. 86. a.
10 Co. 42. b.
1 And. 346.
2 And. 142, 149.
Moor 471, 592.
633.
(g) Mo. 364. 633.
1 Co. 85. a.
10 Co. 42. b.
4 Leon. 83.
1 And. 7, 186.
2 And. 142.
1 Jones 59.
Bridgm. 135.
(h) Jenk. Cent.
276. Poph. 78.
1 And. 309.
Moor 546.
10 Co. 42. b.
11 Co. 80. a.

(e) Co. Lit. 6. a. there were not twelve Words, *hec fuit (a) candida illius & raris fides & simplicitas, que pauculis lineis omnia fidei firmamenta posuerunt.* And so has this Case now been adjudged in both Courts.

Mich. 3 Jac.

I N T H E

COMMON PLEAS.

BLAKE'S Case.

Cr. Jac. 99.
Noy 110.
2 Rol. Rep. 188.

EDen brought a Writ of Covenant against *Blake* Assignee of *Price*, and the Breach was for not Repairing of the House, the Defendant pleaded an Accord between him and the Plaintiff, and Execution thereof in *satisfactione & exoneratione decassus reparationum predicti* upon which the Plaintiff demurr'd; which Plea began in the Common Pleas, 3 Jac. Rot. 1033. And it was objected, That this Action of Covenant was founded on the Deed, which could not be discharged but by Matter of as high a Nature, and not by any Accord or Matter in *pais*, for *Nihil (a) tam conveniens est naturali equitati, unumquodque dissolvi eo ligamine quo ligatum est.* And it appears by all our Books, That neither Arbitrament, nor Accord with Satisfaction is a Plea, when the Action is grounded on a (b) Deed. Vide 1 H. 7. 14. b. 33 H. 8. 51. *Dier* (c) 1 H. 5. 6, 7. 45 E. 3. 4. b. 25 H. 8. Br. Det. 173. 2. When the Action is in the Realty, or mixt with the Realty, Accord with Satisfaction is no Plea; for Accord with Satisfaction is a Bar for the (d) Personalty, and not of the Realty, and when the Personalty is mixt with the Realty, it is no Bar for the Personalty; for (e) *omne majus trahit ad se minus.* Vide 11 H. 7. 13. b. 13 H. 7. 20. a. b. in *Wast*. So in a Ravishment of Ward, *Quare Impedit, &c.* But it was resolved by the whole Court, that the Defendant's Plea was good in the Case at Bar; for there is a Difference, when a Duty accrue

(a) 2 Co. 53. a.
4 Co. 57. b.
5 Co. 26. a.
2 Inst. 359, 573.
Davis 33, b.
(b) 2 Rol. 265.
(c) 33 H. 8. 51
pl. 14. *Dyer*.
(d) 11 H. 5. 6. b. 7. a.
(e) Cr. El. 356.
9 Co. 78. a.
(f) Cr. El. 357.
4 Co. 1. b.
9 Co. 79. b.
* 3 Inst. 109.
5 Co. 115. a.
2 Co. 68. a.
Co. Lit. 52. b.
285. a. 1 Bullstr.
105. 2 Bullstr. 48.
(g) 2 Rol. Rep.
187, 188.
Palm. 110, 111.
9 Co. 79. b.
Yelv. 125.
1 Rol. 265.

accrues by the Deed in (a) Certainty, *tempore confectio- nis scripti*, as by Covenant, Bill, or Bond, to pay a Sum of Mo- ney, there this certain Duty takes its Essence and Operation originally and solely by the Writing; and therefore it ought to be avoided by a Matter of as high a Nature, altho' the Duty be merely in the Personalty; but when no (b) certain Duty accrues by the Deed, but a Wrong or Default subse- quent together with the Deed, gives an Action to recover Damages which are only in the Personalty, for such Wrong or Default, Accord with Satisfaction is a good Plea; as in the Case at Bar, the Covenant doth not give the Plaintiff at the Time of the Making of it any Cause of Action, but the Wrong or Default after in not Repairing of the House, to- gether with the Deed, gives an Action to recover Damages for Default of Reparations. And forasmuch as the End of the Action is but to have (c) Amends, and Damages in the Personalty for this Wrong, therefore Amends and Satisfaction given the Plaintiff is a good Plea. For the Action is not merely grounded on the Deed, but also on the Deed and the Wrong subsequent, which Wrong is the Cause of the Ac- tion, and for which Damages shall be recovered, as in 13 E. 4. 1. b. & 5. a. b. in Trespass the Plaintiff recovered by Verdict, the Defendant brought Attaint against the Plain- tiff and Petit Jury, and one of the Petit Jury pleaded Ac- cord between the Plaintiff and Defendant and Satisfaction, and held a good Plea. For the Writ of (d) Attaint is not only grounded on the Record, but on Matter in Fact also, for the Supposition of the Falsity in the Oath, is Matter in Fact. And in 35 H. 6. 30. a. in Attaint brought on false Oath in Appeal of *Mayhem*, one of the Petit Jury pleaded Arbitrament between the Plaintiff and Defendant; and in all Cases where Arbitrament is a good Plea, Accord with Sa- tisfaction is a good Plea. *Vide* (f) 6 H. 7. 10. a. b. acc'. And gene- rally in all Actions where (g) Damages only are to be reco- vered, Arbitrament or Accord with Satisfaction is a good Plea; as in an Action of Wast in the (h) *tenuit*, where Da- mages are only to be recovered; and so is the Report of Serjeant *Bendlores* to be understood: For, in an Action of Wast against Lessee for Years in the i) *tenet*, Accord is no Plea, as it hath been before said. So it is to be collected on the Book of 35 H. 6. 30. a. that in Appeal of (k) *Mayhem* Accord with Satisfaction is a good Plea, because in the same Action Damages are only to be recovered. And so is the ge- neral Rule put in 6 E. 6. *Dier* (l) 75. in *Andrews's Case*. *Vi- de* 47 E. 3. 20. b. Accord for a Rent (m) reserved on a Lease for Years, 7 E. 3. *Issue* 9. (n) 11 H. 7. 4.

(a) 1 Rol. 265.
Cr. El. 304, 306.
Doct. pl. 17.
Cr. Jac. 100.

(b) Doct. pl. 17;
1 Rol. 265.
Lutw. 322.

(c) Yelv. 127.
9 Co. 78. a.
(d) Hetl. 112.
Cr. El. 357.
Doct. pl. 18, 19.
Dyer 75. pl. 27.
Fitz. Bar. 111.
Br. Accord 9.
Br. attaint 91.
(f) 6 H. 7. 10. a.
b. Br. Trespass
279. Br. accord 3
Plowd. 11 b.
9 Co. 79. b.
Doct. pl. 15.
Fitz. bar 150.
(g) 9 Co. 78. a.
Cr. El. 357.
Dyer 75. pl. 27.
Cr. Jac. 100.
4 Co. 1. b.
(h) Doct. pl. 17.
1 Brownl. 239.
1 Rol. 266.
(i) 9 Co. 8. b.
Cont. Cr. Jac.
100. 2 Inst. 307.
Doct. pl. 17.
Moor 6.
O. Benl. 4.
N. Benl. 35.
(k) Doct. pl. 17,
13. 9 Co 78. b.
(l) 2 Rol. Rep.
188. 9 Co. 78. a.
Cr. Jac. 100.
(m) Doct. pl. 18.
1 Rol. 266.
(n) 10 H. 7. 4. a.

Mich. 3 Jac.

In the Common Pleas.

HIGGENS'S Case.

IN Debt by *Randal* and his Wife Executrix of *Thermit-
thorpe* against *Higgins*, on a Bond made to the Testator
the Defendant pleaded that the Testator *in vita sua in cur-
ria de banco hic recuperavit debitum prædictum, ac 60 s. pro
damnis*, (without alledging any Execution,) *quod quidem
recordum recuperationis*, was removed, *extra bancum per
br. de Errore coram Rege, & ibidem remanet minime re-
versatum seu annullatum*, and thereupon it was demurred.
And it was objected, That if a Man recovers Debt on a
Bond, or Rent on a Lease for Years, it is at the Plaintiff's
Election to sue Execution on that Judgment, or to have a
new Action; and that for divers Reasons. 1 By the Judg-
ment, the Deed or Rent is not changed, but continues a
Deed and a Rent notwithstanding the Judgment; as if a
Man be indebted in (*b*) Arrearages on Accompt, and takes a
Bond for the Payment of them, yet he may have an Action
on the one or the other, as it is agreed in 11 *H. 4.* and
Mich. 2 Jac. Rot. 3272. in this Court in Debt by *Richard*
(*c*) *Brantbwait* against Sir *William Cornwallleys* the younger
on a Bond for Payment of Money, the Defendant pleaded
in Bar, *qd Querens post diem solutionis pecuniæ*, and be-
fore the Purchase of the Writ did accept of a Statute-Staple
for the same Debt, and in full Satisfaction of the Bond on
which the Plaintiff demurr'd: And it was adjudged for the
Plaintiff. For although he had taken a Statute for the same
Debt, which is a Matter of Record, and of a higher Nature
than the Bond is, yet the Bond did remain in Force; and
it was in the Plaintiff's Election to take his Action or Re-
medy on the one or the other. 2. It was objected,
That it would be against Reason to compel the
Plaintiff to sue Execution on the first Judgment, for
perhaps the Plaintiff knows that the first Judgment is

erro-

Doct. pl. 306

(*b*) 1 *Rol.* 604.
Br. Det. 64.
 11 *H. 4.* 79. *b.*
Fitz. Bar 185.
 22 *H. 6.* 55. *b.*
Dyer 21. *pl.* 132.
 51. *pl.* 14.
 (*e*) *Cr. Car.* 85,
 86. *Post.* 45. *b.*
 1 *Rol.* 470, 471.
Lit. Rep. 58.
 1 *Inst.* 212. *b.*
 9 *Co.* 79.
Lutw. 466.

erroneous, or that he has recovered by false Oath, in which Case the Judgm. is reverfable by Error, or Attaint, and therefore if he should sue Execut. it would be in vain; for he ought to reftore (when the Judgm. is reverfed) all that which he has received. 3. It was objected, if in Debt on a Bond the Def. denies his Deed, and it be found his Deed, in that Case the (a) Deed shall be delivered to the Pl. and the Reason is, to the End that he may have a new Action if he will; but if it be found not his Deed, the Deed ought always to remain in Court, till the Pl. has reverfed the Judgm. *Vide 9 E. 4. 50. a. b.* If two be bound in a Bond jointly and feverally, and the Obligee recovers againft one of them on this Bond, the Nature of the Bond is not fo changed by this Recovery, but he may on the fame Bond have an Action againft the other. But it was refolved, that as long as the (b) Judgm. remains in Force he cannot have a new Action upon the fame Bond; for as he who has a Debt by fimple (c) Contract, and takes a Bond for the fame Debt, or any Part of it, the Contract is determined, *3 H. 4. 17. b. 11 H. 4. 79. b. 9 E. 4. 50. b. 51. a.* So when a Man has a Debt on a Bond, and by ordinary Course of Law has Judgm. thereon, the Contract by Speciality which is of an inferior Nature, is by (e) Judgm. of Law changed into a Matter of Record, which is of a higher Nature. 2. If he who recovers may have a new Action and a new Judgm. he may have infinite Actions, and infinite Judgm. to the perpetual Vexation and Charge of the Def. & (e) *infinitum in jure reprobatur* 3. On every Judgm. the Def. shall be (f) amerced, and if he be a Duke, Marq. Earl, Vifc. or Baron, he shall be amerced to 100 s. and fo the Def. might be infinitely amerced on one and the fame Obligation, which would be mifchievous, & (g) *interest Reipublicæ ut fit finis litium.* And if a Man has a Liberty by Prefcription, and takes Letters Patents thereof, the Matter of Record drowns the Prefcription which was the Inferior, as it is held in *33 H. 8. Br. (b) Prefcription 102. Vide 10 H. 7. 21. a. b. & 24. b. 2 E. 4. 14. b. 22 H. 6. 56. 8 H. 4. 16. 34 H. 6. 26. &c.* And if a Man has an Annuity by Deed or Prefcription, and brings his Writ of Annuity and has Judgm. fo long as this (i) Judgm. doth remain in Force, he shall never have a Writ of Annuity, (altho' it be an Annuity of Inheritance) but a *Sc. fa.* on that Judgment; becaufe the Matter of the Speciality or Prefcription, is by the Judgm. altered into a Thing of a higher Nature. *Vide 37 H. 6. 13. b. (k) Judgm. in an Action of Forgery of a false Deed, is a good Bar in another Action on the fame Forgery. But if (l) Recovery be in Debt on a Bond in the County by Jus-ticies, there notwithstanding fuch Judgment, the Plaintiff may have an Action of Debt on the Bond in a Court of Record, for the County Court is not of Record, and therefore the Bond is not changed into any Thing of a higher Nature;*

(a) Co. Lit. 231. b.
5 Co. 74. b. Palm. 41.
1 Sid. 131, 170.
(b) 2 Rol. Rep. 108.
Yelv. 133.
Cr. Jac. 338.
Cr. El. 608, 817.
Doct. pl. 67.
Owen 37.
Larch. 193.
Moor 545.
(c) 1 Rol. 604.
Br. Der. 64.
Br. Contract 8, 33.
Obligation 21.
Det. 57, 64.
Firz Bar 175.
13 H. 4. 1. a.
Dyer 21. pl. 131.
B. N. C. 105.
2 E. 4. 14. a. b.
29 H. 8. Br.
Contract 29.
Dall. 53.
(d) 21 H. 7. 5. b.
Cr. Car. 415.
9 E. 4. 50. b.
Dy. 21. pl. 131.
16 E. 4. 3. b.
Cr. Jac. 481.
Hard. 368.
(e) 8 Co. 168. b.
12 Co. 24.
2 Inft. 340.
2 Bullfr. 99.
Hob. 159.
(f) Postea 54. a.
8 Co. 40. a.
2 Inft. 28.
19 E. 4. 9. a.
21 E. 4. 77. b.
(g) 11 Co. 69. a.
3 Bullfr. 98.
Godb. 242.
Hard. 128.
6 Co. 9. a.
(h) Palm. 83.
(i) Doct. pl. 66. l.
Co. Lit. 145.
(k) Doct. pl. 67.
(l) Doct. pl. 67.

but

but so long as such Judgm. remains in Force the Pl. shall not have another Action by *Justicies* in the same Court for the infinite Vexation of the Party, as hath been said. And as to the said Case of *(a) Brambrow*. it was agreed to be good Law; for a Stat. *(b) Staple*, or Bond in the Nat. thereof, is but a Bond recorded and one Bond, be it of Record, or not of Rec. *(c)* cannot merge another. Also a Bond, and Bond in the Nature of a Statute Staple are two distinct Liens, made by Assent of the Parties without Process of Law, whereof the one hath no Dependancy on the other. But in an Action brought on a Bond, the Suit is grounded on the Bond, as a Building upon a Foundation; and the Pl. hath Judgm. to recover the Debt due by the Bond; so that by judicial Proceeding, and Act in Law, the Debt due by the Bond is transformed and metamorphosed into a Matter of Record: and Judgm. in a Court of Record is of an higher Nature than a Stat. Staple, Stat. Merchant, or any Recognizance acknowledged by Assent of the Parties, without judicial Proceedings. And as to the Objection which was made, that perhaps the Recovery is erroneous; to that it was answered, that that was the Pl. Fault, and altho' it be erroneous, yet so long as it remains in Force, it ought to be executed; and when it is reversed, then the Obligee is restored to his new Action on the Bond. And it is true, that in old Books, after Judgm. given in an Action of Debt on a Bond, the Bond shall be damned, because the Duty was changed into another Nature, and that was the true Reason of the old Books, and not the Reason which *Brook* supposes in Abridging the Case of 11 *H.4. fairs* 19. that otherwise the Obligee might again recover thereupon. And therewith agree 9 *E. 4. 51. a. 7 H. 4. 39. b. 11 H. 4. 73. b. 45 E. 3, 11, &c.* And the Court had Consideration of the Book in 17 *E. 3. 24.* where *Ed. Devon* brought an Action of Debt on a Bond of 20 *l.* against *Richard Scot*, who pleaded, that before the Mayor and Bailiffs of *Newcastle* upon *Time*, the Plaintiff by Plaint on the same Bond, recovered and had Execution; and there because the Defendant did procure the Bond to be damned, the Plaintiff had Judgment to recover again, notwithstanding the former Judgment and Execution, And there *Shard* said to the Defendant, see now the Deed be damned. But the Court said, that that Judgment was given because it was the Defendant's Folly, that the Deed was not damned on the former Judgment. For in the Time of *E. 3. R. 2. and H. 4.* It was held, That when a Man did recover on a Bond, that the Deed (as hath been said) should be damned. Wherein the Content and Quietness of Men in old Times ought to be observed, that when Judgm. was given against them by Course of Law, they

(a) Ant. 44. b.
 1 Rol. 470, 471.
 Lit. Rep. 58.
 Cr. Car. 85, 86,
 (b) Bridgm. 123
 (c) 11 H. 4. 79. b.
 1 Rol. 604. Br.
 Contract 33.
 Br. Det. 64.
 Br. Obligar. 23.
 13 H. 4. 1. a.
 Lit. Rep. 58.
 Cr. Car. 85, 86.
 193. 1 Brown. 47
 Hob. 68, 69.
 Cr. Jac. 579, 649
 650. Cr. El. 716,
 727. Mo. 872.
 Stile 339. 340.
 1 Mod. Re. 221.
 4 Co. 59. l. 60. a.
 5 Co. 28. b.

they were satisfied therewith without prying with Eagles Eyes into Matters of Form, or the Manner of Proceeding, or of the Trial, or Insufficiency of the Pleading, &c. to the Intent to find Error to force the Party to a new Suit, and himself to a new Charge and Vexation. But since Men became mote contentious, and not satisfied with any Trial or Judgment, but Writs of *Error* and *Attaints* (which in old Times were rare, and especially Writs of *Error*) were so frequent, as of more late Time they were, the Judges thought it dangerous to cancel the Deed, either where the Plaintiff recovered, or where he was barred by Judgment, for in both Cafes the Judgment might be reversed by Error or Attaint, and therefore the Reason and Cause of the said Judgment in 17 *E. 3.* is now changed, and there is not any Question but Judgment and Execution upon a Bond, is a good Bar in a new Action thereupon; and therefore the said Book of 17 *E. 3.* is not to be urged against this Judgment. Also the Court said, that if a Man brings an Action of Debt on a Bond, and is barred by Judgment, so long as the Judgment stands in Force, he cannot have a new Action: *Pari ratione* when he hath Judgment in an Action on the same Bond so long as the Judgment stands in Force, he shall not have a new Action. And as to the Case which has been objected, that where two are bound jointly and severally, and the Obligee has Judgment against one of them, that yet he may sue the other, it was well agreed. For against him the Nature of the Bond is not changed, for notwithstanding the Judgment, he may plead that it is not his Deed. And afterwards in the Case at Bar, Judgment was given against the Plaintiff, and the Doubt in 9 *E. 4.* 50. *b.* 51. *a.* where this Matter is very well debated on both Sides, well resolved.

17 *E. 3.* 24. *a.*
Antea 45. *b.*

Antea 7. *a.*

5 *Co.* 86. *b.*
Antea 45. *a.*
Cr. Jac. 338.
Godb. 257.
Hob. 2. 4 *H.* 7. 8.
a. b. 1 *Rol. Rep.* 8

Mich.

Mich. 3 Jac.

In the Common Pleas.

DOWDALE'S Case:

Cr. Jac. 55.

(a) Cr. Jac. 503.

(b) Cr. El. 842.
B. N. C. 451.
(c) Kelw. 51. a.(d) Dy. 271. 272.
Pl. 29. 2 Rol. 689.
Palm. 366.
Postea 47. a.

IN Debt by *Richardson* against *Dowdale*, Executor of *Lante*, the Defendant pleaded, fully administered, and the Plaintiff said, that he had Assets at *Excester*, and the Jury found that the Testator died *infra regnum Hiberniæ*, and that the Defendant after the Testator's Death, divers of the Testator's Goods within the Realm of (a) *Ireland* took and administered, to the Value of the Debt, and that the Def. *Nulla alia sive plura bona quæ fuer' præd' testatoris, post mortem testatoris infra regnum Angliæ unquam administravit, Et si, &c.* And it was objected by the Defend. Counsel, that it hath been a Question in old Books, whether the Jury can find transitory Things in a foreign County, and in 2 *Ma. Br. Att. (b)* 104. it is held that the Jury of one County are not (c) compellable to find transitory Things in another County, but at their Pleasure; and it was said, as a Jury of one County cannot find a Thing which is local in another County, so a Jury cannot find any Thing although it be transitory, done in another Realm; for by Presumption of Law they can in neither Case take Consuance of the Thing. As in 10 *El. Dyer* 271. (d) In Debt brought in *London* against one as Son and Heir on a Bond made by his Father, who pleaded nothing by Descent at the Time of the Writ purchased, nor ever after, &c. and the Plaintiff averr'd Assets by Descent in *London*, in *Parochia & Ward prædict'* and gave in Evidence Assets in *Cornwal*, and whether that were good Evidence, or whether the Jury might find it or not was the Question; and there it seems it was not good Evidence; nor could the Jury find this local Matter in a foreign County. And 47 *E. 3. 2. 21 E. 4. 10. a. 22* and 36. *b. 10 H. 7. 22. a. b. 11 H. 7. 16. a. b.* and many other Books are, that a Thing merely done beyond Sea, shall not be tried here. But after many Arguments and good Consideration it was resolved,

solved; that Judgment should be given for the Pl. And in this Case these Points were resolved for good Law. First, when the Place is material, as when it is made Parcel of the Issue, there the Jury cannot find the Point in Issue in any other Place, for by special Pleading, the Point in Issue is restrained to a cert. Place. 2. There is a Difference when the Place is named but for Conformity and Necessity; and when (as it hath been said) it is Parcel of the Issue, as in the Case which hath been put in 10 *Eliz.* in Debt against the Heir, he pleadeth nothing by Descent generally, in that Case the Plaintiff could not reply in so general a Manner, for then no Trial could be had thereof, but in such Case, for Conformity and Necessity of Trial, he ought to name a certain Place, as there he did, within a Parish and Ward within *London*. But God forbid, but that the Jury may find Affets by Discent, in any other County within *England*; for the Law is, that the Pl. in such Case shall have in Execution all the Lands which the Heir has, and perhaps he has Lands in divers Counties, and therefore altho' one Place be named for Necessity, yet the Jury may find all that which by Law shall be chargeable in such Case, in what Town or County soever it lies, and so was the principal Case resolved afterwards in 10 *Eliz.* altho' it be not there so reported; and therewith in Effect agrees 10 *H. 6. 13. b.* adjudged, and therefore the said Conceit of *Brook 2. Ma. Attainr* 104. was utterly denied *per totam Cur'*, for they are bound under Pain of Attaint, to find Affets in any County whatsoever. For, (as it hath been said) it may be that the Ex'or has Goods of the Testator in divers several Counties, and which in none of the said Counties by it self is sufficient. So if a Man has 20 Acres of Land in Tail in the County of *N.* and 20 Acres of equal Value in Fee-simple in 20 several Counties, and makes a Feoffment in Fee of the Land in Tail with Warranty and dies, the Issue in Tail brings a Formedon for the Land in *N.* in this Case the Feoffee can alledge Affets but in one County only; but the Jury are bound on manifest Proof upon Pain of Attaint, to find the Affets in all the several Counties in which the Feoffor had Lands in Fee-simple. 3. On every general Issue the Jury ought to find all local Things in any other County, which are material in Law for the Matter in Question, as Warranty and Affets in another County: So where Lands are exchanged for Lands in another County, and the like. 4. When a Bar is pleaded in a real or personal Action, as a Release, &c. in a foreign County, there the Jury that try it shall assess Damages for the Profits of the Lands in another County, and so by a Mean shall enquire of Things local in another County, which originally they cannot do, *quia multa conceduntur per obliquum,*

1 Bullst. 130.
Hob. 170.Dyer 30. pl. 206.
Hutt. 8.
7 Co. 27. a.
Calvin's Case.
Cr. Jac. 503.
Co. Lit. 282. b.
Hardr. 61.

2 Rol. 689.

Co. Lit. 282. b.

Cr. El. 842. b.

B. N. C. 451.
Moor 47, 207.Co. Lit. 261. a. b.
282. b. 7 Co. 27
Calvin's Case
2 Sid. 118.

Cr. El. 842.

quæ

que non conceduntur de directo. And when they try the Matter of the Bar on good and pregnant Evidence they ought to find all Dependants thereupon, as Damages, &c. And by these Differences you will better understand your Books, which at first seem to disagree, 3 E. 3. *Affize* 446. 18 E. 3. 38. 21 E. 3. 11. 1 *Aff. p.* 16. 3 *Aff. p.* 4. 6 *Aff. p.* 4. 5 *Aff. p.* 7. 21 *Aff. p.* 8. 29 *Aff. p.* 5. 44 E. 3. 6. b. 14 H. 4. 35. 5 H. 5. 2. 10 H. 6. 13. 21 H. 6. 51. 33 H. 6. 37 H. 6. 2. 7 E. 4. 45. 18 E. 4. 1. 22 E. 4. 19. 13 H. 7. 17. *Br. Issue* 82. 2 *Mar. Br. Attaint* 104, and the *Quere* in *Dyer* 10 *Eliz.* 271, 272. well resolved. But it was resolved, That in the Case of Felony the Trial shall be always by the Com. Law in the same Place where the Offence was, and shall not be supposed in any other Place; For in Criminal Causes the Rule holds *Ubi quis delinquit, ibi punietur.* Lastly it was resolved, That the Jurors have found the Substance of the Issue, that is to say, Assets; and the finding that they are beyond Sea is surplussage. For, if the Executors have Goods of the Testators in any Part of the World, they shall be charged in Respect of them. For many Merchants and other Men, who have Stocks and Goods to a great Value beyond Sea, are indebted here in *England*, And God forbid, that those Goods should not be liable to their Debts; for otherwise there would be a great Defect in the Law. *Vide M.* 30 & 31 *Eliz.* in an Action on the Case on *Assumpsit*, (which Action was grounded on an Instrument called a Policy, commonly made between Merchants for Assurance of their Goods) the Pl. declared, that the Def. at *London* did assume, that such a Ship should sail from *Melcomb Regis* in the County of *D.* to *Avvile* in *France* safely without Violence, &c. And the Pl. declared, that the said Ship in sailing towards *Avvile*, *sc.* in the River of *Soame* in the Realm of *France*, was arrested by the King of *France*, &c. and the Parties came to issue, whether the said Ship was so arrested or not; And this Issue was tried by *Nisi prius* before *Wray* Ch. Just. in *London*, and found for the Pl. And it was moved in Arrest of Judgm. that this Issue, arising merely from a Place which is out of the Realm, could not be tried: For whether the Ship was arrested in the River of *Soame* in *France*, or not, is merely and wholly out of the Realm, and therefore it could not be tried; And thereupon the Books were cited in 10 H. 7. 22. a. b. 11 H. 7. 16. a. b. 21 E. 4. 10. a. 47 E. 3. 2. 12 H. 4. 16. 13 E. 1. *Mortdancest.* 47. 12 H. 3. *ib. p. ult.* 29 *Aff. p.* 11. And if it could be tried, it was said, That the Jury should come from *Melcomb*, for by Common Intendment they may have best Knowledge of the Arrest. And it was answered and resolved, That this Issue should be tried where the Action was brought; and it was agreed, That where as well the Contract as the Performance of it is wholly made, or to be done beyond Sea, and it so appears there, it is not triable in our Law; but

1 Brownl. 32.

Cr. Jac. 55.
Hard. 64, 346.

4 Inst. 142.

Selden sur For-
tescue 31.
10 H. 7. 22. a. b.
Owen 6.
Moor 178.
Vaugh. 213.
Godb. 76.
1 Mod. Rep 37.
Co. Lit. 261. b.
7 Co. 26. 27.
Calvin's Case.
1 Sand. 247.
1617 Car. 2. c. 8.

but here the Promise was made here in *London*, which is the Ground and Foundation of the Action: And therefore there in this Case of Necessity it shall be tried, or otherwise it should not be tried at all. And the Arrest which is in Issue is not the Ground of the Action, but the *Assumpsit*, and the Arrest is the Breach of the *Assumpsit*; and therefore in this Case of Necessity it shall be tried where the *Assumpsit*, which is the Ground and original Cause of the Action, was made. And the Record of a Case in an Action of Debt of 500*l.* between *Hugh Gynn* Plaintiff, and *Evangelist Constantine* Defendant, *Pasch.* 28 *Eliz.* was shewed the Court; which was, That *Constantine* by Indenture of Charter-party made at *Tberford* in *Norfolk*, did covenant with *Hugh Gyn*, that such a Ship should sail from *Blackney* in *Norfolk* to *Muttrel* in *Spain*, and should there stay for a certain Time, and bound himself in 500*l.* to perform it. In which the Issue was, whether the Ship did stay at *Muttrel* aforesaid for a certain Time; which Issue was tried for the Plaintiff by a Jury *de vicineto de Tberford*, where the Charter-party was made; and after long Deliberation, Judgment was given in the King's Bench for the Plaintiff. Note Reader, this Point hath been twice adjudged. *Vide* 7 *H.* 6. 14. *Quare Impedit.* *Vide* 5 *R.* 2. *Trial* 54.

Co. Lit. 261. b.
Yelv. 202.

Godb. 204.
2 Leon. 22.
3 Leon. 172.
4 Inst. 141, 142.
Co. Lit. 261. b.

1 Brownl. 22.

Co. Lit. 261. b.

Mich.

Mich. 3 Jacobi,
In the King's Bench,

B O S W E L ' S *Case.*

Jr. Jac. 92.
Co. Ent. 264.
nu. 14.
1 Sid. 94.
Jenk. Cent. 281.

3 Bulst. 174.

3 Bulst. 174.
N. Bendl. 45.
pl. 79. F. N. B.
38.

Cr. Jac. 93.

Anthony Lowe brought a *Quare Impedit* of the Church of *Wymbisb* against *Richard* Bishop of *London*, and *John Lancastre*, and counted, That *Henry* Earl of *Sussex* was seised in Fee of the Manor of *Wymbisb*, to which the said Church was appendant, who presented *John Lancastre* one of the Defendants, who was admitted, instituted and inducted, and afterwards the said Earl died seised, after whose Death the Manor to which, &c. descended to *Robert* now Earl of *Sussex*, who levied a Fine of the said Advowson to *Edward Hamond* in Fee, who granted the next Avoidance to *Anthony Lowe* the Plaintiff, and afterwards the said *John Lancastre* resigned to the said *Richard* Bishop of *London* the other of the Defendants, whereby the Church became void by the said Resignation, and so it did belong to the Plaintiff to present, and the Defendant did disturb him. The Bishop pleaded, *Quod ipse nihil habet, nec habere clamat in Ecclesia prædictâ nisi admissionem, institutionem & destitutionem personarum, &c. & petit judicium si absque speciali impedimento, &c.* *John Lancastre* the other Defendant pleaded, That before the Writ purchased he was in the said Church by the Space of six Months, of the Presentment of the said *Henry* Earl of *Sussex*, *absque hoc*, that the Church was void *modo & forma*; as the Plaintiff had declared. As to the Plea of the Ordinary, the Plaintiff prayed a Writ to the Bishop against him, *& conceditur, sed cesset executio quousque* the Plea between the Plaintiff and the other Defendant be determined. As to the Plea of *Lancastre*, the Plaintiff did maintain that the Church was void *modo & forma*, &c. on which they were at Issue, and at *Nisi prius* it was found for the Pl. And farther the Jury did enquire of the three ordinary Points, 1. *Si Ecclesia plena sit,*
&

Et sic, ex cuius presentatione. 2. The yearly Value of the Church. 3. Si tempus semestre transierit after the Avoidance. Cr. Jac. 93. Dyer 185. pl. 12.

As to the first, they found that the Church was full of Lawrence Boswell, ex presentatione Dominæ Eliz. Regine Angl^æ Co. Lit. 344. b. pendente brevi de Quare Impedit. As to the second, that the Church was of the yearly Value of 80 l. As to the third, that the Action was brought within six Months after the Avoidance; on which Verdict judgment was given in this Manner. Ideo consideratum est, quod præd^{us} Antonius recuperet versus præfat. Johannem Lancastre presentationem suam ad Ecclesiam prædictæ quæ modo plena existit de præfato Laurentio Boswell, ex presentatione dictⁱ nuper Regine Eliz. pendente præd^{us} breve de Quare Impedit inter ipsum Antonium & præfat. Johan^{em}, & damna sua ad valorem Ecclesiæ præd^æ per dimid^{um} anni, quæ in se attingunt ad 40 l. per jurator præd^{um} in forma præd^æ assess. & habeat breve præf. Episcopo London^{is} illius Ordinari^{us}, quod non obstante reclam^{atione} sua, aut reclam^{atione} præd^æ Joh^{annis} & Laur^{entii}, seu eorum alterius (licet 2 Rol. 389. idem Laurentius ad Ecclesiam præd^{am} pendente breve præd^æ dictⁱ admissus, institutus, & in eadem inductus existat) eundem Laurentium ab Ecclesia prædictæ removeat, ac ad Ecclesiam illam ad presentationem ipsius Antonii idoneam personam admittat: It præd^{us} Johan^{em} in misericordia. And on this Jugm. a Writ of Error was brought, and divers Errors assign d. And now this Term after many Arguments at the Bar and Bench these Points were resolved per totam Cur^{iam}. 1. That at the Com. 2 Inst. 353, 354. &c. Law before the Stat of West. 2. cap. 5. If one com. Person had presented to a Church which did belong to another common Person, and his Clerk had been admitted and instituted, (in which Case, in the Case of a com. Person, the Church was full) presently thereby the rightful Patron was out of Possess. and the Usurper had gained the Inheritance of the Advowf. by Wrong, and the lawful Patron had lost the Presentment *hac vice* for ever. For he had no other Remedy but a Writ of Right of Advowson, in which the Inheritance of the Advowson should be recovered, but the Incumbent should not be removed. And that is the Reason why full or not full shall be tried by the Bishop, because the Church is full by Institut. which is a spiritual Act; For if it should not be full till Induction, then full or not full should be tried by the Verdict of 12 Men according to the Com. Law: For Induction is a Thing notorious, and shall not be tried by the Bishop, *Vide* 22 H. 6. 27, &c. And yet in some Case a Jury shall inquire of the Plenarty, as in this Case, and in all *Quare Impedit*, one of the 3 Points inquirable is, if the Church be full, or not. And at the Common Law as well Infants as Feme-coverts, were put to their Writs of Hob. 2, 3.

2 Inst. 359.

Right in the same Case, and there were two Reasons at the Common Law in the said Case. 1. That he who came in by Admission and Institution, came in by a judicial Act, and the Law presumes that the Bishop, who has the Cure of the Souls of all within his Diocese, for which he shall answer at his fearful and final Account (in Respect of which he ought to keep and defend them against all Hereticks and Schismaticks, and other Ministers of the Devil) will not do or assent to any Wrong to be done to their Patronages, which is of their earthly Possession; but if the Church be litigious, that he will inform himself of the Truth *de Jure Patronatus*, and so do Right. 2. Another Reason was, that by the Com. Law, in every Parish there ought to be *idonea persona*: For so it appears by the Words of the *Quare Impedit, Quod permittat presentare idoneam personam, &c.* which Epithet *Idonea* includes Ability in Learning and Doctrine, Honesty in Conversation, and Diligence in his Function, and all that to instruct the People of God in true Religion and good Conversat. and to avoid Contention; and to the Intent that he who has so great a Charge might effectually and peaceably attend his Charge, the Com. Law did provide, that after Institution he should not be subject to Actions; and so neglect his Duty, in losing his Time in Suits and Troubles in Law; and that was the Reason of the Com. Law, That after Institution into the Church at the Presentation of another, altho' he had no Right, that the Incumbent should not be removed at the Suit of any Common Person: but to recover his Right, he might have a Writ of Right of Advowson, by which the Incumbent should not be removed. And it is to be observed in these Cases, forasmuch as the final Intent of the Law was to have *idoneam personam*; and that no Profit might by any Means arise to the Patron (for that would be detestable Simony) the Com. Law did prefer the Service of God to be celebrated, and the People of God instructed *per idoneam personam* in Peace and Quietness before any Right of any other common Person, and without any Regard to Infancy, Coverture, or any such like Disability of the Patron. But at the Com. Law, if one had (a) usurped on the King, and his Presentee had been admitted, instituted and inducted, (for without Induction the Church is not full against the King) yet the King at the Common Law might have a *Quare (b) Impedit*, and thereby remove the Incumbent; for no Act of the Bishop or any other could bar the King of his Right; & (c) *nullum tempus occurrit Regi*. But in such Case, altho' it concern'd the King, if the Presentee of another be admitted, instituted and inducted, the King could not present till he had removed the Usurper's Incumbent by *Quare Impedit*, and

(a) Ant. 30. a.
Cr. El. 241, 519.
Cr. Jac. 54, 123,
385. 2 Rol. 349,
371. Moor 338.
Hob. 242.
Owen 7, 8.
4 Leon. 118.
2 Rol. Rep. 7.
1 Mod. Rep. 277.
(b) Cr. Jac. 385.
Antea 30. a.
Co. Li. 133. a.
2 Rol. 349.
3 Bulltr. 90.
Lit. Rep. 354.
(c) Hob. 347.
Lit. Rep. 99, 340.
Co. Lit. 41. b.
90. b. 118. a.
294. b. Hard.
24, 25. 1 Jones
79, 2 Inst. 273,
360. Godb. 297,
305, 312, 217.
Plowd. 321. a. 3.
1 Rol. Rep. 165.
Palm. 357, 357.
2 Rol. Rep. 422.

Co. Lit. 17. b.

and that was (as hath been said) to avoid Contention in the Church; so that he who is in in such Manner, shall not be removed, but by Process and Course of Law, altho' it were in the King's Case. But if a Bishop (a) collates without Title to a Church presentable, and his Clerk is inducted, yet that should not put the rightful Patron out of Possession; for that is but a Provision for the Celebration of Divine Service, in the mean Time till the Patron presents, and that belongs to his Office, and therefore shall not put the Patron to a *Quare Impedit* in such Case, but his Presentee ought to be received without any Process of Law; and therefore in such Case no Plenarty by Collation can be pleaded against the Patron; for no Plenarty is available in Law, against him who has Title to present, but only Plenarty by Presentation. And therewith agree the Words of the Stat. of (b) *Westm. 2. c. 5. Cum aliquis, &c. presentaverit ad aliquam Eccles.* But Plenarty by (c) Collation at the Com. Law, did put him who had Right to collate to his Writ of Right at the Com. Law. For as Plenarty by Presentation did put him who ought to present out of Possess. at the Com. Law, *parratione & jure*, Plenarty by Collation put him who ought to collate out of Possession. For (d) *eadem lex est ubi eadem est ratio.* And that appears by the Judgment in 17 *E. 3. 64. b.* in the Dean of *Lincoln's* Case. But forasmuch as Bishops would admit and institute Presentees, without informing themselves, (as they ought to do) of the Right of him who presented, many Patrons lost their Presentment without any Regard to Infancy, Coverture, &c. For that Reason the said Act of (e) *Westm. 2. cap. 5.* was made, and that recites. *Cum aliquis jus presentandi non habens presentaverit ad aliquam Ecclesiam, cuius presentatus sit admissus, (id est institutus) ipse qui est verus Patronus per nullum aliud breve recuperare potuit advocacionem suam quam per breve de recto.* By which Act (f) three Points amongst others were provided. 1. If an Usurpation be made on an Infant, or Feme-covert, who has an Advowson by Descent, the Infant after his full Age, and the Wife after the Death of her Husband, shall have the same Action by *Quare Impedit*, or *Assise of Darrein presentment* as her late Ancestor might have had. So if Tenant in Dower, or Tenant by the Courtesy, or Tenant for Life, or in Tail, suffers an Usurpat. he in Rev'n who claims it by Descent, shall have the same Remedy. So the same Law of an Usurpat. in the Time of the (g) Vacancy of the Bishoprick, Archdeaconry, Rectory, &c. but in all these Cases the Usurper has gained the Inheritance by Wrong, and the Stat. will not revert the Right, but only give a possessory Action to remove the Incumbent; where by the Com. Law they had not any Remedy, but by Writ of Right, in which they should recover their Inheritance, but not their Presentment. 16 *E. 3. Quare Impedit*

(a) 2 Inst. 351.
2 Rol. 350.
Hob. 242, 302.
Co. Lit. 344. b.
Antea 29. b.

(b) Anr. 30.

(c) Antea 30. a.
2 Rol. 350.

(d) 7 Co. 18. b.
Calvin's Case.
Co. Lit. 10. a.
191. a. 232. a.

(e) 2 Inst. 353
354, 355, &c.

(f) Vide B. tit.
Present' al Ff.
glice 46. 14 H.
8. 31. Hob. 238.
Hert. 160.
2 Inst. 359.
1 Jones 48.
Cait. 34, 354

(g) Hob. 240.
Cr Jac. 673.
2 Inst. 359.
Cait. 34.

(a) Hob. 240, 241
 1 Jones 46, 48.
 Herl. 160
 F.N.B. 34. x.
 2 Inst. 358.

Impedit (a) 67. *Adams's Case*. *D.* was seized of a Manor to which an Advowson was appendant, and died; the Manor to which, &c. descended to an Infant, the Church became void and *Adam* usurped during the Infancy of *E.* *E.* at full Age infeofed *F.* of the Manor, and afterwards the Ch. became void, and *F.* presented, and the Assignee of *Adam* brought a *Quare Impedit*, and it was adjudged, that by the Usurpat. the Infant was out of Possess. of the Advowson so that by his Feoffin. of the Manor at his full Age, nothing in the Advowson pass'd to the Feoffee, because the Feoffor had but a Right, and the Usurpation was voidable by Action, which could not be transferred to a Stranger. And it seems also by the Book that *E.* was likewise without Remedy in such Case. But it is agreed

(b) 2 Inst. 356.

per totam Curiam in 50 *E.* 3. 14. *b.* (b) That if Ten't for Years or Guardian, brings a *Quare Impedit*, altho' the Def. has a Writ to the Bishop against the Termor or Guardian, and his Presentee be admitted, instituted and inducted, yet the Tenant of the Freehold is not thereby put out of Possess. Note a good Difference betwixt him who usurps by Wrong, as in 16 *E.* 3. aforesaid, and him who has no Right, and yet his Presentee comes in by Course of Law: *Et nota*, that the Words of the Stat. are general, *fus presentandi non habens*. The second Thing which is enacted by the said Act is, that Plenarty is no Pleain an Affize of *Darrein* Presentment, or *Quare Impedit*; for the Words of the Stat. are *Dummodo breve infra Tempus*

(c) 2 Inst. 356.

semestre impetretur, quanquam infra tempus semestre presentationis suam recuperare non possit. The 3 Thing is, *de cetero in brevibus ultimæ presentationis quare impedit adjudicentur Damna, viz. si tempus semestre transierit per impedimentum alicujus, ita qd' Episcopus Ecclesiam conferat, et verus patronus ea vice presentationis suam amittat, adjudicentur damna ad valor' Eccl' de duob' annis: Et si tempus semestre non transierit, sed disrationetur present' infra tempus præd', tunc adjudicentur damna ad valorem Medietatis Eccles. per unum annum, &c.* If an (d) Infant, or a Feme-covert hath an Advowson by Purchase, they are not within the said first Purview of the said Act, but they are within the said second Branch, if they pursue their Remedy within the 6 Months, by *Quare Impedit*, or Affize of *Darrein* presentment. So of an Advowson which they have by Descent, they may by the second Purview have a *Quare Impedit*, or Affize of *Darrein* presentm. within the 6 Months; but if they surcease that Time then the Infant, *postquam hæres ad etatem pervenerit*, shall have also his Remedy, the same Law of a Feme-covert after the Death of her Husb. See *Bract. lib. 4. fol. 244. 1 E. 2. Quare Impedit* 43. 20 *E. 2. Common* 22. 44 *E. 3. 18. 34 H. 6. 28. 35 H. 6.*

(d) 2 Inst. 357.
 359. Hob. 239.
 Dyer 259. pl. 20.
 2 Inst. 358.

63. And note, (e) if Ten't in Tail suffers an Usurpat. and dies, the (f) Issue in Tail is remedied by the Equity of the first Branch; which Estate-tail was created at the same Parliam.

(e) 2 Inst. 359.
 Hob. 239
 (f) 1 Jones 49.
 Hob. 241.
 2 Inst. 358.

For, after the Stat. the Issue in Tail cannot have a Writ of (a) Right of Advowson, and therefore shall be aided by the said first Branch, as it is held in 43 E. 3. 24. and 25. *Vide 46 Ass. p. 4. 8 E. 2. Quare Imp. 167. 34 H. 6. 28.* Also it was resolved, that in a *Quare Imp.* or Affize of *Darrein* presentment at the Com. Law, the said 3 Points (b) were not inquirable *ex officio* (as appears by *Bract. lib. 4. tract. 2. c. 6. § 7. fol. 246.*) who wrote in the Time of H. 3. before the said Act of *West. 2.* but now they are inquirable by Force of the 3d Branch of the same Act. For inasmuch as the Pl. is thereby to recover the Value of the Church for 2 Years, if he cannot recover his Presentment and the Value of the Church by half a Year, it is needful for the Court to inquire, if the Ch. be full, or void. 2. If full, of whose Presentment it is full, to the Intent it may appear to the Court, if he may recover the Presentment or not; and lastly, the Inquiry of the Value of the Church is needful, forasmuch as according to that he shall recover Damages. *Vide 8 E. 3. 5. 27 E. 3. Damages 106. 43 E. 3. 11. 11 H. 4. 80. 3 Eliz. Dier 194.* And at the Com. Law before that Stat. in a *Quare Impedit* the Patron did not recover any (c) Damages; for the Law doth so abhor Simony, that it gives the Patron no Recompence either for his Presentment, or for any Disturbance thereof. But at the Com. Law a *Quare Impedit* lies, when the Bishop for any Colour or Cause, will not admit his Clerk, or when any other disturbs him, so that he can not prefer his Clerk, then before the Ch. is full, he may have a *Quare Impedit*, and have a Writ to the Bishop, but shall recover no Damages. Note Reader, it was adjudged, *Pasch. 32 El.* in a Writ of Error in the K's Bench between (d) *Burkberd* and the Queen on a Judgm. given in a *Quare Impedit* in the Com. Pleas against him for the Ch. of *Rettingden*, in the County of *Essex*, That the Q. should not recover (e) Damages in a *Quare Impedit*, and the Reason and Cause thereof was shewed by *Wray* Ch. Just. 1. Because at the Com. Law no Damages were recovered in a *Quare Impedit*, and at this Day no Damages can be recovered but only in Case where they are given by the said Stat. of *West. 2. § ideo* the Qu. cannot recover any by the Com. Law. 2. The Queen is (f) not within the said Clause of the Act of *West. 2.* which giveth the Damages, for the said Clause, as appears before, hath 2 Branches: 1. *Si tempus semestre transferit per impedimentum alicujus, ita qd' Episcop' Ecclesiam consecrat, & verus patronus presentationem ea vice amittat, &c.* and the Queen is not within this Branch; for she cannot lose her Presentment, and by Consequence cannot have double Damages; and the 2d Branch, *Et si tempus semestre non transferit, &c.* depends on the other; so that forasmuch as the Queen is not within the first, she cannot be within the second. And so the Doubt in 7 *El.* (g) *Dyer*,

(d) F.N.B. 30. b.
1 Jones 49.

(b) 16 Co. 118. b.
Dyer 135. pl. 12.
2 Rol. 722.
2 Keb. 409.
Co. Lit. 344. b.

(c) Co. Lit. 17. b.
344. b. 2. Inst.
362. 3. Inst. 158.
5 Co. 59. a.
Cr. El. 162.

(d) 11. eop. 149.
Cr. El. 162.

(e) Dyer 238.
pl. 28. 2. Inst. 362.
Cr. El. 162.
2 Leon. 149, 150.

(f) 2. Inst. 362.
Cr. El. 162.

(g) Dyer 238.
pl. 28. Cr. El. 162
11. eon. 149.

In Sir *J. Thynn's* Case, now on the true Sense and Understanding of the Law, is well resolved against the Judgment given in *temp. E. 1. Quare Imped.* 181. which seemeth to be the Error of the Clerk or of the Reporter; for all the Precedents in the same Time, and all Times after are to the Contrary, 2 or 3 only of later Time which passed in Silence. But with this Judgm. agrees; *H. 6. Damages* 17. adjudg'd 3. *H. 6. 3. 12 E. 3. Champerty* 9. 18 *E. 3. 2.* and all the Precedents as is aforesaid. And the Judgment given in such Case of the Queen in *Com' Banco* which was entered by the Clerks without Advice of the Court was reversed. Yet note, That all the (a) Counts of the King in *Quare Impedit* are to his Damage, and yet no Damages shall be recovered. It was further resolved in the Case at Bar, that at the Common Law in some Case he who was admitted, instituted and inducted at the Presentment of another, should be removed by Judgment in a *Quare Impedit*; as in a *Quare Impedit*, if the Disturber being Def. presents pending the Writ, and his Clerk is admitted, instituted and inducted, and afterwards Judgm. is given against the Def. such Clerk shall be removed: The same Law if a Stranger usurps (b) pending the Writ, his Clerk shall be removed by the Judgm. at the Com. Law, and so in all Cases when any Clerk cometh in by the Presentment of any Stranger against whom the Pl. hath good Title, his Clerk shall be removed. So if the (c) Queen usurps, and a *Quare Impedit* is brought against her Incumbent for it doth not (d) lie against the Queen) and pending the Writ the Queen presents another who is instituted and inducted, he shall be removed, for he cometh in under the Title of the Pl. But if a Stranger to the Writ, who hath good Right, presents his Clerk pending the Writ and his Clerk is admitted, and instituted, he shall not be removed; for then by such Device the rightful Patron may be defeated of his Presentment. And that was one of the Causes, that after the said Act of *Westm. 2.* it shall be inquired, if the Church be full, of whose Presentment, to the End it may appear whether the Pl. shall recover his Presentment or not, and that agreeth well with the Reason of the Com. Law; for in every *Præcipe* where any Land, or other Thing is recovered, when Judgm. is given for the Demandant, if it be pleaded in Bar of any other Action, the Tenant ought to aver, that the Title of the now Demandant is mean between the Judgm. and the Title of the Demandant in the first Action; so that altho' there be 20 Descents, &c. it shall not hurt. *Vide* 33 *E. 3. Tit. Title* 3. 21 *E. 4. 52.* 27 *H. 8. 13.* So that altho' there be 20 Usurpers pending the Writ, they shall not hurt at the Com. Law. It was also resolved, that no Incumbent shall be removed by the said Stat. by *Quare Impedit* or Affize of *Darrein* Presentment purchased within the six Months, unless the Incumbent be named in the Writ, *quia (f) res inter alios acta alteri nocere non*

delet

(a) Jenk. Cent.
281. Hob. 23.

(b) Cr. Jac. 93.
1 Rol. 397.
Co. Lit. 344. b.
Hob. 320.

(c) 1 Rol. 390.
1 Mod. Rep. 255,
256. Dyer 364.
pl. 28.

(d) Hob. 193.

(e) 2 Rol. 390.
Cr. Jac. 93.
Co. Lit. 344. b.
(f) Ant. a 1. b.
1 Sid. 93.
Jenk. 281.
Co. Lit. 152. b.
Hard. 385.

debet, altho' the Incumbent be in by defeisible Title; and therewith agree 30 *E.* 3. 46 *E.* 3. 15. 9 *H.* 6. 30. & 56. 19 *H.* 6. 68. *b.* 5 *E.* 4. 115. 9 *E.* 4. 30. *Quia quicumq; aliquid statuerit parte inaudita altera, equum licet statuerit, haud equus fuerit.* Also when the *Quare Impedit* is brought against the Disturber and the Bishop and six Months pass as hath been said, the Bishop cannot collate by Lapse. Then admit that other six Months pass, so that the Time is devolved to the Metropolitan, who is not named in the Writ, whether shall he present by Lapse? And it was resolved, That he cannot; for he shall never present by Lapse but when the inferior Ordinary might have collated by Lapse, and surceaseth his Time; so that the first Degree in such Case fails; and therewith agree 11 *H.* 4. 8. It was also resolved, That in the Case at Bar, altho' it was found *ex officio*, that the Church was full of *Boswel* who was a Stranger to the Writ, and it doth not appear whether he came in by better Title than the Plaintiff had, yet the Plaintiff ought to have a Writ to the Bishop generally, and the Bishop ought to execute it; (avail it what it can) and he cannot return on the Writ directed to him, That the Church is full of another; for no Issue can be taken between the Plaintiff and him; for he hath no Day in Court, no more than the Sheriff on an *Habere facias seisinam* can return that another is Tenant of the Land by Right; for that cannot come in Issue between the Demandant and him, and therefore he ought to execute the King's Writ, and so ought the Bishop in the other Case. And altho' the third Person hath Right, yet they are excused, because they have their Warrant by Process of Law, and then the Parties may try their Rights, as the Law requireth. And so you will better understand the Books in 18 *E.* 2. Tit. *Darrein Presentment* 20. 50 *E.* 3. *Incumbent* 10. 21 *H.* 7. 8. *a.* & *b.* 9 *El. Dier* 260. 14 *H.* 8. 31. 19 *E.* 2. *Darr. Presentment* 21. 19 *E.* 3. 17. 9 *H.* 6. 31. 6 *E.* 6. *Dier, Henflowe's Case.*

Co.Lit.344.b.
Cr. Jac. 93.
Hob.201,320.

3 Bullfr. 175;

Co.Lit.344.b.
345. a.

Antea 30. a;

1 Sid. 93, 94;

F.N.B.47. k.
Moor 372.
Hob. 320.
Cr. Jac. 93.
Dyer 260.pl.21.
Doct. pl. 191.

Mich. 3 Jacobi,
In the Star-Chamber.

ISABEL Countess of Rutland's Case.

Moor 765.

IN the great Case this Term in an Information preferred by the Attorney General against *S.* and divers Serjeants at Mace, and others, for Arresting the Body of *Isabel* Countess of *Rutland*, late the Wife of *Edward* Earl of *Rutland* by Force of a *Capias ad satisfaciend'* on a Judgment in Debt given in the Common Pleas against her, these Points were resolved for good Law by the Lord Chancellor *Egerton*, *Popham* and *Garwy* Chief Justices, *Fleming* Chief Baron, and by the whole Court of Star-Chamber, although some Precedents by Ignorance of Clerks are to the contrary.

(a) 9 Co. 68. a.

1. That the (a) Person of one who is in Law a Countess by Marriage, or by Descent, is not to be arrested for Debt or Trespals; for altho' in Respect of her Sex she cannot sit in Parliament, yet she is a Peer of the Realm, and shall be tried by her Peers, as appears by the Statute of (b) 20 H. 6.

(b) Moor 769.
2 Inst. 45.
Stamf. 152. 153.
20 H. 6. c. 9.

which was but a Declaration of the Common Law. And there are two Reasons why her Person should not be arrested in such Cases; one in Respect of her Dignity, and the other in Respect that the Law doth presume that she hath

(c) Stile 222.

Hob. 61.

Moor 767.

7 Co. 34. a.

Nevill's Case.

(d) 9 Co. 49. a.

60. a. 68. a.

Cro. Arg. 106.

2 Leon. 174.

Hob. 61.

Stile 222.

(e) Moor 769.

Hob. 61.

(c) sufficient Lands and Tenements in which she may be distrained. 2. It was resolved, that the (d) Person of a Baron who is a Peer of Parliament shall not be arrested in Debt or Trespals by his Body for the Causes aforesaid; for none of the Nobility, who is Lord of Parliament, and by the Law ought to be tried by his Peers, shall in such Cases be arrested by his Body. And both these Points are well confirmed by our Books, 11 H. 4. 15. b. in a *Homine replegiando* against the Lady (e) *Spencer*, it appears that the Lady *Spencer* was a Peer of the Realm, and that in Debt or Trespals, *Capias* lieth not against an Earl, Baron, or Baroness, & *hujusmodi*, for because of their

Estate

Estate and (a) Dignity they are intended to have sufficient; 3 H. 6. 48. a. A Writ of Debt upon Arrearages of Accompt was brought by the Lady *Daburgaweny* against another; the Def. pleaded, he owed her nothing, and was ready to wage his Law, and prayed by Force of the Stat. of 5 H. 4. cap. 8. that the Pl. should be examined, which Act is general, that Examination shall be made, which is always intended upon Oath. And there *Cokein*, who gave the Rule, said, That the Lady *Daburgaweny* is a Peer of the Realm, and it would not be well to make her come to be examined; for by the same Reason we ought to make every Duke, or Earl of *England* come. *Rolf*, Serjeant, Why not? Sir, the said Act of (c) 5 H. 4. c. 8. is general, and is made for every Man, high and low. To which *Cokein* said, The Law will have a Difference between a Lord or a Lady, &c. and another common Person. By which Book it is to be observed, That a Lady, who was but a Wife of a Baron, is a Peer of the Realm, and is in Equipage as to Nobility and Privileges incident to their Dignities with Dukes, Earls, &c. 48 E. 3. 30. b. *Ralph Everden* Knight, brought a Writ out of the *Chancery*, and also a Writ of Privy Seal to the Justices, reciting that he was a Baron, commanding them to discharge him of swearing in (d) *Jurat Assis. seu recognitionib' quibuscumq;* because the Barons ought not to swear in any Inquest or Assise without their Will, and upon good Advice he was absolutely discharged. *Vide Regist.* (e) 179. 35 H. 6. 46. a. in (f) Attaint in the King's Bench, the Grand Jury appear'd, and one of the Grand Jury challenged himself, forasmuch as his Ancestors had been Barons and Lds. of Parliam. and that they have had their Place in the same House of Parliam. and this Matter was tried by six Triers of the same Jury, wherefore he prayed Allowance of his Challenge, and that he might be discharged. *Fortescue* Ch. Just. We cannot allow it without a Writ testifying it, for we ought to be informed of your Challenge by Matter of Record, or otherwise we cannot allow it, *ad quod tota Cur' concessit. Nota*, Duke or not Duke, Earl or not Earl, Baron or not Baron, shall not be tried by the Country, but by (g) Record; for if they be Lds. of Parliam. it appears by Record, and therefore by Record, *viz.* by the King's Writ it ought to be certified. But a Woman who is a Dutches, Countess, or Baroness, by Marriage, which is a Matter in Fact, in such Case, not Dutches, &c. shall be tried by the Country; for their Dignity accrued to them by Matter in Fact. *Vide 2 H. 6. 11. a.* The Wife of the Earl of *Arundel* ought to be (h) named Countess, in an Action brought against her, or by a Name which is tantamount, 12 E. 3. brev. 254. accord. *Vide Plow. Com. 223. Hen. Barkley miles, Dom. Barkley, &c. 14 H. 6. 2. b.* An Action of Debt was brought against a Man and Wife, (i) Countess of *D.* against whom an *Exigent* was prayed. *Newton*, You shall not have an *Exigent* against an Earl, and

(a) 14 H. 6. 2. b. Moor 767.

(b) Br. Examination 25. Moor 769. 1 Jones 154.

(c) 10 Co. 103. 2. Dyer 145. pl. 63.

(d) 27 H. 8. 22. b. Br. Exemption 3. F. N. B. 165. e.

Co. Lit. 156. b. Moor 767.

9 Co. 49. a.

2 Rol. 646.

Dy. 314. pl. 98.

Doct. & Stud.

15. a. b.

Br. Challenge

37.

1 Jones 153.

(e) Dyer 314.

pl. 98.

(f) Fitz. Chal-

lenge 44.

Br. Challenge

13.

(g) 12 Co. 70.

94. 95.

2 Inst. 50.

9 Co. 31. a. 49. a.

2 Rol. 575.

22 Ass. 24.

Moor 767

Co. Lit. 16 b.

7 Co. 15. a.

Calvin's Case.

(h) Fitz. Brief 8.

Stil. 252, 253.

(i) Br. Exi-

gent 37.

Postea 53. b.

Isabel Countess of Rutland's Case. PART VI.

no more against a Countess: And *Fulthorpe* there said, that the Reason thereof was not only, because it cannot be intended that an Earl can be without Lands, but another Reason is for the Dignity of his Name. For an *Exigent* is not awardable against a Duke, Earl, or Baron. *Martin*, in that Case the Woman hath lost the Name of Countess by taking of Husband; for by taking of Husband all the Names which she had before are lost; *quod Paston affirmavit*, wherefore the Writ shall (a) abate forasmuch as she is therein named Countess. But *nota* a Difference between a Baroness or Countess by Marriage, and by Descent; for it is true, *si Baronissa, &c.* by Marriage marrieth again under the Degree of Nobility, she hath lost her Name of Dignity; for in such Case *Si (b) mulier nobilis nupsit ignobili, desinit esse nobilis*: But if she be noble by Birth or Descent, whosoever she marrieth yet she remains noble, for Birthright is *character indelibilis*; but that which is gained by Marriage may also be lost by Marriage; for (c) *eodem modo quo quid constituitur, dissolvitur*. And as to the Book in 8 H. 6. 9. b. & 10. a. where the Case was, that a Writ was, *Præcipe Joh. Lovel militi & B. Domina Aburgaveny, unum messuagium*, and the Def. demanded Judgment of the Writ, for this *John Lovel*, Knight, is Lord, not named; Judgment of the Writ, & *non allocatur* by the whole Court. *Rolf*, Then Judgment of the Writ; for no more than he shall be called Lord, shall she be called Lady; Judgment of the Writ. *Babington*, At the most it is but Surplusage, and the Writ is not the worse. And it was resolved, that this Book was good Law, but ill reported: For as to the Plea to the Writ, that the said Sir *John Lovel* was *Dominus*; it was sufficient for three Reasons. 1. He ought to have pleaded that he was a Baron of Parliament; for (d) *Dominus* is too general. 2. If he had so pleaded, he ought to have shewed a Writ under Seal testifying the same, because it was dilatory in Abatement of the Writ. 3. If the said Woman being the other Demandant was not Baroness in Law, without Doubt the Naming of her Baroness should (e) abate the Writ, as appears by the said Book of (f) 14 H. 6. 2. b. And peradventure this *Lovel* was Lord in Reputation, as many are at this Day, and not a Lord of Parliament; As the eldest Son of a Viscount, Earl, &c. who are not Barons in Law but Reputation; and therefore in Legal and Judicial Proceedings shall not be so named. And if the said Book should be otherwise intended, it would be erroneous and against all the other Books in all Successions of Ages. And every Baron of Parliament ought to have a (g) Knight returned

(a) 2 Inst. 50.
Co. Lit. 416. b.
4 Co. 118. b.

(b) Owen 81.
Br. Nofme de
Dignity 69.
4 Co. 118. b.
Cawley 247.
Co. Lit. 16. b.
(c) Cawley 247.
4 Co. 118. b.
Co. Lit. 16. b.
2 Bulstr. 284.
2 Rol. Rep. 39.

(d) Stil. 254.
(e) Moor 769.
B. N. C. 499.
Dyer 79. pl. 51.
Noy 88.
Poph. 209.
Latch. 174.
Owen 81, 82.
N. Benl. 62.
pl. 109.
4 Leon. 196.
Br. Nofme de
Dignity 31, 69.
O. Benl. 37.
(f) Antea 53. a.
Cr. Eliz.
869.
27 H. 8. 22. b.
Co. Lit. 156. a.
Plowd. 117. a. b.
Dyer 107. pl. 27.
208. pl. 18. 246.
pl. 70. 318. pl. 10.
B. N. C. 84.
465.
2 Rol. 636, 637.
Br. Enquest 110.

of his Jury, as appears in 13 *E. 3. Inquest* 43. 27 *H. 8. 22. b.*
 4 *Eliz. Dy.* 208. 14 *El. 3. 107. III.* And an Earl or Baron
 shall be amerced (a) 100 Shillings, 9 *E. 4. 50. b. 53.* It was
 resolved, That forasmuch as in the Case at Bar, a (b) *Capias*
 was awarded against the Countess by the Court of Com. Pleas,
 That the Sheriff or his Officer by his Warrant might with-
 out any Offence execute it; for they ought not to (c) dispute
 the Authority of the Court, but execute the Writs directed to
 them, and to that they are sworn; and altho' it appears in the
Capias that she was a Countess, against whom by the Law
 no *Capias* in such Case lies, & *ignorantia juris non excusat*,
 and especially Sheriffs and other Ministers of Law and Ju-
 stice, as was objected yet, forasmuch as in some Cases as in
 Cases of Contempt, &c. a *Capias* (d) lieth against them, it
 was therefore resolved, That the Sheriff and his Officers ought
 not to examine the judicial Act of the Court, but execute the
 Writ, and therewith agreeth the Opinion in 36 *H. 8. Dy.* 61.
pl. 26. If a *Capias* or *Exigent* cometh to the Sheriff against
 a Duke, Earl, &c. where it lieth not against them, he ought
 to execute the Writ, and not argue and dispute the Validity
 of it. But the Truth of the Case of the Countess of *Rutland*
 was, That the Serjeants who had the Sheriffs Warrant to ar-
 rest the said Countess on the said *Capias ad satisfaciendum*,
 being fearful that she would be rescued by her Servants and
 Friends, and so escape, for which the Sheriffs (if she should
 be arrested on the *Capias ad satisfaciendum*, and escaped)
 would be charged. The Serjeants at Mace advised the said
S. to enter a feigned Action of 100*l.* before the Sheriffs
 in *London*, according to their Custom, upon which they
 would first arrest the said Countess, and by Force thereof car-
 ry her to the Compter, and then take her Body in Execu-
 tion on the *Capias ad satisfaciendum*. And afterwards the said
 Serjeants in her Coach, with many others, came to the Coun-
 tesses in her Coach, and shewed her their Mace, and touching
 her Body with it, said to her; We arrest you *Madam*, at the
 Suit of the said *S.* which were all the Words they used, and
 thereupon they compelled the Coachman to carry the said
 Countess to the Compter in *Woodstreet*, and at the Door
 thereof the Sheriff came, and carried the Countess to his
 House, where she remained seven or eight Days, till she
 paid the Debt. And it was resolved, That the Sheriff,
 or any other by his Authority who makes an Arrest of
 the Person of another, (e) ought on the Arrest, to shew at
 whose Suit it is; out of what Court, for what Cause he
 makes it, and when the Process is returnable, to the In-
 tent that, if it be for any Execution, he might pay it and
 free his Body (if he will) from Imprisonment; and if it
 be on Mesne Process, either to agree with the Party, or

(a) 9 *H. 6. 2. b.*
 Br. Amerce-
 ment 2.
 21 *E. 4. 77. b.*
 19 *E. 4. 9. a.*
 1 *H. 6. 7. b.*
 2 *Inst. 28.*
 8 *Co. 40. a.*
 Antea 45. a.
 (b) 9 *Co. 68. 2.*
 Latch. 223.
 2 *Rol. Rep.*
 493, 494.
 10 *Co. 76. b.*
 Cr. Jac. 3.
 Moor 767.
 (c) Cr. Car. 393.
 602.
 Lane 49.
 Hob. 48.
 2 *Sand. 193.*
 (d) Cr. Eliz.
 170, 503.

(e) 2 *Rol. 279.*
 Cr. Jac. 485,
 486.
 9 *Co. 68. b. 69. a.*

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to put in Bail according to Law; and to know when he should appear. And therefore it was resolved, that the said
(*) 2 Rol. 279. (a) general Arrest cannot be said by Force of the said Writ of Execution; and that the said Arrest of the Countess by the Serjeants at Mace of their own Heads, without other Warrant, is against Law, and the said Countess was falsely imprisoned. (And so in Summons in real Actions, the Summoners in the Presence of the Pernors and Viewers, &c. ought to summon the Tenant, 1. To keep his Day of Return, and name it in Certainty, to render; &c. 2. They ought to name the Name of the Demandant, &c. 3. The Land in Demand. *Vide* 3 E. 3. 48. 43 E. 3. 32. a. 50 E. 3. 16. b. &c.) And that was the chief Reason that a severe Sentence was given against S. the Serjeants, and the others their Confederates; and the entering of such feigned Actions in *London*, was utterly condemned by the whole Court. For by Colour of Law and Justice, they by such feigned Means do against Law and Justice, and so make Law and Justice the Author and Cause of Wrong and Injustice. *Vide* the Statute of 5 H. 4. cap. 8. in the Preamble.

Dy. 244. pl. 61,
62.

Trin.

Trin. 4 Jacobi.

The Lord Chandos's Case.

KING H. 7. by his Letters Patents in the 19th Year of his Reign granted to *Giles Bridges* Esquire the Manor of *Blunsden* in the County of *Wilts*, to have and to hold to him and his Heirs Males of his Body. The same King, Anno 24. of his Reign by his Letters Patents reciting the former Letters Patents of Intail, *Ac cum postmodum, idem Egidius ven' in Cancellar' nostram coram Willibelm' Cantuariensi Episcopo Cancellario nostro, & ibidem sursum reddidit dictas literas patentes ad opus nostrum cancellendas, virtute cujus eadem literæ patentes tunc & ibidem fuer' cancellat'; virtute cujus nos de manerio prædicto seifiti fuimus & ad præsens sumus in Dominico nostro ut de feodo. Sciatis quod nos de gratia nostra speciali, certa scientia & mero motu, dedimus & concessimus præfato Egidio Bridges & Isabellæ uxori suæ manerium prædictum cum pertinen'* (without any Grant of the * Reversion of the said Manor,) To have and to hold to them and to the Heirs of *Giles*. And whether the Reversion should pass or not by this Grant, was the Question, between *Grey Lord Chandos*, Issue and Heir of the said Intail, and *Sir Thomas Low* Knight Alderman of *London*, who had taken a Lease for Years of the said Manor of *William Lord Chandos*, Father of the said Lord that now is; and a Fine was levied by the said Lord *William* for Assurance of the said Lease: But if the Reversion remain'd in the King, then the said Lease was voidable, and the said (a) Fine could not make it good, for that was restrained by the Statute of (b) 34 H. 8. And upon a Petition made to the King by the said *Sir Thomas Low*, who was dispossessed by the said *Grey Lord Chandos*, the King referred it to the Considerat. of the Ld. Chancel. and Ld. Treasurer of *England*, who heard Counsel on both Parts: And because the Case was difficult

8 Co. 56. a. 77. a. 1
Lane 3, 7, 9,
76, 112.
Hob. 224.
11 Co. 11. b.
2 Rol. Rep. 277,
278, 360.

* 2 Rol. Rep.
180, 277, 278.
Postea 56. a.
8 Co. 56. a.
Lane 3, 7.
Dyer 233.
pl. 10, 11.
B. N. C. 267.
Hob. 224.

(a) Raym. 271.
(b) 34 & 35 H. 8.
c. 20.
2 Co. 15. b.
16. a. 52. a.
Moor 115, 195.
1 And. 46, 47,
142, 143, 171.
1 Leon. 85. 3
Ash. 26. N.
417. Raym. 349.

Gr. Ca. 430. Plowd. 555. a. Yelv. 149. Noy 132. Co. Lit. 335. a. 372. b.
Leon. 57. 4 Leon. 40. Benl. in Kelw. 213. a. b. O. Benl. 32. Benl. in
Benl. 223. pl. 254. 8 Co. 77. b, 10 Co. 37. a. Hub. 299. 2 Rol. Rep. 108,

they

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(a) Br. Patent 38.
 Plow. 332. a.
 1 Mod. Rep. 196.
 Kelw. 8. b. 12. b.
 Moor 45, 164.
 9 H. 6. 28. b.
 Lane 12, 110.
 2 Co. 33. b. 54. a.
 6 Co. 29. b.
 10 Co. 112. b.
 11 Co. 4. b. 74. b.
 87. a. 40. a.
 Hob. 223, 229.
 Cr. Car. 198.
 2 Rol. 188.
 Dyer 339. pl. 47.
 352. pl. 26.
 Co. Ent. 384.
 41 Aff. 19.
 1 Co. 43. a.
 7 Co. 12. a.
 4 Co. 35. b.
 5 Co. 94. a.
 Yelv. 48.
 (b) Postea 56. a.
 66. b.
 Co. Lit. 324. b.
 10 Co. 107. a. b.
 Cr. Car. 400.
 5 Co. 124. b.
 4 Co. 36. a.
 Dyer 125. pl. 45.
 233. pl. 10, 11.
 Plow. 155. a.
 159. a.
 30 E. 1. Grant 86.
 7 E. 4. 20.
 Fitz. Feoffment 22.
 Fitz. Grant 97.
 35 H. 8. Br. Grant 50.
 Hob. 224.
 2 Rol. Rep. 180,
 277, 278.
 Antea 55. a.
 8 Co. 56. a.
 Lane 3, 7.
 B. N. C. 267.
 Lit. Rep. 18.
 (c) 2 Rol. Rep. 355.
 Lane 12, 13, 75.
 Godb. 415.
 (d) 1 Co. 43. a.
 49. b. Hob. 224.
 Lane 12, 13, 75.
 Dyer 352. pl. 26.
 5 Co. 94. a.
 10. Co. 68. a.
 2 Rol. Rep. 273.
 Cr. Car. 198.
 (e) Cr. Jac. 34, 35
 10 Co. 109. a. b.
 113 a. Lane 13.
 Plowd. 191. b.
 Car. 548.
 Yelv. 48.

they referred it to the Lord Ch. Just. of *England*, and Lord Ch. Baron, who oftentimes heard the Case debated betwixt the Counsel of both Parties. And it was objected by the Counsel of the Lord *Chandos*, that the said Grant of the said Manor by the said Letters Patents of 24 *H. 7.* were void for divers Reasons. 1. That the said Estate-tail was not recited, as an Estate-tail continuing, whereby the Rev'n might be granted, but as an Estate-tail determined; and therefore the K. granted it as a Thing in Possess. when in Truth he had but a Rev'n expectant on an Estate-tail. 2. The King was deceived in his Grant, for the King by the Suggestion of the Party thought that by the Surrender of the said Letters Patents of 19 *H. 7.* the Estate-tail was thereby defeated and determined, by Reason whereof the King was seised thereof in his Demesne as of Fee, in which the King was deceived: For by the Surrender of the said Letters Patents the Estate-tail was not determined, nor the King seised in his Demesne as of Fee, but the King had only a Rev'n in Fee expectant on the Estate-tail. 3. The King was (a) deceived in the Estate he granted, for he intended to grant an Estate in Fee in Possess. and not a Rev'n expectant on an Estate-tail; and the K. granted *Mancerium de Blunsden*, and not *reversion' Mancerii*. And after many Arguments and good Deliberation had with divers other Just. it was resolved, that the (b) Rev'n should pass by the said Letters Patents of 24 *H. 7.* And as to the said 3 Objections, it was considered, how much of the said Recital was the Suggest. of the Party, and (c) how much the Affirmation of the King himself. And as to that, it was resolved, That the Recital of the Estate-tail, and that the (d) Patentee had surrendered or delivered the said Letters Patents to the Chancellor to be cancelled, both these were in Judgment of Law the Informat. and Suggestion of the Party; but the Clause *virtute cuius* we were seised in our Demesne as of Fee) was but the Collection of the King himself, as a Consequence on the Surrender, in which the King mistook the Law. Also the Party inform'd the King, that he had delivered the Letters Patents to the Chancellor, to be cancelled; upon which the King affirmeth (*quæ (e) quidem literæ patentes adtrunc & ibidem cancellat' fuer'*) that is not the Information of the Party, but the Affirmat. of the King; and the Collect. or Affirmat. of the King, (on the Informat. of the Party) when it is not made any Part of the Considerat. shall not avoid his Grant. For all that the Party had informed was true; and the Error was in the Consequent or Collect. which the K. made upon it; then so far as the Party had truly informed the King of the Estate-tail, and of the Delivery of his Letters Patents to be cancelled; altho' the K. hath mistaken the Law, or the Matter in Fact, in that Case it being no Part of the Considerat. shall not avoid his Grant, for no Fault was in the Party.

Party. Also it was resolved, that by the Grant of the Manor, without a Word of the Reversion, the (a) Reversion should pass; for this Word Manor includeth all Estates, and Degrees of Estates of or in the Manor, as if *A.* gives the Manor of *D.* to *B.* in Tail, and afterwards the Donor is (b) attainted of Treason, by which the King is seised of the Reversion, and afterwards by his Letters Patents grants *Manerium de D.* to another and his Heirs: In that Case, although the King grants the Manor of *D.* as in Possession, yet the Reversion shall pass, for the King had an Estate (*viz.* the Reversion in Fee) grantable in him; and the Estate-tail by a common Person need not be recited. And it is not like the Case of (c) *Alton Woods*, for there the King was not Consant, nor informed of his true Estate, *scil.* that he was seised in Tail, with the Reversion expectant to his Heirs and Successors, and his Grant in the same Case, could not take Effect without Fraction of Estates, or Wrong done, and therefore the Case of *Alton Woods*, was not to be likened to this Case. For in our Case, the Party hath informed the King of the Truth of all Matters in Fact, *scil.* of the Estate-tail, and of the Delivery of the former Letters Patents, so that in true Judgment of Law on the Matter contained in the Patent, the King had but a Reversion in Fee expectant on an Estate-tail: And in this Case no Wrong is done to any, nor is there any (d) Fraction of Estates. And here the King's Intent was to depart with all his Estate, and (e) less passeth by this Grant, (*scil.* the Reversion) than he did intend to pass; for he did intend to pass the Possession; and so it is not any Prejudice to the King. But if more would pass, than he intended to pass, as where he intended only to pass the Reversion, and the Possession will pass, there it will be otherwise. Also this Grant was made *ex certa scientia*, & *mero motu*, which shall be taken in the most (f) liberal and beneficial Sense, according to the King's Intent and Meaning expressed in his Grant.

(a) Cro. Car. 400.
5 Co. 124. b.
4 Co. 36. a.
Dyer 125. pl. 45.
233. pl. 10, 11.
Plowd. 155. a.
159. a.
30 E. 1. Grant 86.
7 E. 4. 20.
Fitz. Feoffment 22.
Fitz. Grant 97.
35 H. 8. Br. Grant 50.
Lit. Rep. 18.
2 Rol. Rep. 180, 277, 278.
Co. Lit. 324. b.
Poitea 66. b.
10 Co. 107. a. b.
8 Co. 56. a.
Lane 3, 7.
B. N. C. 267.
Hob. 224.
(b) 2 Rol. 190.
(c) 1 Co. 43, &c.

(d) 1 Co. 52. a.

(e) 2 Rol. Rep. 180.
Hob. 224.

(f) 8 Co. 56. a.
167. a.
Antea 6. a. 5
11 Co. 11. a.
143. b. Fitz.

Co. 56. a. 1 Co. 49. a. 51. b. 3 Leon. 243, 249. Kelw. 7. b. 175. a. 198. a.
10 Co. 67. b. 2 Sid. 141. 2 Rol. 200. Hard. 500. Plowd. 32. a. 126. a,
Grant 29. 2 R. 3. 4. a. b. 3 Bulltr. 6. 2 Inlt. 496, 497.

Hill.

Hill. 4 Jacobi.

In Communi Banco.

BREDIMAN'S Case.

2 And. 185.
Cr. Jac. 142.
2 Rol. Rep. 181.

Hill. 45 Eliz. Rot. 105. Charles Brediman did arraign an Affize of Novel disseisin against Robert Bromley, Thomas Reyner, and Francis Cotton, of a Rent of 10*l.* in *H.* &c. in the County of Midd. and made his Title, that Sir Richard Pexal Knight, was seised of the Manor of Swacliff, in *H.* &c. in his Demefne as of Fee, and held it in So-cage of Michael Shoreditch, and 9 Octobr. 13 Eliz. made his Will in Writing, and thereby devised to the Plaintiff a Rent of 10*l.* issuing out of the said Manor of Swacliff for his Life, Yearly to be payed, and by the same Will devised to Dame Eleanor his Wife the said Manor, to have from the Day of his Death, for 15 Years; and afterwards the said Sir Richard, 10 Octobr. 13 Eliz. died. Eleanor entred into the said Manor, and paid the said Rent of 10*l.* and for the Rent of 10*l.* due the 10th of Octobr. 40 Eliz. and for the Arrearages of 16 Years before: The Plaintiff the said 10th Day of October 40 Eliz. half an Hour before Sun-set of the same Day, came to the capital House of the said Manor, and there remained till after Sun-set, *petendo tam prædict.* 160*l.* *de arrearagiis prædict. redditus, quam prædict. decem libras in prædicto decimo die Octobris anno 40 Eliz. suprædict. eidem Carolo tunc sic debet. existen. sibi solvi.* And the Defendants *ad tunc tenentes, &c. seu eorum aliquis, nec aliquis alius arrearagia prædicta seu redditum prædict. aut aliquam inde parcellam eidem Carolo ad tunc sic ut præferi debet. & insolut. existen. eidem Carolo solverunt seu solvit, sed illa ei ad tunc & ibid. solvere denegaverunt, & eorum quilibet solvere denegavit, & sic prædict. Robertus, Thomas & Franciscus, ipsum Carolum de redditu præd. ad tunc & ibid. injuste & sine judicio disseisiver. & hoc, &c.* And the Affize was taken against the said Tho. and Franc. by Default, and

and Rob. pleaded *NulTorr*, and the Recognitors of the Affize found for the Pl. *sc.* the Seisin and Disseisin of the Rent, and the only Point which was debated at the Bar and at the Bench was, if the Payment of the said Rent by *Eleanor*, who was Termor for Years were a suffic. Seisin of the Rent to maintain an Affize against the Ter-tenant after the Years determined. And this Case was oftentimes argued at the Bar in the Time of the *Ld. And.* in the Time of the *Ld. Garedy*, and of *Coke* now Ch. Just. And it was objected at the Bar that the Seisin had by the Hands of Ten't for Years is suffic. to have an Affize, for it appears by 33 *E. 3. Verd.* *47. That Seisin by the Hands of a (a) Bailly or Procurat. is suffic. and 8 *H. 6. 17. a. b.* in some Case Seisin by the Hands of him who hath nothing in the Land is suffic. As if there be (b) Lord and Ten't, and the Ten't makes a Feoffin. in Fee, before Notice made by the Feoffee, the Payment of the Feoffor is a good Seisin. And 27 *E. 3. 83. a.* in a *Scire facias* on (c) a Fine levied of a Rent, the Tenant said, That the Demandant had received 16 s. Parcel of the same Rent pending the Writ, by the Hands of one who held the Land out of which the Rent issued at Will, and took his Plea to the Whole, because the said Rent was a Rent-service and (d) Seisin of Parcel gave Seisin of the Whole, and so the Fine executed by that Seisin; upon which the Pl. demurr'd, and it was awarded that he should answer to the Remnant, by which it appears (as it was objected) that Seisin by the Hands of a Ten't at Will, was a sufficient Seisin as to that which was paid. And 8 *Aff. pl. 16. 8 E. 3. 53. & F.N.B. 179. f.* that Paym. of the Rent by Ten't for Years is suffic. Seisin to have an Affize for the Rent. And it was said that other Seisin the Devisee of the Rent could not have, during the Term, by other Hands than by the Ten't for Years, and the Payment of the Rent was a lawful Thing, and which of Right ought to be done, and therefore the said Payment by the Tenant for Years shall bind the Ten't of the Freehold, and shall give him suffic. Seisin to have an Affize. And upon solemn Argument this Term by the Judges of the Com. Pleas, it was resolved by the whole Court *sc. Coke* Ch. Just. *Walms. Warburt.* and *Daniel*, That the said Paym. of the Rent by the said Ten't for (f) Years was no Seisin to bind the Ter-tenant after the Years determined for several Reasons. 1. In Respect of the (g) Imbecillity and Smalness of the Interest of 'Tenant for Years, who at the Com. Law could neither prejudice nor draw the Estate of Freehold in Question, For altho' the Recovery against the Ten't of the Freehold were by Agreement, Ten't for Years could not be received before the Stat. of (h) *Glouc.* nor could he (i) falsify the Recovery before the Stat. of (k) 21 *H. 8.* So that by the Com. Law Ten't for Years was subject to the Pleasure of the Tenant of the Freehold; for he could not falsify a Recovery of the Freehold in Respect of the Feebleness of his Estate, and none by the Com. Law could falsify a Recovery of the Freehold, but he who had a Freehold. *Vide* 7 *H. 12. a. 9 E. 4. 37. b. 30 H. 6. 16. 7 H. 4. 17. b. 19 E. 3. Aff. 82.* The second Reason was, *ex Etymologia & vi termini,*

* Cr. Jac. 142.
(a) Postea 59. a.
Cr. Jac. 142.

(b) Postea 58. a.

(c) Fitz. Scire
fac. 132.

(d) 4 Co. 9. a.
20. 1. 1. 153. a.
315. a. 2. Rol. 463.
1 E. 4. 7. 0.
Br. Semm 31.
(e) 2 N. B. 179. f.

(f) Cr. Jac. 142
2. Rol. Rep 181.
2. Rol. 465.

(g) Cr. Jac. 142
2. Rol. 465.

(h) 6 E. 3. c. 11.
2. Inst. 321,
322, 323.

(i) 9 Co. 135. a.
Cr. El. 284. 718.

(k) 2 N. B. 98 c
220. 1. 21 H. 8.

15. 11 Co.
33. d. 2. Inst. 327

322, 323.
9 Co. 135. a.

Co. Lit. 46. a.

- sc.* that he who hath not Seisin in the Land charged cannot give a Seisin of the Rent; for *nemo potest (a) plus juris in alium transferre quam ipse habet.* And that is the Reason that a *Præcipe* lies not against a Termor, because he cannot give Seisin, and yet in one Case one Manner of *Præcipe* only lies against him who hath but a Chattel, and no Freehold; and that is, that a Writ of *Dower* lies against (*b*) Guard. in Chivalry, as appears in *Temp. E. 1. Brief. 863. 8 E. 2. ibid. 809. 6 E. 3. 8. &c.* but if such Guard. makes a Lease for Years of the Land, no Writ of *Dower* lies against the (*c*) Lessee, as appears in *8 E. 3. 84.* And a Writ of *Dower* lies against Guard. in Chivalry for 2 Reasons. 1. Otherwise the Ten't in *Dower* would be without Remedy, for in such Case no Writ of *Dower* lies against the Heir, as it is adjudged in *9 H. 6. 6. b. in Frevil's Case.* 2. The Guardian may pray, (if the Case so require) that the Demandant may endow her self *de le plus beale*; but no other *Præcipe* lies against such Guardian. And no Writ of *Dower* lies against Guard. in (*d*) Socage, nor can he assign *Dower*, as appears in *29 Aff. 68.* And it was said, as *Possessio* is derived, *a pos & sedeo*, because he who is in Possess. may sit down in Rest and Quiet: So *Seisina* also is derived a *Se-dendo*, for till he hath Seisin all is *labor & dolor, & vexatio Spiritus*; but when he hath Seisin, he may *sedere & acquiescere.* In all Suits to recover Seisin or Possess. he who prosecutes them ought to labour, but when he has obtain'd Seisin he may *sedere & accumbere* in Peace and Tranquility. The 3d Reason was a manifest Difference (*e*) between receiving and giving Seisin; for it is true, that he who hath but a Term for Years may take Seisin for the (*f*) Benefit of him who hath the Freehold, *45 E. 3. 26. a.* Grantee for Years of a Common uferth it, that giveth Seisin to him in the Rev'n, *22 Aff. 84. acc. 12 E. 3. Aff. 86.* Payment to the Grantee for Years of a Rent, is a suffic. Seisin for him in the Rev'n, *M. 39 & 40 El. in the 5th Part of my (g) Rep.* Presentment by the Grantee of the next Avoidance, or for Years, is a sufficient Title in a *Quare Impedit* for the Grantor; and all our Books are, That the Possess. of Lessee for Years, or (*b*) Guardian, &c is suffic. Seisin for him in the Rev'n to have an Assise. But *sicut beatus est, ita majus est dare, quam accipere.* For in the first Case he who giveth Seisin is Ten't of the Freehold, and he who receiveth Ten't for Years, but in this Case he who maketh the Paym. is but Ten't for Years of the Land, and he who receiveth it claimeth a Freehold in the Rent, and therefore the Tenant for Years by his Payment cannot give Seisin to bind him who hath the Freehold; and therewith agree *2 H. 6. 3 & 8 H. 6. 17, 31. Vide 11. H. 4. 29. a. b.* Homage done by the (*i*) Husband before Issue shall not bind the Wife, but Seisin by the Hands of a (*k*) Disseisor, or by one who hath a defeasible Title is suffic. and shall bind him who hath Right, for he is Tenant
- (a) 4 Co. 24. b.
5 Co. 113. a.
6 Co. 68. a.
8 Co. 63. b.
- (b) 9 Co. 16. b.
Co. Lit. 35. a.
38. b. 1 Rol. 681.
9 H. 6. 6. b.
24. b. 47 Aff. 15.
per Finchden.
(c) 9 Co. 17. a.
8 E. 3. 15. b.
- (d) Br. Dower
63. 31 E. 1.
Dower 151.
Co. Lit. 35. a.
1 Rol. 682.
- (e) Cr. Jac. 142.
- (f) Cr. Jac. 142.
- (g) 5 Co. 57. b.
97. h. 98. a.
2 Rol. 378. 379.
Cr. El. 518.
Moor 456.
2 And. 49. 50.
F. N. B. 33. h.
(h) 1 Rol. 270.
- (i) Cr. Car. 521.
- (k) 2 Rol. 464.

Ten't of the Land, and the Act is lawful; but Incroachment of Rent by his Hands shall not bind him who hath Right, for that is not lawful, and therewith agree 8 H. 6. 18. a. 39 H. 6. 2. b. 33 E. 3. *Avowry* 255. *S. Aff* 6. 16. 31. but in the same Case if there be any Covin between the Disseisor and him who hath the Rent, and that the Purpose of the Disseisin was, that the Disseisor should give Seisin of the Rent, there such Seisin shall not bind the Disseisee, or him who hath Right, for the Covin maketh it unlawful in the same Manner as Dower assigned by such (a) Disseisor, or Recovery against him, if the Disseisin was had by Agreement or Covin. But it was said, When there are (b) Ld. and Ten't, and the Ten't makes a Feoffm. in Fee, before Notice and Tender of the Arrerages, the Feoffor may give Seisin, for he is Ten't as to Avowry, 8 H. 6. 18. for in such Case if the Lord should avow on the Feoffee before Tender of the Arrerages, he would (c) lose them, as it is agreed in 7 E. 3. & 7 H. 4. &c. And therefore, forasmuch as in such Case the Com. Law doth compel the Ld. to avow on the Feoffor, for this Cause at the Com. Law such Seisin by the Feoffor, *causa necessitatis*, was good. And in this Case Difference was taken and agreed between Attornm. and Seisin; for in Case of a Grant of a Seigniorie or Rev'n, &c. to Attorn. Privity of Estate was requisite; but not to Seisin: But at the Com. Law the Ld. was not (d) compellable to take his Rent of any other but of him who was his immediate Tenant in Privity, and therefore at the Com. Law the Lord paramount was not compellable to accept his Rent by the Hands of the Ten't peravail, or by the Hands of a Ten't for Life, where the Rev'n was over, and that well appears by the Stat. of (e) *West. 2. cap. 9. Capitalis Dom' servitia & consuetudines sibi debet. renuebat accipere per manus alterius quam per manus proximi tenentis sui, & sic tenentes in dominico amiserunt proficua tenement' suorum; non habeat capitalis Dom' potestatem distringendi tenentes in dominico, dum præd' tenens offerat ei servitia debita & consueta*: And yet Seisin had by the Hands of the Ten't peravail, or Lessee for Life was good, if the Ld. accepted it. And it was said, that if Ten't in (f) Tail makes a Feoffm. in Fee, if the Donor obtains Seisin of his Rent by the Hands of the Discontinuee, it is sufficient to have an Assise, and yet he cannot avow on the Discontinuee, nor is there any Privity between them. The 4th Reason was drawn from the (g) Nature of the Rent in the Case at Bar, which as it was said hath 3 cross Aspects. 1. It is against Com. Right. 2. It is in Creation *reddit* (b) *siccus*, barren without Fruit, and for its Dryness is compared to a Stone: *Summa petit scopuli, siccaque in rupe resedit*. 3. It is *Redditus cæcus & siccus*; for it is a Rent remediless, which cannot see any (i) Way or Remedy to attain to it. And it is to be observed, That a Right (without any Estate

(a) 1 Rol. 549.

8 Co. 132. b.

15 E. 4. 4. b.

Br. Dower 15.

59. Br. Ass. 181.

Co. Lit. 35. a.

357. b. 2 Co. 67. a.

3 Co. 78. a.

5 Co. 30. b.

2 Rol. Rep. 17.

Plow. 51. a. 54. b.

Poph. 64. 100.

Br. Damages 96.

(b) Ant. 57. a.

2 Rol. 464.

(c) Co. Lit.

269. b. 3 Co. 65. b.

65. a. 1 Rol. 317. a.

(d) 2 Infl. 373

(e) 2 Infl. 373.

374. Co. Lit.

100. a. b.

(f) 2 Rol. 464

Co. Lit. 269. a.

(g) Cr. Jac. 142.

(b) Lit. Sect. 218

Co. Lit. 144. a.

(i) Lit. Sect. 217

in Possess. Rev'n, or Rem'r) for which good Remedy by Action is given, is not yet Affets, until it be recovered and reduced into Possess. So an Estate as in Rent-seck, which descendeth, for which the Heir hath not Remedy, is not Affets until he hath gained Seisin, for Want of Right, and Want of Remedy are in one Equipage. So one shall not be (a) remitted to a Right remediless, as appears in the *Marq. of Winchest. Case in the 3d. Part of my Rep. & M. 12. & 13. El. int' Terling & Trafford* it was adjudged, That a Rev'n expectant on an Estate-tail was not (b) Affets, because it lay in the Power of Ten't in Tail to dock and bar it at his Pleasure: And thereupon it was concluded, That forasmuch as such first Seisin which should give Vigour and Life to this remediless Rent, and should charge the Freehold, ought to be given by him who hath a Freehold at least, and not by him who hath but a Chattel, therefore Seisin given by him who had but a Term for Years was not suffic. And it was said, that the Rent-seck in the Case at Bar was remediless in its Creat. because it was created by Will; so that not only a Remedy for the Rent, but a Writ of Annuity also failed. But if a Man grants a Rent by Deed out of cert. Lands, there as to charge the Land it is remediless, but the Grantee may charge the Person of the Grantor in a Writ of Annuity; and therefore it was said that in such Case, if he adderth a Proviso, that it shall not charge his Person, it is void, unless he gives him Seisin upon the Delivery of the Deed; for such Proviso doth take away from the Grantee all his Remedy; and to avoid that, *Litt. in his Chap. of Rents*, puts his Case of a Rent-charge, in which there was such Proviso, in which Case the Grantee was not (c) deprived of his whole Remedy. It was further agreed, That forasmuch as a Rent-charge, or a Rent seck was against com. Right, that in an Assize thereof all the Tertenants, *sc.* the Tenants of the Freehold (who always are in Law intended within these Words Tertenants) ought to be (d) named; as it is agreed in 9 E. 3. 13. 22 H. 6. 24. a. 33 E. 3. *Aff. 456, &c.* And thereupon it was concluded, that if in Case of Disseisin which is tortious, and Privation of Seisin, the Ten'ts of the Freehold ought to be named and made Party, *a fortiori*, in the Case of Seisin, which in this Case is Creation of Remedy for the Rent, the Ten't of the Freehold ought to be Party and princip. Agent in the Perfect thereof; and he who hath a Rent hath not taken the Explees thereof, until he hath Seisin by the Hands of the Tenant of the Freehold; for *expleia derivantur de verbo expleo*, that is, to fill or make up, or to make perfect; for he who hath a Rent, (and especially a Rent-seck) hath not a perfect and expleat, or compleat Estate in the Rent, until he had Seisin thereof, and when he hath Seisin, his Estate is compleat and perfect, for he hath reaped the

(a) 3 Co. 3. 2.
Co. Lit. 349. a. b.

(b) Antea 42. a.
1 Rol. 269.
1 Rol. Rep. 234.
357. 2 Rol. Rep.
129.

(c) Co. Lit.
146. a. Sect. 220

(d) Co. Lit.
150. b.

(e) Co. Lit.
159. b. 160. a.

the Explees, *ſc.* the Fruit and Commodity thereof. *Vide Bract. lib. 2. fol. 40. Item nec expletia capere poſſit, quia nond' venit tempus meſſium nec vindemiarum; ſi autem fructus non manuros percepit, vel arbores proſtraverit, iſta non debent dici expletia, cum ſint potius ad dumnum quam ad commodum.* And *Litt. cap. Attornm. 125.* was cited, if there be (a) Lord, Meſne and Ten't, and the Ld. will grant the Services of the Meſne, altho in his Grant he doth not make Mention of the Meſne; yet it is neceſſary that the Meſne attorn, and not the Ten't peravall, becauſe the Meſne is Ten't to him; but (b) otherwiſe it is where certain Land is charged with a Rent-charge, or Rent-ſeck, for in ſuch Caſe if he who hath the Rent grants it to another, the Ten't of the Freehold ought to attorn to the Grantee, becauſe the Freehold is charged with the Rent, &c. And if the Ten't of the Freehold ought to attorn to a Grant (as *Litt.* holds) *a fortiori*, the Ten't of the Freehold ought to give Seiſin, For Seiſin is more than Attornment, for every lawful Seiſin includes Attornment; but Attornment doth not include Seiſin. And it appears by 21 *H. 6. 9. b.* That if the Tertenant, out of which the Rent-charge is iſſuing, be diſſeiſed, and he who hath the Rent grants it over, the Diſſeiſee cannot attorn, becauſe he hath not the Freehold, although he hath the mere Right to it, *a fortiori* Ten't for Years who hath no Freehold; nor Right of Freehold, ſhall not give Seiſin of it. Laſtly, It was agreed, that it would be full of many (c) Inconveniencies, if he who hath not the Freehold ſhall give Seiſin; for then Ten't by Stat. Merchant, or Staple, Tenant by *Elegit*, Guardians, Grantees of Wards, &c. alſo if the K. extends and leaſes over, all theſe might put Lords or Owners of Rents in Poſſeſſ. of the Rent or Services, of which they had not any Seiſin within Time of Limitat. which will be very dangerous, and the Cauſe of many Suits and Troubles, and as to the Objection, *ſc.* That Payment by a (d) Bailly would be a ſufficient Seiſin, it was agreed, unleſs it works a ſpecial Prejudice to the Lord; as if the Ld. hath not been ſeiſed of his Rent within (e) 60 Years; and the Tenant maketh one his Bailly generally of his Manor he cannot without expreſs Commandment of his Maſter pay this Rent remedileſs to the Ld. for that would be a ſpecial Prejudice to him, which a Bailly without Commandment cannot do. And as to the Caſe of (f) 27 *E. 3. 83. a;* it was agreed, for there the Ten't pleaded the Paym. of the Rent by the Hands of Ten't at Will, and ſo avowed the Paym. as his own Paym. by the Hands of Ten't at Will: 4 *H. 6. 29. b. 30. a.* in (g) Replevin againſt *W.* he made Conuſance as the K's Bailly; and ſaid, That the K. was ſeiſed of the Caſtle of *Laniceſton* as Parcel of his Dutchy of *Cornwall*; and of a Rent of 20 *s.* iſſuing out of the Town of *T.* and that

(a) *Lit. Sect. 556*
Co. Lit. 311. a. b.

(b) *Lit. Sect. 556*
Co. Lit. 311. b.

(c) *Cr. Jac. 142.*

(d) *Antea 57. a.*
Cr. Jac. 142.

(e) 4 Co. 10. 2.

(f) *Antea 57. a.*
Fitz. Sc. fac. 132.

(g) *Fitz. Avowry 7.*
Br. Avowry 77.

Cr. Jac. 665.

all who had been Dukes there had been seised Time out of Mind by the Hands of those who were dwelling and resident within the same Town, and prescribed to distrain for it *quoties*, &c. And it was held a good Seisin, for the Rent was issuing out of the whole Town, and that all the Residents and dwellers ought to pay it, in which Case he could not alledge Seisin by the Hands of any Person in certain, for the Seisin given by one shall bind all, and it cannot be intended, that a Man can have Knowledge of all the Inhabitants; wherefore, by the Advice of the whole Court, the Confinance in such Case was awarded good.

Hill. 4 Jac.

In Communi Banco.

GATEWARD'S Case.

Hob. 86. 1 Bullst.
183. Cr. Jac. 152

IN Trespas by Robert Smith against Stephen Gateward Gent. *Quare Clausum fregit apud Horsington in Com. Lincoln vocat Horsington Holmes, cum quibusd' averiis, viz. equis, vaccis & bidentibus depastus fuit 1 Aug. An, 43 El.* with Continuance. The Defendant *quoad porcos*, pleaded not guilty: And as to the Residue of the Trespas he pleaded, *quod villa de Stixwold est antiqua villa, & contigue adjacet prædict' Claus. vocat' Horsington Holmes, quodque infra eandem villam habetur, & a toto tempore cujus contrar' memoria boni non existit talis habebatur consuetudo, viz. quod Inhabitantes infra eandem villam de Stixwold prædict' infra aliquod antiquum messuagium ibidem ratione commorantia, & resident' suæ in eadem habuerunt & usi fuerunt & consueverunt habere Com. Pastur' in præd' loco in quo, &c. pro omnib' & omnimod' bobus & equis, & aliis gressis animal' communicat' super hujusmodi antiqua messuag' sua infra præd' villam de Stixw. præd' modo & sermo sequente viz.*

viz. quolibet anno ad omnia tempora anni, necnon pro bi-
dentib' suis levant' & cubant', &c. quolibet ann. super pri-
mum diem Augusti, & abinde usque festum Annunciationis
beatæ Mar' virginis tunc prox' sequen'. And pleaded that
he præd' tempore quo fuit & adhuc est commorans & inhabi-
tans in the said Town of Stixwold, in an ancient House in
S. præd', and so justified; upon which the Pl. did demur in
Law. And this Plea began, Trin. 3. Jac. and was often-
times argued at the Bar, and now this Term was openly ar-
gued at the Bench by all the Justices; and it was unani-
mously resolved by all the Justices of the Common Pleas
That the (a) Custom was against Law for several Reasons.

1. There are but * four Manner of Commons, sc. Common
appendant, appurtenant, in gross, and by Reason of Vicinage,
and this Common *ratione commorant' & resident'* is none of
them, and (b) *argumentum a divisione est fortissimum in ju-
re.* 2. What Estate shall he have who is (c) Inhabitant in
the Common, when it appears he hath no Estate or Interest
in the House, (but a mere Habitation and Dwelling) in Re-
spect of which he ought to have his Common? For none can
have Interest in Common in Respect of a House in which he
hath no Interest. 3. Such Common will be transitory, and to-
gether uncertain, for it will follow the (d) Person, and for no
certain Time or Estate, but during his Inhabitation, and such

Manner of Interest the Law will not suffer, for Custom ought
to extend to that which hath Certainty and Continuance.
4. It will be against the Nature and Quality of a (e) Common,
for every Com. may be suspended or extinguished, but such
a Common will be so incident to the Person, that no Person
certain can extinguish it, but as soon as he who (f) releases, &c.
removes, the new Inhabitant shall have it. 5. If the Law
should allow such Common, the Law would give an Action
or Remedy for it; but he who claims it as Inhabitant can
have no Action for it. 6. In these Words, Inhabitants and
Residents, are (g) included Tenant in Fee-simple, Ten't for
Life, for Years, Tenant by *Elegit*, &c. Tenant at Will, &c.
and he who hath no Interest, but only his Habitation and
Dwelling; and by the Rule of all our Books without Que-
stion, (h) Tenant in Fee-simple ought to prescribe in his own
Name, Tenant for Life, Years by *Elegit*, &c. and at Will, &c.
in the Name of him who hath the Fee, and he who hath
no Interest can have no Common; so that none that hath
any Interest, be it but at Will, and ought to have Com-
mon, but by good Pleading he may enjoy it. 7. No
(i) Improvement can be made in any Waste, if such Com-
mon should be allowed, for the Tenants for Life, for

(a) Cr. Jac. 152;
665.

* Cr. El. 363.

(b) Co. Litt.
213^d b.(c) Cr. El. 180;
363; 1 And. 152;
2 Leon. 44.Godb. 96, 97^d.(d) Cr. Jac. 152^d.(e) Cr. Jac. 152^d.(f) Cr. Jac. 152^d.(g) Cr. Jac. 30^d.(h) 2 Rol. Rep.
288. Dougl. p.
102. Dyer 71. p.
42. 15 E. 4. 29. b.

(i) 1 Vent. 397;

Years, at Will, Tenant by *Elegit*, Stat. Staple, and Stat. Merchant, of Houses of the Ld. himself would have Common in the Wafts of the Ld. himself, if such Prescript. should be allowed, which would be inconvenient. But two Differences were taken and agreed by the whole Court. 1. Between a Charge in the Land of another, and a Discharge in his own Land. 2. Between an (a) Interest or Profit to be taken or had in another's Land, and an Easement in another's Land; and therefore a Custom that every Inhabitant of a Town hath paid a *Modus Decimandi* to the Parson in Discharge of their Tithes is good, for they claim not a Charge, or Profit appender in the Soil of another, but a Discharge in their own Land: So of a Custom that every Inhabitant of such a Town shall have a Way over such Land, either to the Church or Market, &c. that is good, for it is but (b) an Easement, and no Profit; and a Way or Passage may well follow the Person, and no such Inconvenience as in the Case at Bar. 8. It was resolved, That Copyholders in Fee, or for Life, may by Custom of the Manor have Common in the Demeans of the Ld. of the Manor, but then they ought to alledge the (c) Custom of the Manor to be, *quod quilibet tenens Customarius cujuslibet antiqui mesuagii customar*, &c. and not *quod quilibet inhabitans infra aliquod antiquum mesuagium customar*, &c. For a Copyholder hath a customary Interest in the House, &c. and therefore he may have a customary Common in the Lord's Wafts; and in such Case he cannot prescribe in the Name of the Ld. for the Ld. cannot claim Common in his own Land, and therefore of Necessity such Custom ought to be alledged. *Vide* 21 E. 3. 34. See the 4th Part of my Reports, *Foiston's Case*, 31, 32. Another (d) Difference was taken and agreed, between a Prescript. which always is alledged in the Person, and a Custom, which always ought to be alledged in the Land: For every Prescription ought to have by Common Intendment a lawful Beginning, but otherwise is it of a Custom; for that ought to be reasonable, & *ex certa causa rationabili* (as *Littleton* saith) *usitata*, but need not be intended to have a lawful Beginning, as Custom to have Land devisable, or of the Nature of Gavelkind, or Borough English, &c. These and the like Customs are reasonable, but by common Intendment they cannot have a lawful Beginning, by no Grant, or Act, or Agreem. but only by Parliam. See also for this Matter *Foiston's Case*. Also it was agreed, that the Cust. of a Manor that *Dom' pro tempore* shall grant Lands customary, is good, and Tenant at Will may well do it, and so 20 H. 6. 8. b. by the Custom of the Court of Common Pleas, the

(a) Hob 86, 118.
Cr. Jac. 152.
Cr. Car. 419.
Cr. El. 180, 363.
2 Bulltr. 195.

(b) Co. Lit.
110 b. Cr. Jac.
152. Cr. El. 180,
363. Cr. Car.
419. Dyer 71.
pl. 42. 15 E. 4.
29 b. Hob. 118.
1 Jones 276,
297.
(c) Doct. pl. 81.
Hob. 86, 4 Co
31. b. 32. a.

(d) 4 Co. 32. a.
8 Co. 5. a.
Co. Lit. 113. b.

the Chief Justice grants divers Offices for Life, and these Customs are good: But in such Cases, he who grants them hath an Interest in the Manor or Office, and their Grant is made good by the Custom. And 19 R. 2. *Action sur le Case* 52. A Beadle of the Hundred shall have 3 Gallons of Beer of every Brewer who sells within the Hundred, *causa qua supra*. But a Custom, That an Inhabitant or Resident, shall grant or take any Profit, is merely void. 9. It was resolved, That if the Custom had been alledged, That *quilibet pater familias infra aliquod antiquum Messuag. &c.* it would be also insufficient for the Causes and Reasons aforesaid; and if he hath any Interest, he may be relieved as aforesaid. *Vide* 7 E. 4. 26. a. 15 E. 4. 29. b. 32. 18 E. 4. 3. b. 20 E. 4. 10. b. 18 H. 8. 1. b. 19 H. 8. reported by *Spilman*, that such Custom is not warranted by Law, and so was it adjudged in this Court, *Trin.* 33. *Eliz. Rot.* 422. See the Book of *Entries, Trespass, Common* 6. *Vide* 9 H. 6. 62. b. 7 E. 6. *Dyer* 70. *Isam's Case*. Note Reader, the Law in this general Case well resolved, and no Book in the Law is adjudged against it; and hereby it appears how Pleaders may safely plead in these and the like Cases; and observe well, That the Custom in the Case at Bar was insufficient and repugnant in it self; for it was alledged, that the Custom of the Town of S. was, that every Inhabitant thereof had used, &c. to have Common within a Place in the Town of H. which was another Town. *Vide* 21 *Eliz. Dyer* 363. pl. 27.

(a) 4 Co. 23. b.
Dyer 71. pl. 44.
20 H. 6. 8. b.

1 Rol. 106.
9 Co. 51. a.

1 Bullfr. 123.

Dyer 70, 71.

Mich. 4 Jacobi.

In Communi Banco.

CATESBY'S Case.

Cr. Jac. 141,
166.
Jenk. Cent. 282.
Yelv. 100.

George Catesby brought a *Quare Impedit* of the Church of *Wishton* in the County of *Northampton*, against the Bishop of *Peterborough*, and *Walter Baker* Clark, and the Plaintiff counted, That *Thomas Catesby* his Father was seised of the Manor of *Wishton*, &c. to which, &c. in Fee, and presented *Francis Foster* his Clark to the said Church who was admitted, instituted and inducted. *Pasch. 34 Eliz. Thomas Catesby* levied a Fine of the said Manor, to which, &c. to *Henry Yelverton* Esq; and *Thomas Hefitrigge*, and to the Heirs of the said *Henry*, to the Use of himself for Life, and after his Decease, to the Use of the Plaintiff for Life, and afterwards *Thomas* died; after whose Death the Church became void, by Deprivation of *Thomas Foster* canonically made, 15 *Januarii* 1604. and yet is void, and so it did appertain to him to present; and the Defendants did disturb him. The Bishop confessed the Seisin of *Thomas*, and the Fine, and the Uses thereof, and that the Church is now void by the said Deprivation, as the Plaintiff hath counted; and farther pleaded, that at the Time of the said Deprivation, (a) *scil.* 24 *Feb.* 1604. he gave Notice of the said Deprivation to the said *George Catesby* then Patron, &c. and that the said Church remained void *per sex menses* after the said Notice, wherefore the said Bishop, as Ordinary, after the said six Months, *viz.* 12 *die Augusti*, 1605. *per lapsum temporis*, did collate the said *W. Baker* the other Defendant, &c. as it was lawful for him to do. To which the Plaintiff said, that it appeared by the Plea of the Bishop, that he did collate (b) *infra tempus semestre proximum post diem notitiæ: Et nota* that, the other Defendant pleaded the like Plea; and the Plaintiff made the like Replication; and on the said Replications, the Defendants did severally demur in Law. And the only Point in this Case was, whether the six Months should (c) be accounted according to the Computation of 28 Days to a Month, for then the six Months were past, and the Ordinary had well collated, or whether the Computat. should be according to the Kalendar, and then the 6 Months accord. to such Computat, were

(a) Palm. 310,
312.

(b) 2 Inft. 360.
(c) Y. lv. 100.
Co. Lit. 135. b.
Postea 62. b.
2 Inft. 360, 674.
Cr. Jac. 141,
166, 167.
1 Leon. 31.
4 Leon. 180.
Foph. 104.
Dyer 218. pl. 6.
Moor 40.
Dall. in Keil-
way 205. a.
D. ll. in Ash. 6.
Larch. 14, 16.
Dall. 72*

not past. And this Plea began, *Trin. 4 Jacobi, Rot. 1928.* and upon Argument at Bar and Bench, it was adjudged for the Pl. and the principal Causes and Reasons of their Judgment were these. 1. (a) *Tempus semestre*, being spoken in the singular Number (as it appears by the Dictionaries) signifies *half a Year, or six Months, scil. tales 6 menses, qui conficiunt dimidium anni.* And there is a great Difference in our ordinary Speech, between the singular Number, as a twelve Month, includes all the Year, according to the Kalendar, but twelve Months shall be reckoned according to twenty-eight Days to each Month. 2. (b) *Verba accipienda sunt secundum subjectam materiam*, and because this Computat. of Months concerns those of the Church, there is great Reason that the Computation should be according to the Computation of the Church, which they best know. 3. It appears by the Stat. of *West. 2. cap. 5.* that such Computation ought to be made, &c. For *si tempus semestre non transierit, &c. tunc adjudicentur damna ad valorem medietatis Ecclesie per unum annum*: so that the Stat. intended to reckon by the Year, and not by Months. 4. It is commonly said in our Books, that if a Year and a Half be past, Title is devolved to the King to present by Lapse, whereby it appears, that the Computation shall be according to the Kalendar, and not according to twenty-eight Days to the Month, for that doth not amount to a Year and a Half. 5. When the Computation is doubtful, it is good to determine it for the Relief and Remedy of him who hath Right, and for the Advantage of Right, to give him the longest Time; to the End that he lose not his Right: And these were the Reasons that were given of this Judgment. For Authorities, a Resolution of this Court *tempore E. 2.* in the *c.* written Book of Cases in his Time; in which Book, (which belongs to *Walmsley Just.*) appears a Writ awarded out of this Court, in these Words, *Rex venerabili in Christo, W. eadem gratia Lincoln. Episcopo salvi. Cum Magister milicie Templi in Anglia quondam Assis. ultime presentationis quam per breve nostrum arraniavit coram dilecto & fideli nostro I. de C. Justiciario nostro, &c. versus G. de W. de Ecclesia de M. vacante, & ad suam presentationem spectantem ut dicebat, Advocationem illius Ecclesie distraxerit in Curia nostra per breve nostrum de Judio. Vobis obtinuerit demandare quod ad presentationem suam idoneam personammitteretis ad Ecclesiam supradictam, vos ut accepimus lapsus & computatis singulis diebus a morte Rectoris Ecclesie illius, usque ad numerum octies viginti & octo dierum continue sequentium, qui sex menses facere videntur asserentes preedictam Ecclesiam auctoritate Consilii, ratione lapsus hujusmodi semestr' temporis ad vos eam vice legitime fuisse devolutam, idoneam personam ad mandatum nostrum preedictum ad presentiam preedicti Magistri admittere distulistis ad eandem, in ipsius Magistri prejudicium, & exhereditat manifestum. Vos igitur quia in vacationibus Ecclesiarum, secundum legem & consuetudinem*

(a) Cr. Jac. 141,
166. Yelv. 100.
1 Inst. 135. b.
Lutw. 1139.
Comb. 439.

(b) 2 Inst. 361,
Hob. 179.
Lit. Rep. 19.
3 Keb. 355.

(c) Gr. Jac. 167,
Yelv. 100.
2 Inst. 360.
2 Rol. 362, 363,
364.

suæritudinem hætenus obtentam & usitatam in regno nostro hujusmodi tempus computari debet, non a die mortis Restoris, sed a die scientiæ Parroni, usque ad sex menses completos, non juxta numerum singulorum dierum, sed juxta numerum sex mensium, qui menses in Calendario computantur, eundem magistrum præsentationem suam ad Ecclesiam illam indebite defraudare volentes, vobis mandamus firmiter injungentes, quod ad præsentationem prædictam idoneam personam admittere non differatis ad Ecclesiam supradictam.

Teste, &c. And altho' now the Law is taken, that the six Months shall be (a) accounted from the Death, and that in such Case there needs no Notice. Yet, (begin it when it will) it appears there by the Award of the Court, that the six Months shall be accounted according to the Kalendar, and not *secundum numerum singulorum dierum, &c.* Also Marrow in his Reading in the Time of H. 7. was of the same Opinion. And Spelman Just. reports a Case (which I have seen in the Book of Telverton Just.) resolved in the Time of H. 8. in these Words: A Matter in Law was put to 2 Just. in the Time of K. H. 8. to have their Opinion, and Resolution, between the Bishop of Lincoln and one Dr. White, how the six Months should be accounted in a *Quare Impedit*, whether according to four Weeks to a Month, or according to the Kalendar, *scil. Septemb. Octobr.* and they by the Advice of their Compan.said, that the 6 Months should be accounted according to the Kalendar, and not by the Weeks. And of such Opinion was Wray Chief Justice, which I my self heard, And with this Resolution agreed Popham Chief Justice of England, Flemming Chief Baron, and all the other Justices at Serjeants-Inn in Fleetstreet. And notwithstanding a Writ of (b) Error was brought on this Judgment in the King's Bench, where the Judges for the Reasons and Causes aforesaid affirm'd the Judgment.

(a) Cart. 44.
Cawley 13, 14.
Lit. Rep. 19.
1 Leonard 31.
Cr. Eliz. 835.
Co. 1 it. 135.b.
Cr. Jac. 141,
166.
Jenk. Cent. 282.
2 Inst. 360, 674.
Yelv. 100.
2 Rol. 521.
322, 363, 364.
Poph. 104.

* Dr. & Stud.
116. b.

(b) Cr. Jac.
166, 167.

Mich. 4 Jacobi.

In Communi Banco.

Sir MOYLE FINCH'S Case.

IN a Replevin between *Avery*, and *Daniel Crat*, which began in *Communi Banco*, *Pasch. 1 Jacobi*, Rot. 1610. upon long and intricate Pleading, the Case was such: *Katharine Lady Moyle* was seised of the Manor of *Beamston* in the County of *Kent*, for the Term of her Life, the Rem'r to *Katharine Lady Finch* in Fee: And afterwards the *Lady Finch* took to Husband *Nicholas Seintleger*, *Hill. 10 El. Seintleger* and his said Wife, and one *Anth. Deal*, levied a Fine of all the Demeans of the said Manor, (by certain Quantity of Acres which included all the Demeans of the Manor) to *T. Finch* and his Heirs, who granted, and rendred the Demeans of the said Manor to the said *Deal* for fifty Years, from the Feast of *St. Michael* then last past, rendring 5*l.* Rent, and granted the Reversion to *Seintleger*, and the *Lady Finch*, and to the Heirs of the *Lady Finch*: which Fine was levied according to certain Indentures before made between the Parties, whereby, amongst other Covenants, it was agreed, that the said *Nicholas Seintleger*, and the *Lady Finch*, &c. should have free Ingress and Egress, in and out of the said Manor, for them, their Steward, Servants and Tenants, to hold the Court Baron, in and upon the said Demeans: And it was averr'd, that the said Demeans, together with the Services, were *a tempore levationis finis, durante tota vita* of the said *Katharine Lady Finch*, at *Eastwell*, & *alibi* in the County of *Kent*, *communiter cognita, habita, reputata* & *nuncupata per nomen Manerii de Beamston*. And afterwards by Indenture tripartite, Anno 16 *Eliz.* between *Sir Thomas Heneage* and *Anne* his Wife, of the first Part, *Seintleger* and his said Wife of the second Part, and *Sir M. Finch* of the third Part, it was covenanted and agreed, that *Seintleger* and the said *Katharine* his Wife, should levy a Fine of the Manors

Co. Ent. 991.

nu. 10.

1 Siderf. 190.

of

Sir MOYLE FINCH'S Case. PART VI.

of *Eastwell, Potbury, Setons, Willington, Ucking and Ulley*, in the County of *Kent*, and of all other Lands, Tenements and Hereditam. of the said *Katharine* in the said County of *K.* except the Manor of *Beamston* in the said County, to the Use of *Kath. Lady F.* for Life, and afterwards to the Use of the said *Sir M. Finch* in Tail, with divers Rem's over, which Fine was levied accordingly, in which as many Acres were contained, as were sufficient to pass the said Demeans. *Ant. Deal* being possessed of the said Interest of the Term as aforesaid, made his Will in Writing, and thereof made *Moyle Deal* his Son his Executor, and Anno 19 *Eliz.* died, the said *M.* then being of the Age of 3 Years, and immediately after his Death, Administration of the Goods of the said *Anth. Ratione minoris etatis* of the said *M. Deal*, was committed to one *Robert Thomas*, and afterwards, Anno 23 *Eliz. Seintleger* and *Kath.* his Wife levied a Fine of the Manor of *Beamston*, and of divers Acres sufficient to pass all the Demeans, to the Use of *Seintleger*, and *Kath.* his Wife, and to the Heirs of the said *Kath.* until the said *Seintleger*, with the Assent of the said *Kath.* his Wife in Writing, signed and sealed by him, declared to what other Uses, and then to the same Uses. *Rob. Tho.* the Administrat. demised the Tenem. aforesaid, to *Pa. Lofty* for 10 Years, and afterwards the said *K. Lady Moyle* Anno 26 *Eliz.* died, *Pa. L.* entred Anno 27 *Eliz. Seintleger*, with the Consent of his said Wife, accord. to the said Limitat. declared the Uses of the Tenem. aforesaid, to be to *Hancock* and *Sturges*, and their Heirs, who ejected *Pa. L.* and did thereof enfeof *Glanvile* and *Sturges*, and their Heirs, to the Use of *K. Lady Finch* for her Life, and after to the Use of *H. Finch*, her younger Son, and *Ursula* his Wife, and the Heirs of their two Bodies. *Pa. Lofty* the Lessee of the said Administrator, recenter'd, *K. Lady Finch* died, the Rent reserved by the said Fine, *de Anno 10.* was arrear for 13 Years ended 44 *Eliz.* and for the said Arrearages, the Def. as Bailly to *H. Finch*, distress'd, and the Pl. Lessee of *Sir M. F.* brought a Replevin. And in this Case 4 Points were moved, and argued, as well at the Bar, as this Term, by *Daniel, Warberton, Walmsley* and *Coke* Ch. Just. at the Bench. The first Point was, whether by the Fine of 10 *Eliz.* in which was such a Grant and Tender, as is aforesaid, the Manor was destroyed for ever, and that was called the destroying Point. 2. Admitting the Manor was for ever destroyed, whether the Except. in the said Indenture of 16 *El.* by the Name of the Manor of *Beamston*, be sufficient to except, and save the Manor out of the Fine of 16 *Eliz.* levied to the Use of the same Indentures; and that was called the saving Point. 3. Whether the Lease made by the Administrator *ratione minoris etatis*, for 10 Years, be good or not, and that was called the making Point. The fourth and last Point was, whether there needed any Attornm. or that the Regress of *Pa. Lofty* the Lessee for Part of the Term, *scil.* for 10 Years, should amount to an Attornment; and that was called the perfecting

Point. As to the 1st, It was resolved *per tot' Cur'*, that altho' at one Instant the Demeans were granted and render'd to *Sand K. Lady F.* and to the Heirs of *K.* so that there was not any Transmutat. of any Possess. yet the Demeans being once by the Act of the Party absolutely severed in Fee-simple from the Services of the Manor, the Manor is destroyed for ever. And a Differ. was taken between the Act of the Parties and the Act of the Law: For if there be 2 Coparceners of a Manor, and on a (a) Partit. the Demeans are allotted to one, and the Services to the other, in that Case, altho' there is an absolute Severance, yet if one dies without Issue, and the Demeans descend to her who hath the Services, the Manor is revived again; because on the Partit. they were in by Act of Law, and the Demeans and Services were united again by Act in Law. And so was the clear Opin. of *Thorpe* and the other Just. in the Time of *E. 3.* as *Thirning* Ch. Just. reports in *b. 12 H. 4. 25. b.* And the Case intended was the Case of *Hugh Audley E. of Gloucester*, which began 17 *E. 3.* 72. *a. b.* but there was not resolved. *Vide 18 H. 6. 26. a. acc.* So if on a Partition an Advowson appendant is allotted to one, and the Manor to the other, and afterwards one dies without Issue, whereby the Law unites them again, in that Case the Advowson which was once severed, is now appendant again. Also it is agreed in 26 *H. 8. 4. a.* that if a (c) Partit. be made of a Manor betwixt 2 Coparceners, and on the Partit. each hath Parcel of the Demeans, and Parcel of the Services, because each of them is in by Act of Law, each of them has a Manor. But if a Man has a Manor, and he grants Part of the Demeans, and Part of the Services to another, he shall not have a Manor, for a Man by his own Act cannot create a Manor at this Day; and so it appears, that (d) *fortior est dispositio legis quam homin'*. As to the second Point, it was objected, That forasmuch as in *anno 10 El.* the Manor was destroyed, it could not be excepted by the Name of the Manor in *anno 16 El.* and that for 3 Reasons. 1. The Time of 50 or 6 Years is not a (e) sufficient Time to gain a Reputat. but it was urged it ought to be *a tempore cujus*, &c. As when Land passeth as appertain. to a House, it ought to be averred to be usually occupied with the House *a tempore cujus*, &c. as appears in *Hill and Gr. Case, Plov. Com. 170. b. 2.* The Averm. that from the Time of the Levying of the Fine during the Life of the Lady *F.* it was known and reputed for a Manor was impossib. for it could not be reputed and known immediat. after the Fine levied, but Time ought to give a Name and Reputat. *Et eo potius*, because the said Fine was levied of the Reversion; for the Lady *M.* had the whole for the Term of her Life, and such Reputation and Consuance could not be of a Rev'n expectant on an Estate for Life, as it might be of a Possess. 3. Altho' the (f) Reputat. of a vulgar Name will serve in Grants or Conveyances, yet it will not serve in judicial Proceed. of the Law, which are framed by learned Men; and therof. by the said Fine of 25 *El.* which is a judicial Proceed. of Law, that shall not pass by the Name of a g) Manor, which in Truth and in Law is not a Manor. But it was

(a) 18 H. 6. 26. a.
2 Rol. 122.

(b) Br. Extinguishment 13.
Fitz. Extinguishment 5.

(c) 2 Rol. 122.
Davis 61. b.
Cr. El. 39.
Br. Manor 1.

(d) Postea 69. b.
8 Co. 152. a.
2 Rol. 315.
Hutton 18.
2 Sid. 59.
10 Co. 67. b.
Co. Lit. 338. a.
(e) 2 Rol. Rep.
347.
Cr. Car. 308.

(f) Yelv. 191.
(g) 2 Rol. Rep.
67.
Cr. El. 524.
707, 708.
Palm. 376.

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resolved, That the Exception as this Case is, is sufficient to except the Demeans and Services by the Name of the Manor, notwithstanding the Manor was destroyed. 1. It was the

(a) good and true Intent of the Parties: For the Lady *Finch* and the others who were Parties to the Fine and Indentures of 10 *El.* did not think of any dismemb'ing or destroying of the Manor: For in the same Indenture Provision was made to have ingress and egress to hold the Courts of the Manor: Also all the Parties to the Indenture of 16 *El.* thought that it was a Manor, (of whom *Sir Moyle F.* was one) for by the express Words it is excepted by the Name of a Manor, and in the Fine of 16 *El.* divers Manors are named, but no Mention of the Manor *Beamston*, for that was intended to be excepted; but it is by the express Name of the Manor of *Beamston* mentioned in the Fine of 23 *El.* so that the true Intention of all the Parties appears, that it should be excluded out of the Fine of 16. and included in the Fine of 23. And it is well said in *Hill and Grange's Case*, *Plow. Com.* 170. *b.* It is the (b) Office of Judges to take and expound the Words which the common People use to express their Meaning, according to their Intents, and not according to the very Definition. And *Gravelton* saith, *Nihil tam convenientis est naturali equitati, quam voluntat' Dom' volentis rem suam in alium transferre ratam habere.* And altho' *generalis regula generaliter (c) est intelligenda*, yet the said (d) Rules are principally to be observed in Wills, and also in Cases of Uses which were but (e) Trusts and Confidences between Man and Man. And to that Purpose *Shelley's Case* in the first Part of my Reports, and (f) *Carter and Ringstead's Case* there vouched were cited and applied to that Purpose. 2. Forasmuch as the true Intent and Meaning of the Parties appears, why should not we as Judges adjudge it good? It has been objected, That the Thing excepted is not well named: For in Law *Beamston* is not a Manor, for it was destroyed by the Fine of 10 *El.* and for that Destruction, the Exception of it by the Name of a Manor shall be void. In the Argument of which Point it was said, That the Law doth not favour Advantages of Misnosmer more than the strict Rule of Law requires, neither in Writs which may be abated, and new purchased, nor (especially) in Grants or other Conveyances, in which Case the Party has not Remedy to have new. And therefore if two be joined in one Writ, the one shall not plead (g) Misnosmer of the other, as it is agreed in 14 *II. 6. 3. b.* In an Action against (h) Husband and Wife, altho' they are one Person in Law, yet the one shall not plead Misnosmer of the other. 33 *E. 3. Maintenance de bre'* 63. In Trespass in *Holderness apud W.* the Def. pleaded (in Respect of some Misnosmer) that there was no such Town, Hamlet, or Place known, &c. The Pl. replied there was, without shewing in certain, either that it was Town, Hamlet, or Place known, and all

(a) *Yelv.* 191.
Cr. El. 524,
 707, 708.
Palm. 376.
 2 *Rol. Rep.* 67.

(b) *Wing. Max.*
 23.

(c) 1 *Co.* 100. a.
Co. Lit. 36. a.
 (d) *Co. Lit.*
 313. a.
Moor 138.
 1 *Co.* 95. b.
Cr. El. 208.
 (e) 1 *Co.* 121. b.
 127. a.
 2 *Co.* 58. b.
Bacon's Lect
 5, 6, 7, 8, &c.
 (f) *Cr. El.* 208.
 2 *Leon.* 47.
 8 *Co.* 118. b.
 1 *And.* 245.
Owen 84.

(g) *Br. Misnosmer* 69.
 29 *Aff.* 70.
 21 *H. 6.* 27. b.
 21 *E.* 4. 71. b.
 22 *E.* 4. 44, 45.
Lutw. 36.
 (h) *Doct. pl.* 244
 33 *H. 6.* 22. b.
Ritz. misnosm. 4

all that in Detestat. of nice and dilatory Except. And it was also observed, That till this Generat. of late Times it was never read in any of our Books, that any Body politick or corporate endeavour'd or attempted by any Suit to avoid any of their Leases, Grants, Conveyances, or other of their own Deeds for the Misnomer of their true Name of Corporat. but after that a Window was opened to give 'em Light to avoid their own Grants for the Misnom. of themselves, what Suits and Troubles thence ensued every Body knows. But it was said, for every curious or nice Misnom. God forbid, that their Leases, or Grants, &c. should be defeated; for there will be a found Difference betw. Writs and Grants, and in all Cases this is true, *qd' (b) apices juris non sunt jura*. But it was resolv. that as this Case is, there was a suffic. Name in Law to make the Except. good. For *nomen dicitur a noscendo, quia notitiam facit*, and in this Case it is averred, *qd' cognitum fuit per nomen, &c.* So that it is not only *notum*, but *cognitum*, which is more; and by true Etymology and Sense, *Cognom' major' est ex sanguine tractum, hoc intrinsec' est, agnomen extrinsec' ab eventu*; and yet the Law doth not regard this precise Propriety of Words. For if a Grant be made to a Bastard by the Sirname of him who (as is supposed) begot him, it is good, if he be known by such Name. So if a Rem'r be limited *Rich. filio Rich. Marwood*, it is good, altho' he be a (c) Bastard, if in vulgar Reputat. and Knowledge

(*) 10 Co. 125. b.

(b) Co. Lit. 283. a. b. 304. b. Noy 30. 10 Co. 126. a.

(c) 41 E. 3. 19. a. 1 Rol. 359. Co. Lit. 3. b. Br. grant 17. Hob. 32.

Swinb. 52. 310. Cr. El. 509. 510. 2 Rol. 43. 44. Moor 430. P. lit. 67. a. Noy 35. (d) Swinb 310. 2 Rol. 43.

(e) 39 E. 3. 11. a. Antea.

(f) Swinb 310.

(g) Hob. 32. Co. Lit. 3. a. 9 Co. 48. a. 11 Co. 21. 2.

Cui pater est populus, non habet ille patrem.

In 41 E. 3. 19. a. there is a notable Case. (d) *Richard Thompson* had Issue by one *Johan* before Marriage *Agnes*, and afterwards married *Johan*, and made a Feoffm. in Fee, and took back an Estate to himself for Life *remanere inde Agnetæ fil' præd' Richardi & Johann'*, and agreed that it is a good Rem'r, without any Averm. that she was known to be their Daughter, as it was in the said Case of 39 (e) E. 3. but there it was objected that a Bastard is not their Daughter in Law, and therefore the Rem'r void: But there *Finchd.* gave the Rule and said, it is found that the Daughter was born before the Marriage, so that by their Marriage after she was their Daughter. In which it is to be observed, that altho' by the Com. Law she was not their Daughter; yet because she had Colour by the Ecclesiast. Law, which saith, (f) *Qd' subsequens matrimonium tollit peccatum præcedens*, this Colour is sufficient in Case of a Conveyance to make the Remainder good. And so note a Difference between a Descent and Purchase; and therewith expressly agreeth 35 Ass. 15. In 27 E. 3. 85. a. b. *W. Abbot of Worcest.* by the (g) Name of *W. Abbot of W.* by his Deed, with the Consent of his Covent granted to the Burgesles of *W.* Common of Pasture

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in cert. Lands, and altho' his Christ. Name was mistaken, yet
 2) Co. Lit. 3. a. forasmuch as there was a suffic. (a) Certainty to ascertain the
 Name of the Grantor, *sc.* Abbot of *W.* for that Reason the
 11 Co. 21. a. Grant was adjudg. good; for in this Sense it is true, (b) *Nihil
 facit error nominis cum de corp. constat*, but otherwise it is of
 a Writ; for there if the Abbot be named by a false Christian
 Name, the Writ (c) shall abate, because he may purch. a new
 Writ, and therewith agree 18 E. 4. 8. b. 15 H. 7. 1. b. 22 H. 6, &c.
 1) Co. 121. a. As to the 2d Object. which has been made, that in this Case
 48. a. there was not a suffic. Time to make the Reputat. of a Manor,
 Co. 126. 2. and that Time out of Mind is requisite in this Case; it was
 11 Co. 21. b. answered and resolved, that there is a Difference between a
 Title to a Thing to be created and claimed by Prescript. of
 Time, and the Name of a Thing in *esse* to make it pass in a
 Conveyance, for no Man can claim Rent, Common, or other
 Profit of Inherit. by Usage, but he ought to claim it by Pre-
 script. *a temp. cuius memor'*, &c. for such Time is requisite by
 the Law; but to make a Thing in *esse* pass by a Name, there
 needs not Time whereof, &c. but such conven. Time that it
 may be known by such Name. And it will be asked to what
 Places ought such Knowledge to extend? To all *England*?
 Or to all the County in which the Land lies? Or to what
 Place? To that it was answered and resolved, that it extends
 only in Law *ad vicinictum* of the Town where the Land lies,
 for there the Knowledge ought to be, where it ought to be
 tried, and that is *in vicineto* of the Place where the Land lies
 For the Name of a Manor or Land, or other local Thing is to
 be tried, where it lies, because it is local; as the Name of the
 Person is to be tried where the Writ is brought, because it is tran-
 sitory; and therefore it was agreed, that the House in the *Strand*
 now of late called *Exceter* House, and the House in *Fleetst.*
 now called *Dorset* House, have within these 3 Years gained suf-
 fic. Names amongst all their Neighb. to know it by such Name,
 and thereby to distinguish the same House from other Houses.
 In 41 E. 3. *Maintenance de bre'* 49, the Case was, that in Truth
 there was a Manor called *Asplegise*, and it was also known by
 the Name of *Asple* only, and there in a *Prac.* brought
 of the Manor by the Name of the Manor of *Asple* without Ad-
 dit. the Tenant after the View, demanded Judgm. of the Writ,
 because the Manor put in View was the Manor of *As-
 plegise*; to which the Demandant said, that the Ma-
 nor put in View is known by the Name of *Asple*, and
 thereupon Issue was taken. In which it was observed. 1. That
 the Plea for the Maintenance of the Writ was, That the
 Manor is known in the present Tense, which is intended, the
 Day of the Writ purchased without any Prescript. 2. That altho'
 a Manor cannot begin within Time of Memory, yet a Manor
 may acquire a Name to be demanded in a *Præcipe* within con-
 ven. Time. And 3. That such Name acquired by Knowledge of
 the Country is suffic. without the true and proper Name. *Vide*
 8 H. 6. 32. b. for in that Sense it is true, *denom' propr' non est*

curandum, dum in substantia non errerur, quia (a) nomina mutabil' sunt, res autem immobiles, In (b) 45 E.3.6.a. in a *Quare Imped.* of the Church of B. the Def. pleaded, that there was no such Church in the County where the Writ is brought; afterwards Issue was joined that there was a Ch. in the same County known by the Name of B. for *Finchd.* who gave the Rule there said, if any Ch. in the County be known by such Name, it is suffic. to maintain the Writ, which agreeth with the Book of (c) 41 E.3. In 21 H.6.4.a.b. In *Tresp. versus Johann' Arderne Abbatem S. Johannis Baptist' de Colcest.* The Abbot pleaded, that he was founded by the Name of the Abb. of the Ch. and Monast. of St. *Joh'n Bapt. &c.* The Pl. said, that this Abbot was known by the one Name and the other, and so to Issue; in which it was observed, that it is suffic. to say, that this Abb. (without saying and his Predecess.) was known by such Name. *Ergo,* there needs not Time whereof, *&c.* 47 E.3.5.a. there it appears, if a Chapel be in the Time of H.3. and when it became void K. H. 3. presented to it as to a Ch. and so did E.1. and E.2. and afterwards E.3. being disturbed, brought a *Quare Imp.* as to a Ch. and there *Cavendish* Ch. Just. said, That after the said Presentments had been received to the same Chappel as to a Ch. I say it is not now a Chappel but a Ch. By which it appears, that the said Rule is true, that *nom' sunt mutabil' res autem immobiles.* And therewith agreeth 11 H.6.18.b. where the Case was, that a Parson had an Annuity by Prescript. of a Vicar. and afterwards E.3. when the Vicar died, presented one I. as Parson, and so were all his Successors presented as Parsons, and the Parson made a special Prescript. *sc.* That A. was Vicar, and that he and all his Predecessors Vicars, *&c.* And that after the Death of A. the K. presented as to a Parsonage, and so that he and his Successors had payed, *&c.* and charged the Def. as Parson in a Writ of Annuity, and there it appears that by the said Presentm. the Name of Vicarage was changed into a Parsonage. As to the 2d Object. That the Averm. was impossible and repugnant, that from the Time of the Levying of the Fine it was known, reputed, *&c.* To that it was answered and resolved, That there was not any Impossibility or Repugnancy, for in the Averm. there are 4 Words, *cognit. habit. reputat. & nuncupat.* and they were true before 10 E1. for then, and Time whereof, *&c.* it was *revera* a Manor, so that the Knowl. Reputat. or Appellat. did not begin from the Fine in 10 E1. but this Averm. continues that which was in Truth before the Fine a Manor, from the Time of the Fine to be known, reputed and called a Manor. And always the Reputat. is better, when it hath a Ground and is founded on Truth. And therefore if a Man marries with a Woman (d) precontracted, and has Issue by her, this Issue in Law and Truth bears the Surname of his Father. But if after the Husband and Wife be divorced for the Precontract,

(a) Scile 391.
(b) Br. Qu.
Imp. 33.

(c) 41 E. 3.
Maintenance
de brief 49.
Antea 65. b.

2 Inst. 684.

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now the Issue has lost its Sirname; for as it hath been said, *Cognomen majorum est ex sanguine tractum*, and now the Issue is Bastard & nullius filius; and yet because he once had a lawful Sirname, it is a good Ground of Reputat. subsequent. So if I have a Park by the K's Licence and Grant, and it is commonly known by the Name of a Park, and afterwards I surrender my Patent to the K. whereby in Law it is no Park, yet having once the Name of a Park in Truth, it is a good Ground for Reputat. and Continuance of the Name of a Park after; and the Avowant might have prescribed as this Case is, that the said Demeans and Services had *a tempore cujus, &c.* been known by the Name of the Manor; for before the Fine it was known in Truth, and after the Fine in Reputat. so that it is not a Creation of a new Name, but a Continuance of the old name. *Vide 7 El. Dyer 233. (a)* The K. seised of a Manor, whereof all the Demeans are leased for Life by the Lease of an Abbot, rendering Rent, in that Case the K. has not a Manor in Possession, nor can hold Court; and yet if the K. leases the Manor to another for Years as a Manor in Possess. the Lessee shall have the (b) Rev'n and the Rent: For altho' it is not in a Manor in esse, yet it is well known that it was intended to be demised. And to that Purpose is the Case in 20 *El. Dier 362.* where the Case was, That (c) *Ed. 6.* was seised of the Manor of *Clevery*, of which a Wood containing 300 Acres was Parcel, *Ed. 6.* by his Letters Patents granted the said Wood in Fee, and afterwards the said Wood escheated to him for Treason. Afterwards the Queen granted the said Wood in Fee, the Grantee regranted it to Queen *El.* who by her Letters Patents granted the said Manor, & omnes boscos modo vel antehac cognit. vel reputat. ut pars membrum, vel parcelle ejusdem manerii to the Earl of *Leicester* in Fee: And altho' in rei veritate, before the Severance made of the Wood by King *E. 6.* it was always Parcel of the Manor, yet in good Propriety of Speech it was then, *cognit. ut pars & membrum dicti manerii*; for altho' (ut) is a Word of Similitude; and not of Identity, yet Truth is the most sure Foundation of Knowledge and Reputation, and therefore it was there adjudged, that the Wood did pass. As to the 3d Objection, that a Manor in (d) Reputat. and not in Truth shall not pass by Fine, which is a legal Proceeding drawn by Men learned in the Law, and therefore vulgar Reputation will not serve in it; to that it was answered and resolved, that the Rule which *Stonor* gave in 9 *E. 3.* 38. in the like Case, was true, That the Process of this Court should not be maintained by Usage in pais; but there is a Difference (e) inter *Brevia adversaria*, sc. brought as an Adversary to recover the Land, &c. & *brevia amabilia*, sc. brought by Consent and Agreement amongst Friends; for it is true in

(*) *Dyer 233.*
pl. 19. 11.

(b) *Ant. 55. a. b.*
56. a. Co. Lit.
324. b. Co 26. a
5 Co. 124. b.
8 Co. 26. a.
10 Co. 107. a. b.
Cl. Car. 400.
Dyer 125. pl. 45.
233; pl. 10, 11.
Flow. 155. a.
159. a 30 E. 1.
grant 86. 7 E.
4. 20. Fitz.
feoffment 22.
Fitz. grant 97.
37 H. 8. Br.
grant 50.
2 Rol. Rep. 180,
277, 278.
Lane 3, 7.
Lit. Rep. 18.
B. N. C. 267.
Hob. 224.
(c) Dy. 362.
pl. 17. Cr. Car.
169. 2 Rol. 186.
Moor 190, 191.
1 Leon 15.
(d) 2 Rol. Rep.
67. 1 Sid. 190.
Cr. El. 524, 707,
708. Noy 7.
Moor 190.
(e) 5 Co. 38. b.
45. b. 7 Sid. 68.

brevibus adversariis, the Proccs of this Court shall not follow the Custom or Reputat. of the Country, as in 6 E. 3. 11. The Demand in a Writ of Entry demanded the Manor of C. the Tenant said that the Tenements put in View, are a House and a Carve of Land called, &c. and not a Manor, &c. By which it appears, that if it were not in Truth a Manor, altho' it were in Appellat. the Writ shall abate: But it was adjudg'd in Sir John Bruyn's Case, in the Beginn. of the Reign of Q. El. That in a com. Recovery which is had by Agreeem. and Consent of Parties, of Acres of Land, they shall be accounted according to the customary and usual Measure of the Country, and not according to the Stat. *de terris mensurand'* made an. 33 E. 1. So it is agreed in 47 E. 3. 18. a. That if a Man bargains and sells so many Acres of Wood, it shall be (a) measured according to the Usage of the County, *sc.* according to 20 Foot to the Rod, and not according to the said Act, for (b) *consuetudo loci est observanda*. And it appears by the Book in 39 E. 3. 11. a. that a Rem'r limited to a (c) Bastard by the Name of Son of R. Marwood, whereas in Truth he was *nullius fil'* was good, because he was known and reputed as his Son. And M. 22 & 23 El. in the K's B. in *Ejeff' firmæ* between Vines and (d) Durham, a Lease was pleaded of a Manor, &c. whereof, the Tenements in which, &c. were Parcel, and Issue was joined, *quod non demisit manerium*; and on that Issue the Jurors gave a special Verdict, *sc.* that there were not any Freeholders, but divers Copyholders of the said Manor; and that it was known by the Name of a Manor, and after good Considerat. it was adjudged by Sir Chr. Wray Ch. Just. *& totam Curiam*, that altho' it was not a (e) Manor in Law for Want of Freeholders, and altho' it was in Pleading, which is always drawn by learned Men, and that it was in an Action adversary, and not amicable; yet that forasmuch as an Issue is triable by Lay-men, and that in Truth the Tenements in which did pass by the Lease (and therefore not like to a Writ it was adjudged for him who pleaded the Demise of the Manor. Hill. 25 El. in this Court *Carrier's Case* was, that where it is required by the Stat. of 1 H. 5. c. 5. that in every Writ original, &c. in which an Exigent shall be awarded that Additions shall be given to the Def. of their Estates or Degrees, or of their Trade, &c. and the Case was, that one was (f) Yeoman by his Birth, and yet commonly called Gent. in that Case, in such Writ brought against him, he may have the Addition of Gent. altho' in Truth he is not a Gent. but only by vulgar Reputat. but forasmuch as the Intent of the Act is to have such a Name, by which he may be known, it is sufficient to satisfy the Act of Parliament. Another Reason was added, that in this Case there was at the Time of the Making of the Indentures in Anno 16 Eliz: a Manor in Truth, *scil.* in the Lady Moyle for the Term of her Life, which was sufficient to support the Name.

(a) Cr. El. 267;
Poph. 55.

(b) 10 Co. 140. a.
+ Co. 28. b.
7 Co. 5. a.

(c) 1 Rol. 359;
41 E. 3. 19. a.
Co. Lit. 3. b.
B. Grant 17;
Hob. 32.

Anrea 65. a.
Swinb: 310.
Cr. El. 509, 510;
Moor 430.

Noy 35.
2 Rol. 43, 44.
(d) 2 Rol. 43, 712

(e) Doct. pl. 188,

(f) 1 Inst. 668.

Sir MOYLE FINCH'S Case. PART VI.

of the Manor; and to make the Demeans and Services pass by the Name of it: Wherefore it was concluded, that by the Name of the Manor of *Beamston* the said Demeans and Services, late Parcel of the Manor, were excepted by the Indenture *de anno 16 El.* As to the 3d Point it was resolved, that the Lease made by the Administrator *ratione minoris etatis* was good; altho' it was not necessary that the Lease should be made; for the Lady *Moyle* was then alive; so that that Lease enured as an *Interesse termini* to begin after the Death of the Lady *M.* But this Differ. was taken, that when a Man makes an (a) Ex'or of such tender Years, (as in this Case of 3 Years) that he cannot execute the Will, then if the Administrator (b) *ratione minoris etatis* be granted specially, as it was *M. 41 & 42 El.* in *Prince's Case*, *Administ' omnium bonorum, ad opus, commodum, & utilitatem executor' durante minore etate, & non alit', nec alio modo committimus, &c.* there such special Administrator cannot make such Lease, as in the Case at Bar: But when the Administrator is committed generally *ratione minoris etatis*, without any Restraint or Limitat. there such Lease made, as in the Case at Bar is good. For by the Ecclesiastical Law, *Minor 17 annis non admittitur fore executorem*; and such general Administrator, *ratione minoris etatis*, shall not only have an Action to recover Debts and Duties, (for the Interest of the Actions is in him, and also shall be liable to all Actions; for during the Time the Testator died *quasi intestatus*) but also he may make Leases or Demises, and they shall be good, wherefore the Lease in the Case at Bar was good; and *eo potius* in the Case at Bar, because no Entry is pleaded by the Ex'or, and he who pleads the Demise is a Stranger to it, and therefore he cannot know what Rent is reserved, and therefore when he pleads *demisit*, if it was for any Cause void, he might take Issue *qd' non demisit*, or shew the special Matter, but it shall be intended *prima facie*, that the Lease is good, and without Question it is good till the Ex'or attains to 17 Years, and also till he enters, as some said. As to the last Point, 1. it was resolved, That forasmuch as *Paul Lofty* had but an *Interesse termini* during the Life of the Lady *Moyle*, therefore as to the said Interest upon the Fine *de anno 23 El.* (which was levied in the Life of the Lady *Moyle*) no Attornment could be. 2. When after the Death of the Lady *Moyle* the Lessee entered, he made the Rev'n in *Seintleger*, and the Lady *Katbarine* his Wife, and when they made Declaration of Uses to *Hancock* and *Sudger*, those Uses arose out of the Fine, to which Fine no Attornment could be made by him who had a future Interest, as is aforesaid: For when Attornment is not requisite to a Fine, which is the Root, no Attornment is requisite to the Declaration of the Uses, which are but the

(a) 2 Inst. 397.

(b) 5 Co. 29. b.

Cr. El. 678, 679.

718. 719. 2 And.

132. Raym. 484.

Swinb. 288.

3 Leon. 278.

8 Co. 135. b.

2 Inst. 398.

March 138.

Owen 35.

Dall. 85.

Branches. 3. It was resolved, that if a Man be seised of a Manor, Part of which is in Lease for Life, and Part in Lease for Years, and he levies a Fine to *A.* to the Use of *B.* in Tail, with divers Rem's over, in that Case *B.* shall avow for the Rent, or have an Action of *(a)* Waste without any *(b)* Attornm. for when a Rev'n is settled in any one in Judgm. of Law, and he has no possible Means to compel the Ten't to attorn, and no Laches or Default is in him, there he shall avow, and shall have an Action of Waste without Attornm. for the Rule is, *qd' remedio destituitur ipsa re valet, si culpa absit,* as in *(c)* 20 *E. 3. contra form' collat'* because the Founder cannot have *contra form' collat'* of an Advowson, he shall present without any Suit, so *7 E. 3. & 3 H. 7.* A Man shall be Ten't by the *(a)* Curtesy of a Rent or Advowf. altho' the Wife dies before the Day incurs, or the Presentm. falls; so the Ld. in Mortmain, or of a Villain, claims a Rev'n, by the *(e)* Claim the Law vests the Rev'n in him, and he has no Means to compel the Ten't to attorn, and therefore he shall avow and shall have an Action of Waste, without Attornm. the same Law of Letters Patents; and of a Devise of a Rev'n, as appears in *34 H. 5.* for in all the said Cases *culpa absit.* But it was objected, that in the said Case of the Fine there was Default and Laches in the Conusee, for he might have made Mention of the Leases in the Fine, and then he might have brought a *Quid juris clamat,* and compelled the Lessees to attorn, and so he had Means to have compelled them to attorn; wherefore in Regard he had omitted it, there was a Default in him, and by Consequence he shall neither have an Action of Waste, nor avow without Attornm. no more than if one levies a Fine to anothe. of Land, which is in Lease for Life, he is without Remedy for Rent or Waste without Attornm. To which it was answered and resolv. that in the said Case the Conusee could by no Possibility have a *Quid juris clamat;* for altho' he had recited the particular Estates in the Fine, yet he could not have a *Quid juris clamat,* for after the Conufance or Concord, and before the Fine engrossed, he ought to sue the *Quid juris clamat,* and immediately by the Conufance or Concord, the Rev'n passed to the Conusee. *Vide F.N.B. (f)* 147. a. & 22 *H. 6. 57.* and *eo instante* it is executed by the Stat. of *(g)* 27 *H. 8.* of Uses; so that it is not possible for him to have a *Quid juris clamat,* nor any Remedy to compel the Ten'ts to attorn. And forasmuch as by the Act of Parliament, which is an Act in Law, *sc.* by the Execut. of the Possession to the Use, the Benefit of the Conusee to have a *Quid juris clamat* is toll'd, it is reasonable in Regard every Subject, *sc.* the Conufor, Conusee, particular Ten'ts, and all others, are Parties or Privies to the Act of Parliament, that it should not turn to the Prejudice of any, for *(h)* *impotentia excusat legem,* and an Act in Law shall prejudice no Man. It was adjudged in the King's Bench, *Pasch. 41 Eliz.* between *i. Heston* and *Ruddleston.* t. At Com. Law a Man by the Convict. of Felony, although

- (a) 2 *Jones* 4.
 (b) 4 *Co. 70. b.*
Co. Lit. 309. b.
 321. b. *Cr. El.*
 285. *Raym.* 91.
Cr. Jac. 1931
 Vaugh. 40.
 (c) 20 *E. 3.*
Fitz contra
form' collat. 6.
 (d) 1 *Co. 97. b.*
Fitz. bar 293.
Co. Lit. 15. b.
 29. a. 7 *E. 3.* 66.
 a. b. 3 *H. 7.* 5. a.
 F. N. B. 149. d.
Fitz. Dilcent 3.
Br. Penant per
le Carrelie 5.
Perk. Sect. 463.
 469. *Dr. &*
Strud. 84. a.
 (e) *Co. Lit.* 119. a.
Lit. Sect. 179.

(f) 5 *Co. 39. b.*

- (g) *Co. Lit.*
 309. b. *Cr. El.*
 285.
 (h) 1 *Co. 98.*
Co. Lit. 29. a.
Haid. 387.
 4 *Co. 11. a.*
 5 *Co. 22. a.*
 6 *Co. 21. b.*
 9 *Co. 73. a.*
 10 *Co. 139. b.*
 (i) 5 *Co. 110. a.*
 3 *Init* 114.
Raym. 370. 380.
Hob. 292.

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he has his Clergy, shall forfeit all his Goods which he had at the Time of the Conviction, or which he shall acquire after, and shall remain disabled to acquire Goods to his own Use, till he has made his Purgation. 2. That where by the Statute of (a) 18 *El. c. 7.* it is enacted, That after Clergy allowed, he shall not be delivered to the Ordinary, as before was used, to make his Purgation, but shall be burnt in the Hand and delivered; which Act has taken away his Means to enable himself again; and therefore it was adjudged, that after he is delivered by Force of the Act, he shall be enabled in the same Manner as if he had made his Purgation. And it is in Effect all one with a Bargain and Sale by Deed indented and inrolled, for there the Use passeth from the Party, and the Statute executes the Possession, and the Party has no Remedy, nor is there any Default in him, and therefore the Rev'n shall be in him without Attornment. So in the said Case of the Fine, the Limitat. of the Use is declared by the Conusor, and *Cestuy que use* has the Use by him, and that is executed by the Statute; and *B.* in the said Case supposeth the Gift to be made by the Conusor, as it is adjudged in (b) 7 *E. 6. Br. Formedon.* And for the same Reason it was resolved, that in the Case at Bar, when *Seintleger* and his Wife levied the Fine in 16 *El.* and by Enumeration of Acres and Towns, all the Demesns of *Beamson* did pass, and the Law (forasm. as they were excepted out of the Uses in the Indentures in 16 *El.*) did create and vest the Use in *Seintleger* and his Wife again, as it was before, that they should have an Act'n of (c) *Wast*, as they might have before the Fine levied, or otherwise there would be great Mischief in such Cases innumerable: So, be the Use limited on the Fine to a Stranger, or to himself, created by Act in Law, or limited by Declarat. of the Party, it is all one. But (d) *Owsey's Case, Mich. 36 & 37 El.* reported by me in my 5th Part of Reports in *Mallory's Case*, where the (e) Conusee of a Rev'n by Fine disseises the Lessee for Life, and makes a Feoffm. in Fee, the Lessee re-enters, that is no Attornm. for he cannot (f) *plus juris in alium transferre quam ipse habet.* So in *Knottisford's Case* there cited, if such Conusee of a Rev'n before Attornm. (g) bargains and sells the Rev'n by Deed indent. and inroll. that such Bargainee shall not avow, or have an Act'n of *Wast* without Attornm. *causa qua supra.* And *Walm.* said, that the Case of Limitat. of a Use on a Fine had been adjudg. in this Court, according to this Resolut. Note, a good Resolut. for all Conveyances on Considerat. of Marriage or otherwise, upon Limitat. of Uses on Fines levied, or Recoveries, &c. And observe, by this Resolut. there is great Facility and Safety for them to whom Uses are levied; which is also good for the Benefit of the Commonwealth, that particular Estates should not be dispensible of *Wast*, nor those in the Rev'n barred from recovering their Rents, which in all Equity and Reason are due to 'em, and no Inconven. to the partic. Ten'ts. For upon Execut. of Estates by the Stat. of 27 *H. 8.* of Uses, (as upon Covenants in Considerat. of Blood, or upon (b) Bargain and Sale by

(a) Cr. Jac. 430,
431. 2 R. 1. 212.
5 Co. 50. b.
110. a. b.
Hob. 294.

(b) 7 E. 6. Br.
Formedon 46.

(c) Vaugh. 43.

(d) 5 Co. 113. a.
Cr. El. 264, 354.
Owen 23.
2 Anderl. 15.
(e) Co. Lit.
309. b. 321. b.
(f) Co. Lit.
309. b. 4 Co. 24. b.
6 Co. 57. b.
8 Co. 63. b.
5 Co. 113. a.
(g) 5 Co. 113. a.

(h) 5 Co. 113. a. b.
Co. Lit. 309. b.
2 Co. 36. a.
8 Co. 94. a.

Deed indented and inrolled, and the like) there needs no Attornm. 4. It was resolved, that altho' there was not any Privy between them in the Rev'n, and *Pa. Lofly*, for he had but a particular Term for 10 Years out of the said Lease of 50 Years, and if the Rev'n had been granted over, that he could never have attorned; yet when those in Rev'n ejected the second Lessee, and enfeoffed *Glanvile* and *Sturges*, &c. that by the Regrefs of the second Lessee those in Rev'n by Force of the Feoffm. should avow for the Rent, and that for divers Reasons: 1. Because that Re-entry is not in all Regrefs to be resembled to an exprefs Attornm. for to an exprefs Attornm. (a) Notice is inseparably Incident, as appears in *Tooker's Case*, but he who re-enters may be ignorant of the Feoffm. 2. Those who claim by the Feoffm. have the Rev'n in them, and have not Means to compel the particular Ten't to attorn, as hath been said before: But when a Man makes a Feoffm. of a Manor, there the (b) Services do not pass till Attornm. but remain till Attornm. in the Feoffor, as *Litt.* holds: And so it was adjudged in the *Common Pleas*, 15 *El.* in (c) *Bracebridge's Case*. But in Pleading of a Feoffm. of a Manor, he need not alledge (d) Attornm. of the Tenants of the Manor, but that shall come in on the other Part. And so the Books 21 *E.* 3. 19 *E.* 3. the Bishop of *Cantorbury's Case*, 30 *E.* 3. in *Droit de Gard*, 8 *H.* 4. 1. 9 *E.* 4. 33. 42 *Aff.* 6. 20 *H.* 6. 7. 37 *H.* 6. 24. 1 *H.* 7. 3. 13 *H.* 7. 14. 34 *E.* 3. *Double Plea* 24. 43 *Aff.* 20. *Temp. E.* 1. Tit. *Attornm.* are well reconciled. 3. By the (e) Regrefs of the second Lessee, it reverts all Interests, and settles a Rev'n, which Act subjects not only the second Lessee to distress, but the first Lessee to Wast, and after the second Term ended, to distress also: For the first Lessee hath put this Act, *scil.* to make Re-entry, in the Power of the second Lessee, and therefore his Re-entry which is the Act which makes a Rev'n shall bind both: And the Re-entry of one may subject himself to a Distress, and an Action of Wast, who of himself could not attorn; and therefore it is held in 32 *E.* 3. *Age* 80. that a Man (f) *non compos mentis*, cannot attorn, for he who is *amens* (without a Mind) cannot make an Attornm. which is an Agreement; and yet if a Man, *non compos mentis*, be Lessee for Years rendring Rent, and the Lessor ejects him, and makes a Feoffm. and afterw. the Lessee, *non compos mentis*, re-enters, this Act of Re-entry subjects himself to distress, and an Action of Wast, altho' he could not make an exprefs Attornm. So in the Case at Bar, although the second Lessee could not make an exprefs Attornm. yet his Re-entry reverting all Interests and Estates which were devested by the Act and Wrong of the Feoffor, shall subject both the Lessees to distress, &c. And as the 2d Lessee might assent, that he in Rev'n should make a Feoffm. and Livery and Seisin thereupon, and that should bind the first Lessee, forasmuch as he had given him the Possession;

(a) 2 Co. 67. b. 68. b.

5 Co. 113. b. Palm. 207.

Dyer 302. pl. 43. Co. Lit. 309. b.

(b) 1 Rol. 293. Cr. El. 401. Co. Lit. 310. b.

(c) Co. Lit. 317. b. 318. a.

1 Rol. 293. 1 Leon. 5. 264.

1 Anderf. 113. 1 Co. 133. b. Moor 99.

(d) Cr. El. 401. Co. Lit. 303. b.

310. b. Yelv. 135.

8 Co. 82. b. (e) Co. Lit.

318. b. 319. a.

(f) 1 Rol. 296.

* 10 Co. 83. a. So in the Case at Bar, the first Lessee having made a Lease
 (a) Co. Lit. to the second Lessee, he hath thereby given him Power of Re-
 319. a. entry, which Act subjects both to distress, &c. 4. The Law is
 (b) 2 Co. 68. b. grounded on great Reason and Equity in this Point, for per-
 (c) 8 Co. 162. a. haps the Feoffee being a Purchaser, and a Stranger, knew no-
 Co. Lit. 338. a. thing of the Lease, or knew of it, and thought that it was void,
 2 Rol. Rep. 315. or defeated; God forbid, if after the Lessee hath evicted, or
 Hutt. 18. lawfully taken the Possess. from him, which he thought to have
 2 Sid. 59. enjoyed, (*) *qd' affinitio adderet' affinito, sc.* to lose the Possess.
 10 Co. 67. b. and also to be without Remedy, either for the Rent reserved,
 6 Co. 64. a. (which the Lessee enjoying the land in conscience ought to pay)
 (d) Co. Lit. and for Wast (which the Lessee is by Law prohibited to commit.)
 218. b. 338. a. And (d) *Coke* Ch. Just. said, That be the Evict'n by the Lessee by
 2 Rol. 496. Entry, or Action, that the Rev'n remains in the Feoffee, and he
 5 Co. 111. b. 54. b. shall avow; and have an Action of Wast, against the Opinion of
 Cr. El. 264, 522, *Ashton*, in (b) 34 H. 6. 6. b. according to the Opinion of *T'horpe*
 605, 873, 874. Poph. 8, 9. Just. in 41 E. 3. 18. b. who said, That if he in Rev'n disseises the
 10 Co. 52. b. 53. a. Ten't for Life, and aliens in Fee, altho' the Ten't recovers the
 67. b. Freehold, yet the Rev'n is not restored; so said *Seton* in 18 E. 3.
 2 Leon. 188. 48. b. that if I disseise my Ten't for Life, and make a Feoffm. to
 3 Leon. 247. another in Fee, altho' my Ten't for Life recovers afterwards by
 Dall. 74. Assise, the Rev'n remains in the Feoffee. 5. (c) *Fort' & equior*
 4 Leon. 30. *est disposit legis quam hominis*; and therefore he who has a fu-
 Moor 196, 358, ture Interest, cannot surrender it by any express Surrend. but by
 636, 637. taking a new Lease, which is an Act, and amounts to a (d) Sur-
 2 And. 52, 192. rend. in Law, it may be surrendred and determined, as it is
 Dyer 46. pl. 9. held in 37 (e) H. 6. &c. So if the (f) Father be enfeoffed in Fee,
 112. pl. 49. 140. and the Feoffor warrants the Land to him and his Heirs, now
 pl. 43. 177. his Assignee shall not vouch; but if the Father enfeoffs his Son
 35. 200. pl. 62. and Heir apparent with Warranty, and dies, in that Case the
 280. pl. 13. 349. Heir being in Truth assignee, shall vouch: For the Law which
 pl. 15. has determined the Warranty of the Father to the Son, will
 Perk. sect. 617. give the Son the Benefit of the first Warranty, as it is adjudged
 14 H. 8. 15. a. in (g) 43 E. 3. 5. by which it appears, that the Act of Law is
 Br. Lease 14. stronger, and more equal than any Act which the Party could
 2 Rol. Rep. 171, have done. So in the Case at Bar, the Entry of the Lessee, by
 406. which by the Act and Judgm. of Law, all Interests and Estates
 Lane 7. are settled according to the Law is stronger than an express
 Lit. Rep. 273, Attorm. for that the 2d Lessee could not make; and more e-
 282. qual, for inasmuch as the Possess. is evicted by the 2d Lessee, and
 37 H. 8. 18 a. thereby the Interest of the 1st Lessee reverted, and a Rev'n set-
 Plowd. 107. b. tled in the Feoffee, Equity requireth, that the Feoffee, who
 194. b. hath lost the Possess. shall not be without Remedy to recover
 Br. Surrender the Rent, and to punish Wast, 18 E. 3. 47. a. b. *Audley* Earl of *Glo-*
 143. 35. *cester's* Case, (b) The Lessor disseises his Lessee for Life, and
 2 Co. 17. b. makes a Lease for Life to another, the first Lessee re-enters, he
 7 Co. 38. a. leaves the Rev'n in the 2d Lessee for Life, and he shall have
 Raym. 148. the Rent reserved, 46 E. 3. 30. b. If he in the Rev'n ousts
 O. Benl. 57. the Ten't by Statute-Merchant, and makes a Feoffm. in Fee, and
 Kelw. 70. b. the Tenant by Stat. Merchant re-enters, that makes the Re-
 21 H. 7. 5. a. b. version in the Feoffee, yet there is not any Attendance. *Vide*
 Br. Estoppel 210. (i) Co. Lit. 318. b.

44 *Aff. p. II. Bassingborn Affise*, 2 *H. 5.* 5 *H. 5.* 12. 9 *H. 6.* 16. and 34 *H. 6.* 6. *Vide (a)* 9 *H. 7.* 25. *a.* where the Case is misprinted, For the true Case is as I have seen it in the Manuscript; That if he in Reversion disseises the Donee, and makes a Feoffment in Fee, and the Donee re-enters, he leaves the Reversion in the Feoffee: But if the Donee be disseised, and the Donor disseises the Disseisor, and makes a Feoffm. in Fee, and the Donee doth make Regress, the Feoffee shall not have the Rev'n but the Disseisor, for the Difference between an Estate and a Right, an Estate may well pass to the Feoffee by the Feoffm. as where he in Rev'n disseises the Donee, or the Lessee for Life; but where the Donee or Lessee is disseised, now he in Rev'n hath but a Right, which he cannot transfer to another, and therefore when he disseises the Disseisor, and makes a Feoffment, that passes the Estate which he gained by Disseisin, and extinguishes his antient Right, which he could not transfer to another; And then the first Disseisor hath the first Possession, and better Right than the Feoffee of him in Rev'n, for he comes in under him who disseised the first Disseisor, and the antient Right is extinct. So if the Disseisee disseises the Heir of the Disseisor, now he hath gained an Estate by Disseisin, and hath an antient Right, if he makes a Feoffment in Fee to another, he thereby passes the Estate which he gain'd by Disseisin, and extinguishes his antient Right, which he could not transfer to another: For there is such an extreme and natural Enmity between the Estate by Wrong gain'd by Disseisin, and the antient Right, that the Right cannot incorporate it self in the Estate by Wrong and pass with it, but in such Case rather suffers *(b)* Extinguishment than to pass with it; so that when the Heir re-enters he shall hold the Land for ever, as well against the Feoffor as the Feoffee: So if Ld. and Ten't be by Fealty and Rent, and the Lord disseises the Tenant of the Land and makes a Feoffm. in Fee, the Seigniority is thereby extinguished; But if a *(c)* Man makes a Gift in Tail, or a Lease for Life, &c. rendring Rents and disseises the Ten't in Tail, or for Life, &c. and makes a Feoffment in Fee, there the Estate passes to the Feoffee, and when the Donee or Lessee re-enters, he revives the Rent as incident to the Reversion. The same Law of a Lease for Years in the Case at Bar. So there is a Difference between a Reversion with *(d)* Rent incident to it, and a Right, or Seigniority, or Rent in Fee, 28 *H. 8.* *(e)* *Dy.* 33. *b.* 4 *Eliz.* *(f)* *Dy.* 212. the Case of the *Greyhound*. And Judgment was given for the Defendant, who made Conusance in the Right of *Henry Finch*, and this was the first Matter in Law, that *Coke* Chief Justice argued in the Common Pleas after he was Chief Justice.

(a) Co. Lit. 277. a. 266. a. Hob. 258, 278, 279.

(b) Hob. 258.

(c) Co. Lit. 319. a.

(d) Dyer 31. pl. 212.

(e) Dy. 33. 16.

(f) Dyer 212. pl. 37, 38.

Hill. 4 Jacobi,

In Communi Banco.

The Lord DARCY'S Case.

Cr. Jac. 151.
2 Inst. 91, 93.
Co. Lit. 82. a.

Thomas Lord Darcy of Chichester brought a Writ de Valore Maritagii against Stephen Page, Brother and Heir of Brian Page, Quare cum Maritagium ipsius Stephani ad ipsum Tho. Dominum Darcy pertineat pro eo quod præd' Brianus terram suam de eo tenuit per servitium Militare, & idem Tho. Dominus Darcy præfat. Stephan. dum fuit infra etatem & in custodia sua, competens Maritagium absque disparagatione, juxta formam Statuti de communi concilio regni Domini Regis Angliæ inde provis. sæpius obtulerit, idem Stephanus maritagium illud renuens, præfat' Tho. Domino Darcy de maritagio suo non satisfacto, se in terras & tenement' illa intrusit, & de maritagio suo eidem Tho. Domino Darcy satisfacere contradicit: And counted that the said *Brian* held twenty-five Acres of Land in *Peldon* in the County of *Essex* of the Plaintiff, as of his Manor of *Newball* in *Peldon* aforesaid by Knights Service, &c. and afterwards the said *Brian* died in his Homage without Issue, the Defendant being his Brother and Heir, and of the Age of twenty Years and six Months, and that the Plaintiff tender'd to him being then within Age a competent Marriage, sc. *Mary Mannock* Daughter of *Anthony Mannock* Gentleman, then of the Age of eighteen Years without Disparagement, and that the Def. refused. The Def. denied the Tender; upon which the Pl. demurr'd. And this Case had been many Times argued at the Bar, and this Term was argued by the Just. at the Bench, and upon open Argum. it was adjudged for the Pl. for the Reasons and Causes reported in (a) *Palmer's* Case in the fifth Part of my Reports. And so this Quest. is now in Peace, being adjudged by both Courts. Note Reader, The Case of the Heir (b) Female differs much from the Case of the Heir Male. 1. Because for the Heir Female the Guardian shall never have the Forfeiture of Marriage; for at Com. Law

(a) Cr. Jac. 66.
5 Co. 126. b.
127. a.
Yelv. 59.
2 Inst. 93.
M. or 22.
(b) Co. Lit.
79. a.

Law the full (a) Age of the Heir Female was 14 Years, as it is resolved in 35 *H. 6. 52. Litt. f. 22. Stamsf. Prærog. 13. b. F. N. B. 256. c. & 259.* and many other Books; so that if she be of the Age of 14 Years at the Time of the Death of her Ancestor, she shall be out of Ward, and if she be within the Age of 14 Years, she shall have (b) Livery by the Com. Law at the Age of 14 Years, for that makes as to this Purpose her full Age. And at the Com. Law there was not in any Case any (c) Forfeit. of Marriage, but only the single Value, 16*E. 3. Actio sur le Stat. 14.* But the Forfeiture of the Marriage is given by the Stat. of *Merton, c. 6. made 20 H. 3.* the Words of which Stat. are, *De hærede autem cum sit quatuordecim annor' vel ultra usq; ad plen' etat', si se maritavit sine Licentia Dom' sui, &c. Dom' suus tunc teneat terr' ejus ultra termin' etatis sue, scil. 21 annor' per tant' tempus, &c.* which Act without Quest. cannot (d) extend to the Heir Female, for it extends only where such Heir is 14 annor', vel ultra, and the Heir Female at such Age is out of Ward; also the Stat. speaketh *ultra termin' etatis sue, sc. 21 annor'*, and that is the full Age of the Heir Male as to Wardsh. and not of the Heir Female. And vide the Stat. of (e) *West. 1. c. 22.* where the Stat' of *Merton* is recited, and then it is provided as follows. And of Heirs Females after they have accomplished the Age of 14 Years, *quasi diceret*, The Stat. of *Merton* has provided for the Heir Male; and because no Provision is yet made for Heirs Females, by the same Act it is provided, That the Lord shall (f) not have or keep by Reason of Marriage, the Lands of such Heirs Females, above 2 Years after the Age of 14 Years; and if the Lord within the 2 Years do not marry them, then shall they have an Action to recover their Inheritance quietly, without giving any Thing for the Wardsh. or the Marriage; which 2 Years is given by the said Stat. for the Benefit of the Lord, as appears by (g) 35 *H. 6. 52. 53. & Litt. f. 23.* And if within these 2 Years the Lord tenders a Marriage to the Heir Female, and she refuses, and marries elsewhere within the 2 Years, yet the Lord shall not have the Forfeiture of the Marriage, for the Stat. gave it only to make a Tender, and therewith agrees the Book in 35 *H. 6. Gard 71.* by the Opinions of *Priest, Markham, Yelverton* and *Danby.* The 2d Difference between the Heir Male and the Heir Female was, That at the Com. Law, if the Guardian had not made Tender to the Heir Female before 14 Years, the Ld. could not have held the Land of such Heir, (as he might of the Heir Male) *Nom' pœnæ*, till the Value were paid. For the Law did tender their speedy Advancem. *quia maturiora sunt vota mulier' quam viror'.* And therefore the Heir Female might have entred into her Land immediately after the Age of 14 Years, for her better Preferm. in Marriage, and therewith agreeth (h) *Lit. 22. b.* expressly, and 35 *H. 6. 52, 53.* yet in such

(a) Co. Lit. 78. b.

(b) Co. Lit. 79. a.

(c) 2 Inft. 90, 91. Co. Lit. 82. b. 4 Co. 82. a.

(d) Cr. Jac. 151

(e) 2 Inft. 202, 203.

(f) Cr. Jac. 151.

(g) Co. Lit. 79. a. Moor 22. nu. 74, 2 Inft. 203.

(h) Co. Lit. 79.

The Lord DARCY's Case. PART VI.

Case the Lord without any Tender before fourteen Years, shall recover the single Value, for that *de mero jure pertinet*. 3. If the (a) Lord holds the Land over 14 Years, during the 2 Years by Force of the Statute of *Westm. 1.* and within the 2 Years makes no Tender, but takes the Profits of her Land, and so hinders her Preferment in Marriage by receiving all the Profits of her Land, in that Case, as the Statute says, if he doth not make (within these 2 Years) any Tender, then he shall lose by exprefs Provision the Value of the Marriage, and shall content himself with the Profits by the 2 Years for his Value given him in Lieu thereof by the Statute; so that every Guardian who holds the Land in such Case ought to take heed that he makes Tender within the 2 Years, or else he will lose the Value; but if he will wave the Benefit of the 2 Years, or if he cannot hold the said 2 Years, as Guardian of the Body of the Heir Female only, there he shall have the Value of the Marriage without any Tender. And to the principal Case, *Coke* Chief Justice added this Reason, (b) That if the Common Law would have compell'd the Lord to have made a Tender to his Ward to have the single Value, the Common Law would have given all necessary Circumstances to the Performance and Accomplishment thereof, as to have appointed a certain Place, &c. where the Tender ought to be made; and not leave the Lord who was the Superior, to seek the Ward who was the Inferior, and who might, if he would, take Advantage of his own Flight, or *subterfuge*, when no Laches could be in the Lord,

(a) Co. Lit.
79. a.
Moor 593.
nu. 800. 22.
nu. 74.
Cr. El 468, 469.

(b) 5Co. 127. b.

Pasch. 5 Jacobi,

In Communi Banco.

BURREL'S Case.

IN an *Ejectione firmæ* between *Thomas Burrel* Plaintiff, and *Seib Holmes* and *Robert Holmes* Defendants, of Lands in *Huntington* in the County of *York* on a Demise made by *Richard Burrel* and *William Allein*, to which Not guilty was pleaded; on the Evidence the Case was such, Grandfather, Father and Son, the Grandfather on the Marriage of the Father, made the Father's Wife a Jointure of other Lands, and at the same Time, *scil.* 8 *Septemb.* 23 *Eliz.* covenanted to Demise the Tenements in which, &c. to the Father, and 10 *Septemb.* next following, according to the Covenant, the Grandfather by Indenture made a Demise of the Moiety of the Tenements, in which, &c. to *Seib* the Father, to begin after the Death of the Grandfather for 1000 Years, and of the other Moiety for 1000 Years to begin at a Day to come, in both which Demises were Provisoës, That if the Father should die without Issue, or if he should make any Lease upon which the antient Rent should not be reserved, that the said Leases made to the Father should be void. The Father 10 *Feb.* 20 *Eliz.* assigned over the said Leases to the Use of *Robert* his Son an Infant, to the Intent that they might not be merged by the Descent of the Reversion; and with this colourable Purpose and Intent, that the Infant should pay Debts, and within a short Time after the Grandfather died; the Father entred into the Land, and took the Profits, and made Leases, and did other Things, as Owner of the Land, and neither the Assignees nor the Infant took any Profit, nor paid Debts. Also in the said Assignment of the said Leases divers Persons of good Credit were named amongst others; but the Assignment was delivered in a secret Manner to a Person of mean Quality; for which and other Circumstances it was taken, that as well the said first Leases (being of a Form and Device unusual) as the Assignment were fraudulent; and after the Death

Co. Lit. 3. b.
Lane 48. 113.
Hob. 166.

of

of the Grandfather, the Father for a great Sum of Money bargained and sold the Tenem. in which by Deed indented and enrolled, 2 Sept. 44 El. to Rich. Burrel and Will. Allen and their Heirs; in which the Father covenanteth with *Burrel* and *Allen*, that the Lands should be clear of all Leases, &c. And if the said original Leases, or the Assignm. should be avoided by the Purchasers by the Stat. of (a) 27 El. c. 4. was moved and debated: And in this Case on Evidence given at the Bar of the Com. Pleas, 2 Points were unanimously resolved by *Coke* Ch. Just. *Walmsley*, *Warberton* and *Daniel*, That where the Words of the said Stat. of 27 El. are (" That all and every Conveyance, Grant, Charge, Lease, Incumbrance and Limitat. of Use, of, in or out of any Manors, Lands, &c. for the Intent and Purpose to defraud and deceive such Person, &c. as have purchased or shall purchase &c. the same Lands, &c. shall be deemed, &c. only against such Purchaser, &c. void, frustrate, and of none Effect.")

1. It was resolved, That if the Father makes a Lease by Fraud and Covin of his Land to defraud others to whom he shall demise or sell it (as all fraudulent Leases should be so intended) and before the Father sells or demises it he dies, and the Son knowing, or not knowing of the said Lease, sells the Land on good Consideration; in that Case the Vendee shall avoid that Lease by the said Act: For inasmuch as it is intended and presumed in Law, That every fraudulent Lease is made to the Intent generally to defraud Purchasers, Farmers, &c. within this Generality, every particular Purchaser, Farmer, &c. is included; and the said Act is very well penned, for the Words of the Act are (b) general; and it is not necessary, that he who sells the Land should make the former fraudulent Estate, or Incumbrance, but be the Estate, &c. fraudulent *ut supra*, whosoever sells it, the Purchaser shall avoid such fraudulent Estate, &c. And therefore in the Case at Bar, the said Leases being on the Evidence thought (c) fraudulent, the Vendee of the Father and Heir shall avoid them. 2. It was resolved, That although the Father had nothing in the Inheritance of the Land at the Time of the Assignm. of his Term, but the whole Estate of Inheritance was then in the Grandfather, yet when the Grandfather died, and the Father sold the Land, his Vendee shall avoid the said Term by the said Act, (the said Assignm. on the Evidence being taken fraudulent,) for if he had bargained and sold the said Term only, the Bargainee should avoid the said fraudulent Assignm. and by Consequence the Vendee of the whole Fee-simple shall avoid it. And it was said by the Ch. Just. That that which is called (d) Trust between the Father and the Son, is in Judgm. of Law fraudulent as to a Purchas. And I acquaint. *Popb.* Ch. Just. with this Resolut. and he allowed well of it, and said, it was well

(a) Moor 602. nu. 833, 615, 616. nu. 843. 1 Rol. Rep. 167. Bridgm. 22. Goldsb. 8. pl. 11. 118. pl. 2. Cr. El. 447. 5 Co. 60. b. Cr. Jac. 158, 180. 3 Co. 80. a. Co. Lit. 3. b. 2 Rol. Rep. 305. 11 Co. 74. a. b. Lane 47, 102.

(b) 11 Co. 74. a. b.

(c) 5 Co. 60. a. Doct. pl. 200. 2 Inlt. 415. Hob. 72. 2 Rol. 684.

(d) 3 Co. 81. b.

well done to construe the said Act in Suppression of Fraud; and (as he told me) it was adjudged before him and his Companions, Justices of the King's Bench, That where a (a) Man in a secret Manner made an Estate to the Use (a) § Co. 60. a. of his Wife for her (b) Jointure by Fraud and Covin to defraud a Purchaser, to whom he intended to sell the Land, that in such Case if the Fraud be proved in Evidence, or confessed in Pleading, the Purchaser should avoid such Estate. (b) Cr. Jac. 158.

Pasch. 5 Jac.

In the Court of Wards.

Sir DREW DRURY's Case.

THE Case between Sir *Drew Drury* the Elder, Plaintiff, and Sir *Drew Drury* the Younger, Defendant in the Court of Wards, was such. It was found by Inquisition *virtute Brevis*, before the Escheator of the County of *Norfolk*, anno 41 *El.* after the Death of *Roger Drury* Esquire, That the said *Roger* was seised of a House in *Yarmouth* in the said County, Parcel of the dissolved Monastery of *Black Fryars* in *Yarmouth*, and thereof died seised, the Defendant being his Son and Heir, and of the Age of fourteen Years and seven Months, the said House at the Time of his Death was held *in capite* by Knight's Service; and that the said *Roger* was also seised of the Manor of *Barking* in the County of *Norfolk* held of the King by Knight's Service, and not *in capite*; and after Office thereof found, Queen *Elizabeth* under the Great Seal granted the Custody and Wardship of the Body of the Defendant to the Pl. The Pl. made a Tender of a Marriage to the Def. being within Age, which he refused; and afterwards the K. that now is, made him a Knight being then also within Age, and afterwards he married elsewhere within Age. The said *Roger* was a free

L. Burgefs

Sir DREW DRURY'S Case. PART VI.

Burgeſſes of the Town of *Yarm. K. E.* 1. made ſuch a Charter to the Burgeſſes of the ſaid Town in theſe Words, *Conceſſimus etiam pro nobis & heredib' noſtris, quantum in nobis eſt, Burgenſibus, & probis hominib' ſupradict' de magna Fernemutha, qd' omnes illi de villa præd' oriundi, licet, ipſi terras vel tenementa extra libertatem vill' tenuerint per tale ſervitium per qd' maritagia eorum ratione minoris etatis ipſorum ad nos vel heredea noſtros pertinere deberent, ſecundum legem & conſuetud' regni noſtri, nihilominus juxta libertates vill' præd' ſe maritare poſſint ſine occaſione vel impedimento noſtro vel heredum noſtrorum in perpetuum: Salvo jure alterius cujuſlibet.* And in this Caſe two Queſtions were moved. 1. Whether the ſaid Charter has diſcharged the Defendant from Wardſhip or not. And as to that, it was clearly reſolved by *Popham* and *Coke* Chief Juſtices, and *Fleming* Chief Baron, and the Court of Wards, that the ſaid Charter has not diſcharged him for divers Reaſons. 1. Becauſe it is not an abſolute Diſcharge of it ſelf, but hath Reference, ſc. *juxta libertates vill' præd'* which ought to be ſhewed. 2. The Tenure was created on a Grant made of the Houſe after the Diſſolution of the Monaftery, and the ſaid Grant cannot extend to a Tenure created after. 3. It is not ſet forth in the Caſe that the ſaid *Roger* was born in *Yarmouth*, for the Charter is *de villa præd' oriundi*. The 2d and great Queſtion was, whether by the making the Defendant Knight he was diſcharged in Law of the Value of his Marriage. And this Caſe was referred to the ſaid Ch. Juſtices and Ch. Baron, who *Hill. 4 Jac.* at Serjeants Inn heard the Caſe argued and debated by *Topham* of Counſel with the Defendant, and *Fr. Bacon* with the Plaintiff. And afterwards in *Eaſter Term* it was again argued by Serjeant *Hutton* for the Defendant, and Serjeant *Nichols* for the Plaintiff. After which Arguments the Judges had Conſideration of the Caſe, and upon Conference amongſt themſelves it was unanimoſly reſolved, and ſo openly declared in the Court of Wards, in the Preſence of *Robert Earl of Salisburry* Maſter of the Court of Wards, That the Def. ought to pay the Value of his Marriage; and that his Creation of Knight had not (a) diſcharged him from it. And in this Caſe theſe Points were reſolved. 1. That the Intendment of the Law is, That the Heir within Age of 21 Years is not (b) able to do Knights Service, till his full Age of 21 Years, and therewith agreeth *Lit. lib. 2. c. 4. f. 22. a.* but ſuch Preſumption of Law gives Place to a Judgment and Proof to the contrary, as it is ſaid (c) *Stabitur præſumptioni donec probetur in contrarium*; and therefore when the King who is Sovereign and the ſupreme (d) Judge of Chivalry has dubbed him a Knight, he has thereby adjudged him able to do Knights Service, and all are con-

cluded

- (a) 2 Inſt. 12.
- Cr. Jac. 156.
- (b) Co. Lit. 74. b.
- 75. b. 78. b.
- Cr. Jac. 156, 389
- Lit. Sect 103.
- 3 Co. 34. b.
- (c) 5 Co. 7. b.
- Cawd. Caſe.
- 4 Co. 71. b.
- 2 Co. 48. a.
- Co. Lit. 373.
- Hob 298.
- 2 Bullſtr. 314.
- (d) 2 Inſt. 1, 12.
- 2 Sid. 82.
- 1 Co. 173. a.

cluded to say the contrary, and therefore such Heir so made Knight shall be out of (a) Ward and Custody. But if the K. creates such Heir within Age a (b) Duke, or Marquess, or Earl, or Viscount, or Baron, he shall not thereby be out of Ward or Custody. For in antient Time every Baron, &c. held his Barony, &c. by Grand Serjeanty, as appears in *Aff. pl. ult.* in (c) *Clifford's Case*, and the *Ld. Cromwel's Case* in the 2d Part of my Rep. 80.a. which Service (as *Litt.* says *lib. 2. c. 8. f. 35.*) is called (d) Grand Serjeanty, or *magna Serjeantia*, as *Fleta* calls it, *lib. 1. c. 9.*, because it is a greater or more worthy Service than Knight's Service, as to bear the King's Banner or his Lance, or to lead his Host, or to be his Marshal, &c. as *Lit.* says, or to be High Steward of *Engl.* as 11 *El. Dier* (e) 285. is, &c. And the Son and Heir within Age of a Duke, Marquess, Earl, Viscount and Baron, shall be in (f) Ward notwithstanding their Dignities. 2. It was resolved, That when (g) Ten't by Knights Service dies his Heir within Age; immediately the Value of the Marriage as a Chattel is vested in the *Ld.* 24 *E. 3. 25. b. Old N. B. 27 E. 3. acc'*. Then when (h) such Heir is made Knight he is to this Purpose made of full Age, and as much is done in Judgm. of Law, as if he had attained to his full Age of 21 Years, for at such Age the Law intends him able to do Knights Service, And now when the K. makes him Knight before such Age, the Intendment or Presumption of Law gives Place to this Judgm. and Proof to the Contrary. And now he is to this Purpose set and computed of full Age. Then admit he hath accomplished his Age of 21 Years, without Question the *Ld.* shall have the Value of his Marriage: But at (i) Com. Law it was taken, that by the making of him a Knight being in Ward, (forasmuch as now in Judgm. of Law he was esteemed as to this Purpose as of full Age for his Ability to do Knights Service) his Land would be immediately out of Wardship. And therefore it was provided by the Stat. of *Magna Charta, cap. 3. Ita tamen quod si ipse dum infra etatem fuerit fiat Miles, nihilominus terra remaneat in Custodia Dominorum suorum.* So that altho' such Heir within Age be made Knight, and therefore to that Purpose esteemed of full Age, (k) yet the Lands shall remain in the Lord's Custody till his Age of 21 Years by the Purview of the said Act; and if the Law had not been clear for the Value of the Marriage, for the Cause and Reason aforesaid, without Doubt the Makers of the said Act would have made Provision, as well for that as for the Land. 3. It was resolved. That when the King makes the (l) Heir apparent within Age of a Tenant by Knights Service, a Knight in the Life of his An-

(a) 2 Inst. 11.
(b) 2 Inst. 11.
Cr. Jac. 256.

(c) 2 Co. 80. a.
81. a. 18 Aff. 18.
Co. Lit. 222. a. b.
8 Co. 90. b. 91. a.
1 Rol. 438.
Br. condit. 105.
(d) Lit. Sec. 153.
C. Lit. 105. b.

(e) Dy. 285. pl. 39

(f) 2 Inst. 11.
(g) 2 Inst. 11, 12
Antea 70. b.
Hob. 46.
Cr. Jac. 156.
2 Rol. 39.
(h) Cr. Jac. 156.

(i) Cr. Jac. 155

(k) Hob. 46, 91.

(l) 2 Inst. 14

cestor, and afterwards the Ancest. dies, the said Heir within Age, in that Case he shall be out of Ward, and shall pay no Value of his Marriage, neither shall the Ld. have the Custody of the Land; for in such Case by the making of him (a) Kt. in the Life of his Ancest. he is made as of full Age, so that when his Ancest. dies, no Interest either in the Body, or the Land, shall ever vest in the Ld. And the Stat. of *Magna Charta* for the Custody of the Land doth not extend to it, for the Purview thereof extends only when the Heir in Ward (*infra etatem*) is made Knight, then *remaneat terra in Custodia, &c.* but when the Heir is made Knt. in the Life of his Ancest. then the Custody cannot remain or continue, which never had any Beginning or Effence, and therewith agreeth *Ratcliff's Case*, (b) *Pl. Com.* 4. The Just. said, they ought to have good Considerat. in all Cases depending before them; not only of the antecedent (*sc.* of the present Case in Quest.) but also of the Consequent, *sc.* what general Prejudice will ensue thereupon, either to the K. or Subject; and surely great Prejudice would ensue to the K. if the Law should be otherwise in the principal Case; for it might be great Prejudice to the K. in his Wards, not only of Knights made by himself, but also by his Lieutenants in *Ireland* and elsewhere. Also none would buy any Wardship of the K. when notwithstanding they have paid the Value thereof to the K. and have them passed under the great Seal (as the Pl. hath in the Case at Bar) that by making him a Kt. it should bar him of the Value of the Marriage: For a Man would give little or nothing for a Thing which depends upon such an Incertajnty. It would also be very prejudic. to the Subjects, if, after their Wards are lawfully vested in them, they should be deprived and defeated of them by making them Kts. and especially when it appears by (c) 7 *H.* 4. that a Man may be made a Kt. as soon as he is baptized. 5. It was resolved, that when the Heir within Age is made Kt. after Tender made to him, (as in the Case at Bar he was) altho' he within Age marries elsewhere, yet he shall not pay the Forfeiture of the Marriage; for by making him Kt. he is out of the (d) Wardship and Custody of his Lord; for after he is Kt. he ought to be *sui juris*, and may employ himself in Feats of Arms to defend the Realm, &c. and therefore ought not to be in the Wardship or Custody of any; and none shall pay any Forfeiture, but when after Refusal he marries himself during the Time he is under the Custody and Wardship of his Ld. and that appears by the Statute of *Merton, cap. 6. Si se maritaverit sine licentia Domini sui, ut ei auferat maritagium suum, &c.* which Words can't be understood when he is out of Wardship and Custody, no more than when he is married after his Age of 21 Years; but as the Guard. has some Prejud. by the Loss of his Forfeit. in such Case by the making of his Ward a Kt. so hath he thereby also a Benefit;

For

(a) 2 Inft. 12.

(b) Plow. 257. b
258.

(c) 7 H. 4. 7. b.
Br. nomine de
dign. v. 10.
Br. Addit. 17.

(d) 2 Inft. 91.
Cr. Jac. 389,
390. Hob. 90, 91

For altho' the Guardian in Chivalry cannot have a Writ *de valore maritagii*; nor compel the Heir to satisfy him the Value of his Marriage till his full Age; *sc.* till his Body is out of his Custody; and if such Heir dies before such Age, the Lord shall lose the Value, yet in this Case immediately after the Heir is made Knight he may have a Writ *de valore maritagii*, because he is thereby out of the Wardship and Custody of his Guardian, and the usual Writ *de valore maritagii* when he accomplisheth his Age of 21 Years, is, *dum fuit infra etatem in Custodia, &c.* F. N. B. 141. and *Regist.* and there shall be a special Count upon the Case; for note it is not *dum fuit infra etatem* generally, but *dum fuit infra etatem in Custodia*; and those Words well stand, for now he is out of Custody. And two Precedents were cited, one of *Rob. Earl of Essex* in 29 *Eliz.* the other of one *Ratcliff* in *Mich. 1 Jac.* who were both made Knights during the Time they were in Ward, and were by the Order of the Court of Wards discharged of the Value of their Marriages. But on good Consideration of the said Precedents it appeared, that they passed (a) *sub silentio*, without Argument or any Resolution of any of the Judges of the Law; and a great Number of Precedents were shewed, which agreed with the Resolution of the said Justices in this Case. *V. 15 E. 4. 10. b. & Br. (b) Gard. 2 E. 6.* in abridging the Case of 15 *E. 4.* and *Radcliff's Case, Pl. Com. 268.* And this was the last Case that *Sir John (c) Popham* Knight, the venerable and honourable Chief Justice of *England*, and Counsellor of State to *Queen Eliz.* and to our Lord the King that now is, resolved, who was a most reverend Judge, of a ready Apprehension, profound Judgment, most excellent Understanding in the true Reason of the Law, and of universal and admirable Experience and Knowledge of all Business which concerned the Commonwealth; accompanied with a rare Memory, with perpetual Industry and Labour for the Maintenance of the Tranquility and publick Good of the Realm, and in all Things with great Constancy, Integrity and Patience.

(a) *Hard. 93.*(b) 2 *Inst. 11.*
Br. Gard. 42, 72(c) *Cr. Jac 166.*

Pasch. 5 Jac.

In the Court of Wards.

Sir GEORGE CURSON'S Case.

Gr. Jac. 157.

IN the great Case in the Court of Wards this Term, between Sir *Geo. Curson* Knight, and his Wife Defendants, in an Information *ex parte Johannis Leveson* Knight, and between Sir *Jo. Leveson* Plaintiff, and *Sackvile* Esq; and *Mary* his Wife Defendants, it was resolved by the two Chief Justices, and Chief Baron, upon Argument and View of Precedents, That where Sir *Walter Leveson* was seised of a Reversion in Fee held *in capite* expectant on an Estate-tail (which he had made to *Richard* his Son) he by Indenture in Consideration of Blood did covenant to stand seised of the said Rev'n, to the Use of *Mary* his Niece, *sc.* Daughter and Heir apparent of the Lady *Curson*, Sister of the said Sir *Walter*; and afterwards Sir *Richard Leveson* the Son died without Issue; That in this Case the King should not have Primer Seisin by the Statutes of 32 and 34 *H. 8.* and that depends upon Consideration and Construction of the Words, and Purview of the said Statutes, which in Effect are, "Every Person having any Manors, Lands, &c. holden *in Capite, &c.* shall have full Power and Authority, to give, dispose, will, or assign, by his last Will in Writing, or otherwise by any Act or Acts lawfully executed in his Life two Parts of the same Manors, Lands, &c. in three Parts to be divided, &c. to and for the Advancement of his Wife, Preferment of his Children, and Payment of his Debts, or otherwise at his Will and Pleasure; saving always and reserving to the King our Sovereign Lord, the Custody, Wardship, and primer Seisin, or any of them, as the Case shall require, of as much as shall amount to the clear yearly Value of the third Part, &c." Then it was in Consideration how the Law stood concerning Wardship and primer Seisin in this Case, before the Statutes of 32 and 34 *H. 8.* And 1. It was resolved, That by the Statute

10 Co. 83. a.

32 H. 8. c. 1.

Cr. Jac. 157.

34 H. 8. c. 5.

Postea 77. a.

3 Co. 27. a.

1 Sid. 56.

Co. Lit. 76. b.

111. b.

tute of (a) *Marleb. de hiis qui primogenitos feoffare solent.* (a) 52 E. 3. c. 6. Co Lit. 76. a. 2 Inst. 107, 110, 111, 112.

it was Collusion apparent to enfeoff his eldest Son, for without Question every one would (to prevent the Lord of his Ward) enfeoff his eldest Son, if the giving of his Land to him, to whom the Land would descend by the Com. Law, would serve in such Case. The same Law, and the same Reason, if the Tenant enfeoff his collateral Heir apparent, as it is also said, and not denied in *Pl. Com. in Partridge's Case*, 82. a. Also Provision was made when the Tenant enfeoffs others upon Collusion, &c. which was averrable; but it was doubted, whether (b) Collusion could be averred upon particular Estates, as an Estate for Life, or in Tail, and it was held clearly that no Collusion could be averred, when upon an Estate for Life, or in Tail, the Rem'r or Rev'n was limited or left in another, 27 H. 8. 10. & 33 H. 6. 14. b. So when a (c) Stranger was joined with the Heir, although the Inheritance was limited to the Heirs of the Heir, and that the Stranger had but for Term of Life, as it is agreed in 31 E. 3. *Collusion* 29. & 33 H. 6. 14. b. So it was taken, that if * *Cestuy que use* had devised his Use by his Will, no Collusion could have been averred upon a Will. For *Nemo presumitur esse immemor sue atern' salutis, & maxime in articulo mortis, & orname* (d) *testamentum morte consummat' est.* (d) 3 Co. 29. b. 32. a. 34. a. 4 Co. 61. b.

And therefore the Stat. of 4 H. 7. c. 10. which gave the Wardship of *Cestuy que use*, made an Exception when any Will is by him declared. *Vide* 27 H. 8. 14. So if the Father had enfeoffed another, either for the Advancem. of his Daughters, or his younger Sons, or for Payment of his Debts, and afterwards to enfeoff his Heir; it was not any (e) Collusion, for he was bound to provide for them, and therewith agree 33 H. 6. 14. b. & 27 H. 8. 7. b. *vid. Mich.* 9. & 10 *El. Dy.* 260. 2 & 3 *El.* 195. 20 *El.* 361. 19 *El.* 276. 5 *Ma.* (f) 158.

Then secondly it was resolved, That as the Statute of 32 H. 8. gave Benefit to the Subject, to have Power to make a Devise of his Lands by his last Will in Writing; so by the Saving it gave Benefit to the King in the said three Cases, *sc.* Advancement of his Wife, Preferment of his Children, and Payment of his Debts, in (g) none of which Cases the King (as it appears before) should have Benefit of Ward, or Primer Seisin before this Statute. And it is to be known, that these Words in the said Purview of the Act (*or otherwise at his Will and Pleasure, any Law, Statute, Custom, or other Thing to the contrary thereof notwithstanding*) have Reference and Relation only to last Wills, and not to Acts executed, and that for two Reasons. 1. It was necessary to add those Words to Wills, for otherwise none could have devised two Parts, but only either for the Advancem. of his Wife, or Preferment of his Children, or Paym. of his Debts,

Sir GEORGE CURSON'S Case. PART VI.

and it was not the Intention of the Act, but that he might devise two Parts to whom he would, so that a third Part descended. But it was in vain to refer those Words, (*or otherwise at his Will and Pleasure*) to Acts executed, for he might do that without any Authority or Power given him by that Act. *Et quando (a) dispositio referri potest ad duas res ita quod secundum relationem una vitatur, & secundum aliam utilis est, tunc facienda est relatio ad illam ut valeat dispositio, & semper ita fiat relatio, ut valeat dispositio.* 2. These later Words do likewise illustrate it, (*sc. any Law, Statute, Custom, or other Thing*) for no Law did restrain a Man by Act executed, to convey his Land to whom he would by Act in his Life. But the Law and general Custom of the Realm did restrain Men to devise Lands to any unless it was by some special (*b*) Custom in some particular Place; and that appears by several Statutes and Acts of Parliament; so that the said Words (*or otherwise, &c.*) having such Conclusion, refer only to last Wills. Also in the third Article of 34 & 35 H. 8. of Explanation it is declared, *That all Persons holding any Lands in chief, &c. have, and by Authority of this present Parliament shall have full and free Power, &c. to give, dispose, &c. to any Person, &c. by his last Will, or otherwise by any Act lawfully executed in his Life, two Parts of his Lands, &c. at his free Will and Pleasure,* omitting the Words of 32 H. 8. *sc. Advancement of his Wife, Preferment of his Children, and Payment of his Debts.* But that doth nor take away the Act of 32 H. 8. as to the said three particular Cases, in which Ward and Primer Seisin is by the Saving given to the King; but all other Cases are explained notwithstanding these Words (*or otherwise*) by the said Act of 34 & 35 H. 8. 3. It was resolved, that the said Saving of Ward and Primer Seisin in the said Act of 32 H. 8. should have Relation only to Acts executed, and not to Wills; for always in Statutes Relation shall be made according to the Matter precedent, for the Act gives the Owner of the Land Power by his Will to devise but two Parts, so that the 3d Part ought of Necessity to descend; and in such Case the King shall be assured of the Wardship, or primer Seisin of a 3d Part. But in the Case of Act executed, he may convey all, and therefore it was needful to add the said Saving as to that; But the Saving extends only to one of the said three Cases before particularly mentioned, which (as hath been said) gives great Benefit to the King more than he had before, and so as to this Purpose to make Acts executed in Equipage with Wills. And there was great Reason to provide for the said 3 Cases, because they were ordin. and usual; and every Man by the Law of God, of Nat. and of Nations, was bound to provide

(a) Lit. Rep. 66.

(b) Co. Lit. 111. b.

8 Co. 164. a.

2 Inst. 113.
Co. Lit. 78. a.

a competent Living for his Wife, his Children, and for the Payment of his Debts. And if the said Words (*or otherwise*) should refer as well to Acts executed, as to Wills, and should give Wardship and primer Seisin to the King, not only in the said particular Cases, but in all others; then if any one conveys his Lands to the Use of his (*a*) Bastard, or to a meer Stranger, on any Consideration whatsoever, it would be within the saving, which hath oftentimes been resolved and adjudged to the contrary. *Vide Mich.* 12 and 13 *Eliz. Dyer* (*b*) 296. 14 *Eliz.* 313. and 18 *El.* (*c*) 345. And therefore the Opinion in 2 *E.* 6. * *Testament*, was utterly denied by all, unless it be intended that it was given to a Stranger by Act executed, to one of the said three Purposes, or upon Collusion. 4. It was resolved, That if there be (*d*) Grandfather, Father, and divers Sons, and the Grandfather in the Life of the Father, conveys his Lands to any of the Sons, it is out of the said Act of 32 *H.* 8. for it is not common nor usual. *Et* (*c*) *ad ea quæ frequentius accidunt jura adaptantur*; and the Father ought to have the immediate Care of his Sons and Issue: But if (*f*) the Father be dead, then the Care of them belongs to the Grandfather, and then if he conveys any of his Lands to any of the said Sons, it is within the said Statute. But it was resolved clearly, That a voluntary Conveyance to the Use of any of his (*g*) collateral Blood, who is not his Heir apparent, is not within the said Act: For none would intend, that he would disinherit his Heir on Purpose to take away the Wardship from the King, when every one hopes to live till the Age of his Heir, much less to defeat him of the Primer Seisin. And if other Construction should be made, the said three Examples, and the naming of his Children would be vain, if the Act should extend to every other of the Blood. And according to this Resolution in the principal Case, the Experience of the Court of Wards hath always been: And a great Number of Subjects who are now in Peace, would be vexed and molested if the common received Opinion should be now changed. And accordingly it was resolved in the Court of Wards, in Sir Rowland Hill's Case, in Matthew (*b*) Draper's Case, *Mich.* 22 *Eliz.* and divers others. And so the Doubts in *Dyer* 2 *Eliz.* (*i*) 181, in *Modie's Case*, and 8 *Eliz. Dy.* 252. in (*k*) *Knivetou's Case*, &c. well resolved.

- (*a*) Co. Lit. 3. b. 78. a. 123. a.
 10 Co. 83. a.
 Jenk. Cent. 239.
 Cr. El. 358, 509.
 Poph. 188.
 Goldsb. 191.
 Moor 430.
 2 Rol. 43, 44.
 Noy 35.
 1 Anderf. 79.
 (*b*) *Dyer* 296. pl. 23.
 10 Co. 83. b.
 (*c*) *Dyer* 345. pl. 4.
 Co. Lit. 78. a.
 10 Co. 83. b.
 * Br. Testament 24.
 (*d*) Co. Lit. 78. a.
 (*e*) Co. Lit. 238. a.
 2 Inst. 137.
 5 Co. 127. b.
 7 Co. 28. a.
 Calvin's Case Carter 13.
 (*f*) Co. Lit. 78. a.
 Cr. Jac. 157.
 (*g*) Co. Lit. 78. a.
 Cr. Jac. 157.
 Anrea 75. b.
 (*h*) Cr. Jac. 157.
 (*i*) *Dyer* 181. pl. 51.
 (*k*) *Dyer* 252. pl. 97.
 10 Co. 46. a.
 Co. Lit. 78. a.
 2 Rol. 395, 493.
 Goldsb. 27.
 3 Co. 6. b.

Pasch. 5 Jacobi.

In Communi Banco.

BULLEN'S Case.

- (a) 1 Brownl. 189, 190. Yelv. 186.
- (b) 11 Co. 42. a. 45. a. 1 Brownl. 190. 1 Rol. Rep. 32, 73. 2 Inft. 71. Yelv. 186. (c) 1 Rol. Rep. 32. 2 Inft. 71.
- (d) 8 Co. 41. a.
- (e) 2 Inft. 73.
- (f) 2 Inft. 73.
- B**ETWEEN *Robert (a) Bullen* Plaintiff, and *Richard Godfrey* Esquire Defendant, Lord of the Manor of *Bale* in *Norfolk*, it was agreed, that the Lord of a Leet, might well have a certain Sum, as 10*s. pro (b) certo Letæ*, of all the Resiants within this Leet, called sometimes *Capisagium*, &c. and sometimes *Certum Letæ*, and by other Names, and it might have a reasonable Beginning, *scil.* When the Lord purchas. and acquired the Leet for the (c) Ease of the Resiants therein, so that they need not go to the Sheriffs Torn, but to do their Suit real at the Lord's Leet; also the Lord of a Leet was at every Eyre obliged at his own Costs to claim this Franchise, &c. And in the Case at Bar the Issue was, whether the Plaintiff at the Court-Leet mentioned in the Record, was a chief Pledge of the same Court or not: And thereupon a special Verdict was found, that the Plaintiff was Resiant, and that he was certified at the said Act, to be a chief Pledge, by the chief Pledges of the Leet; but he made Default, and was (d) amerced for his Default 2*s. 6d.* so that he did not appear, nor was sworn as chief Pledge, & s*c.* And it seemed to the Court, that they could not adjudge him a chief Pledge upon this Verdict; for Leets were divided in *decurias* or *decennas*, unde dicitur *decennarii* to this Day: And out of every ten, (each of them being Pledge for the other, from whence the Court was called (e) *Curia visus franci plegii*) one was called *Capitalis plegius*, seu *Primarius fidei-jussor*; and in some Places at this Day, he is called the *Tythingman*, and in *Yorkshire (f) Tenmantale*. And therewith agreeth *Lambert* in his Book *de priscis Anglor' legibus*, and *Flota lib. 2. c. 45.* and Reason proves it; for he can't

be called capital Pledge, but in Respect that others are inferior Pledges. *Vide* the Statute of 28 E. 2. *de visu franci pleg.* of chief Pledges: And our Books speak of chief Pledges. *Vide* 4 E. 3. 125. 126. and 4 E. 3. 30. 45 E. 3. 23. of the old Impression, 13 H. 4. 12. b. So that the Return of the Constable, or the Presentment of the Jury in the Leet, doth not make a Man chief Pledge. And it appears by the said Act of 18 E. 2. that it ought to be enquired at the Leet, if all the chief Pledges with their Decenners, that is, the other nine, appear, by which it appears, that the tenth principal Man was the chief Pledge; *Sed tempora mutantur, & nos mutamur in illis.* So that *vera institutio hujus curiæ evanuit, & velut umbra ejusdem adhuc remanet.* And this Case was very obscure and doubtful at the first, and afterwards, *materia ista consopita fuit in arbitrio.* *Vide* 30 E. 3. 23. of the Franckpledge of the Town, and his Authority. 2 Inst: 72.

Pasch.

Pasch. 5 Jacobi,

In Communi Banco.

The Lord ABURGAVERY'S Case.

7 Co. 37. b.

Between *Richard Michelborn* Plaintiff, and *George Query* Defendant, in Replevin which Plea began *Trinit. 4 Jac. Rot. 1146. in Communi Banco*, the Case was such; *Margaret Pool* and *Frances Pool* were Tenants for Life of 12 Acres of Land in *Keym in Sussex*, the Reversion to the Lord *Aburgaveny*. Afterwards, *scil. 34 Eliz. Richard Michelborn* the Plaintiff had Judgment in the Common Pleas against the said *Margaret*, in an Action of Debt of 200*l.* 24 *May* 37 *Eliz.* the said *Margaret* did release to the said *Frances Pool* all her Estate and Right in the said Land, and afterwards, *scil. 27 Jun. 37 Eliz.* The Plaintiff sued Execution out of the said Judgment, for the said Debt, by *Execit.* and the said 12 Acres amongst others, as a Moiety of the other Lands, &c. were delivered to the Plaintiff, and the Plaintiff in Bar of the Avowry, (which was for Damage-feafance in his Freehold) averred the Lives of the said *Margaret* and *Frances*: The Avowant pleaded, that *Frances* assigned her Interest to the Lord *Buckhurst*, who before the taking, had surrendered to the Lord *Aburgaveny*, and traversed the Life of *Frances*; upon which Plea, the Plaintiff did demur in Law, and after Argument at Bar and Bench, Judgment was given for the Plaintiff, because he had traversed the Life of *Francis*, which was not a Thing material, nor issuable; for *non refert* whether she was living or dead: And in this Case these Points were resolved. 1. When Judgment is given against *Margaret* one of the Jointenants for Life, in an Action of Debt, and afterwards she releases to her Jointenant before Execution, altho' *Frances* to whom the Release is made between them is now in by the Lessor, and not by the said *Margaret*, yet as to the Pl. who has Judgm. in the Action of Debt,

1 Rol. Rep. 310.

1 Jones 62.

3 Bultr. 132.

Debt, by which the Moiety of *Margaret* was charged to his Execution) she by her own Act shall not defeat the Pl. of his Execution, but (a) as to him the Estate of *Margaret* (a) 1 Jones 62; hath Continuance in Law, altho' in Truth *Frances* after the Release made, had but an Estate for her own Life: But if *Margaret* had died (b) before Execution, the Survivor (b) Co. Lit; should hold it discharged of any Execution to be sued against 184. b. her. Vide 13 H. 7. 22. a. 5 H. 5. 8. b. 10 E. 3. Charge 13. 2 Rol. 88. 17 E. 2. Charge 15. 18 E. 3. Execution, Statbam. 10 E. 4. 3. b. 40 E. 3. 31. 37 H. 8. Br. Alienation 31. And upon all the said Books it was collected for good Law, that if (c) two (c) Co. Lit; Jointenants be in Fee, and one grants a Rent-Charge in Fee, 185. a. and afterwards releases to the other, in that Case altho' to some Intent, he to whom the Release is made, is in by the first Feoffor, and no Degree is made betwixt them, yet as to the Grantee of the Rent-Charge, he is in under the Jointenant who (d) released; and he who survives, shall not avoid it after the Death of him who released; for he who survives, by Acceptance of the Release, has deprived himself of the Way and Means to avoid the Charge; for *jus accrescendi* sc. the Right of Survivorship was the sole Means to have avoided it, and the Right of Survivorship is utterly taken away by the Release, and so the Doubt in 33 H. 6. 5. a. well resolved. 2. It was resolved, that when the Release is made to *Frances*, by which she has a sole Estate for Life when she dies, and he in Reversion enters, and is in of his old Estate, yet as to *Michelborn*, the Estate of *Margaret* who is yet living, hath Continuance. As if the Husband seized of a Rent, or Common in Fee, releases to the Terre-Tenant, this Rent is extinct, and yet having Regard to the Wife, it hath Continuance, for she shall be thereof (e) endowed, as it is adjudged in 5 E. 2. Dower 143. 20 E. 3. 27. 24 E. 3. 29. 34 Aff. 15. 22 E. 3. Dower 131. 44 E. 3. 32. Vide 31 E. 3. Assers 5. 11 H. 7. 12. a. Mefnalty descended to the Tenant paravail within Age, 26 Aff. 60. the Case of the Honour of *Pickering*.

(a) Co. Lit. 185. a. Dyer 2. & 3 El. 187. a. pl. 5. Bridgman 28. Finch's Ley 4. b. 1 Rol. Rep. 309, 311. 2 Rol. Rep. 491. 3 Bullf. 132. Moor 139. Cr. Jac. 417.

(e) Co. Lit. 32. a. 7. Co. 37. b. (f) 3 Co. 31. a. Br. Incidents 11. Br. Patents 35. Moor 161.

Trin.

Trin. 5 Jacobi,

In Communi Banco.

Sir EDWARD PHITTON'S Case.

SIR *Edward Phitton* was outlawed at the Suit of one *R.* after Judgment before the general Pardon of (a) 43 *El.* for 18*l.* and after the Pardon Sir *Edward* died, and now his Executors made Satisfaction which was acknowledged of Record and without any Process, (for no Process could be awarded against them on the Outlawry) they pleaded the general Pardon, and with an Averment, that they are not any of the Persons excepted, &c. and in this Case these Points were resolved. 1. That the Executors should (b) take Benefit of the said general Pardon, by which it is enacted, that all the King's Subjects, their Heirs, Successors, Executors, and Administrators, shall be acquitted and pardoned, released and discharged of all Offences, Contempts, and all other Things, &c. and that it shall be expounded most (c) beneficially and availably for the Subject, &c. and further gives and grants all Goods, Chattels, Debts, &c. forfeited, and doth prohibit any Clerk to make out any Writ, &c. provided that every Clerk may make (d) *Capias utlag.* at the Plaintiff's Suit against such Persons outlawed, to the Intent to compel the Defendant to answer: And that the Party shall sue a *Scire facias*, before the Pardon in that Behalf shall be allowed; which is as much as to say, having regard only to the Plaintiff, but having regard to the King, it is an absolute Pardon and Grant of his Goods, &c. *Nota hoc*, Then comes another Proviso, That this Act shall in no wise extend to any Person outlawed upon any Writ of *Capias ad satisfaciendum*, until such Time as the Person so outlawed, shall satisfy, or otherwise agree with the Party; and that is intended always as to the Party Plaintiff; for, for him the Provision is made. (e) But against the King, he is a Person able to take Benefit of the Pardon,

Pardon, and capable of his Goods against the King: So note, he is a Person (a) able by the Pardon, against the King, but not as to the Party Plaintiff; as a Villain is disabled against his Lord, but not as to any other: And that appears by Construction upon the whole Act, for if the Party (b) outlawed should remain outlawed against the King, then the Gift and Grant of his Goods and Chattels would be void. 2. It was resolved, altho' the Words of this later Proviso are, *until such Time as the Person so outlawed shall satisfy*, it is such Interest in the Person outlawed, that altho' he dies after the Pardon, yet his Executors may satisfy, and have Benefit of the Pardon. 3. Forasmuch as this Case is no *Scire facias*, nor *Capias utlagatum*, nor other Process lies against the Executors, they may, (after Satisfaction acknowledged) *gratis* come in, (for Necessity without Process) and plead the general Pardon, with Averment, that they are not any Persons excepted. And see a Clause in the Beginning of the Act, that every Subject by himself, or his Attorney, may plead this present Act for *his or their Discharge*, &c. *Vide* 3 *El. Dyer* 201. upon the Statute of 23 *H. 8.* Executors shall have (c) Attaint. 6 *E. 6. Bendloes*, Executors shall have Restitution upon the Statute of (d) 21 *H. 8.* Also Administrators shall have a Writ of Error upon 27 *Eliz.* as it was adjudged 36 *Eliz.* in the Lord (e) *Mordant's* Case in the Exchequer-Chamber; yet those Statutes speak only of the Party, and not of his Executors or Administrators. *Vide* 28 *Aff. p. 7. 11 E. 3. Executors* 77.

(a) 1 Leon. 51.
Cr. Jac. 271.
Yelv. 197.

(b) Winch. 33.
58.
Hurt. 53.

(c) O Benl. 4.
pl. 11.
N. Benl. 87.
c. 132.
Benl. in *Ash.* 14.
Benl. in *Kelw.*
210. pl. 14.
Moor 17. nu. 60.
1 And. 24, 25.
c. 57.
Co. Lit. 294. b.
Dyer 201. pl. 65.
Poph. 191.
(d) Poph. 191.
3 Inst. 242.
21 H. 8. c. 11.
(e) Cr. El. 294.
295.

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