THE

REPORTS

AND

ARGUMENTS

Of that LEARNED JUDGE,

Sir *JOHN VAUGHAN*, Kt.

LATE

LORD CHIEF JUSTICE

OF THE

Court of Common-Pleas,

BEING

All of them SPECIAL CASES;

And many wherein he Pronounced the Reſolution of the whole Court of *Common-Pleas*, at the time he was Chief Juſtice there.

Publiſhed by his Son, *EDWARD VAUGHAN* Eſq;

Careſully Corrected from the Errors of the former Impreſſion; With many **Additional References** in this **Second Edition.**

LONDON,

Printed by the Aſſigns of *Richard* and *Edward Atkins* Eſquires; And are to be ſold by *C. Harper*, *A. Churchill*, *J. Harriſon*, *D. Browne*, *J. Cleave*, *W. Rogers*, *W. Freeman*, *T. Goodwin*, *M Wotton*, *R. Vincent*, *B. Tooke*, *A. Boſvile*, *F. Coggan*, *J. Hartley*, and *E. Place*. 1706.

TO THE

READER.

Prefaces to *Books*, if written by other *Hands* than the *Author's own*, are for the moſt part *Panegyricks*, and lean more to *Flattery* than *Truth*; the Writers of them taking more pains to deſcribe *Themſelves*, than the *Au-*

thor of the *Book*. If they write *Elegantly* enough, or ſtrain ſufficiently in his *Praiſe*, they captivate the *Reader* (or at leaſt conceive ſo) into a *good Opinion* of themſelves; but the *ſufficiency* of the *Author* muſt ſtill appear from *his own Work*.

This therefore ſhall be, Firſt, only ſuch a brief Account of the Author, as is uſual of *Perſons* of his *Station* upon the like *Occaſion*: And Secondly, the *Reaſon* why theſe *Papers* ſee the *Light*; which I conjecture the *Author* intended ſhould have *died* with him; or *ſurvived* him in very few *Hands*, and thoſe ſuch as he had a *particular Eſteem* for.

He was the *eldeſt Son* of *Edward Vaughan* Eſq; and born on the Fourteenth of *September*, in the Year of our Lord 1603.

at

at *Trowſcoed* in the County of *Cardigan*, the *ancient Seat* of his *Family*, himſelf being the Eleventh of that Houſe in a Direct Line.

About the Tenth Year of his Age he was ſent to be *Educated* at a *Publick School* in the *City* of *Worceſter*, and about the Fifteenth remov'd from thence to *Chriſt-Church* in *Oxford*; where, altho' he had a *Tutor* of the ſaid *College*, yet the *Education* of him was more eſpecially committed to an *Uncle* of his own by his *Father*'s ſide, then a *Fellow* of *All-Souls College* in *Oxford*, who being a Perſon of *good Learning* and *Prudence*, omitted nothing that might *cheriſh* the *hopes* he entertain'd of his *Nephew*, and improve him in all kinds of *Learning* with which the *Univerſity* doth *ſeaſon Youth*. This *Care* of his *Uncle*'s he would frequently commemorate to his laſt.

To the Reader.

About the *Eighteenth Year* of his Age he was removed to *London*, and on the *Fourth* of *November*, in the Year 1621. admitted of the *Inner-Temple*, where I have often heard him ſay that he addicted himſelf to *Poetry*, *Mathematicks*, and ſuch more *alluring Studies* at firſt, neglecting that *ſeverer* of the *Laws* of *England*, until he became acquainted with that *incomparable Perſon* Mr. *J. Selden*, who diſcerning in him a *ready Wit* and *ſound Judgment*, did ſtudiouſly afford him *Occaſion* of making a right uſe of two ſuch *excellent Ingredients*, and frequently admitted him to the Converſe of *himſelf*, and other *worthy Perſons* his *Cotemporaries*, where having been *inſtructed* in the value of *Civil Learning*, he ſoon after apply'd himſelf cloſely to that Courſe of *Study*, and more particularly of the *Laws* of *England*, which he after made his *Profeſſion*.

His

His *Practice*, after he was call'd to the *Bar*, was for the moſt part in the *Star-Chamber*, where he ſoon became Eminent.

He was elected *Burgeſs* for the *Town* of *Cardigan*, to ſerve in the *Parliament* conven'd on the Third of *November*, 1640. where he gave ſufficient Teſtimony his *Learning* was not confin'd within the Walls of *Weſtminſter Hall*, but that he was poſſeſſed of great *Publick Abilities* likewiſe.

Soon after King *Charles* the Firſt withdrew from *White-Hall* to *Hampton-Court*, and that the *Rent* between Him and the *Parliament* was too too viſible, being no longer able to ſerve his *Prince* there, he left the *Houſe of Commons*, (whence He, among other *Worthy Members*, was not long after *ſecluded* by *Vote* of that *Houſe*, and a *new Writ* iſſued forth for

the

the *Election* of a *Member* in his place) and he betook himſelf to thoſe *Duties* wherein he was capable of ſerving his *Prince* in his *proper County.*

From the Year 1641. in which he retir'd from the *Parliament*, until the Year 1660. in which *God* bleſſed us with the *Reſtoration* of our *preſent King*, he did in a manner quit his *Profeſſion*; for in that time he never received a *Fee* from any perſon whatever, nor could be prevail'd with to appear in any *Court*, altho' exceedingly importun'd to it by ſuch as had a deſire to make uſe of his *Abilities*: And the reaſon I have heard him aſſign for it was, *That it was the Duty of an honeſt Man to decline, as far as in him lay, owning Juriſdictions that derived their Authority from any Power but their Lawful Prince.*

Private

Private Counſel he frequently imparted, but that was either *gratuitouſly* to ſuch of his *Acquaintance* as he had a great *Eſteem* for, or *charitably* to ſuch as were *not at all*, or *not well able*, to *Fee* other *Council*.

Thus for the moſt part for Twenty years together he paſs'd a *retir'd Life* at his *own Country-houſe*, until he was elected to ſerve as *Knight of the Shire* for the County of *Cardigan* in this preſent *Parliament*, begun the Eighth day of *May*, in the Year 1661. and on the Twentieth of *May*, 1668. His *Majeſty*, whoſe *Goodneſs* is ever extenſive to *Worthy Men*, did by his *Commiſſion* under the *Great Seal*, conſtitute him *Chief Juſtice* of the *Court of Common-Pleas*, in which *Imployment* he died on the Tenth of *December*, in the Year 1674. leaving theſe *Remains* of his *Labours* in that *Court*, which having no particular *Direction* from

from the *Author* to that purpoſe, I did for ſome time reſolve ſhould not have been made publick, although I well underſtood the value of ſome of them, wherein there are *Queſtions* handled, not familiar in any of our *Reports* yet extant, but in their Nature more Publick.

This *Reſolve* of mine being imparted to ſome *Learned Gentlemen* of the *Coif*, and others who had a particular Eſteem for the *Author*, begot *Importunities* for *Copies* of ſeveral of thoſe *Arguments* then in my hands, which were procured, and ſoon after, by what means I know not, diſperſed further than I intended them, and as I have been informed, cited as *Authorities*.

Thus having, without my privity, become ſo Publick, and apprehending that things in them-

themſelves *good*, *innocent* and *uſeful*, may by miſapplication become *dangerous* and *diſguſtful*, I conceived it beſt to procure a *Licence* for them to ſpeak for themſelves, that they may bear their own blame, and that ſuch as make uſe of them may have no *further ſhare* in the *Guilt* (if any ſuch be) than that they have done as others do, that is, *quoted Authority*.

Which I conceive may be done with ſafety; moſt of the ſubſequent *Caſes* being not the *ſingle Opinions* of the *Author*, but the *Reſolutions* of the *whole Court* by *Him* delivered. If in ſome few other *Caſes* it hath been his Fate in any thing to differ from his *Brethren*, it is no more than many of his *Predeceſſors* have done; particularly, that moſt *Learned* and *Reverend Judge* the Lord *Hobart*, whoſe *ſingle Opinions* in many *Caſes* publiſh-

ed, being built upon *excellent Reaſon*, carry great weight with them at this day: whether the *Author* may be ſo *fortunate*, Time muſt determine. But I hope ſuch as ſhall think fit to *oppoſe* ſuch of his *Opinions* wherein he is *ſingular*, will firſt *reverſe* the *Reaſons* of them; for if *they* be not vanquiſhed, the *Concluſions* thence deduced muſt prevail. So, *Reader*, I commit him to you, heartily wiſhing you the *Benefit* deſigned by this *Publication.*

WE *all knowing the Great* Learning, Wiſdom, *and* Integrity *of the* Author, *Do, for the Common Benefit, allow the Publiſhing of theſe* Reports *and* Arguments *in the ſame Letter as now they are Printed.*

Finch C.
Ri. Raynsford.
Fra. North.
Tho. Twiſden.
W. Montagu.
W. Wylde.
Tim. Littleton.
Hugh Wyndham.
Rob. Atkyns.
Edward Thurland.
V. Bertie.
Tho. Jones.
Will. Scroggs.

REPORTS
OF
Sir John Vaughan
LORD CHIEF JUSTICE
OF THE
Court of Common-Pleas.

Hil. xvii & xviii Caroli 2. *Reg. C. B.* Ro. 1032.

John Tufton Knight and Baronet, Plaint. verſ. *Richard Temple* Knight of the Bath and Bar. *Chamberlain Hammerſley* Cl. *John* Biſh. of *Lich.* and *Cov.* Def.

In a *Quare Impedit* for hindring him to preſent a fit Perſon to the Vicarage of the Church of *Burton-Baſſet* in the County of *Warwick*, being void, and belonging to his Gift.

THE Plaintiff ſets forth, That whereas Thomas Temple Kt. and Bar. was ſeized of two third parts of the Manor of Burton-Baſſet, to which one third part of the Advowſon of the Vicarage aforeſaid, that is, to preſent a fit perſon to the ſame Vicarage the firſt time, when the ſame then after ſhould happen next to be void: And after the ſame firſt Preſentation, then every third turn of the ſame Vicarage being void, for ever appertains, and did appertain, in his Demeſne as of Fee.

And one Edward Wootton Kt. Lord Wootton, was ſeized of one other third part of the Manor aforeſaid, and of one third part of the Rectory Impropriate of Burton-Baſſet: to which third parts one other third part of the Advowſon of the Vicarage aforeſaid, that is, to preſent a fit perſon to the ſame Vicarage the ſecond turn, when the ſame Vicarage then after ſhould happen next to be void: And after the ſame ſecond Preſentation, then every third turn of the ſame Vicarage being void, for ever doth appertain, and then did appertain, in his Demeſne as of Fee.

That the ſaid Thomas Temple was likewiſe ſeized of another third part of the Advowſon of the Vicarage aforeſaid, that is, to preſent a fit perſon to the ſame the third turn, when the ſame Vicarage then after ſhould happen next to be void: And after ſuch third Preſentation, then every third turn of the ſame Vicarage being void, for ever. Ut de uno groſſo per ſe, ut de feodo & jure.

That the ſaid Thomas Temple being ſeized of the two third parts of the ſaid Manor, to which, &c. the ſaid Vicarage became void by the reſignation of Thomas Freeman, then laſt Incumbent.

That thereupon the ſaid Thomas Temple preſented in his turn to the ſaid Vicarage one John Reignolds his Clerk, who was admitted, inſtituted and inducted thereto, in the time of the late King James.

That the ſaid Edward Wootton being ſeized of the ſaid other third part of the ſaid Manor, and third part of the Rectory aforeſaid, to which, &c. dyed thereof ſo ſeized at Burton-Baſſet aforeſaid.

That after his death, the ſaid third parts, to which, &c. deſcended to one Thomas Lord Wootton his Son and Heir, whereby the ſaid Thomas Lord Wootton became thereof ſeized in his Demeſne, as of Fee.

That being ſo ſeized, he levied a Fine of the ſaid third parts, to which, &c. in the Common-Pleas, 4 Car. 1. in Octab. St. Martini, to Nicholas Pay Eſq; and Reginald Pay Gent. Complainants, the ſaid Lord Wootton, Mary his Wife, and one Henry Wootton Kt. deforc.

That the ſaid Fine was to the uſe of the ſaid Lord Wootton and Mary his Wife, during their natural lives, and the longer liver of them; then to the uſe of the firſt ſon of the body of the Lord Wootton, and the heirs males of the body of ſuch firſt ſon begotten, and ſo to the ſixth ſon ſucceſſively, and the heirs

males

males of their bodies, and ſo to every other the ſons of the ſaid Lord Wootton ſucceſſively.

Then for default of ſuch iſſue, to the uſe of Margaret Wootton third daughter of the ſaid Lord Wootton and Mary his wife, and of ſuch husband with whom the ſaid Margaret ſhould happen to marry, for term of ſuch husband's natural life, (if the ſaid Margaret ſhould ſo appoint the ſame per aliquod ſcriptum ſub manu & ſigillis ſuis) and of the heirs males of her body begotten, for part of her Marriage-portion; then to the uſe of the heirs of her body begotten; and for default of ſuch, to the uſe of the right heirs of the ſaid Thomas Lord Wootton for ever.

That by the ſaid Fine, and Statute of Uſes, the ſaid Lord Wootton and Mary his wife were ſeized of the ſaid two third parts, to which, &c. for their lives, with the Remainders over as aforeſaid.

That being ſo ſeized, the ſaid Vicarage became void by the death of the ſaid John Reignalds, and the ſaid Lord Wootton preſented to the ſame in his turn one John Crag, who was accordingly inſtituted and inducted tempore Car. 1.

That the ſaid Thomas Temple being ſeized of the other third part of the ſaid Advowſon in groſs, levied a Fine among other things of the ſaid third part of the ſaid Advowſon to Edward Peeter and Thomas Peeter Eſqs; Complainants, and the ſaid Thomas Temple and Heſter his wife being deforceants.

That this Fine was ſo levied to the uſe of one William Peeter Eſq; and his heirs.

That the ſaid Will. Peeter being ſeized by virtue of the ſaid Fine and Statute of Uſes, the ſaid Vicarage became void by the Reſignation of the ſaid John Cragg, and the ſaid Will. Peeter preſented in his turn thereto one Rob. Kenrick his Clerk, who was accordingly admitted, inſtituted and inducted, temp. Car. 1.

That the ſaid Thomas Temple being ſeized of the ſaid two third parts of the ſaid Manor, to which, &c. died ſo ſeized at Burton-Baſſet aforeſaid.

That after his death, the ſaid two third parts, to which, &c. deſcended to one Peter Temple his ſon and heir, who was thereof ſeized, and died ſo ſeized.

That after his death, the ſame deſcended to the ſaid Richard Temple his ſon and heir, who was, and yet is, ſeized of the ſaid two third parts.

That being ſo ſeized, the ſaid Vicarage became void by the death of the ſaid Robert Kenrick, which vacancy was the third vacancy of the ſaid Vicarage after the ſaid firſt Preſentation of the ſaid Thomas Temple.

That

That the ſaid Richard, 12 Decembr. anno 1654. preſented to the ſaid Vicarage in his turn one Richard Manſell his Clerk, who upon his preſentation obtained the ſaid Vicarage, and was in actual poſſeſſion thereof; and ſo being in poſſeſſion, a Statute was made the 25th of April, 12 of the King, for confirmation and eſtabliſhing of Miniſters in their Eccleſiaſtick Poſſeſſions, ordained by any Eccleſiaſtick Perſons before the 25th of December then laſt paſt; And that the ſaid Richard Manſell, by virtue of the ſaid Statute, was real and lawful Incumbent and Vicar of the ſaid Vicarage.

That the ſaid Lord Wootton and Mary his Wife being ſeized of the ſaid third part of the ſaid Manor and Rectory aforeſaid for their lives, with Remainder as aforeſaid, the ſaid Lord Wootton ſo ſeized, dyed at Burton-Baſſet aforeſaid.

That the ſaid Mary ſurvived him, and was thereof ſole ſeized for term of her life by ſurvivorſhip, and being thereof ſo ſeized, with Remainder, as aforeſaid,

The ſaid Margaret married the ſaid John Tuſton, and after the 8th day of Auguſt 22 Car. 1. by a writing under her hand and ſeal produc'd in Court by the ſaid John Tuſton, dated the ſame day and year, appointed that the ſaid Fine levied as aforeſaid in the fourth year of the King, ſhould be, and the Conuſees therein named ſhould ſtand ſeized of the ſaid third part, to the uſe of the ſaid Margaret, and of the ſaid John Tuſton for term of his life, as by the ſaid writing more fully appears.

By virtue of the ſaid Fine, and Statute of Uſes, the remainder of the ſaid third part, after the death of the ſaid Mary, belong'd to the ſaid John Tuſton and Margaret for term of the ſaid John's life, with Remainder as aforeſaid.

That the ſaid Mary being ſeized of the ſaid third part with, Remainder over as aforeſaid, the ſaid Margaret at Burton-Baſſet aforeſaid, dyed without Iſſue of her Body, and the ſaid John Tuſton ſurvived her.

That the ſaid Mary afterwards, at Burton-Baſſet aforeſaid, dyed ſeized of ſuch her Eſtate, after whoſe death the ſaid third part remain'd to the ſaid John Tuſton, who was thereof ſeized for term of his life, with Remainder over to the heirs of the Lord Wootton.

That the ſaid Tuſton being ſo ſeized, in a Stat. made at Weſtminſter, begun the 8th day of May in the 13th year of his reign, and there continued until the 19th day of May in the 14th year of his reign, it was amongſt other things enacted, That Parſons, Vicars, and other Churchmen being Incumbents of any Eccleſiaſtical Living,

Living, ſhould ſubſcribe the Declaration or Recognition ſet forth in the ſaid Act in manner as by the ſaid Act is recited, (which is ſet forth at large in the Pleading) upon pain of forfeiting the ſaid Parſonage, Vicarage, or other Eccleſiaſtical Living, and to be *ipſo facto* deprived of the ſame.

And the ſaid John Tuſton in fact ſaith, That the ſaid Richard Manſell was in poſſeſſion of the ſaid Vicarage of Burton-Baſſet, and did not, as by the Act was required, ſubſcribe the ſaid Declaration, whereby he ſtood ipſo facto deprived, and the ſaid Vicarage became void.

That ſuch vacancy of the ſaid Vicarage is the third vacancy thereof, after the aforeſaid Preſentation of the ſaid Lord Wootton, and therefore it belongs to the ſaid John Tuſton to preſent a fit perſon to the ſame, and that the ſaid Biſhop, Rich. Temple and Chamberlayne do hinder him ſo to do, to his damage of fifty pounds.

The ſaid Biſhop and Richard Temple plead in Bar. And firſt, the ſaid Biſhop, That he claims nothing but as Ordinary.

Then the ſaid Richard Temple ſaith, The ſaid Tuſton ought not to have his Action againſt him, and taking by Proteſtation, That the ſaid Tuſton was not ſeized in his Demeſne as of Freehold for term of his life, of the third part of the ſaid Manor of Burton Baſſet, and of the third part of the ſaid Rectory of Burton-Baſſet aforeſaid, for Plea ſaith,

That he the ſaid *Richard Temple* was, and yet is, ſeized of the ſaid two parts of the ſaid Manor, and of the Advowſon of the Vicarage of *Burton-Baſſet* aforeſaid, as appertaining to the ſaid two parts of the ſaid Manor, in his Demeſne, as of Fee and Right, in the time of the King that now is.

That being ſo ſeized, the ſaid Vicarage became void by the ſaid Deprivation of the ſaid *Richard Manſell*, by reaſon whereof he the ſaid *Rich. Temple* being ſeized of the ſaid Advowſon as aforeſaid, preſented to the ſaid Vicarage the ſaid *Chamberlayne*, as was lawful for him: Then traverſeth *abſque hoc*, That one third part of the Advowſon of the ſaid Vicarage, namely, to preſent a fit Perſon to the ſame Vicarage every third Turn of the ſaid Vicarage, doth appertain to the ſaid one third part of the ſaid Manor, and to the ſaid one third part of the Rectory Impropriate of *Burton-Baſſet*, as the ſaid *John Tuſton* hath alledg'd, which he is ready to aver, and demands Judgment.

And the ſaid Chamberlayne the Clerk, taking by Proteſtation, That he doth not know any the matters in the Declaration to be

true; and taking alſo by Proteſtation, that before the ſaid Vicarage became void by the Deprivation of the ſaid Rich. Manſell, and at the time it was ſo void, the ſaid Rich. Temple was, and yet is, ſeized of the ſaid two parts of the ſaid Manor, and of the Advowſon of the Vicarage of the ſaid Church of Burton-Baſſet, as appertaining to the ſaid two parts of the ſaid Manor, in his Demeſne, as of Fee and Right. And for Plea ſaith,

That he the ſaid *Chamberlain* is Vicar of the ſaid Vicarage by the Preſentation of the ſaid *Richard Temple*, and was thereto admitted, inſtituted and inducted.

Then traverſeth, *abſque hoc*, That the ſaid *Thomas* Lord *Wootton* after the death of the ſaid *John Reignalds*, ſo as aforeſaid, preſented to the ſaid Vicarage, being void in his turn, the ſaid *John Cragg*, as the ſaid *Tuſton* hath alledged, and demands Judgment.

As to the Biſhop's Plea, his excuſe is admitted, and the Plaintiff hath Judgment with a ceſſat executio againſt him, and a Writ to admit idoneam perſonam to the Vicarage, non obſtante reclamatione.

To the Defendant Temple's Plea the Plaintiff demurs, and the Defendant Temple joins in Demurrer.

To the Plea of Chamberlain the Incumbent the Plaintiff replies, That the ſaid Thomas Lord Wootton after the death of the ſaid John Reignalds Incumbent as aforeſaid, preſented to the ſaid Vicarage, then vacant, in his turn as aforeſaid, the ſaid John Cragg, as the Plaintiff hath formerly alledged. Et de hoc petit quod inquiratur per patriam.

To which the Defendant Chamberlain doth not rejoin any thing, nor joins in Iſſue; and therefore the Plaintiff hath Judgment to recover his Preſentation as againſt him, and a Writ to the Biſhop non obſtante reclamatione, and to remove the Defendant Chamberlain from the Vicarage, notwithſtanding his Admiſſion, Inſtitution and Induction, but with a ceſſat executio until the Plea be determined between the Plaintiff and the Defendant Temple.

THIS CASE in fact cannot be cut ſhorter than as it hath been open'd to be upon the Record; it being a Hiſtory of ſeveral Preſentations to the Vicarage of Burton-Baſſet, and of ſeveral ſuppos'd Titles, ſo to preſent in the perſons who preſented.

The Queſtions therefore in this caſe do ariſe from the cauſes of the Plaintiffs demurring to the Defendants Plea, which as hath been inſiſted on, are two.

Poſt 7. 1. The firſt is, That in a Quare Impedit Plaintiff and Defendant are both Actors, and either of them, as their Right happens to

to fall out, may have a Writ to the Biſhop to admit his Clerk, that therefore either of them muſt make out a ſufficient Title. Poſt 58.

For it will be unreaſonable, that a man ſhould have a Writ to the Ordinary to admit his Clerk, who hath made no Title appear to the Court why it ſhould be granted him.

That the Law is clear, the Plaintiff in a Quare Impedit muſt in his Count alledge a Preſentation in himſelf, or thoſe from whom he claims, and that therefore the Defendant ſhould likewiſe ſo do. Poſt 60.

But in this Caſe the Defendant in his Plea hath alledged no Preſentation in any from whom he claims, or in himſelf.

2. The ſecond cauſe of Demurrer inſiſted on is, That the Defendant hath by his Plea traverſed the Appendency alledged in the Plaintiffs Count of the third part of the Advowſon of the Vicarage of Burton-Baſſet, to the third part of the Manor, and third part of the Rectory of Burton-Baſſet: whereas he ought to have traverſed the Preſentation alledged by the Plaintiff in the Lord Wootton, by whom the Plaintiff claims, and not the Appendency; And divers Authorities have been pretended, that ſo is the Law. Poſt 8.

1. As to the firſt cauſe of Demurrer, It is true that in a Quare Impedit both Plaintiff and Defendant may be Actors, and either have a Writ to the Biſhop, as the Right falls out to be: Ant. 6.

But it is not true that both are always Actors in a Quare Impedit; for if the Defendant hath preſented his Clerk, and he be admitted, inſtituted and inducted before the Quare Impedit brought, the Defendant hath then no cauſe to have a Writ to the Biſhop for the doing of that which is already done; and conſequently in ſuch Caſe the Defendant is no Actor, but a bare Defendant.

When a man hath preſented, and his Clerk is inſtituted and inducted, he is at the end of his work, and hath no more to do than to keep what he hath gotten; for thereby he hath a full poſſeſſion, which is Title ſufficient, if there be not a better.

But the Plaintiff, who is to recover that which he hath not, muſt ſhew a good Title before he can recover, or he ſhall never avoid the Defendant's poſſeſſion, by ſhewing no Title, or an inſufficient, which is the ſame with none.

It can be neither Law nor common Reaſon for the Plaintiff to tell the Defendant, You have no good Title, and thence to conclude therefore I have. Poſt 58.

The Plaintiff muſt recover, if at all, by his own ſtrength, and not by the Defendant's weakneſs, as is well urg'd and clear'd in
Poſt 58. Digby's and Fitzherbert's Caſe in the Lord Hobart.

The Defendant hath alledged in his Plea a Title pro forma, and that he hath preſented by reaſon thereof, and that his Clerk is inſtituted and inducted, which is ſufficient for the preſent and future time, if no better Title be oppoſed to it, without alledging any other Preſentation in himſelf, or any from whom he claims.

Poſt 58. But if the Defendant were out of poſſeſſion, as the Plaintiff is, he muſt then make out a good Title, as the Plaintiff now muſt, or elſe the Defendant ſhould never have a Writ to the Biſhop to admit his Clerk; and in ſuch caſe only it holds true, that the Defendant is Actor as well as the Plaintiff.

And in ſuch caſe he is to alledge a Seiſin of the Advowſon, as the Plaintiff muſt in himſelf, or thoſe from whom he claims; which can never be done, without alledging a former Preſentation, that being the only actual Seiſin of an Advowſon, for the cauſe why he ſhould preſent to the preſent vacancy.

So as the not alledging a former Preſentation will be no objection to the Defendant's Title; beſides, the Plaintiff hath alledg'd a Preſentation both in his anceſtor Sir Tho. Temple of Reignalds, and in himſelf of Manſell for him: but I make no account of that, for if the Defendant will take advantage of a Title admitted him by the Plaintiff, he muſt take it as the Plaintiff gives it, which in this Caſe the Defendant doth not.

For the Plaintiff by his Count makes the Defendant's Anceſtor and himſelf ſeiz'd in their Demeſne as of fee, of two parts of three of the Manor of Burton-Baſſet, and of a third part of the Advowſon of the Vicarage of Burton-Baſſet, as appendant to the ſaid two parts.

But the Defendant by his Plea ſaith, he was ſeized in fee of two parts of three of the ſaid Manor, and of the intire Advowſon of the Vicarage, as appendant to the ſame two parts, and ſo preſented, which is another Title than that admitted by the Plaintiff.

Ant. 7. 2. For the ſecond cauſe of Demurrer, which is a point of more difficulty, I take it for Law, and ſhall accordingly prove it, That when the Defendant traverſeth any part of the Plaintiffs *Count* or *Declaration* in a *Quare Impedit*, it ought to be ſuch part as is both inconſiſtent with the Defendant's Title, and being found againſt the Plaintiff, doth abſolutely deſtroy his Title; for if it doth not ſo, however inconſiſtent it be with the Defendant's Title, the Traverſe is not well taken.

To

To prove this, I ſhall make uſe of two Caſes urged at the Bar for the Plaintiff, but rightly underſtood, are fully againſt him.

The firſt is, 10 H. 7. f. 27. in a Quare Impedit the Plaintiff declared, That he preſented ſuch a one his Clerk, who was admitted, inſtituted and inducted, and after the Church became void, and he ought to preſent. The Defendant pleaded, his anceſtor was ſeized of a Manor to which the Advowſon was appendant, and preſented; and that the Manor deſcended to him, and that the Church being void, he preſented; and traverſed, abſq; hoc, That the Advowſon is in groſs. 10 H. 7. f. 27.

It was adjudg'd, That the Defendant ought to have traverſed the Preſentation, and not the Seiſin of the Advowſon in groſs.

Whence it was inferr'd, That in the preſent Caſe the Preſentation alledg'd ought by like reaſon to have been traverſed, and not the Appendency; for traverſing the Appendency in this Caſe, differs not from traverſing the Seiſin in groſs in that Caſe.

But the reaſon of that Judgment, when rightly underſtood, is very clear.

1. The Plaintiff in the Quare Impedit (as the Caſe appears in the Book) did not declare that he was ſeized of the Advowſon in groſs, and preſented, (though perhaps if the Original Declaration did appear, it might be he did ſo declare) but declares, That he preſented, and his Clerk was admitted, inſtituted and inducted; and the Church becoming void, it belong'd to him to preſent again.

For which reaſon, he alledging no Seiſin in groſs of the Advowſon, but only his Preſentation, and that his Clerk was received, the Defendant formally ought to have traverſed the Preſentation, which was alledged, and not the Seiſin in groſs of the Advowſon, which was not alledged.

But the Caſe is the ſame, whether he did, or did not alledge in his Declaration that he was ſeized of the Advowſon in groſs, and preſented.

For ſtill the Plaintiffs Preſentation was to be traverſed by the Defendant, and not his being ſeized in groſs, though it were true that the Defendant making Title by the appendency of the Advowſon to his Manor, the Plaintiffs Seiſin in groſs was abſolutely inconſiſtent with the Appendency, and therefore ſpeciouſly to be traverſed by the Defendant. Keilewey 51 & 91.

But that Traverſe left a Title in the Plaintiff not deſtroy'd, and therefore was not good.

For

For whether the Plaintiff were ſeized or not of the Advowſon in groſs, he preſenting in the vacancy, and his Clerk being admitted, inſtituted and inducted, he thereby gained a good Title by Uſurpation to preſent when the Church became next void.

And that is the true reaſon in that Caſe, why the Preſentation, which made the Plaintiffs immediate Title to preſent again, was to be traverſed, and not his Seiſin in groſs of the Advowſon, which was not material, when his Uſurpation gave him a Title, though he were not ſeiz'd in groſs before his Uſurpation.

1 Ander. 301.

The next Caſe I ſhall uſe is as good Authority out of the New Books as the other was out of the Old; It is the L. Buckhurſt's Caſe, reported in the firſt part of the L. Anderſon.

Ander. 1 part f. 269. p. 276.

The L. Buckhurſt brought a Quare Impedit againſt the Biſhop of Chicheſter and T. Bickley for diſturbing him to preſent to the Vicarage of Weſtfield, and declared, That the Advowſon of the Vicarage appertain'd to the Rectory of Weſtfield, whereof he was ſeized in fee, and preſented Maurice Sackvil his Clerk, who was thereto admitted, inſtituted and inducted; That the Vicarage was a Vicarage with Cure, of the annual value of 8 l. And that the ſaid Sackvil accepted another Benefice with Cure, by reaſon whereof, and of the Statute of 21 H. 8. the Vicarage became void, and he preſented, and was diſturbed by the Defendants.

The Biſhop pleaded, That before the Writ purchaſed, one Richard Biſhop of Chicheſter, his predeceſſor, was ſeized of the Advowſon of the ſaid Vicarage in fee as in groſs, and collated to the ſaid Vicarage, being void, one Maurice Berkley, who was inducted thereto; and the ſaid Richard dying, the preſent Biſhop was made Biſhop, and became ſeized of the Advowſon, and the Church became void by the ſaid Sackvil's taking another Benefice with Cure, and he collated the ſaid Bickley the other Defendant, and traverſed abſq; hoc, That the Advowſon of the ſaid Vicarage pertained to the Rectory of *Weſtfield*, modo & forma as the Plaintiff alledg'd. And Bickley, the other Defendant, pleaded the ſame Plea.

Upon this Plea it was demurred, becauſe the Traverſe to the Appendency was not good, as was alledged; and after much Argument, and many Caſes cited, where the Appendency was traverſable,

The Court reſolved the Appendency was not traverſable in the Caſe; nor was it material whether the Advowſon were appendant

pendant or in groſs, as the Book is expreſs, ſo as nothing could be traverſable in the Caſe then, but the Lord Buckhurſt's Preſentation, which after the Induction of his Clerk, tho' it were by Uſurpation, made him a good Title to preſent when the Vicarage became next void.

Whence it follows, that if the Defendant could not traverſe the Lord Buckhurſt's Preſentation of Sackvil, which was his immediate Title, the Defendant was remedileſs, but by a Writ of Droit d'Advowſon.

And in the reſolution of this Caſe of the L. Buckhurſt, the Caſe of 10 H. 7. f. 27. before cited was principally rely'd on, as warranting the Judgment, which it fully doth, it being adjudg'd for the ſame reaſon there, that the Seiſin in Fee of the Advowſon in groſs was not traverſable, but the Preſentation was, as it was adjudged in this Caſe, that the Appendency was not traverſable by the Defendant, but the Preſentation.

And by the way I obſerve, that in the Report of the Lord Buckhurſt's Caſe it is admitted that the Plaintiff in the Caſe of 10 H. 7. did count that he was ſeized of the Advowſon in groſs and preſented, whereas I noted the Original Caſe in the Book is, that he counted only upon his Preſentation, and probably it was ſo for the reaſons given in Digby's Caſe by the L. Hobart, That a bare Preſentment is only militant, when ſo alledged by the Plaintiff, and may be in ſuch a Caſe, as may prove the Defendant to have Right of Preſenting at the preſent avoidance, if no Right be alledged by the Plaintiff why he ſhould preſent. Hob. Digby's Caſe, fo. 102.

Whence I collect, that in both theſe caſes of 10 H. 7. and this of the L. Buckhurſt's, tho' there were a manifeſt inconſiſtency in the firſt Caſe between the Plaintiffs Count, that he was ſeized of the Advowſon in groſs, and preſented, and the Defendants Title, that he was ſeized of a Manor to which the Advowſon was appendant; for it was impoſſible it ſhould be appendant for the Defendant, and in groſs for the Plaintiff.

And in the L. Buckhurſt's Caſe, who counted that he was ſeized of the Rectory of Weſtfield, to which the Advowſon of the Vicarage belong'd; and the Defendant made Title, that he was ſeized of the Advowſon in groſs; which Titles were directly inconſiſtent: yet neither the Seiſin in groſs in the firſt Caſe, nor the Appendency in the laſt Caſe were traverſable, but the Preſentation of the Plaintiffs in both, which made their immediate Titles to preſent at the next avoidance, whether there were a Seiſin in groſs, or an Appendency or not, when they firſt preſented.

As

As in theſe two Caſes the true reaſon of the Law appears, why the Seiſin in groſs of the Advowſon, nor the Appendency of the Advowſon alledged by the Plaintiffs, were not traverſable, but only the Preſentation.

Hob. Digby's Caſe, fo. 103. By theſe caſes the Lord Hobart's ſcruple in Digby's Caſe is ſatisfied, where he thinks, that if a man hath gained a Title by Uſurpation at the next avoidance, he muſt not declare that he was ſeized in Fee formerly of the Advowſon, and preſented; but muſt declare ſpecially of the true Patrons former Preſentation, and then the Church becoming void, that himſelf preſented, leſt otherwiſe he declaring that he was ſeized of the Advowſon in Fee, the Defendant ſhould trice him by traverſing his Seſin, which was falſe, when in truth he had a Right to preſent by Uſurpation; for by theſe Caſes it is clear, that the Seiſin in groſs nor Appendency are traverſable, tho' alledg'd by the Plaintiff, when he hath got a Title by Uſurpation, but the Preſentation ought to be traverſed.

I ſhall for clearing this Learning ſhew in the next place, when the Seiſin in groſs, or Appendency of the Advowſon alledg'd by any Plaintiff in his Count is traverſable by the Defendant, and not the Preſentation, and the true reaſon of the difference.

27 H. 8. f. 29. In a Quare Impedit, the Plaintiff declared, That J. S. was ſeized in Fee of a Manor, to which the Advowſon was appendant, and preſented, and after infeoffed the Plaintiff of the Manor, whereby he became ſeized till the Defendant diſſeized him, and during the Diſſeiſin the Church became void, and the Defendant preſented; the Plaintiff entred into the Manor, and ſo recontinued the Advowſon, and the Church is again become void, whereby the Plaintiff ought to preſent.

The Defendant pleads, That a ſtranger was ſeized of four Acres of Land, to which the Advowſon is appendant, and preſented, and of the four Acres infeoffed the Defendant; and the Church being void, it belongs to the Defendant to preſent; and takes a Traverſe, abſq; hoc, That he diſſeized the Plaintiff of the Manor.

This Traverſe was adjudged not good; for the diſſeiſin or not diſſeiſin of the Manor was not material to intitle the Plaintiff to the Quare Impedit; but all his Title was by the appendency of the Advowſon to the Manor, and therefore the Traverſe ought to have been, and was ſo reſolved to the appendency, which deſtroyed the Plaintiffs intire Title to preſent, and alſo inconſiſtent with the Defendants appendency of the Advowſon to his four acres.

I ſhall only put one Caſe more to the ſame purpoſe out of the New Books, reported by the Lord Hobart.

Sir Henry Gawdy Kt. brought a Quare Impedit againſt the Archbiſhop of Canterbury, Sir W. Bird, and Humfrey Rone Clerk, and declared, That Sir Richard Southwel was ſeized of the Manor of Popenho in Norfolk, to which the Advowſon was appendant, and preſented, and his Clerk was inſtituted and inducted; That Southwell bargained and ſold the Manor to one Barrow, who being ſeized, the Church became void by the death of Southwel's Incumbent, and ſo continued for eighteen months, whereby the Queen, in default of the Patron, Ordinary and Metropolitan, preſented by lapſe one Snell; then by mean Conveyances derives the Manor to which the Advowſon is appendant to himſelf, and that by the death of Snell it belongs to him to preſent, and is diſturbed by the Defendants. Sir H. Gawdy's Caſe, Hob. 301.

The Archbiſhop claims nothing but as Ordinary, Sede vacante of the Biſhop of Norwich.

Sir William pleaded, Ne diſturba pas.

And Rone the preſent Incumbent pleaded, That he was Parſon by the King's Preſentation, and that long before Southwel had any thing in the Manor, Q. Eliz. was ſeized of the Advowſon in groſs, in Right of the Crown, and preſented Snell: That the Advowſon deſcended to King James by the death of the Queen; and he being ſeized, the Church becoming void by Snell's death, preſented the preſent Incumbent, who was inſtituted and inducted.

And traverſed abſq; hoc, That the Advowſon was appendant to the Manor of Popenho; and thereupon Iſſue was joined.

In this Caſe alſo the Traverſe of the appendency by the Def. was clearly good, and ſo admitted; for the Plaintiff Gawdy had no more, nor other Title to preſent, than by the appendency of the Advowſon to the Manor; and the Incumbent's death, and the appendency to the Manor, was inconſiſtent with the Defendant's Title by the Advowſons being in groſs.

Theſe two laſt Caſes fully prove the Rule by me taken, and which will conclude the Caſe in queſtion, That the Traverſe is well taken to the appendency of the Advowſon, when it is all the Plaintiffs Title to preſent, and is inconſiſtent with the Defendants.

But in this Caſe of Gawdy's, the Jury found ſpecially, That Southwel was ſeized of the Manor, with the Advowſon appendant, and preſented; and that the Incumbent dying 2 Feb. 1588. the Queen the 15th of Feb. in the ſame year preſented Snell to the Church, then void per mortem naturalem ult' Incumbent' ibidem

vacantem. Et ad noſtram Præſentationem jure Prærogativæ Coronæ noſtræ Angliæ ſpectantem; and her Clerk inſtituted by Letters of Inſtitution, running per Dominam Reginam, veram & indubitatam, ut dicitur, Patronam.

And after the death of Snell, King James preſented Rone in theſe words, ad noſtram Præſentationem, ſive ex pleno jure, ſive per lapſum temporis, ſive alio quocunque modo ſpectantem; and refer'd to the Court, whether the Advowſon were appendant to the Manor or not? It was adjudged,

1. That the Advowſon remain'd appendant, notwithſtanding the Queens Preſentation.

2. That her Preſentation could not be by lapſe, for her Preſentation and Inſtitution and Induction were in the ſame month of February wherein the voidance was.

3. If the Queen had preſented by lapſe, it had made no ſeverance of the Advowſon.

4. That the Queens Preſentation made no Uſurpation, becauſe ſhe preſented as ſuppoſing ſhe had a Title in right of her Crown, as appeared by the form of her Preſentation, which is very remarkable, and therefore her Preſentation was meerly void; for it ſhall not be intended the Queen took away anothers Right againſt her own will and declared intention.

5. For the ſame reaſon K. James his Preſentation of Rone, who by the form of his Preſentation ſuppoſed he had a good Title when he had none, was alſo void. And this agrees with the Reſolution in Green's Caſe, the 6th Rep. that the Queens Preſentation made as by lapſe, when ſhe had no ſuch Title to preſent by lapſe, but another Title, either in Right of her Crown, or by Simony, or ſome other way, was void, becauſe ſhe was miſtaken in her Preſentation: So if ſhe preſents by reaſon of ſome ſuppoſed Title in her Letters of Preſentation, when indeed ſhe had no Title at all, the Preſentation is meerly void; and tho' ſuch Preſentation make a Plenarty, ſo as to avoid lapſe, yet the right Patron is not out of poſſeſſion, but may preſent ſeven years after; and if his Clerk be indued, the former Preſentee is immediately outed.

Hob. 302.

Hence it is to be noted, as a point very obſervable in this Learning, that tho' the King may preſent by Uſurpation, yet he ſhall never preſent by Uſurpation, if in the Letters of Preſentation he preſent by ſome Title which he hath not: but if he preſent generally, making no Title at all by his Preſentation, and his Clerk be received and dies, he hath gained a Title by Uſurpation.

But if the King declare in a Quare Impedit, That he was ſei-

zed

zed of the Advowſon in groſs, or as appendant to a Manor, and preſented, if he had preſented before by Uſurpation, the Defendant ſhall not traverſe his Seiſin of the Advowſon or Appendency at all.

So is it in the caſe of a common perſon alſo, as appears in the end of the Caſe 10 H. 7. where it is ſaid, It was agreed by the Court, That if the Plaintiff entitle himſelf to an Advowſon, as appendant to a Manor, and ſheweth a Preſentment as appendant (for ſo are the words) and the Defendant ſhews another Preſentment, without that that the Advowſon is appendant, this Traverſe is good; for if it be not appendant, as the Plaintiff declares, it is ſufficient to deſtroy his Declaration; and ſo there both are traverſable, but otherwiſe as the Cas is here, viz. the principal Caſe firſt cited.

I conceive the meaning clearly to be, that in the principal Caſe the Seiſin in groſs of the Advowſon, alledged in the Declaration, was not traverſable, but the Preſentation, which might be by Uſurpation, and made a good Title, though the Plaintiff were not ſeized in groſs of the Advowſon.

But if the Plaintiff declare the Advowſon to be appendant to a Manor, and withal ſets forth in his Declaration the Letters of Preſentation to the Church as appendant, there the Defendant may traverſe either the Appendency or the Preſentation; for though the Advowſon were appendant, yet if the Plaintiff preſented not, he had no Title.

Whence I infer, that if the Plaintiff had only counted a Seiſin of the Manor to which the Advowſon was appendant, without ſhewing the Preſentment to be to the Church by virtue of the appendency, the Traverſe of the appendency had not been good; but it muſt have been of the Preſentation, which might have been by Uſurpation, notwithſtanding the alledging barely of the appendency, as is reſolved before in the point in the L. Buckhurſt's Caſe in Anderſon, and in the principal Caſe of 10 H. 7.

But when the Count is of the appendency of the Advowſon, and alſo of the Preſentation to it as appendant there, there could be no Uſurpation, according to the Reſolutions in Sir Henry Gawdy's Caſe in the Lord Hobart before cited, and in Green's Caſe in the 6th Report of the Lord Cook.

And the not obſerving of this difference made the Reporter at the end of the L. Buckhurſt's Caſe deny this latter part of the Caſe in 10 H. 7. becauſe it was clearly againſt the reaſon of the principal Caſe in 10 H. 7. and againſt the Reſolution of the L. Buckhurſt's Caſe, if the words of ſhewing the Preſentment to

have been as appendant, had been omitted in the Caſe.

But thoſe words make the latter Caſe in 10 H. 7. exactly to agree with the Judgments both in Sir Henry Gawdy's Caſe in Hob. and Green's Caſe in the 6th Rep.

15 H. 6. Fitz. Quare Imped. num. 77. To the four firſt Caſes may be added the Caſe of 15 H. 6. where the Plaintiff counts in a Quare Impedit, That his Anceſtor was ſeized of a Manor, to which the Advowſon is appendant, and preſented, and died, and that the Manor deſcended to the Plaintiff, and the Church became void, whereby he ought to preſent. The Defendant pleads, That long after the Preſentation alledged by the Plaintiff, the Defendant was ſeized of the Advowſon in fee, and preſented ſuch a one; and after the Church became void, and he preſented the preſent Incumbent. And this Plea was allowed a good Plea by the Court, without anſwering to the Appendency alledged by the Plaintiff, which was in effect avoided by the Defendant's Preſentation after. And in this Caſe the Plaintiff was without remedy, unleſs he could traverſe the Preſentation alledged by the Defendant, otherwiſe than by his Writ of Droit d'Advowſon.

Crook 2 Car. f. 61. Sir Greg. Fenner verſ. Nicholſon & Patfield. As alſo the Caſe in Crook. If the Plaintiff make Title to preſent, as being ſeized of an Advowſon in groſs, or as appendant; and the Defendant make Title, as preſented by reaſon of a Simoniacal Preſentation made by the Plaintiff, and thereby a Devolution to preſent to the King, under whom the Defendant claims: Becauſe the Defendant doth admit the Advowſon to be in groſs or appendant in the Plaintiff, and that neither of them is inconſiſtent with the Title made by the Defendant, he ſhall not traverſe the Seiſin in groſs, nor the Appendency; but becauſe ſomewhat elſe is neceſſary to give the Plaintiff Right to preſent, that is, the vacancy of the Church, either by Death, or Reſignation, or Deprivation, which the Plaintiff muſt alledge, and which are inconſiſtent with the Defendant's Title, who claims not by vacancy by Death, Reſignation or Deprivation, but by the Simony, therefore he ſhall traverſe the vacancy alledged either by Death, Reſignation or Deprivation, as the Caſe falls out, without one of which the Plaintiff makes no Title; and if the preſent vacancy be by either of them, the Defendant hath no Title.

Now to apply theſe Caſes to the Queſtion before us, Whether the Defendant ſhould have traverſed the *Preſentation* of the Lord *Wootton* alledg'd by the Plaintiff, or the *Appendency* (which he hath done) to the third part of the Manor, and third part of the Rectory of *Burton-Baſſet*? It ſeems clear, That in all Caſes of *Quare Impedits*, the Defendant may ſafely traverſe the Preſentation

on alledged in the Plaintiffs Count, if the matter of fact will admit him ſo to do; for the Plaintiff hath no Title without alledging a Preſentation in himſelf, his anceſtor, or thoſe from whom he claims the Advowſon: but the Defendant muſt not traverſe (that is, deny) the Preſentation alledged, when there was a Preſentation, for then the Iſſue muſt be found againſt him.

The Lord Wootton therefore having preſented, by what Right ſoever it was, there was no traverſing his Preſentation.

But by what Right ſoever the Lord Wootton preſented, the Plaintiff hath no Right to preſent, unleſs the Lord Wooton's Preſentation were by the appendency to the third part of the Manor; for he deriving no Title to the Advowſon as in groſs, nor any other way, but as belonging to the third part of the Manor, which he derives from the Lord Wootton: therefore nothing is traverſable by the Defendant but the Appendency, which, if found againſt the Plaintiff, he hath no colour of Title.

Paſch.

Paſch. 19 *Car.* 2. *Rot.* 484. *C. B.*

Henry Edes Plaintiff in a *Quare Impedit*, againſt *Walter* Biſhop of *Oxford.*

That he was, and is, ſeized of the Advowſon of the Church of Chymer, in groſs, in fee, and thereto preſented William Paul his Clerk, who was inſtituted and inducted accordingly; That after, the Church becoming void, and ſo remaining by the death of the ſaid William Paul, and it belongs to him to preſent, he is hindred by the Defendant.

The ſaid Biſhop, by Proteſtation, ſaying the Church did not become void by death of the ſaid William Paul, pleads, That the ſaid Church was full of the ſaid *Paul.*

The ſaid William Paul was created Biſhop of Oxford, whereby the ſaid Church became void, and the Right of Preſentation devolv'd to the King by Prerogative.

25 H. 8. c. 21. Then pleads the Clauſe of the Act of 25 H. 8. which impowers the Archbiſhop of Canterbury to give Faculties and Diſpenſations, as the Pope did, at large.

That after, and before the Writ purchaſed, decimo of the King, the ſaid William Paul died at Oxford.

That after his death, the Defendant was elected Biſhop of Oxford, and after, and before the Writ purchaſed, viz. the 27th of of Novemb. 1665. Gilbert, now Archbiſhop of Canterbury, and Primate of all England, by his Letters of Diſpenſation, according to the ſaid Act, and directed to the ſaid Walter, the Defendant, now Biſhop, under his Seal, then elect, and upon the Biſhop's Petition of the Means of his Biſhoprick,

Graciouſly diſpenſed with him, together with his Biſhoprick, the Rectory of *Whitney*, in the Dioceſs and County of *Oxford*, which he then enjoyed; and the Rectory of *Chymer* aforeſaid, which he by the King's favour ſhortly hoped to have, to receive, hold, retain and poſſeſs *in commendam*, as long as he lived and continued Biſhop of *Oxford*, with or without Inſtitution and Induction, or other Solemnity Canonical, and to take and receive the Profits to his own uſe, without Reſidence. *Quantum in eodem Archiepiſcopo fuit, & Jura Regni paterentur.*

The

The Letters of Diſpenſation not to be effectual without the King's Confirmation.

That the King after the 28th of November, 17 of his Reign, under the Great Seal, to the ſaid Church, ſo void by ceſſion, preſented the Defendant, then as aforeſaid Biſhop elect, and after, that is, the 28th of November, 17 Car. 2. the King by his Letters Patents under the Great Seal, dated the ſame day and year, and duly inrolled in the Chancery, according to 25 H. 8. did confirm the Letters of Diſpenſation, and that the ſaid Biſhop might enjoy all things contained in them, according to the form and effect thereof, with clauſes of non obſtante aliquo Statuto, or other matter.

Then avers, That the cauſe of Diſpenſation was not contrary to the Word of God, and that the Pope in H. 8.'s time did uſe to grant the like Diſpenſations to the King's Subjects, which he is ready to aver, &c.

The Plaintiff replies, That true it is William Paul ꝑdict' was elected Biſhop of Oxford, being Incumbent of Chymer; but that after his Election, and before his Creation, he (2 Decemb. 1663.) obtained Letters of the Archbiſhop under his Seal of Faculties, for cauſes therein mentioned, of Diſpenſation to hold the Church of Brightwell and the Rectory of Chymer, both which he then lawfully had, and to retain the ſame with his Biſhoprick, after his Conſecration, &c. durant' vita ſua natural' & Incumbentiâ ſuâ in Epiſcopatu ꝑdict' & quamdiu eidem Epiſcopatui ꝑeſſet.

The King, 9 Decemb. 15 of his Reign, confirmed the Letters Patents under the Great Seal, with non obſtante, according to the ordinary form.

30 Decemb. 15 Car. 2. was created Biſhop.

Upon this Replication the Defendant demurs, and the Plaintiff joins in Demurrer.

Note, The Defendant doth not ſhew to whom he was preſented

He doth not ſay that he entred by virtue of the Preſentation of the King in Chymer.

In diſcuſſing the Caſe, as it appears upon this Record, I take it granted,

1. If a perſon Incumbent of one or more Benefices with Cure be conſecrated Biſhop, all his Benefices are ipſo facto void. Poſt 20.

2. Upon ſuch voidance, the King, and not the Patron, is to preſent to the Benefices ſo void by ceſſion.

3. That

Poſt 23.

3. That any Diſpenſation after the Conſecration comes too late to prevent the Avoidance.

4. That the Pope could formerly, and the Archbiſhop now, can ſufficiently diſpenſe for a Plurality by 25 H. 8.

I ſhall therefore firſt make one general Queſtion upon the Caſe as it appears.

Whether *William Paul*, Rector of *Chymer*, and elected Biſhop of *Oxford*, and before his Conſecration diſpenſed with by the Archbiſhop to retain his ſaid Rectory with the Biſhoprick, and having the ſaid Letters of Diſpenſation confirmed by the King, and inroll'd, *modo & forma prout* by the Record, did not by virtue of the ſaid Diſpenſation and Confirmation prevent the Voidance of his ſaid Rectory by Ceſſion upon his Conſecration?

For if he did, the Rectory became not void until his death, and by his death the Plaintiff, being Patron, hath Right to preſent.

To determine the General Queſtion, I ſhall make theſe Queſtions, as ariſing out of it.

1. Whether any Diſpenſation, as this Caſe is, be effectual to prevent an avoidance after Conſecration?

2. Whether the Archbiſhop hath power, with the King's Confirmation, to grant ſuch a Diſpenſation?

3. Whether this Diſpenſation in particular be ſufficient to prevent a voidance of Chymer after Conſecration of the late William Paul.

1. This Caſe differs from the Biſhop of Oſſory's Caſe in Sir J. Davis's Reports, who had a Faculty accipere in commendam, with odd power, and executed it by collating himſelf into a Living void by lapſe.

2. It varies from the Caſe of Colt and Glover in the Lord Hobart's Reports, and the Diſpenſation there to the Biſhop elect of Lichfield and Coventry, which was to retain one Benefice which he had; and propria authoritate capere & apprendere as many as he could, under a certain value.

The defeats of that Diſpenſation are numerous, and excellently handled by the Lord Hobart in that Caſe of Colt and Glover: But in our Caſe there is no affinity with the defeats of thoſe Diſpenſations, but is barely to retain what legally was had before.

Obj. 1. Per Thyrning The Bp. of St. Davids Caſe. 11 H. 4. f. 37. b. 38. a. Rolls f. 358. ob. 1. 11 H. 4. f. 60. B. per Hill.

An Incumbent of a Church with Cure being conſecrated Biſhop, his Living was void by the Law of the Land; therefore the Pope could not prevent the voidance after Conſecration, for then the Pope could change the Law of the Land; and if the Pope could not, the Archbiſhop cannot.

Ant. 19. Poſt 22.

The

The better Opinion of that Book 11 H. 4. is contrary, and ſo agreed to be in the Iriſh Caſe of Commendams, and Rolls his Opinion is grounded only upon 11 H. 4. Anſw. 1.

If an Incumbent with Cure take another Benefice with Cure, the firſt is void by the Law of the Land, and the Patron hath Right to preſent: therefore the Pope could not grant a Diſpenſation, nor the Archbiſhop now can, to hold a Plurality, for that were to alter the Law of the Land, and to prejudice the Patron. But the Law was and is otherwiſe, therefore that reaſon concludes not in the caſe of a Biſhop.

A ſecond reaſon in that caſe of 11 H. 4. is, that ſuch a Diſpenſation cannot prevent the avoidance, becauſe there is no uſe of it until Conſecration; for before the Incumbent retains his Living without any Diſpenſation, and when conſecrated, his Benefices are void, and then it is too late to diſpenſe as is agreed. Obj. 2. 11 H. 4. f. 59 b. per Skreen.

This reaſon is as effectual againſt a Diſpenſation for a Plurality; for before a man takes a ſecond Living, there can be no uſe of it; and after by this reaſon it comes too late, for the Patron hath Right to preſent. Anſw. 2.

It was in that great Caſe endeavoured to avoid the preſſure of this Argument, by ſaying the Diſpenſations in caſes of Plurality were not alike with that of retaining the former Benefice when the Incumbent was created Biſhop, becauſe in the caſe of Plurality there was no actual voidance, and conſequently no Title to the Patron to preſent before Deprivation, and that the Diſpenſation prevented the Deprivation, which was a Spiritual Act, wherewith the Patron had not to do, and by a conſequent only prevented the voidance.

It is reſolv'd in Holland's Caſe, Digby's Caſe, and many others, That the Patron may preſent as ſoon as the *Incumbent* is inſtituted in a ſecond Living without Deprivation; and that the Law was anciently ſo; therefore that evaſion is not material. Holland's Caſe, 4 Rep. Digby's caſe, 4 Rep.

Another Anſwer hath been likewiſe offered, and paſſeth in the New Books for current, that in the caſe of Pluralities the voidance is by the Canon-Law, and therefore may be diſpenſed with by the ſame Law: but in the caſe of a Biſhop made, the voidance is by the Common Law.

If Canon-Law be made part of the Law of this Land, then is it as much the Law of the Land, and as well, and by the ſame Authority, as any other part of the Law of the Land. And if it be not made the Law of the Land, then it hath no more effect than a Law of Utopia; therefore the Canon-Law in force here is the Law of the Land. 2 Inſt.

Beſides, their meaning is to be learn'd, who ſay an Incumbent's Benefice, made a Biſhop, is void by the Common-Law, and not by the Canon-Law. The words of Thyrning in that caſe, 11 H. 4. are, (who was then Chief Juſtice.)

11 H. 4. f. 60. b. Da. Rep. f. 81. a. & f. 68. b. Ant. 20. I ſuppoſe that when a man benefic'd is made a Biſhop, it is by the Law of holy Church that his Benefice becomes void, and the ſame Law which gives the voidance, may cauſe that it ſhall not be void, and that concerns the Power of the Apoſtle. The Common-Law doth not prohibit Pluralities, nor make a voidance of his Benefice when the Incumbent is Biſhop, but the ancient Eccleſiaſtical Law of *England.*

Obj. 3. 11 H. 4. f. 77. a. per Hill. It is a Contradiction, that the Incumbent being the Biſhop's Subject, and the Biſhop his Sovereign, ſhould be united: the Servant, qua Servant, may as well be Maſter; the Tenant, qua Tenant, Lord; the Deputy, the Deputor; the Delegator, the Delegated; which is impoſſible.

Anſw. It is a Contradiction, that a perſon ſubject, being ſo, ſhould not be ſubject; but no Contradiction, that a perſon ſubject ſhould ceaſe to be ſo: The ſubjection of the Incumbent ceaſeth when the Rectory is in the Biſhop; the Deputy is not, when the principal Officer executes the Office in perſon; and relation of Lord and Tenant deſtroy'd, when the Lord occupies the Land himſelf.

If an Act of Parliament ſhould enable every Biſhop to hold his former Benefices, no Contradiction would follow, nor doth now by the Diſpenſation.

And note, all theſe Reaſons deny the Pope's Power formerly, the Archbiſhop's now, and the King's alſo; for they are not Reaſons againſt the Power of the party diſpenſing, but that the ſubject-matter is capable of no Diſpenſation.

Siderfin 305. There is no inconſiſtence for a Biſhop to be an Incumbent, for he is a Spiritual Corporation, and being Patron of a Living, might and may have it appropriate, that is, to be for him and his Succeſſors perpetual Incumbents.

Da. Rep. f. 80. b. The Rectories of *Eaſtmean* and *Hambleden* are appropriate *ad menſam* of the Biſhop of *Wincheſter*, and many others in *England* and *Ireland* ſo appropriated.

Selden hiſt. of Tithes, c. 6. par. 3. f. 80. b. c. 9. par. 2. f. 253. Every Biſhop, many hundreds of years after Chriſt, was Univerſal Incumbent of his Dioceſs, received all the Profits, which were but Offerings of Devotion; out of which he paid the Salaries of ſuch who officiated under him as Deacons or Curates in places appointed.

Second

Second Queſtion, Whether the Pope formerly uſed to diſpenſe in ſuch a caſe, and conſequently the Archbiſhop now can, by the Stat. of 25 H. 8. c. 21? Queſt. 2.

1. The particular Diſpenſation granted to the Biſhop of St. Davids in 11 H. 4. is a full inſtance; nor was it in the Argument of that Caſe inſiſted, that the Pope could not diſpence with a Biſhop to retain or receive a Benefice. But the ſole Queſtion was, Whethere (in that particular Caſe, becauſe the Benefice to be retain'd belong'd to the Preſentation of a Church-man, viz. the Biſhop of Salisbury) the Diſpenſation did not amount to a Proviſion, and ſo was within the Statute of Proviſions, 25 E. 3. Biſhop of St. David's Caſe.

2. By the Stat. of 28 H. 8. it appears the Biſhop of Rome did grant Faculties and Diſpenſations to the King's Subjects, as Pluralities, Unions, Trialities, Appropriations, Commendams, Exemptions; where Commendams are enumerated: And by that Act all granted by the Pope are made void, but to be renew'd in Chancery. 28 H. 8. c. 16.

Procuring Commendams were ſo frequent in Ireland, that a ſpecial Act of Parliament was there made, 7 E. 4. againſt all ſuch as ſhould purchaſe Bulls for any Commendam, to put them out of the King's Protection. 7 E. 4. c. 2.

4. A Baſtard inſtituted and inducted before Deprivation a Secular Prieſt before he became Regular, whereof many were in England (and Thyrning ſaith he knew that Edmond Monk of Berry, who was with *Edward* the 3. held many Benefices, though a Monk) and Pluralities, were ordinarily diſpenſed with by the Pope. 11 H. 4. f. 78. a. & f. 60. a. 11 H. 4. f. 76. b.

5. Hankford ſaith he hath ſeen that the ſame man was Abbot of Glaſtenbury and Biſhop of another Church, ſimul & ſemel. 11 H. 4. f. 38. a.

Horton, The Pope may grant, that one man may hold three Biſhopricks at a time; which Hankford agreed, if with conſent of the Patrons: for if without their conſent, it was not diſpenſing to hold them, but granting away the Property of the Patron, which a Diſpenſation could not. 11 H. 4. f. 76. a.

Henry Beaufort, Uncle to Henry the 6th, had a Diſpenſation to retain the Biſhoprick of Wincheſter, being Cardinal; but it was ineffectual, becauſe obtained after he was Cardinal. Da. Rep. f. 80. 77. b. Ant. 20.

Cardinal Woolſey obtain'd before he was Cardinal a Diſpenſation to hold the Archbiſhoprick of York and the Abbey of St. Albans, together with his Cardinalſhip.

Lindwood. Titulo de Præbendis cap. Audiſtis, Poteſtas quæ ſecundum antiqua jura dabatur Epiſcopis ad diſpenſandum ſuper pluralitate Lindwood. f. 100. b.

pluralitate Beneficiorum reſtricta eſt, ſaltem in Dignitatibus & Beneficiis curatis, ſed circa beneficia ſimplicia bene poterunt Epiſcopi diſpenſare. And in the ſame gloſs, In Dignitatibus & Curatis ſolus Papa diſpenſat.

Authority in the point, That a Rector of a Church diſpens'd with according to 25 *H.* 8. before he is conſecrated Biſhop, remains Rector, as before, after Conſecration.

38 H. 6. f. 19. Br. Spoliat. pl. 4. 1. Where the Pope licenſes one who is created a Biſhop to retain his ancient Benefice, and the Patron preſents another, the elder Incumbent ſues a Spoliation in the Spiritual Court, it well lies, for both claim by the ſame Patron, Quæ ſupradicta omnes conceſſerunt, ſaith the Book.

Fitz. N. B. tit. Spoliation, f. 36. b. 2. The Writ of Spoliation lies properly by one Incumbent againſt another Incumbent, where the Right of the Patron comes not in debate.

As, if a Parſon be created Biſhop, and hath a Diſpenſation to hold his Rectory, and after the Patron preſents another Incumbent, who is inſtituted and inducted, the Biſhop ſhall have againſt that Incumbent a Spoliation, this proves the Biſhop to continue Incumbent after his Conſecration, and to hold his Rectory by his former Preſentation.

Dy. 6 El. f. 228. b. pl. 48. 6 & 7 El. f. 233. A. p. 12. John Packhurſt, Rector of Cleve in Gloceſterſhire, had a Diſpenſation to hold it, notwithſtanding he were advanc'd to any Biſhoprick in the Realm, for three years from the Feaſt of St. Michael, 1560. to the ſame Feaſt, 1563. He was after conſecrated Biſhop of Norwich, and within the three years reſign'd. The Queen preſented one her Chaplain, ſuppoſing ſhe had Title by ceſſion of the Biſhop: Sir H. Sydney the Patron brought a Quare Impedit, and the Church was found to be void by Reſignation of the Biſhop of Norwich, and recover'd, and had Judgment.

1. This Caſe proves the Biſhop of Norwich Incumbent, as formerly, notwithſtanding his Conſecration, elſe the Living had not voided by his Reſignation. Poſt 25.

2. The Diſpenſation was only for three years, yet he was as intire Incumbent, and might reſign during thoſe three years, as if he had not been Biſhop. Poſt 25.

3. It proves the Diſpenſation may be for a time only to hold his former Benefice, & ad modum concedenits, which clears the laſt Queſtion, that in ſuch a Commendam retinere the Diſpenſation is good, tho' it be but for as long as he is Biſhop of that See, and then determines. Hob.

An

An Incumbent made Biſhop, and retaining by Diſpenſation, may have (which none but a perfect Incumbent can have) a Writ of { Spoliation, / Juris Utrum, / Vi Laica removenda, / Annuity for him, or / Annuity brought againſt him

In the Biſhop of Oſſory's Caſe, they which argu'd againſt him conclude, out of all this difference reſults, viz. That a Faculty granted to one which is not Incumbent, to take a void Benefice, is void: and a Faculty to one which is Incumbent of a Benefice, to retain the ſame, is good. The other ſide for the Biſhop concluded the Capere in Commendam good, where the Patron was not prejudic'd, as in lapſe, and conſequently the *Retinere* to be good, conſented to by him who was to preſent upon voidance.

The Commendam Retinere may be for years, or any time, the difference is manifeſt, if their nature and reaſon be obſerved. Colt and Glover's Caſe, Hob. f. 156.

The difference between Retinere and Capere is no leſs than between holding that which is already my own, and taking that which is another's: I am already benefic'd by Preſentation, &c. in ordinary form; I would take a Biſhoprick, which would void the Benefice, therefore I obtain a Diſpenſation to continue holding my Benefice for three years; I remain Parſon of the ſame Benefice of no leſs Eſtate than I had before; and when the three years are paſt, the Benefice voids, as it would have done at the firſt if there had been no Diſpenſation. Ant. 24.

And again, a Biſhop by Diſpenſation may retain as many Benefices as he had lawfully before; but take none of new if he had his number before, &c. Hob. f. 158.

William Bradbridge being Biſhop of Exeter, obtain'd Letters of Diſpenſation from the Archbiſhop, with the Queens Confirmation, to receive any two Benefices with or without Cure, and retain them with his Biſhoprick within his Dioceſs, quamdiu Epiſcopatui p̃dict' p̃eſſet. After he was preſented to the Rectory of Newton-Ferris, and died, and the Patron preſented Simoniacally; and after ſix months the Biſhop preſented as by lapſe, and a Quare Impedit brought againſt him, where the avoidance of the Church per mortem of the Biſhop of Exeter is admitted, tho' it be taken by Proteſtation in that caſe, that the Church non vacavit per mortem. Cok. lib. Intr. f. 475. Heale's Caſe. Rolls 344. b. pl. 2.

Note, The Biſhop of Exeter was preſented to the Archbiſhop, and inſtituted and induced.

If after the death of the laſt Biſhop, who held this Church by Diſpenſation, the King may preſent, as the Caſe is, the next ſucceeding Biſhop to hold it by Diſpenſation, he may ſo preſent the third, and ſo toties quoties there ſhall be a Biſhop of Oxford, and for the ſame reaſon, viz. the ſmall Incomes of the Biſhoprick.

So ſhall the Patron for ever loſe his Preſentation, omitting nothing to be done, nor committing any thing not to be done, but doing his duty in preſenting a fit perſon, and who deſerv'd to be made Biſhop.

Objections.

Tr. 9 E. 3. pl. 6. 18 E. 3. f. 21. & 18 E. 3. Fitz. N. B. f. 34 Letter F.

The moſt ſpecious Objection is made upon the Books of 9 E. 3. and the Abbot of Thorney's Caſe there cited, That if the King recover in a Quare Impedit, and after confirms the Incumbent's Eſtate, yet after the Incumbent's death the King ſhall preſent; and therefore in this Caſe.

Anſw. 1.

When the King hath recovered in a Quare Impedit, he hath Right to preſent uncontrolably by the Record, and may at his pleaſure ſue forth Execution, and in the mean time permit the Incumbent to continue in the Benefice at his pleaſure: but here it is deny'd that the King hath any right to preſent.

Anſw. 2.

The King's permiſſion or grant, that the Incumbent ſhould not be troubled during his life, cannot be pleaded by the Patron in bar of the King's right to preſent by virtue of his Judgment, for the King's permiſſion was nothing to the Patron, and the King ought to have Execution of his Judgment when he demands it againſt him.

Anſw. 3. 11 H. 4. f. 76. b. per Thyrning 45 E. 3. f. 19.

Juſtice Thyrning alſo gives the reaſon of thoſe Books: The cauſe, ſaith he, is, although the King confirms the Incumbent's Eſtate, yet he had not his Eſtate or Poſſeſſion by the King, but by his Patron's Preſentment, and by the King's Confirmation his Right was neither executed nor extinct.

Anſw. 4.

The King's Confirmation in the preſent Caſe is not of the nature of his confirmation in the Caſe of 9 E. 3. for he doth not here as there he did, intend to transfer any Right of his unto the Incumbent, by continuing his poſſeſſion: but his Confirmation here is only formal, and to compleat the Diſpenſation of the Archbiſhop, which is not ſufficient by the Rule of the Act of 25. unleſs confirmed by the King. It was otherwiſe in the Pope's Caſe before the Act.

There

There are many Preſidents in Mr. Noy's Book, where in like caſe, the King, after the death of a Biſhop holding in Commendam, after his Tranſlation to another See, and after his Reſignation, hath preſented. Obj. 2. Noy 138.

All theſe Preſidents are ſince the 20th of the Queen, which cannot alter the Law. 2. Who knows in the caſes of death, whether thoſe Preſentations were not by conſent of the Patrons? And doubtleſs there are Preſidents wherein the Patrons did preſent, elſe this Queſtion had been earlier. But Judicandum eſt Legibus non Exemplis. Anſw. 1.

Upon Tranſlation of a Biſhop holding a Commendam in the Retinere, as long as he continued Biſhop there, the King ought to preſent; for the Diſpenſation is determined upon his remove, and then is as if it had not been; and a Diſpenſation gives no property to the Living, nor takes away any. Anſw. 2.

But where Property is given to the Living, as by Preſentation, Inſtitution and Induction, or by Grant, as in Appropriations, and ſometimes otherwiſe by the King, ſuch preſenting or granting for a year or ſix, is to grant it during life. As an Attornment cannot be for a time, nor a Confirmation, nor a Denization or Naturalization, and the like; but ſuch acts are perfect, as they may be, notwithſtanding Reſtriction to time, as is agreed well in Manwaring's Caſe. Hob. Colt & Glovers Caſe. Manwaring's Caſe, 21 Jac. Crook f. 691.

I ſhall ſay nothing of the caſe of Reſignation, as not being in the preſent Queſtion.

Judgment was given by the Opinion of the whole Court, That the Avoidance was by Death, not by Ceſſion.

Hill.

Hill. 19 & 20 *Car.* 2. *C. B. Rot.* 1785.

Baruck Tuſtian Triſtram Plaintiff, *Anne Roper* Vicounteſs *Baltinglaſs* Vidua, Defendant, in a Plea of Treſpaſs and Ejectment.

2 Jones 27.

The Plaintiff declares, That the Defendant, vi & armis, entred into 20 Meſſuages, 1000 acres of Land, 200 acres of Meadow, and 500 acres of Paſture, cum pertinentiis, in Thornbury, Shalſton, Everſhaw, Oldwick, Weſtbury, and Looſfield, and into the Rectory of Thornbury, which Thomas Gower Kt. and Bar. and George Hilliard to the ſaid Baruck demiſed the firſt of Octob. 19 Car. 2. Habendum from the Feaſt of St. *Michael* the Archangel laſt paſt, for the term of Five years next enſuing; into which he the ſaid Baruck the ſame day entred, and was ouſted and ejected by the Defendant, ad damnum 40 l.

To this the Defendant pleads, Not Guilty.

And the Jury have found ſpecially, That the Defendant is not guilty in all thoſe Tenements, beſides 5 Meſſuages, 400 acres of Land, 50 acres of Meadow, 100 acres of Paſture, cum pertinentiis, in Thornbury, Shalſton, Everſhaw, Oldwick, and Weſtbury, and in the Rectory of Thornbury; and beſides, in one Meſſuage, 100 acres of Land, 50 acres of Meadow, and 100 acres of Paſture, cum pertinentiis, in Looſfield.

And as to the Treſpaſs and Ejectment aforeſaid, in the ſaid five Meſſuages, &c. and in the Rectory of Thornbury, the Jury ſay upon their Oath, That before the ſaid Treſpaſs and Ejectment ſuppoſed, 22 Junij, 12 Jac. Sir Arthur Throgmorton Kt. was ſeized in fee of the aforeſaid Rectory and Tenements laſt mentioned, and of the ſaid premiſſes in Looſfield; and ſo ſeiz'd,

A certain Indenture Tripartite was mad, 22 Junij, 12 Jac. between him the ſaid Sir Arthur of the firſt part, Edward Lord Wootton, Auguſtine Nichols Kt. Francis Harvey Eſq; and Rowley Ward Eſq; of the ſecond part, and Sir Peter Temple, and Anne Throgmorton, Daughter of the ſaid Sir Arthur, of the third part.

To

To this effect, That the ſaid Sir *Arthur Throgmorton* did covenant and promiſe with the ſaid Lord *Wootton* and Sir *Auguſtine Nicholls*, in conſideration of Marriage to be had between the ſaid Sir *Peter Temple* and the ſaid *Anne*, and other the Conſiderations mentioned in the ſaid Indenture, by Fine or Fines, before the Feaſt of St. *Michael* the Archangel next enſuing, or other good Conveyance to be levied by him and the ſaid Dame *Anne* his Wife, to the ſaid Lord *Wootton*, &c. the Scite and Precinct of the Priory of *Looſfield*, the Rectory of *Thornbury*, and divers Manors, Lands and Tenements in the ſaid Indenture mentioned, ſeveral yearly Rents therein mentioned; and all other his Lands in the Counties of *Northampton*, *Buckingham* and *Oxford*, at any time belonging to the ſaid Priory, to convey and aſſure,

To the uſe of himſelf for life, without Impeachment of Waſte.

Then to the uſe of Dame *Anne* his Wife.

Then to the uſe of the ſaid Sir *Peter Temple*, and the ſaid *Anne* his Wife, during their natural lives, and the longer liver of them. And after both their deceaſes,

To the uſe of the firſt Son of the Body of *Anne* by the ſaid Sir *Peter* begotten, and of the Heirs males of the Body of the ſaid firſt Son, ſo to the ſixth Son.

Then to the uſe of all other Sons in ſucceſſion, in like manner, of the Body of *Anne*, begotten by the ſaid Sir *Peter*.

And for default of ſuch Heirs, to the uſe of all the Iſſues Female of the Body of the ſaid *Anne* by the ſaid Sir *Peter* begotten, and the Heirs of the Bodies of the ſaid Iſſues Female.

For default thereof, to the firſt Son of the ſaid *Anne* by any other Husband, and his Heirs-males, and ſo to the tenth.

In like manner to the Iſſues female of the Body of *Anne*, with divers Remainders over.

A Proviſo, That it be lawful for Sir *Arthur* at all times during his life, to lett, ſet and demiſe all or any the ſaid premiſſes aforeſaid, which at any time heretofore have been uſually letten or demiſed to any perſon or perſons, for and during the term of One and twenty years or under, in Poſſeſſion, and not in Reverſion; or for or during any other number of years determinable upon one, two or three Lives in Poſſeſſion, and not in Reverſion, reſerving the Rents thereof now yielded or paid, or more to be yearly due and payable during ſuch Leaſe and Leaſes, unto ſuch perſon and perſons unto whom the ſaid premiſſes ſo to be demiſed ſhall come and be, by virtue of theſe preſents, if no ſuch Demiſe had been made, ſo long as the ſame Leſſees, their Executors and Aſſigns, ſhall duly pay the Rents, and perform their Conditions, ac-

cording to the true meaning of their Indentures of Leaſe, and commit no Waſte of and in the things to them demiſed.

The like Proviſo verbatim, For Sir *Peter Temple* and *Anne* his Wife, to make like Leaſes during their Lives, and the Life of the longer liver of them, after the death of Sir *Arthur*, and Dame *Anne* his Wife.

That a Fine was accordingly levied, &c. to the Uſes aforeſaid.

They find that all the Meſſuages, Lands, Tenements and Rectory in the Declaration mentioned, are comprized in the ſaid Indenture Tripartite.

They find the death of Sir Arthur Throgmorton and Anne his Wife, 2 Septemb. 1 Car. 1. and that Sir Peter Temple entred, and was ſeiſed for term of his life.

They find he had Iſſue of the Body of Anne his Wife, Anne the now Defendant, Daughter and heir of the Bodies of the ſaid Sir Peter and Anne his Wife; and that Anne, Wife of Sir Peter, died 2 Sept. 3 Car. 1.

1. They find a Demiſe by Sir Peter Temple to Sir Thomas Gower and Hillyard of the Rectory of Thornbury, 9 Maij, 23 Car. 1. for 30 l. Rent.

2. They find a Demiſe by him to them of a Meſſuage in Thornbury, 9 March, 23 Car. 1. of Woolhead's Tenement, for 16 l. 13 s. 4 d. Rent.

3. They find a Demiſe to them, 9 March, 23 Car. 1. of Land in Thornbury, held by Roger Rogers, Rent 13 l. 6 s. 8 d.

4. They find a Demiſe, 9 March, 23 Car. 1. of Nelſon's Tenement in Thornbury, Rent 16 l. 13 s. 4 d. at Michaelmas and Lady-day.

5. They find a Demiſe, 13 March, 23 Car. 1. of Lands in Shalſton, Everſham and Oldwick, held formerly by William Hughes, Rent 15 s. 4 d.

Theſe reſpective Leaſes were made for the term of Ninety Years, determinable upon the Lives of the Lady Baltinglaſs the Defendant, Sir Richard Temple's, and the Life of a younger Son of Sir Peter Temple, as long as the Leſſees ſhould duly pay the Rents reſerved, and commit no Waſte, according to the Limitation of the Proviſo in 12 Jac. which is recited in the reſpective Leaſes.

6. Then the Jury find, Quod p̄dicti ſeperales redditus ſuper p̄dict' ſeperalib' Indentur' reſervat' tempore dimiſſionis fuerint reſervat' redditus de & ſuper p̄miſſis p̄dict' 22 die *Junij*, año *Jacobi* Regis 12. ſup̄dict. Et quod p̄dict' ſeperales redditus, &c. in forma

ma p̄dict' reſervat' ad Feſtum Sancti *Michaelis* Archangeli, quod fuit 1653. debit' non ſolut' ſive oblat' fuerint ſuper idem Feſtum, ſed quod ijdem redditus infra unum menſem p̄x' poſt-Feſtum p̄d' p̄fat' *Annæ Roper* Defend' ſolut' fuerunt.

7. They find a Demiſe to them of the Scite and Priory of Looffield, 9 March, 23 Car. 1. at the Rent of 100 l. payable equally on Lady-day and Michaelmas-day (demiſed by Sir Arth. Throgmorton and Anne his Wife, 20 Maij, 12 Eliz. 1570. to William Hewer for Twenty one years, Rent 100 l. Lady-day and Michaelmas, with ſome Exceptions) for the like term of Ninety years, and upon Limitations like as in the former Leaſes.

The Jury find, Quod Tenementa p̄dicta cum pertinentijs in *Looffield* ſup̄nominat' tempore dict' *Eliz.* nuper Reginæ *Angliæ* fuer' dimiſſa ad redditum 100 *l.* p̄ termino 21 annor' ſed dimiſſio & terminus 21 annor' expirati fuer' Et dicunt, quod eiſdem Juratoribus non conſtabat, quod dicta Tenementa in *Looffield* p̄d' 22 die *Junij*, 12 *Jac.* aut per ſpatium 20 annor' tunc antea fuerint dimiſſa. Et dicunt ulterius, quod 50 *l.* p̄ dimidio unius anni de p̄dict' Tenement' in *Looffield* ad Feſtum Sancti *Michaelis* Archangeli qd' fuit anno Dom' 1653. debit' oblat' fuer' Et quod p̄dict' *Anna Roper* ante Feſtum *Annunciationis* p̄x' ſequen' intravit.

They find, That Gower and Hillyard claiming the ſaid five Meſſuages, 400 Acres of Land, 50 Acres of Meadow, and 100 Acres of Paſture in Thornbury, Shalſton, Everſhaw, Oldwick and Weſtbury, as alſo the ſaid Meſſuage, and other the premiſſes in Looffield, and the Rectory of Thornbury, before the ſuppoſed Treſpaſs and Ejectment, entred upon the Poſſeſſion of the Lady Baltinglaſs, and ſo poſſeſſed, made a Leaſe to the Plaintiff, by virtue of which he entred, and was poſſeſſed, until outed by the Defendant, as by the Declaration. But whether the Defendant be culpable, they refer to the Court.

Upon this Verdict the Queſtions are two:

1. The firſt, Whether the Defendant's Entry into the ſix Tenements leaſed to Gower and Hillyard, for not payment of the Rent reſerv'd upon the day of payment, were lawful or not?

And as to that, the Court is of opinion, that the Defendant's Entry was lawful; for that the Leaſes were not deriv'd out of the Eſtate of Sir Peter Temple, who was but Tenant for life, and had no Reverſion in him, but out of the Eſtate of

Sir Arthur Throgmorton, by Limitation of the Proviſo in the Deed, 12 Jac. ſo as the Leaſes were not Leaſes upon condition to pay the Rent at the day, to which any Demand or Re entry was requiſite for Non-payment; but were Leaſes by Limitation, and determined abſolutely according to the Limitation. For this, Littleton is expreſs, that the words quamdiu, dum, and dumodo, are words of Limitation. As, if a Leaſe be made to a Woman, dum ſola fuerit, or dum caſta vixerit, or dumodo ſolverit talem redditum, or quamdiu ſolverit talem redditum; ſo are many other words there mentioned. And if there be not a Performance according to the Limitation, it determines the Leaſe. Litt. f. 235. a.

But it is otherwiſe where a Rent is reſerved upon Condition; for there is a Contract between the Leſſor and Leſſee, and the Law evens the Agreement between them, as is moſt agreeable to Reaſon, and the ſuppoſition of their Intention.

But in the preſent Caſe Sir Peter Temple had no Intereſt in him, out of which ſuch Leaſes could be deriv'd, but had a Power only to make them, by virtue of the Proviſo in Sir Arthur Throgmorton's Deed, and the Leſſees muſt be ſubject to ſuch Limitations as are thereby made.

It was agreed by the Council of the Plaintiff, That it was not a Condition for payment of the Rent, nor could it be; but they would call it a Caution. A Condition to determine a Leaſe or a Limitation, is a Caution, and a material one; but ſuch a Caution hath no more effect than if it were not at all, is a thing inſignificant in Law; and therefore muſt not ſupplant that, which in proper terms is a Limitation, and hath an effect.

2. The next Queſtion is upon the Leaſe of Looffield, which ariſes upon the words of the Proviſo, That it ſhould be lawful for Sir *Peter Temple* to demiſe all or any the premiſſes, which at any time heretofore have been uſually letten or demiſed for the term of One and twenty years or under, reſerving the Rent thereupon now yielded or paid.

And the Jury finding the Lands in Looffield to have been demiſed 12th of the Queen for Twenty one years for 100 l. Rent; and that that term was expired, and not finding them demiſed by the ſpace of Twenty years before at the time of the Indenture, 12 Jac. Whether the Leaſe by Sir Peter Temple of them, be warranted by the Proviſo, there being reſerved the Rent reſerv'd by the Leaſe in 12 Eliz. viz. 100 l.

The

The Court is of opinion, That the Leaſe of Looffield is not warranted by that Proviſo, for theſe Reaſons:

1. It is clear, Sir Arthur Throgmorton intended to exclude ſome Lands from being demiſable by that Proviſo; namely, ſuch as at any time before were not uſually let and ſet to farm: For where a man's Power is limited to leaſe Lands ſo ſpecially qualified; that is, let and ſet uſually at any time before, when he could not leaſe at all without ſuch ſpecial Power given him, he is abſolutely barr'd from leaſing Land which is not ſo qualified.

2. It muſt be preſumed, Sir Arthur Throgmorton knew he had ſuch Lands, as according to his intention were not at any time before uſually ſet and let, and had reaſon not to ſuffer them to be demiſable within that Proviſo, to the prejudice of thoſe in Reverſion. As for example, his Manſion-houſe, Gardens, Curtilages, and Lands occupied in Demeſne.

For it had been vain to provide againſt the leaſing of Land in ſuch manner condition'd, whereof he had none ſo condition'd. But if notwithſtanding, it ſhall be taken that any his Lands, which at any time paſt, how long ſoever ſince, one, two, or three hundred years, were demiſed, as perhaps the ſcite of his Houſe and all his Demeſnes were, though he knew not of it, ſhall therefore now be demiſable within this Proviſo.

Then is the Proviſo inconſiſtent with it ſelf, and repugnant to his meaning; for he intended thereby to hinder the demiſing of ſome of his Lands: but by that conſtruction of the Proviſo, every part of his Land might be demiſed; for doubtleſs at ſome time or other every part of it was demiſed, and probably by Records or other ancient Evidence might appear ſo to be.

3. If this were the meaning of the Proviſo, the word (uſually) in it was to no purpoſe; for it had been much clearer to ſay, that any Lands at any time heretofore demiſed, ſhould be demiſable for Twenty one years by Sir Peter Temple, which doubtleſs was not Sir Arthur's meaning, and conſequently this Leaſe of Looffield not according to his meaning.

1. Now for the literal ſenſe of the Proviſo: If power be to make Leaſes for three Lives, or Twenty one years, of Lands uſually letten; Land which has been twice letten is within the Proviſo, but not Land which hath been but once letten. Rolls, tit. Power, f. 261. n. 11. 2 Jac. in Banco

Therefore this Land of Looffield letten but once, 12 Eliz. is not within the Proviſo.

But

But I inſiſt not much upon this Caſe, for the words uſually demiſed may be taken in two ſenſes: The one for the often farming, or repeated acts of leaſing Lands, to which ſenſe this Caſe doth reaſonably extend.

But the other ſenſe of Land uſually demiſed, is for the common continuance of Land in Leaſe, for that is uſually demiſed; and ſo Land leaſed for Five hundred years long ſince, is Land uſually demiſed, that is in Leaſe, tho' it have not been more than once demiſed, which is the more received ſenſe of the words, Land uſually demiſed.

2. The meaning of the words, at any time, is various, and of contrary meaning. If it be asked by way of Queſtion, Were you at any time at York? it is the ſame as, Were you ever or ſome time at York? So in the Queſtion, Was this Land at any time in leaſe? is the ſame as, Was it ever, or ſome time in leaſe?

But when the words, at any time, are not part of a Queſtion, but of an Anſwer, they have a different and contrary meaning. As if it be ask'd, Where may I ſee or ſpeak with John Stiles? and it be anſwered, You may ſpeak with him, or ſee him at any time at his Houſe: there the words at any time, ſignifie at all times, and not as in the Queſtion, at ſome time.

So when the words are uſed by way of a plain enunciation, and not as part of a Queſtion or Anſwer; As, You ſhall be welcome to my Houſe at any time, ſignifie, You ſhall be welcome at all times.

So in the preſent Caſe, if it be made a Queſtion, Was ſuch Land heretofore at any time uſually letten and ſet to Farm? imports in the Queſtion, Was this Land ever, or at ſome time heretofore (how long ago ſoever) uſually let to farm?

But by way of enunciation if it be ſaid, This Land was uſually let to farm at any time heretofore; it means, This Land was commonly, at all times heretofore, let to farm.

So this Land was uſually in Paſture at any time heretofore, ſignifies, this Land was always, or commonly in Paſture heretofore.

So, You may leaſe any Land heretofore letten to farm at any time, uſually, is the ſame with, Heretofore letten to farm commonly at all times. And this Conſtruction of the Proviſo agrees both with the words and intention of Sir Arthur.

But what was not farmed at the time of this Proviſo made, nor Twenty years before, could not be ſaid to be at any time before commonly farmed; for thoſe Twenty years was a time before, in which it was not farmed.

But

But to come cloſer, The Proviſo is, That Leaſes may be made for twenty one years of any the Lands in the Deed, reſerving the Rents thereupon reſerved at the time of the Deed made, viz. 12 Jac.

Which neceſſarily implies, that the Land demiſable by that Proviſo, muſt be Land which then was under Rent; for where no Rent then was, the Rent then thereupon reſerv'd could not be reſerv'd. But Looffield had then no Rent upon it, for it was not let of twenty years before, nor then, and therefore was not demiſable by that Proviſo.

The words (or more) will not at all help the Plaintiff, for the words (more or leſs) are words of relation; the one of addition to what was before; the other of diminution; for (more or leſs) muſt relate to ſomething poſitive in the kind before, and can never be a relation to nothing.

So (more wages) neceſſarily implies ſome before, (more meat) (more drink) (more company) and in all expreſſions (more) denotes a relation to ſomewhat before of the kind; and in the preſent Caſe, reſerving (more Rent) muſt imply ſome before reſerved. And therefore where none was at the time of the Deed made 12 Jac. there cannot, in any congruity of ſpeech, more be reſerved, or intended to be reſerved.

Quære, If the Record be mended in the point of finding the death of Sir Peter Temple, and when he died?

In this the Chief Juſtice delivered the Reſolution of the whole Court.

Hill.

Hill. 21 & 22 *Car.* 2. *Rot.* 2259. *C. B.*

Hartf. ſſ. *Ralph Dixon* Plaintiff, *verſus* Dean *Harriſon* Defendant: In a Replevin, *Quare cepit Averia ipſius* Radulphi, & *ea detinuit contra vadios & plegios*, &c.

Diſtreſs, 21 Maij, 21 Car. 2. 2 Jones 2.

THe Plaintiff declares, That the Defendant, 21 die Maij, 21 Regis nunc, at Sandridge, in a place called Fregmorefield, took three Cows of the Plaintiff's, and detained them againſt Pledges quouſque, to his Damage 40 l.

The Defendant, as Bailiff of Elizabeth Rooper Widow, Samuel Hilderſham Gent. and Mary his Wife, Mich. Biddulph Eſq; and Frances his Wife, Humphrey Holden Eſq; and Theodoſia his Wife, avows and juſtifies the Caption; for that the place in quo, &c. contains a Rood of Land cum pertinentijs in Sandridge aforeſaid.

That long before the Caption, Ralph Rowlett Kt. was ſeis'd of the Manor of Sandridge in the ſaid County, whereof the ſaid place is and was parcel time out of mind.

Grant of the Rent, June 26. 8 Eliz.

That the ſaid Sir Ralph, 26 Junij, 8 Eliz. at Sandridge aforeſaid, by his Deed in writing under his Seal, produced in Court, thereby granted and confirmed to *Henry Goodyeare*, then Eſquire, and after Knight, and to the Heirs of his Body, a yearly Rent of 30 *l.* out of all his ſaid Manor, and other his Lands in *Sandridge* aforeſaid, payable at the Feaſts of St. *Michael* the Archangel, and the *Annunciation*.

The firſt payment at ſuch of the ſaid Feaſts which ſhould happen after the expiration, ſurrender, or forfeiture to be made after Sir *Ralph Rowlett*'s death, of certain terms of years, of parcel of the premiſſes made to one *William Sherwood* and *Ralph Dean* ſeverally.

With Clauſe of Entry and Diſtreſs to *Henry*, and the Heirs of his Body, if the Rent were unpaid.

And that Sir Ralph gave the ſaid Henry Seiſin of the ſaid Rent, by payment of a peny, as appears by the Deed.

Rowlett's death, 1 Sept. 33 Eliz.

Sir Ralph Rowlett, after the firſt day of September, 33 Eliz. at Sandridge aforeſaid, died.

That

That after the ſecond day of September, 33 Eliz. the ſaid terms of years expired, whereby the ſaid Henry became ſeized of the ſaid Rent in tail. Terms expired Sept. 2. 33 Eliz.

That Henry had Iſſue the ſaid Elizabeth and Mary, and one Anne, his Daughters and Coheirs, and died 1 Octob. 33 Eliz. ſo ſeized. H. Goodyear died 1 Octob. 33 Eliz.

That the ſaid Coheirs, being ſeized of the ſaid Rent to them and the Heirs of their Bodies, May 1. 1634. Mary married the ſaid Samuel Hilderſham, and Anne married one John Kingſton, whereby the ſaid Elizabeth, and Samuel and Mary in Right of the ſaid Mary, and John and Anne in Right of Anne, were ſeized of the Rent. Mary marry'd Sam. 1 May 1634. & Anne the ſame time married John Kingſton.

December 25. 1635. Anne had Iſſue by John her Husband, the ſaid Frances and Theodoſia; and John her Husband and Anne died 1 Jan. 1635. Anne had Iſſue Frances and Theodoſia; ſhe and her Husband John died 1 Jan. 1635.

That thereby Elizabeth, Samuel and Mary, in Right of Mary, Frances and Theodoſia, became ſeized of the Rent.

April 10. 1647. Frances married the ſaid Biddulph, and Theodoſia the ſaid Humphrey Holden, whereby Elizabeth, Samuel and Mary, in Right of Mary; Biddulph and Frances, in Right of Frances; and Holden and Theodoſia, in Right of Theodoſia, became ſeized of the Rent.

And for 120 l. for four years Arrear after the death of John and Anne, ending at the Feaſt of St. Michael 1655. being unpaid at the time and place, &c. the Defendant, as their Bailiff, entred, and diſtrained the ſaid Cows.

The Plaintiff demands Oyer of the Deed of Grant, and hath it in theſe words, &c.

And then the Plaintiff replies, That before the time of the Caption, that is, à die Paſch' in quind' dies, a Fine was levied in the Court of Common-Pleas, in the 21 of the King, before the Juſtices there, &c. between Richard Harriſon Eſq; and the Avowants of the ſaid Rent, with Warranty to the ſaid Richard and his Heirs.

And that this Fine was to the Uſe of the Coniſors and their Heirs, and demands Judgment.

The Defendant thereupon demurs.

WHERE the Law is known, and clear, though it be unequitable and inconvenient, the Judges muſt determine as the Law is, without regarding the unequitableneſs or inconveniency. Poſt 285.

Poſt 285. Thoſe defects, if they happen in the Law, can only be remedied by Parliament; therefore we find many Statutes repealed, and Laws abrogated by Parliament, as inconvenient, which before ſuch Repeal or Abrogation were in the Courts of Law to be ſtrictly obſerved.

Poſt 285. But where the Law is doubtful, and not clear, the Judges ought to interpret the Law to be as is moſt conſonant to Equity, and leaſt inconvenient.

And for this reaſon, Littleton in many of his Caſes reſolves the Law not to be that way which is inconvenient; which Sir Edward Cook in his Comment upon him often obſerves, and cites the places, Sect. 87.

In the preſent Caſe there are ſeveral Coparceners, whereof ſome have Husbands ſeized of a Rent-charge in tail: the Rent is behind, and they all levy a Fine of the Rent to the Uſe of them and their Heirs.

If after the Fine levied, they are barr'd from diſtraining for the Rent Arrear before the Fine? is the Queſtion; It being agreed they can have no other Remedy, becauſe the Rent is in the Reality, and ſtill continuing.

Poſt 39.

If they cannot diſtrain, the Conſequents are,

1. That there is a manifeſt Duty to them of Rent, for which the Law gives no Remedy; which makes in ſuch a caſe the having of Right to a thing, and having none, not to differ: for where there is no Right, no Relief by Law can be expected; and here, where there is Right, there is as little; which is as great an abſurdity as is poſſible.

2. It was neither the intention of the Conizors to remit this Arrear of Rent to the Tenants, nor the Tenants to expect it; nor could the Conizors remit it but by their words or intentions, or both; nor did they do it by either.

3. It is both equitable in it ſelf, and of publick convenience, that the Law ſhould aſſiſt men to recover their due, when detained from them.

4. Men in time of Contagion, of Dearth, of War, may be occaſioned to ſettle their Eſtates, when they cannot reaſonably expect payment of Rents from their Tenants for lives, or others, and conſequently not ſeaſonably diſtrain them; and it would be a general inconvenience in ſuch a caſe to loſe all their Rents in Arrear. So as both in Equity and Conveniency the Law ſhould be with the Avowants.

In

In the next place we muſt examin, Whether the Avowants, that is, the Conuſors of the Fine, be clearly barr'd by Law to diſtrain for the Rent arrear before the Fine? For it muſt be agreed they have no other Remedy, by the Common Law or otherwiſe. To which purpoſe I ſhall open ſome Premiſſes, that my Concluſion may be better apprehended. Ant. 38.

1. A privity is neceſſary by the Common-Law to diſtrain and avow between the Diſtrainor and the Diſtrained, that the Tenant may know to whom the Rent or other Duty ought to be paid; and likewiſe know a lawful Diſtreſs from a tortious taking of his Cattel.

2. This privity is created by an Attornment, either in Fact or in Law, by the Tenant to the Lord, to the Reverſioner, to the Grantee of a Remainder, or of a Rent by Deed or by Fine. For this, Sir Edward Cook upon Littleton Sect. 59. and in many other of his Sections. Litt. Sect. 579.

The Conuſee of a Fine before Attornment cannot diſtrain, becauſe an Avowry is in lieu of an Action, and thereto privity is requiſite. For the ſame cauſe he cannot have an Action of Waſte, nor many other Actions there mentioned, and the Authorities cited. And ſo is *Littleton* himſelf expreſly, *Sect.* 580. Litt. Sect. 580

Where a man by a Grant to himſelf, or by deſcent from his Anceſtor, hath a Rent-charge, and might once lawfully diſtrain, and avow for ſuch Rent if Arrear, by due Attornment made to him or his Anceſtor, he may ſtill do ſo whenever the Rent is behind, unleſs by Law that Power be ſome way loſt.

1. That Power may be loſt by Extinguiſhment of the Rent, by a perpetual Union of the Tenancy to the Rent, or Rent to the Tenancy, or in other manner, the Grantee having no Heir.

2. It may be loſt for a time by Suſpenſion, as by ſuch Union for a time, and after reſtored again.

3. It may be loſt by a Grant of the Rent upon condition, and upon performance or breach of the condition reſtored again: but the power of diſtraining is not in this Caſe loſt by any of theſe ways. 7 H. 6. 3. Br. Extinguiſhment, p. 17.

4. It may principally be loſt by a ſufficient granting over and transferring the Rent to another; which way comes neareſt to the Caſe in queſtion.

Poſt 41. Andrew Ognell's Caſe, 4 Co. 50. b.

And therefore I ſhall agree the Caſe ſo much inſiſted on, which is ſaid to be agreed per Cur' in Andrew Ognel's Caſe, in Rep. 4. That if a man be ſeized of a Rent-ſervice or Rent-charge in fee, and grant it over by his Deed to another and his heirs, and the Tenant attorn, ſuch Grantor is without Remedy for the Rent Arrear before his Grant; for diſtrain he cannot, and other Remedy he hath not, becauſe all privity between him and the Tenant is deſtroyed by the Attornment to the Grantee, and he hath no more Right than any ſtranger to come upon the Land, after ſuch transferring over of the Rent.

Poſt 43.

I ſhall likewiſe agree another Caſe, That if ſuch Grantee ſhould re-grant the ſame Rent back to the Grantor, either in fee, in tail, or for life, and the Tenant attorn, as he muſt to this Re-grant, yet the firſt Grantor ſhall never be enabled to diſtrain for Arrears due to him before he granted over the Rent; for now the privity between him and the Tenant begins but from the Attornment to the Re-grant, the former being abſolutely deſtroy'd, and the Tenant no more diſtrainable for the ancient Arrears, than he was upon the creation of the Rent for Arrears incurred before, till firſt attorn'd.

If the Caſe in queſtion prove to be the ſame in effect with either of theſe Caſes, then the reaſon of Law for theſe Caſes muſt ſway and determine the Caſe in queſtion.

And I conceive that there is no likeneſs or parity between the Caſe in queſtion and either of thoſe Caſes, either for the Fact of the Caſes, or the Reaſon of Law.

I ſhall therefore begin with comparing this Caſe with the firſt of thoſe Caſes.

1. In the firſt of thoſe Caſes, he that is ſeiz'd of the Rent-charge doth intend to transfer his Eſtate in the Rent to the Grantee, and it is accordingly actually transferred by the Tenants Attornment to the Grant.

2. The Grantee by his Grant, and Attornment to it, becomes actually ſeiz'd of the Rent, and may enjoy the benefit of it by perception of the Rent.

3. His Wife becomes dowable of it.

4. It is ſubject to Statutes, Recognizances and Debts entred into by the Grantee, or due from him to the King.

5. It is poſſible to deſcend to his Heir.

6. It may be Arrear, and he hath a poſſibility to diſtrain and avow for it.

1. But in the Caſe in queſtion, the Conuſors of the Fine did never intend to transfer their Eſtate in the Rent to the Conuſee,

nuſee, nor that any Attornment be made to him. What a man intends to paſs to another, he intends to be without it himſelf, at leaſt for ſome time, which is not in this Caſe.

2. The Conuſee never becomes actually ſeiz'd of the Rent, and not only doth not, but never can enjoy the perception of it; for there is no moment of time wherein the Conuſors themſelves are not actually in Seiſin of it, and conſequently may diſtrain if it be in Arrear, and the Conuſee can never have actually Seiſin, or poſſibility to have Attornment or diſtrain, his Seiſin being but a meer fiction, and an invented form of Conveyance only.

3. The Conuſee's Wife is never dowable of it.

4. It is not ſubject to any Statutes, Recognizances or Debts of the Conuſee.

5. It is never poſſible to deſcend to his Heir, for it inſtantly veſts in the Conuſors.

6. It can never be Arrear to the Conuſee, nor hath he ever a poſſibility to diſtrain for it.

To this purpoſe what is agreed in the L. Cromwell's Caſe, 2 Rep. is applicable: Then it is to be conſider'd what Seiſin *Perkins* had, who was the Conuſee of a Fine in that Caſe; and he had but a Seiſin for an inſtant, and only to this purpoſe, to make a Render; for his Wife ſhall not be endowed, nor the Land ſubject to his Statutes or Recognizances. L. Cromwel's Caſe, 2 Rep. f. 77.

Therefore that firſt Caſe cited out of the Report of Andrew Ognell's Caſe, which I admit to be good Law, hath no reſemblance with the preſent Caſe, in any circumſtance or conſequent: but had the Fine been to a third perſon's uſe, the conſequence had been the ſame as in the Caſe cited out of Ognell's Caſe, not as to the Conuſee, but as to that third perſon to whom the Rent was intended: Ant. 40.

To conclude then this firſt part:

1. That whereof the Conuſors were always actually and ſeparately ſeized, the ſame was never by them transferred to the Seiſin of another: but of this Rent the Conuſors were always in actual Seiſin; for there was no moment of time wherein they were not ſeized; therefore this Rent was never transferred to the Seiſin of another, nor could any other for any moment of time have a ſeparated Seiſin thereof; for what was mine at all times, could be another's at no time. Poſt 47.

2. It

2. It is an impoſſibility in Law, that two men ſeverally ſhall have ſeveral Rights and Feeſimples in poſſeſſion in one and the ſame Land, ſimul & ſemel per Fitzherbert in the Argument of Bokenham's Caſe; and the ſame impoſſibility is ſo to have of a Rent. Nor hath this relation to the Learning of Inſtants in Digby's Caſe, Coke 1 Rep. and Fitzwilliams in Rep. 6.

Dyer 28 H. 8. f. 12. a. p. 51.

That an old Uſe may be revoked, and a new raiſed in the ſame time, and an old Poſſeſſion ended, and a new begun; this is uſual in all tranſmutation of Eſtates and things alſo: For in Nature, a new Form introduc'd, doth in the ſame moment deſtroy the old, according to that, Generatio unius eſt corruptio alterius; but a ſeparate Poſſeſſion can never be in two at the ſame time, not out of the one, and yet in the other, more than the ſame Body can be in two ſeveral places at the ſame time.

3. If a Feoffee to uſe of me and my heirs make a Feoffment to another, without conſideration to the uſe of me and my heirs, notwithſtanding there is a new Feoffment, the words of a Uſe to me and my heirs, yet the Uſe being the former Uſe, viz. to me and my heirs, this latter is no new Uſe given to me, for I cannot have that Uſe given which I had before; for to give what I had before is no Gift, as is well preſs'd by that Book.

Dyer 28 H. 8. f. 12. b. per Baldwin Ch. Juſtice.

And by the ſame neceſſity, where I have the poſſeſſion before, a new poſſeſſion cannot be really given me by the Statute of 27 H. 8. whoſe operation is properly to give to him which had not the Poſſeſſion, but only an Uſe; the Poſſeſſion which he wanted before to the Uſe which he had before, in ſuch manner as he hath the Uſe.

But here the Statute cannot give the poſſeſſion to the Conuſors which they never wanted, nor the Conuſee never had, ad aliquem Juris effectum, tho' perhaps fictitiouſly, and in order only to a form of a Conveyance, which was not the end or intention of the Statute of Uſes; but an Uſe invented after, that might be made of the Statute, in order to a general form of Conveyance, by which the parties might execute their Intentions, wherein the Conuſee is but an Inſtrument or Property to execute their purpoſe, as in Cromwell's Caſe is ſaid; but the Statute brings the new Uſes raiſed out of a feigned poſſeſſion, and for no time, in the Conuſee, to the real poſſeſſion, and for all times, in the Conuſors, which operates according to their intent, to change their Eſtate, but not their Poſſeſſion.

L. Cromwel's Caſe, 2 Rep.

Beſides,

Beſides, it hath been admitted at the Bar, that if the Fine had been levied without conſideration, and no Uſes expreſs'd, the Conizors might then have diſtrained for the Arrear, becauſe the Uſes were the ſame as before; which, if granted, it reſolves the Queſtion; for the Attornment and power to diſtrain, follows the Poſſeſſion, and not the Uſe: And if after the ſuppoſed Poſſeſſion of the Conuſee, and his being ſeiz'd to the old Uſes, when the Statute gives the Poſſeſſion back to the old Uſes, the Conuſors might diſtrain for the Arrears before the Fine, as well as for thoſe after, what hinders their diſtraining for them ſtill? For the Poſſeſſion which the Statute gives to the old Uſes, is as new a Poſſeſſion as that it gives to the new Uſes, and the privity is the ſame in both Caſes in regard of the Tenant.

And it is common experience, that a Fine levied without Conſideration or Uſe expreſſed, is to the uſe of the Conuſor and his Heirs, who may have an Action of Waſte after the Fine, for Waſte committed before, as well as he could before the Fine. The inſtant Poſſeſſion of the Conuſee notwithſtanding which, differs not from this Caſe. Sir Moyle Finch's Caſe, 6 Rep. f. 68. b.

The next Enquiry is, What affinity this Caſe hath with the ſecond Caſe propos'd? viz. That if one ſeized of a Rent in fee, grants it over to a ſtranger and his heirs, and the Tenant attorns; if ſuch Grantee regrants the Rent back to the Grantor and his heirs, there muſt be a new Attornment of the Tenant to the Re-grant; for the privity by the firſt Attornment was totally deſtroyed, and all Arrears of Rent loſt when the Tenant attorn'd to the Grantee; which Caſe I take to be clear Law; for by the Re-grant a total new Eſtate is gain'd in the Rent, and thereby he who hath the Rent as if he never had any former Eſtate in it. Ant. 40.

And in the preſent Caſe, the Eſtates after the Fine are wholly new, and other Eſtates in the Conuſors, (to which the Tenant never attorn'd) than the Conuſors had before the Fine in theſe reſpects.

1. Before the Fine, the Husbands had but Eſtates in Right of their Wives, and now they are Jointenants with their Wives.

2. The Wives before the Fine had Eſtates of Inheritance abſolute, and now they are Jointenants with their Husbands, and among themſelves, where Survivorſhip obtains.

3. The Women were Coparceners before, and the Husbands in Right of their Wives, and they are now all Jointenants.

4. Two

4. Two of the Coparceners had the Inheritance of entire third parts, and the two other of one entire third part; and now the four Women and three Husbands are equally Jointenants, which are Eſtates much differing from the Eſtates they had before the Fine.

I muſt agree, That where perſons ſeiz'd of a Rent-charge, by granting it over with Attornment of the Tenant, have totally departed from their Eſtate, and after retake, either ſuch an Eſtate as they had before, or a differing Eſtate in the Rent, they muſt have a new Attornment, and the former privity is wholly deſtroyed, and conſequently no Arrears can be diſtrained for, by reaſon of the firſt privity, which is not.

But in this Caſe, the Conuſors never were for any moment of time out of poſſeſſion of their firſt Eſtate, nor deſtroy'd the firſt privity by any new Attornment, which either was, or poſſibly could be; but only ſome have enlarg'd their Eſtate, ſome diminiſh'd it, others alter'd it, without deſtroying the old privity, which may ſtand well with the Rules of Law; and conſequently they may diſtrain for Rent Arrear, and avow lawfully, by reaſon of the firſt privity ſtill continuing.

And I muſt obſerve in this Caſe, 1. That the Avowants after the Fine are the ſame perſons avowing as before. 2. That after the Fine there is but one common Avowry as before. 3. That there is no new perſon after the Fine, between whom and the Tenant there was not a privity before the Fine.

That a Man's Eſtate in a Rent-charge may be enlarg'd, diminiſh'd, or otherwiſe alter'd, and no new Attornment or privity requiſite to ſuch alteration of Eſtate.

Litt. Sect 549. A man ſeiz'd of a Rent-ſervice or Rent-charge in fee, grants the Rent to another for life, and the Tenant attorns; after the Grantor confirms the Eſtate to the Grantee in Fee-tail, or Fee-ſimple: this Confirmation is good, to enlarge his Eſtate, according to the words of the Confirmation.

Here no new Attornment to this new Eſtate, which now is Fee-tail or Fee-ſimple, in the Rent which was before; but an Eſtate for life is requiſite, elſe the Confirmation were not good; but by Littleton it is good to enlarge the Eſtate.

2. Sir Edw. Cook in his Comment upon this Caſe, ſaith, It is to be obſerv'd, that to the Grant of the Eſtate for life, *Littleton* doth put an Attornment, becauſe it is requiſite; but to the Confirmation to enlarge the Grantees Eſtate there is none neceſſary, and therefore he puts none.

No

No man can doubt in this Caſe, that if Rent had been in Arrear to the Grantee for life, when his Eſtate was enlarg'd, needing no new Attornment or privity, he did not thereby loſe the Rent Arrear.

If two Jointenants in fee let the Land for life, reſerving a Rent to them and their heirs, if one releaſe to the other and his heirs, this Releaſe is good; and he to whom it was made ſhall have the Rent of Tenant for life only, and a Writ of Waſte without Attornment to ſuch Releaſe, for the privity which once was between the Tenant for life and them in the Reverſion. Litt. Sect. 574.

So is it if one Jointenant confirms the Land to the other and his heirs. Litt. Sect. 523.

The Law muſt neceſſarily be the ſame, if a man ſeized of a Rent-ſervice or Rent charge in fee, grant it to two and their heirs, or to two and the heirs of one of them, and the Tenant attorn; if after, one Jointenant releaſe to the other, or he which hath the Inheritance to him which hath but an Eſtate for life, and to his heirs, the perſon to whom ſuch Releaſe is made ſhall thereby have a Feeſimple, whereas before he had but for life in the Rent, and an Eſtate abſolute, which before was joynt, without any new Attornment, for the reaſon of the former Caſe, becauſe there was once a privity between the Tenant and them, which was never deſtroyed.

So is it if there be Leſſee for life, the Remainder for life, he in the Reverſion releaſeth to him in the Remainder and to his heirs all his Right; he in the Remainder hath thereby a Fee, and ſhall have a Writ of Waſte, and likewiſe the Rent of Tenant for life if any were, without any Attornment of the Tenant for Life, for the former privity between them. Litt. Sect. 575. Co. Litt. 338.

Enlargement of Eſtate by Deſcent.

If a man ſeiz'd of a Rent-charge in fee grant it for life to *A.* and the Tenant attorns; after the Grantor grants the Reverſion of this Rent to the Father of *A.* and his heirs, to whom *A.* attorns (as in this Caſe he may by Sir Edward Cook's Comment) and after the Father dies, and this Reverſion deſcends upon *A.* whereby he hath a Feeſimple in the Rent, no new Attornment is requiſite for this Enlargement of Eſtate. Co. Litt. Sect. 556.

Diminiſhing of Eſtate.

A man ſeized of a Rent-charge in fee, grants this Rent for ſeven years, to commence from the time of his death, the Remainder in fee, and the Tenant attorns in the life.time of the Grantor, as he muſt by the Reſolution in Sir Rowland Hayward's Caſe, 2 Rep. Here the Grantor hath diminiſh'd his Eſtate in the Rent, from a Feeſimple to an Eſtate for life; yet it cannot be doubted but he may diſtrain for his Rent Arrear.

2 Rep. Sir R. Hayward's Caſe.

And ſo is the Law, where a man ſeized in fee of a Rent, for a good conſideration covenants to ſtand ſeized for life, with Remainder over.

Upon theſe grounds upon Littleton, If a man ſeized of a Rent-charge in fee, grant it over to a Feme-ſole for a term of years, the Tenant attorns, and ſhe take Husband, and during the term the Grantor confirm the Rent to the Husband and Wife for their lives, or in fee, they become Jointenants for life or in fee of this Rent, and need no new Attornment. This Caſe is proved by a Caſe in Littleton, Sect.

Hence it is manifeſt, that where a man hath a Rent for which he may once lawfully diſtrain by Attornment of the Tenant (which gives ſufficient privity to avow) ſuch Grantee or Poſſeſſor of the Rent may enlarge or change his Eſtate in the Rent to a greater or leſſer, or different Eſtate, and needs no new Attornment or privity; therefore to diſtrain and avow for ſuch Rent whenever Arrear, unleſs he become diſpoſſeſſed of the Rent, and the privity to diſtrain and avow thereby, be deſtroyed by a Right gained by ſome other to have the Rent, and a Right in the Tenant to pay it to ſome other.

9 H. 6. f. 43. Br. Avowry, p. 123.

To this purpoſe there is a Caſe, If a Man be ſeiz'd of Land in *Jure uxoris* in fee, and leaſeth the Land for years, reſerving Rent; his Wife dies without having had any Iſſue by him, whereby he is no *Tenant by the Courteſie*, but his Eſtate is determined; yet he may avow for the Rent before the Heir hath made his actual Entry. This Caſe is not adjudg'd, but it is much the better Opinion of the Book.

Objections.

The Conuſors are in poſſeſſion ſince the Fine of another Eſtate than they were before the Fine, that is, according to the Uſes of the Fine, which they could not be without an Alienation of the Rent to the Conuſee by the Fine, to enable the raiſing of that new Uſe out of the Eſtate transferr'd to the Conuſee by the Fine. Obj. 1.

That by ſuch Alienation the former privity between the Conuſors and the Tenant, which they had as Parceners by Attornment to the firſt Grant of the Rent, was deſtroy'd; and therefore they cannot now diſtrain but for Rent Arrear, ſince the Fine, by the Poſſeſſion given them by the Stat. of 27 H. 8. to which no Attornment is neceſſary, and not for any Arrears due before upon the old privity.

As ſpecious as this Reaſon ſeems, it may be anſwer'd, That the Conuſors had always an actual and ſeparate Seiſin and Poſſeſſion of the Rent, and were at no time without it; therefore the Conuſee could have no ſeveral and ſeparate Poſſeſſion of it at any time; for it is not poſſible that two ſeverally can poſſeſs the ſame thing, ſimul & ſemel, for the ſame thing can no more be in two ſeparate poſſeſſions at the ſame time civilly, than the ſame thing can be in two ſeparate places at the ſame time naturally. Anſw. 1. Ant. 41.

Is not the reaſon then of equal force, That the Conuſors were at no time out of Poſſeſſion and Seiſin of this Rent, and conſequently never loſt the power to diſtrain for it,

As to ſay, The Conuſee had ſometime a ſeparate Poſſeſſion of the Rent from the Conuſors, out of which the new Uſes were raiſed, and therefore the privity to diſtrain for the old Arrears was for ſome time deſtroy'd?

Beſides, if the old privity be deſtroy'd, the greateſt abſurdity imaginable in Law follows, That a man hath a Right to a thing for which the Law gives him no Remedy; which is in truth as great an abſurdity, as to ſay, The having of Right, in Law, and having no Right, are in effect the ſame.

Whenas on the other ſide, the loſs of the Arrears, and the Conuſors Right to them, is a Conſequent deduc'd from the deſtruction of the old privity between the Conuſors and the Tenant, by an imaginary, and not a real Poſſeſſion of the Rent by the Conuſee.

Obj. 2. Ognell's Caſe, 4 Rep.

Nor will it ſerve to ſay, as is inſinuated in Ognell's Caſe, that the Conuſors have diſpens'd with their own Right in the Arrears, and therefore ſuch Arrears in ſtrictneſs of Law, when the Fine is levied, are not due at all, but remitted, and ſo no abſurdity to have no Remedy for a thing not due.

1. By this reaſon a Law ſhould be equally good that provides no Remedy for performance of Contracts, as that which doth, becauſe all Contracts, for performance of which the Law gives no Remedy, ſhall in Judgment of Law be diſpens'd with, releas'd, diſcharg'd.

2. By this reaſon a Rent-ſeck, before Seiſin had of it, ſhall be no Duty, becauſe the Law gives no Remedy before Seiſin; and conſequently ſuch Rent or ſuch Arrears, as in the preſent Caſe, being paid by the Tenant, may be recovered again, as the proper Money of the Tenant, delivered to the Grantee of the Rent without any conſideration, upon an indebitat' Aſſumpſit, the Law creating a promiſe.

So might a Debt paid after ſix years elaps'd, for which, by the Statute of Limitations, there was no Remedy, yet that doth not ceaſe to be a Debt, as if it had been releaſed.

By like reaſon, if a man hath by accident had his Bonds burn'd or deſtroy'd, whereby he had no Remedy to recover the Debt by Law, it ſhould ceaſe to be a Debt at all.

32 H. 8. c. 37. To this the words of the Stat. of 32 H. 8. c. 37. may be added, which gives Remedy for Recovery of ſuch Debts by Executors as were due to the Teſtators, and for which there was no Remedy before, viz. That the Tenants did retain in their hands ſuch Arrearages of Rents, whereby the Executors could not therewith pay the Debts, and perform the Will of the Teſtator, &c. And ſurely no Arrearages could be of Rent, if they were remitted in Law; nor was it fit the Executors ſhould pay the Debts, or perform the Teſtator's Will with that which was no part of the Teſtator's Eſtate, either in Poſſeſſion, or as a Credit.

If a common Recovery had been to Uſes of Lordſhips and Manors before the Stat. of 27. the Recoverors had no remedy to make the Tenants attorn (for a quid Juris clamat would not lie upon a Recovery) before the Stat. of 7 H. 8. c. 4. which did give Remedy, and which ſaith, That ſuch refuſal of Attornment was to the great offence of their Conſcience refuſing, and not only to the diſinheritance of the Recoverors, but often to the breaking of the laſt Will of the Recoverees, and alſo to the diſinheritance of Husbands, Wives, and others to whoſe uſe the Recovery was had. By which it is plain, that Duties for which there

7 H. 8. c. 4.

there is no Remedy often in Law, are not therefore diſpenſed with, and diſcharged by the party, as is ſuperficially ſaid in Ognell's Caſe.

That the Conuſee of a Rent granted by Fine to Uſes cannot have any actual Seiſin, or be in poſſeſſion of ſuch Rent, ſince the Stat. of 27 H. 8. c. 10.

Before the Stat. of 27 H. 8. if a Feoffment had been to Uſes, and no Livery given, or given by one Attorney when it ought to have been by two, the Uſes in ſuch Deed of Feoffment could never riſe: So if a Reverſion had been granted to Uſes, and no Attornment to the Grantee, no Uſe could riſe, becauſe there was no ſufficient Eſtate in poſſeſſion. And when the Statute of Uſes came, it could have no operation when the Eſtates in poſſeſſion were not ſufficient.

So if an Eſtate for life had been granted to the uſe of a man and his heirs, an Eſtate in fee could not riſe out of it by the Statute of 27 H. 8. c. 10.

And if before the Statute a Reverſion had been granted by Fine to Uſes, and no quid Juris clamat brought, tho' the Land paſs'd by the Fine, yet the Tenant could not be diſtrain'd, nor a Writ of Waſte brought againſt him until he attorn'd; and when the Statute came to transfer the Uſe into the Poſſeſſion, it could be but into ſuch a Poſſeſſion as the Conuſee had by the Fine, without power to diſtrain, or bring Waſte, for the words of the Statute are,

That the Eſtate, Title, Right and Poſſeſſion that was in ſuch perſon or perſons that were, or hereafter ſhall be ſeiz'd of any Lands or Hereditaments, to the Uſe, Confidence, or Truſt of any perſon or perſons, be from henceforth adjudged to be in him or them that have, or hereafter ſhall have ſuch Uſe, Confidence or Truſt, &c.

And therefore if before the Stat. of 27. a Fine had been levied of a Rent-charge to Uſes, as this Caſe is, if before Attornment to, or Seiſin had by the Conuſee, the Statute had come and brought the Poſſeſſion of the Rent to the Uſe, the Ceſtuy que uſe could have had the Rent but as a Rent-ſeck, for which he could not diſtrain for want of Attornment, nor have an Aſſize for want of Seiſin, for the Conuſee had no other poſſeſſion of the Rent; but after Attornment and Seiſin to, or by Ceſtuy que uſe, his Poſſeſſion perhaps became perfected.

But

But ſince the Statute, if a Fine be levied of a Reverſion of Lands to Uſes, or of a Rent, becauſe the Uſe and Poſſeſſion by the Statute come inſtantly together, and the Conuſee of the Fine hath no time poſſible to bring either a quid Juris clamat, or a quem redditum reddit, for, or to receive an Attornment, to perfect his Poſſeſſion, It was reſolved in Sir Moyle Finch's Caſe, that the Ceſtuy uſe ſhould notwithſtanding diſtrain, and have the ſame Advantage as if the Conuſees Poſſeſſion had been perfected by Attornment and Seiſin.

Sir M. Finch's Caſe, Co. 6. f. 68. a.

The intent of the Stat. of 27. which was to bring together the Poſſeſſion and the Uſe, when the Uſe was to one or more perſons, and the Poſſeſſion in one or more other ſeparate perſons, was ſoon after the Statute wholly declined, upon what good Conſtruction or Inference I know not.

For now the Uſe (by the name of Truſt, which were one and the ſame before the Statute) remains ſeparately in ſome perſons, and the Poſſeſſion ſeparately in others, as it did before the Statute, and are not brought together but by Decree in Chancery, or the voluntary Conveyance of the Poſſeſſor of the Land to Ceſtuy que Truſt.

So as now the principal uſe of the Stat. of 27. eſpecially upon Fines levied to Uſes, is not to bring together a Poſſeſſion and Uſe, which at no time were ſeparate the one from the other, but to introduce a general form of Conveyance, by which the Conuſors of the Fine, who are as Donors in the Caſe, may execute their intents and purpoſes at pleaſure, either by transferring their Eſtates to ſtrangers, by enlarging, diminiſhing, or altering them, to and among themſelves, at their pleaſure, without obſerving that rigor and ſtrictneſs of Law for the Poſſeſſion of the Conuſee, as was requiſite before the Statute.

Which I have ſufficiently evidenc'd, by ſhewing that the Attornment of the Leſſee to the Conuſee or Reverſioner, or of the Tenant to him, as Grantee of the Rent-charge, is now diſpenſed with, which was not before the Statute.

For if that were now requiſite, the Conuſors could not only not diſtrain for the Rent due before the Fine, but not for the Rent due ſince the Fine; nor doth the Statute help the matter, becauſe the Ceſtuy que uſe is in poſſeſſion of the Rent by the Statute, and therefore needs no Attornment; for that is true, when the Conuſee hath a perfect poſſeſſion, but without Attornment the Conuſee had no perfect poſſeſſion impowering him to diſtrain; and therefore the Statute can bring no perfect Poſſeſſion to the Uſes to that end.

And

And ſo Sir Edw. Cook agrees the Law, That ſince Littleton wrote, if the Conuſee of a Fine before Attornment, by Deed indented and inroll'd, bargains and ſells a Seigniory to another, the Bargainee ſhall not diſtrain, becauſe the Conuſee, that is, the Bargainor, could not for want of Attornment. Cok. Litt. f. 309. b. Sect. 551.

But on the other ſide, a man perfectly ſeis'd of a Seigniory, Rent, Reverſion or Remainder, bargains and ſells by Deed indented and inroll'd, according to the Statute, the Bargainee ſhall diſtrain without Attornment, by virtue of the Statute.

And if a Fine be now levied to a man to the uſe of a third perſon, the third perſon ſhall diſtrain without any Attornment made, not only to himſelf, by reaſon of the Statute, but to the Conuſee, by the Reſolution in Sir Moyle Finch's Caſe, for otherwiſe the Fine were to little purpoſe.

Which Caſe, tho' it make an Attornment not neceſſary where it is impoſſible to be had, that the Conveyance might not be uſeleſs in effect, and an intended Right to be de novo introduc'd, altogether hindred.

Shall it therefore deſtroy an old Attornment, which cannot but be had, and is ſtill in being, for no other uſe or end, but to deprive the Conuſors of a Rent and former Right juſtly due, to introduce a general inconvenience upon all that have granted Leaſes for lives, and are occaſioned to ſettle their Eſtates?

And there is great difference between a Fine levied of a Reverſion, or of a Rent-charge, to the Uſe of a third perſon, and to the Uſe of the Conuſors; for a third perſon never can diſtrain, unleſs either an Attornment were to the Conuſee, which is impoſſible, becauſe no poſſeſſion continues in him, ſo as to receive an Attornment; or unleſs the conſtruction of the Statute (according to Sir Moyle Finch's Caſe) to make the Conveyance of effect to Ceſtuy que uſe, made the Attornment, becauſe it could not be had, not neceſſary; which is a great ſtrain and violence upon the true Reaſon of Law.

That a Conveyance, which in reaſon could not be good without Attornment, ſhould be ſufficient, becauſe it could not have an Attornment, which was neceſſary to make it ſufficient.

And this practice hath been frequent ſince the Stat. of Uſes; as, in making a Recovery againſt his nature to be a forfeiture, becauſe taken as a Common Conveyance; to make Uſes declared by Indenture between the parties, made a year after the Recovery, to the Uſes of the Recovery, with ſuch Limitations as are mentioned in Downam's Caſe, Rep. 9. Sir Will. Pelham's Caſe. Downam's Caſe, 9 Rep.

L. Cromwel's Caſe, 2 Rep. f. 72. b.

To make a Rent ariſe out of the Eſtate of Ceſtuy que uſe upon a Recovery, which was to ariſe out of the Eſtate of the Recoverer and his poſſeſſion, which is a principal point in Cromwell's Caſe, and reſolved, becauſe by the intention of the parties, the Ceſtuy que uſe was to pay the Rent.

14 Eliz. Harwell verſ. Lucas. Moore's Rep. f. 99. a. n. 243.

Bracebridge's Caſe is eminent to this purpoſe. Tho. Bracebridge ſeiz'd of the Manor of Kingbury in Com Warwick, made a Leaſe for one and twenty years of Birchin-Cloſe, parcel del Manor, to Moore; and another Leaſe of the ſame Cloſe for ſix and twenty years, to commence at the end of the firſt Leaſe, to one Curteis, rendring Rent, and after made a Feoffment of the Manor and all other his Lands to the uſe of the Feoffees, and their heirs and aſſigns, upon condition that if they paid not 10000 *l.* within fifteen days to the ſaid *Tho. Bracebridge* or his Aſſigns, they ſhould ſtand ſeized to the uſe of *Bracebridge* and *Joyce* his Wife; the Remainder to *Thomas* their ſecond Son in Tail, with divers Remainders over; the Remainder to the right Heirs of *Thomas* the Father. Livery was made of the Land in poſſeſſion, and not of *Birchin-Cloſe*, and no Attornment. The Feoffees paid not 10000 *l.* whereby *Bracebridge* the Father became ſeiz'd, and the firſt Tenant for years attorn'd to him. Adjudged,

1. That by Livery of the Manor Birchin-Cloſe did not paſs to the Feoffees without Attornment.

2. That the Attornment of the firſt Leſſee was ſufficient.

Moor f. 99. n. 243.

3. Though the Uſe limited to the Feoffees and their heirs was determined before the Attornment, yet the Attornment was good to the contingent Uſe, upon not paying the Money.

In the Reſolution of this Caſe, *Wild*, *Archer* and *Tyrrel*, Juſtices, were for the Plaintiff; and *Vaughan*, Chief Juſtice, for the Defendant.

Trin.

Hill. 21 *Car.* 2. *C. B. Rot.* 1714.

The King Plaintiff in a *Quare Impedit*, *per Galfridum Palmer*, *Attornatum ſuum Generalem.* Mod. 276.

Robert Biſhop of *Worceſter*, *Thomas Jervis* Eſq; and *John Hunckley* Clerk, Defendants. 2 Jones 8.

The King counts, That Queen Elizabeth was ſeized of the Advowſon of the Church of Norfield, with the Chapel of Coſton, in groſs * in fee, in Jure Coronæ, and preſented one James White her Clerk, who was admitted, inſtituted and inducted. * As of fee, Poſt 59.

That from the ſaid Queen, the Advowſon of the ſaid Church, with the ſaid Chapel, deſcended to King James, and from him to King Charles the Firſt, and from him to His Majeſty that now is, who being ſeized thereof, the ſaid Church, with the Chapel, became void by the death of the ſaid James White, and therefore it belongs of Right to him to preſent, and the Defendants diſturb him, to his damage of 200 l. which the ſaid Attorney is ready to verifie for the King.

The Defendants plead ſeverally; and firſt the Biſhop, That he claims nothing in the ſaid Church and the Advowſon, but as Ordinary.

The Defendant Jervis ſaith, That long before the ſaid Preſentation ſuppoſed to be made by the late Queen, one Richard Jervis Eſq; was ſeized of the Manor of Norfield, with the appurtenances, in Com̃ pdict', to which the Advowſon Eccleſiæ pdictæ tunc pertinuit & adhuc pertinet, in his Demeſne, as of fee: and ſo ſeized, the ſaid Church became void by the death of one Henry Squire, then laſt Incumbent of the ſaid Church, and ſo continued for two years, whereby the ſaid late Queen, ptextu lapſus temporis, in default of the Patron, Ordinary, and Metropolitan, Eccleſiæ pdictæ p tempore exiſtentis dictæ nuper Reginæ devolutæ, by her Prerogative, afterward, that is, tertio die Decembris, 28 Eliz. by her Letters Patents under the Great Seal, bearing date the ſaid year and day at Weſtminſter, to the ſaid Church, then being void, preſented the

ſaid James White, who was admitted, inſtituted and induced, tempore pacis, &c.

That the ſaid James White being ſo Rector of the ſaid Church, and the ſaid Richard Jervis ſeized of the ſaid Manor to which the ſaid Advowſon pertained, &c. the ſaid Richard after, at Norfield aforeſaid, died ſo ſeized.

After whoſe death, the ſame deſcended to one Thomas Jervis Eſq; as Son and Heir of Richard, and from him deſcended to one Sir Thomas Jervis Kt. who entred and was ſeized, and ſo ſeized, the ſaid Sir Thomas Jervis, March 30. 14 Car. 1. by his Deed in writing, ſealed at Norfield aforeſaid, granted to one Phineas White the Advowſon of the ſaid Church, for the firſt and next Avoidance only, whereby the ſaid Phineas was poſſeſſed for the next Avoidance of the ſaid Advowſon, and ſo poſſeſſed, the ſaid Church became void by the death of the ſaid James White, which was the firſt and next Avoidance after the ſaid Grant to Phineas.

30 March, 14 Car. 1.

Phineas, by virtue of his ſaid Grant, preſented one Timothy White his Clerk, who was thereupon admitted, inſtituted and induced, tempore pacis tempore Car. 1.

The ſaid Timothy being Rector, and the ſaid Sir Thomas Jervis ſeized as aforeſaid, the ſaid Sir Thomas died ſeized at Norfield aforeſaid, and the ſaid Manor, with the Appurtenances, deſcended to Thomas the Defendant, as his Son and Heir, who entred, and was, and yet is ſeized; and being ſo ſeized, the ſaid Church became void by the death of the ſaid Timothy White, and the ſaid Thomas Jervis the Defendant preſented the other Defendant John Hunckley, who was admitted, inſtituted and induced long before the Writ purchaſed.

Then traverſeth *abſq; hoc*, That the late Queen was ſeized of the ſaid Advowſon, with the Chapel of *Coſton* aforeſaid, in groſs, and as of fee, *Jure Coronæ ſuæ*, *Et hoc paratus eſt verificare*; and demands Judgment *ſi Actio*.

Mod. 279.

John Hunckley the Incumbent taking by Proteſtation, That the late Queen was not ſeized, nor preſented, as by the Declaration is ſuppoſed: for Plea ſaith, That Richard Jervis was ſeized of the Manor of Norfield, with the appurtenances, in Com̃ pdict', and the Advowſon of the ſaid Church appertained thereto; and pleads the ſame Plea verbatim as to the Queens Preſentation of White, and all other things, as Jervis the Patron pleaded, and the Preſentation of himſelf, and that he was by the Preſentation of the other Defendant Jervis, admitted,

inſti-

inſtituted and inducted into the ſaid Church, Sept. 15. 1660. and traverſeth,

Abſque hoc, That the King was ſeiz'd of the ſaid Advowſon and Chapel in groſs, as of fee, *Et hoc paratus eſt verificare*, and demands Judgment.

The Attorney-General replies, and as to the Biſhop, claiming nothing but as Ordinary, demands Judgment, and a Writ to the ſaid Biſhop, and hath it with a Ceſſet Executio, until the Plea determined between the King and the other Defendants.

And as to the Plea of the ſaid Thomas Jervis the Patron, the Attorney maintains the Seiſin of the late Queen, and of King James, King Charles the First, and of the King that now is, of the ſaid Advowſon of the ſaid Church and Chapel, as by the Count before is declared.

And that the ſaid Phineas White of his own wrong, by Uſurpation upon the late King Charles the First to the ſaid Church, then void by the death of the ſaid James White, preſented the ſaid Timothy White, and traverſeth.

Abſque hoc, That the Advowſon of the ſaid Church was, or is, pertaining to the Manor of *Norfield*, and demand Judgment, and a Writ to the Biſhop.

And as to the Plea of the Incumbent, the Attorney replies as before to the Patron's Plea, That the late Queen, King *James*, King *Charles* the Firſt, and the King that now is, were ſeized of the ſaid Advowſon in groſs, as of fee; and that the ſaid *Phineas White* preſented the ſaid *Timothy*, by Uſurpation upon King *Charles* the Firſt, and traverſeth the Appendency of the Advowſon *Eccleſiæ prædictæ* to the Manor of *Norfield*.

The Patron Jervis rejoyns and demurs upon the Attorney's Replication, as inſufficient, and aſſigns for cauſe, That the Attorney hath traverſed matter not traverſable; and that the *Traverſe* ought to have been omitted out of the *Replication*, as alſo that the ſaid Plea is repugnant in it ſelf, and wants form.

And John Hunckley the Incumbent rejoyns, That the ſaid Advowſon is pertaining to the ſaid Manor, as he alledged in his Plea before, Et de hoc ponit ſe ſuper Patriam; and the Attorney ſimiliter. Mod. 276, &c.

Imperfections in the Pleading.

1. Upon this Quare Impedit brought, there is a good Title to preſent ſurmis'd for the King, but no more: and there is much difference between a Title appearing for the King, and ſuppos'd only.

2. The Defendant by his Plea in Bar hath not well traverſed the King's Title, for it is traverſed but in part, for only the Seiſin of the Advowſon in the Queen is traverſed, whereas properly the Seiſin and Preſentation of the Queen, by reaſon of her Seiſin, ought to have been traverſed, by Abſque hoc, That the Queen was ſeized of the Advowſon in groſs, and preſented. Mod. 281. Poſt 57.

3. The Seiſin of the Advowſon, which makes not a Title alone, nor is not either traverſable or inquirable by the tender of a Demi-mark in the King's Caſe, in droit d'Advowſon, is not traverſable neither alone in a Quare Impedit: But no Demurrer being thereupon, nor no Iſſue taken upon that Traverſe, no more ſhall be ſaid of it. Fitz. N. Br. f. 31. Letter D. Littl. Coke 294 b. Poſt 57.

4. The King may alledge Seiſin, without alledging any time (as Sir Edward Coke ſaith) in a droit d'Advowſon.

5. The Defendant's Traverſe was not neceſſary, becauſe he had confeſſed and avoided the Queens Preſentation, by ſaying it was by lapſe, if the Defendant had reſted upon avoiding the Queens Preſentation. 26 H. 8. f. 4. a. Hob. Digby & Fitzher. f. 102. and Moore & Newman's Caſe, f. 80. & 103.

6. The Attorney-General ought to have maintained his Count, and traverſed the Queens Preſentation by lapſe. Rice & Harriſon's Caſe, Yelv. f. 211.

7. He doth not do ſo, but deſerts making the King's Title appear, and falls upon the Plaintiff's Title, That the Advowſon was not appendant.

8. He offers a double Iſſue, That the Preſentation of Phineas White was by Uſurpation, and the Advowſon not appendant to the Manor.

Certain

Certain Premiſſes.

If a man counts or declares in a Quare Impedit, That he, or his Anceſtors, or ſuch from whom he claims, were ſeized of the Advowſon of the Church, but declares of no Preſentation made by him or them, ſuch Count or Declaration is not good, and the Defendant may demur upon it; ſo is the expreſs Book following. 5 Co. 97. b. Ant. 56.

1. A man ſhall not have a Quare Impedit, if he cannot alledge a Preſentation in himſelf, or in his Anceſtor, or in another perſon through whom he claims the Advowſon, and that in his Count, unleſs it be in a ſpecial Caſe. Then puts that ſpecial Caſe, As if a man at this day, by the King's Licence, makes a Parochial Church, or other Chantry, which ſhall be preſentable, if he be diſturbed to preſent to it, he ſhall have a Quare Impedit, without alledging any Preſentment in any perſon, and ſhall count upon the ſpecial matter. Fitz. N. B. f. 33 Letter H.

And the Law in this, is the ſame in Caſe of the King with a Common Perſon, by all the Books and Preſidents in the Books of Entry. Ant. 56.

To this add the L. Hobart's Judgment, which is always accurate for the true reaſon of the Law. Know, That tho' it be true that a Preſentation may make a Fee without more, (as a Preſentation by Uſurpation doth) that you never have a Declaration in a Quare Impedit, that the Plaintiff did preſent the laſt Incumbent, without more: but you declare, that the Plaintiff was ſeized in fee, and preſented, or elſe lay the Fee-ſimple in ſome other, and then bring down the Advowſon to the Plaintiff, either in fee, or ſome other eſtate. L. Hob. Digby's Caſe, f. 101.

The reaſon is, That the Preſentment alone is militant and indifferent, and may be in ſuch a Title as may prove that this new Avoidance is the Defendant's; and therefore you muſt lay the Caſe ſo, as by the Title you make, the Preſentation paſt join'd to your Title, ſhall prove that this Preſentation is likewiſe yours, as well as the laſt.

Whence it follows, that to count of an Eſtate and Seiſin without a Preſentation, or of a Preſentation without an Eſtate, are equally vicious and naught, be it in the Caſe of the King, or of a Common Perſon, and was never in Example or Preſident. 2 Mod. 185.

2. A ſecond neceſſary Premiſe is this, and is both natural and manifeſt: When you will recover any thing from me, it is not enough for you to deſtroy my Title, but you muſt prove your own better than mine.

Ant. 7.

Grot. de Jur. Belli 603.

For it is not rational to conclude, You have no Right to this, and therefore I have; for without a better Right, melior eſt conditio poſſidentis regularly.

Hob. f. 162. Colt & Glover's Caſe ad finem paginæ.

3. Every Defendant may plead in a Quare Impedit the General Iſſue, which is ne diſturba pas, becauſe that Plea doth but defend the wrong wherewith he ſtands charg'd, and leaves the Plaintiff's Title not only uncontroverted, but in effect confeſs'd; and the Plaintiff may, upon that Plea, preſently pray a Writ to the Biſhop, or at his choice maintain the Diſturbance for Damages.

Hob. Digby verſ. Fitzh. f. 103, 104.

But if a man will leave the General Iſſue, and controvert the Plaintiff's Title, he muſt then enable himſelf, by ſome Title of his own, to do it; but yet that is not the principal part of his Plea, but a formal Inducement only: And therefore there is no ſenſe, if you will quarrel my Poſſeſſion, and I to avoid your Title effectually, do induce that with a Title of my own, that you ſhould fly upon my Title, and forſake your own; for you muſt recover by your own ſtrength, and not by my weakneſs.

Poſt 60. Mod. 278. Ant. 8.

The Lord Hobart goes further in giving the reaſon of this courſe of Pleading, in Colt and Glover's Caſe, in the place before cited: Of this form of Pleading in Law, there is one reaſon common to other Actions, wherein Title is contained to the Land in queſtion ſpecially, which is, that the Tenant ſhall never be received to counter-plead, but he muſt make to himſelf, by his Plea, a Title to the Land, and ſo avoid the Plaintiff's Title alledg'd by Traverſe, or confeſſing and avoiding.——

Mod. 277.

But in the Quare Impedit there is a further reaſon of it, for therein both Plaintiff and Defendant are Actors one againſt another; and therefore the Defendant may have a Writ to the Biſhop as well as the Plaintiff, which he cannot have without a Title appearing to the Court; And ſo are the Preſidents, when a Quare Impedit is brought againſt the Patron for diſturbance of his Clerk, not being in poſſeſſion.

Raſtal l. Intr. f. 484. a. b. Ant. 8.

The Caſe in brief, and the Queſtion upon it.

Upon the Record, as it hath been opened, and the pleading therein between the King and the Patron, upon which all the Queſtion ariſeth: firſt, I ſhall not make the Queſtion to be, Whether there may be a Traverſe taken upon a Traverſe? (tho' that Queſtion be in truth in the Caſe) for that is a Queſtion rather upon terms of Art, than a Quæſtio Forenſis, and riſing upon the naked Fact of a Caſe depending in Judgment.

I ſhall therefore make the Queſtion upon this Caſe ſuch as nakedly it is, without involving it in any difficulty of terms.

The King brings a Quare Impedit, and declares, That Queen Elizabeth was ſeized of the Advowſon of the Church of Norfield in groſs, as of fee, and preſented, and derives the Advowſon to himſelf, and the Church became void by the death of the Queens Preſentee, and he is diſturbed to preſent by the Defendant Jervis.

The Defendant ſaith, That before the Queen preſented, Richard Jervis, his Anceſtor, was ſeized in fee of the Manor of Norfield, to which the Advowſon of this Church is appendant; That it became void by the death of one Squire, and continued ſo for two years; and that the Queen then preſented White her Clerk by lapſe; That the Manor and Advowſon deſcended from Richard to Thomas Jervis, from Thomas to Sir Thomas Jervis; who granted the next Avoidance to one Phineas White, who preſented, upon the death of James White, one Timothy White, who was inſtituted and inducted: And then derives the Manor and Advowſon to himſelf; and that the Church becoming void upon the death of the ſaid Timothy, he preſented the other Defendant Hunckley, and traverſeth the Queens Seiſin of the Advowſon in groſs.

The

The Law in Caſe of a Common Perſon.

If a Common Perſon brings a Quare Impedit, and counts his Title to preſent, and that he is diſturbed: the Defendant, to
Mod. 277. counter-plead the Plaintiff's Title, makes (as he muſt) a Title to himſelf to preſent, and confeſſes and avoids, or traverſeth the Plaintiff's Title.

1. The Plaintiff ſhall never deſert his own Title, and by falling upon, and controverting the weakneſs only of the Defendant's Title, ever recover, or obtain a Writ to the Biſhop, tho' the Defendant's Title do not appear to the Court to be ſuf-
Ant. 58. ficient, for the unanſwerable Reaſons given by the Lord Hobart in the firſt place.

2. If you will recover any thing from another man, it is not enough for you to deſtroy his Title, but you muſt prove your own better than his.

3. There is no ſenſe, if you will quarrel my Poſſeſſion or Right, and I, to avoid your Title effectually, either by traverſing it, which is denying, or confeſſing and avoiding it, do induce that with a Title of mine own, that you ſhould fly upon my Title to impeach it, and forſake your own, as I ſaid before.

4. Tho' I ſhould, being Plaintiff, make it appear to the Court, that the Defendant's Title is not good, but no way making it appear that my own Title is good: what inducement can the Court have to judge for me, and againſt the Defendant, when no more Right appears for the one than the other, and not only ſo, but no Right appears for either? For in ſuch caſe ſure, Melior eſt conditio poſſidentis, I ought not to be ſued by him I have not wrong'd; and he that hath no Right, can ſuffer no Wrong.

5. It is to no end the Plaintiff ſhould ſet forth any Title at all, if he be not to make it good, but it ſhould ſerve his turn only to impeach the Defendant's Title, and conclude ſo unreaſonably, That if I can make it appear the Defendant hath not a good Title, therefore I have, and muſt have Judgment for me.

How

How far, in the King's Caſe, the Law differs not from a Common Perſon's Caſe.

1. And where the King's Title, in a Quare Impedit brought by him, appears to be no more than a bare ſuggeſtion, the King can no more than a Common Perſon (and for the ſame Reaſons) forſake his own Title, and endeavour only the deſtroying of the Defendant's Title; for the weakening of the Defendant's Title, without more, can no more make a good Title to the King, than it can to a Common Perſon.

2. If the King or his Predeceſſor hath preſented by reaſon of Mod. 280. Wardſhip, of Lapſe, of the Temporalties of a Biſhop in his hands, of Outlawry, and in many other Caſes, when the Church becomes void next after the Wards Age, and ſuing his Livery, after the Death of him preſented by Lapſe, Reſtitution of the Temporalties, and Reverſal of the Outlawry.

In all theſe Caſes, if the King brings a Quare Impedit, and counts that he was ſeized of the Advowſon in groſs, and preſented; when the true Patron ſhall confeſs his Preſentation, and avoid it by ſhewing in their ſeveral Caſes, That his Preſentation was in Right of the Ward, by Lapſe, by reaſon of Outlawry, or of Temporalties being in his hands; the King ſhall deſert his own Title, and controvert the Defendant's reſpective Titles, in whoſe Right he did formerly preſent; and if their Title happen to appear not good, recover the ſecond Preſentation againſt thoſe manifeſt Rules of Law deliver'd.

3. If this ſhould be Law generally, then tho' the King have no Title to preſent, nor pretend to any, (for it differs not, not to pretend at all, and not to be obliged to make good the Title pretended) it were a more compendious way, when any Patron preſented, that the King ſhould, by Scire Facias, compel him to ſet forth his Title, and Demur upon it, or Traverſe it, and recover the Preſentation, if the Patron's Title were any way defective.

Wherein the Law differs in the King's Caſe from a Common Perſon's Caſe.

But it muſt be agreed there are Caſes in which the King may deſert his own Title, and not join Iſſue upon the Defendant's traverſing the King's Title, or avoiding it, but traverſe the Title made by the Defendant in his Bar, which is directly taking a Traverſe upon a Traverſe, which regularly a Common Perſon cannot do; nor I think in any Caſe, but where the firſt Traverſe tender'd by the Defendant is not material to the Action brought, as in the Caſe of Waſte in Long, 5 E. 4. Hob. Digby & Fitzherbert's Caſe, and Woodroffe & Codford's Caſe, 37 Eliz. Hob. f. 105.

Long 5 E. 4. in Waſte for cutting ſo many Trees, and ſelling them. f. 100. b.

The King counting of a Title to himſelf by Office found, or by other matter of Record, which is another thing than only ſurmiſing a Title, as in the Caſe at Bar, may chuſe to maintain his own Title found by Office, and traverſed by the Defendant, or otherwiſe appearing of Record, and take a Traverſe to the Title made by the Defendant.

13 E. 4. f. 8. a. 3 H. 7. f. 3. Keilw. 192. a. Stamford Prærog. f. 64. b.

The Reaſon is manifeſt; for the Office of it ſelf is a Title appearing for the King, and he ſhall never loſe his Poſſeſſion, having a Title, but where the Defendant's Title doth appear a better. But what is this, that the King ſhould relinquiſh his own Title only ſurmiſ'd, and controvert the Defendant's, whoſe Title, tho' it ſhould appear naught, leaves no Title in the King? But when an Office is found, or a Title for the King appears by other matter of Record, if the Defendant hath no Title, the King hath one by his Office, or other Record.

So is 13 E. 4. f. 8. and many other Books. Mod. 276.

Some Books, prima facie, ſeem to make for that Opinion, That the King may generally deſert his own Title, and take a Traverſe to the Defendant's.

Brook tit. Prærogative, Pl. 65. Where a man traverſeth the Office of the King, and makes to himſelf a Title (ut oportet) Traverſing the Title of the King contained in the Office, the King may chuſe to maintain his own Title, or to Traverſe

Br. Prærog. pl. 65. 7 E. 6.

Traverſe the Title alledg'd; for the King is not bound to ſtand to the firſt Traverſe which tenders an Iſſue, but may Traverſe the matter of the Plea of his Adverſary. For this no ancient Book is cited.

But dicitur Hill. 7 Ed. 6. Quod ſic utitur, in an Information put by the Subject for the King, in Scaccario, That where the Defendant pleads a Bar, and traverſeth the Information, the King may traverſe the matter of the Bar, if he will, and is not bound to maintain the matter contained in the Abſque hoc. 7 Ed. 6.

This Caſe, as appears in the firſt part of it, was in the Caſe of an Office, and therefore makes not at all againſt my Diverſity; In the latter part the Aſſertion ſeems more general, as if the King could in any Caſe deſert to maintain the matter of his Information, and traverſe the Bar of the Defendant; but there is nothing in this part of the Caſe poſitive enough to over-rule my Difference, and is no more but Sic utitur ut dicitur in Scaccario, which may be a miſtaken Report.

The other Caſe is likewiſe in Brook, but no ancient Book-Caſe cited, but only 38 H. 8. and no more. Br. Travers per ſans ceo, p. 369

An Information in the Chequer, the Defendant pleads, and traverſeth a material point in the Information, whereupon they are at iſſue; there the King cannot wave this Iſſue, as he may in other Caſes, where the King alone is party, without an Informer, ut ſupra per Attornatum Regis, & alios legis peritos. 38 H. 8. Poſt 64.

This Caſe ſeems likewiſe to conclude, That when the Information is only for the King, and a material point traverſed, upon which Iſſue is joined, that the King is not bound to that Iſſue, but may take another. This diſaffirms the former Caſe, when the Information is by an Informer, the King muſt maintain his Information.

Note the Cloſe of this Caſe, ut ſupra, per Attornatum Regis, & alios legis peritos; I ſhall give the Caſe here mentioned in this ut ſupra, which will, I think, determine the Queſtion, and clearly eſtabliſh the Law according to the Difference taken.

That Caſe is likewiſe in Br. and cited to be as in 34 H. 8. whereof there is no Year-Book, neither ſome four years before the laſt Caſe I mentioned. It is thus:

Br. Prærog. p. 116 34 H. 8. Mod. 277, 278. Ant. 63.

Nota, by Whorhood Attornat' Regis, & alios, When an Information is put into the Chequer upon a Penal Statute, and the Defendant makes a Bar, and traverſeth, That there the King cannot have ſuch Iſſue tender'd, and traverſe the former matter of the Plea, as he can upon Traverſe of an Office, and the like, when the King is ſole party, and intitled by matter of Record; for upon the Information there is no Office found before, and alſo a Subject is party with the King for a moiety. Quod nota bene.

Here it is moſt apparent, That upon an Information, when the King hath no Title by matter of Record, as he hath upon Office found, the King cannot have the Iſſue tender'd upon the firſt Traverſe, tho' the Information be in his own Name; which diſaffirms the ſecond Caſe in that point. And for the ſupernumerary Reaſon, That the King is not the ſole party in the Information, it is but frivolous, and without weight; but the ſtreſs is where the King is ſole party, and intitled by matter of Record.

I ſhall add another Authority out of Stamford Prærogative.

If the King be once ſeized, his Highneſs ſhall retain againſt all others who have not Title, notwithſtanding it be found alſo that the King had no Title, but that the other had poſ-
37 Aſſ. pl. 11. ſeſſion before him, as appeareth in 37 Aſſ. p. 35. which is Pl. 11. where it was found, that neither the King nor the Party had Title, and yet adjudged that the King ſhould re-
Stamf. Prær. f. 62. b. tain; for the Office that finds the King to have a Right or Title to enter, makes ever the King a good Title, tho' the Office be falſe, &c. And therefore no man ſhall traverſe the Office, unleſs he make himſelf a Title; and if he cannot prove his Title to be true, altho' he be able to prove his Traverſe to be true, yet this Traverſe will not ſerve him.

Stamf. Prær. f. 64. b.

It is to be noted, That the King hath a Prerogative which a common perſon hath not; for his Highneſs may chuſe whether he will maintain the Office, or traverſe the Title of the Party, and ſo take Traverſe upon Traverſe.

It

If the King take Iſſue upon a Traverſe to an Office, he cannot in another Term change his Iſſue, by traverſing the Defendant's Title, for then he might do it infinitely. Mod. 276.

But the King may take Iſſue, and after demur; or firſt demur, and after take Iſſue; or he may vary his Declaration; for in theſe Caſes, as to the Right, all things remain, and are as they were at firſt; but this ought to be done in the ſame Term, otherwiſe the King might change without limit, and tye the Defendant to perpetual Attendance. Plowd. 243. a. 236. a. 13 Ed. 4. expreſly, and ſeveral other Books, 28 H. 6. f. 2. a.

Judgment pro Defendente.

Hill.

Hill. 21 & 22 *Car.* 2. *C. B. Rot.* 606.

Thomas Rowe Plaintiff, and *Robert Huntington* Defendant, in a Plea of *Treſpaſs* and *Ejectment.*

The Plaintiff declares, That Thomas Wiſe, 1 April, 21 Car. 2. at Hooknorton in the County of Oxford, by his Indenture produc'd, dated the ſaid day and year, demiſed to the ſaid Thomas Rowe the Manor of Hooknorton, with the Appurtenances, 4 Meſſuages, 100 acres of Land, 50 acres of Meadow, 400 acres of Paſture, and 50 acres of Wood, with the Appurtenances, in Hooknorton aforeſaid: As alſo the Rectory and Vicarage of Hooknorton, and the Tithes of Grain, Hay and Wool, renewing in Hooknorton aforeſaid; To have and to hold the premiſſes from the Feaſt of the Annunciation of the Virgin then laſt paſt, to the end and term of ſeven years then next enſuing.

That by virtue thereof, the ſaid Thomas Rowe the Plaintiff into the ſaid Manor and Tenements entred, and of the ſaid Rectory, Vicarage and Tithes was poſſeſſed.

That the ſaid Robert Huntington the Defendant, the ſaid firſt day of April with force and arms, into the ſaid Manor, Rectory, Vicarage and Tithes entred, and him ejected, againſt the Peace, to his great damage, and whereby he is endamaged 100 l.

The Defendant Huntington pleads Not Culpable; And thereupon Iſſue is join'd.

The Jury give a Special Verdict, That as to the Treſpaſs and Ejectment in the ſaid Manor and Tenements, and in the ſaid Rectory, Vicarage, and Tithes aforeſaid, excepting 200 acres of Paſture, parcel of the ſaid Manor of *Hooknorton*, That the Defendant *Huntington* is not culpable; And as to the ſaid 200 acres, they ſay, That long before the ſaid Treſpaſs and Ejectment,

That is, the 14th day of *October*, 1 *Mar.* one *Robert*, then Biſhop of *Oxford* was ſeized in his Demeſne, as of Fee, in Right of his Biſhoprick, of the ſaid Manor, whereof the ſaid 200 acres are parcel, and ſo ſeized the ſaid 14th of *October*, 1 *Mariæ*, at *Hooknorton*

norton aforeſaid, by his Indenture of Demiſe ſealed with his Epiſcopal Seal, dated the ſaid day and year, and ſhewed in Evidence to the Jury, made between the ſaid Biſhop of the one part, and *John Croker* of *Hooknorton* Eſq; of the other part, for Conſiderations in the ſaid Indenture of Demiſe mentioned, had demiſed, and to farm lett, to the ſaid *Croker*; Among other things, the ſaid Manor with the Appurtenances, whereof the ſaid 200 acres are parcel, To have and to hold, to the ſaid *Croker* and his Aſſigns, from the end and expiration, *prioris dimiſſionis in eadem Indentur' mentionat'* for and during the term of ninety years then next following.

The Tenor of which Indenture of Demiſe follows, *in hæc verba*:

This Indenture made the Fourteenth day of *October*, 1 *Mar.* &c. Between the ſaid Biſhop and the ſaid *John Croker*, &c. witneſſeth, That where the ſaid Biſhop, by the name of the Reverend Father in God, *Robert King*, Abbot of *Thame*, and Commendatory of the late Monaſtery of *Oſeney* in the County of *Oxford*, and the Covent of the ſame, by their Deed indented, dated 6 *Apr.* 29 *H.* 8. with the Conſent of their whole Chapter, have demiſed, and to farm lett,

All that their Manſion or Farm of *Hooknorton*, with the Appurtenances in the ſaid County, and all the Manſion and Farm Demeſne, Lands, Meadows, Leaſows and Paſtures, with all Commodities and Profits to the ſaid Manor belonging or appertaining, and the cuſtomary Works of all the Tenants, not granted nor remitted before the date of the Deed; And the Parſonage of *Hooknorton*, and all Lands, Tenements, Meadows, Tithe Corn and Grain, Hay and Wool, and all Profits to the ſaid Parſonage belonging; And alſo the Vicarage of *Hooknorton* aforeſaid, with the Appurtenances; and all Lands, Tithes, Profits, to the ſaid Vicarage belonging. Poſt 71.

And alſo a Paſture called *Preſtfield*, with the Appurtenances in *Hooknorton* aforeſaid; and all Commons of Sheep called by the name of their Founders Flock; and the Hay of a Meadow, call'd *Brown-mead*, with the cuſtomary Works thereto pertaining; and the Tithe and Duty of a Mead, called *Hay-mead*, in *Hooknorton* aforeſaid.

Except and reſerved to the ſaid Abbot and Covent, and their Succeſſors, all Tenants and Tenantries, then, or after to be ſet by Copy of Court Roll; all Fines, Reliefs, Eſcheats, Herriots, Amerciamenrs, Pains, Forfeits, and all Perquiſites of Courts Barons and Leets.

To

To have and to hold the ſaid Farm or Manor, and all other the premiſſes, with the Appurtenances, except before excepted, to the ſaid *Croker*, his Executors and Aſſigns, from the Feaſt of the Annunciation of our Lady laſt paſt before the date of the ſaid Deed indented, for the term of Eighty years, rendring to the ſaid Abbot, Covent, and their Succeſſors yearly, during the ſaid term.

For the ſaid Manor and Farm 9 *l.* For the ſaid Parſonage 22 *l.* 2 *s.* For the Common of Sheep, Hay, and Cuſtom-works of *Brown-Mead* 5 *l.* For the Wool 12 *l.* For *Preſtfield* 6 *l.* 13 *s.* 4 *d.* For the Vicarage 6 *l.* 13 *s.* 4 *d.* of lawful Money, *&c.* at the Feaſt of S. *Michael* the Archangel, and the Annunciation of our Lady, by equal portions, as by the ſame Deed indented, amongſt divers other Covenants and Grants, more plainly appeareth.

And where alſo the ſaid Biſhop, by his other Deed indented, dated 8 *October*, 1 *Edw.* 6. hath demiſed, and to farm lett, unto the ſaid *John Croker*, all that his Manor of *Hooknorton* aforeſaid, Lands, Tenements, Meadows, Leaſows, Paſtures, Feedings, Commons, Waſte Grounds, Woods, Underwoods, Waters, Mills, with all Meſſuages, Tofts, Cottages, Orchards, Curtilages, Courts-Leets, Fines, Herriots, Amerciaments, Franchiſes, Liberties, Rents, Reverſions, Services, and all other Hereditaments whatſoever they be, ſet, lying and being in *Hooknorton* aforeſaid, in the ſaid County, with the Appurtenances.

Except certain Lands and Tenements in the ſaid Town, in the tenure of the ſaid *John Croker*, for certain years then enduring.

To have and to hold all the ſaid Manor of *Hooknorton*, and all other the premiſſes, with the Appurtenances, except before excepted, to the ſaid *John Croker* and his Aſſigns, from the Feaſt of St. *Michael* the Archangel laſt paſt before the date of the ſaid latter Deed indented, to the full end of the term of Ninety years from thence next enſuing.

Rendring to the ſaid Biſhop and his Succeſſors yearly during the ſaid term, 11 *l.* 4 *s.* 9 *d.* at the Feaſts of the Annunciation and St. *Michael* the Archangel, by equal portions, as by the ſaid latter Deed, among other Covenants and Grants, more plainly appears.

The Reverſion of all which premiſſes are in the ſaid Biſhop, and to Him and his Succeſſors do belong, as in Right of his Church.

Now

Now witneſſeth, That the ſaid Biſhop hath demiſed, and to farm lett, and by theſe preſents doth demiſe, *&c.* to the ſaid *John Croker*, all the ſaid Manor and Farm of *Hooknorton*, together with all Meſſuages, *&c.* and all and ſingular other the premiſſes, with the Appurtenances, in the ſaid ſeveral Indentures ſpecified and contained. Ind. 1 Mar.

To have and to hold the ſaid premiſſes contained in the ſaid firſt Indenture, to the ſaid *John Croker*, his Executors and Aſſigns, from the end, expiration and determination of the ſaid term ſpecified in the ſaid firſt Indenture, unto the end and term of Ninety years next enſuing, yielding therefore yearly to the ſaid Biſhop and his Succeſſors, for the ſaid premiſſes, ſpecified in the ſaid firſt Indenture, ſuch and like Rents as in the ſaid firſt Indenture are reſerved, at the ſame days and times; And

To have and to hold, all the premiſſes ſpecified in the ſaid latter Indenture, from the end, expiration and determination of the ſaid term ſpecified in the ſaid latter Indenture, until the end and term of Ninety years then next enſuing: Rendring yearly for the premiſſes in the ſaid latter Indenture ſpecified, ſuch and like Rent as is reſerved by the ſaid latter Indenture, and at the ſame days and times.

Then follows a Clauſe of Diſtreſs, if the Rent be behind for a Month.

And if the ſaid ſeveral yearly Rents reſerved by theſe Indentures, or any of them, be unpaid in part, or in all, by the ſpace of one quarter of a year after any the ſaid Feaſts, at which the ſame ought to be paid, and be lawfully demanded, and no ſufficient Diſtreſs upon the premiſſes, whereupon the ſame is reſerved, to be found: Then to be lawful for the ſaid Biſhop and his Succeſſors, into ſuch of the premiſſes, whereupon ſuch Rents being behind is or are reſerved, to re-enter, and to have as in their former Eſtate.

And the ſaid Jurors further ſay, That the aforeſaid Indenture of Demiſe afterwards, 10 *Maij*, *anno* 1 *Mar.* aforeſaid, by the then Dean and Chapter of *Oxford*, under their Common Seal, was confirmed, and find the tenor of the Confirmation *in hæc verba.*

They further find, That the ſaid 200 acres of Paſture, at the time of making the ſaid Indenture, and at the time of the Treſpaſs and Ejectment, were, and yet are parcel of the ſaid Manor of *Hooknorton.*

They further find, That the Rent for all the ſaid demiſed premiſſes, reſerved by the ſaid Indenture for one whole half year, ended at the Feaſt of St. *Michael* the Archangel, 1643. was behind and unpaid; and that *Robert*, late Biſhop of *Oxford*, the 29th and 30th day of *December*, 1643. into the Parſonage-houſe then, and by the ſpace of forty or fifty years before, reputed and called the Manor-houſe; and that he then, at the ſaid Parſonage-houſe, by the ſpace of one hour next before the Sun-ſetting of both the ſaid two days, remained and continued, until, and by the ſpace of one hour after Sunſetting of both days, demanding, and then did demand the Rent for the half of the year aforeſaid.

They further ſay, That there was no ſufficient Diſtreſs upon the premiſſes at the time of the demand of the ſaid Rent thereupon; And that the ſaid Biſhop, the ſaid 30th day of *December*, 1643. aforeſaid, into the ſaid premiſſes entred.

They further ſay, That all the Right, State, and Title, Term of Years, and Intereſt of and in the Manor, Tenements, Rectory, and other the ſaid premiſſes, by virtue of the ſaid Indenture of Demiſe by the ſaid late Biſhop, as aforeſaid, granted to the ſaid *John Croker*, by mean Aſſignments, came to the ſaid *Thomas Wiſe*.

That by virtue of the ſaid ſeveral Aſſignments, the ſaid *Thomas Wiſe* afterwards, the 4th of *January*, 1667. into the premiſſes entred, and was poſſeſſed for the reſidue of the term of Years, *prout Lex poſtulat*. That he ſo poſſeſſed, afterwards, the ſaid firſt day of *April*, 21 *Car.* 2. at *Hooknorton* aforeſaid, demiſed to the ſaid *Thomas Rowe* the ſaid Manor and Tenements, Rectory and Vicarage, whereof the ſaid two hundred acres are parcel.

To have and to hold, to the ſaid *Rowe* and his Aſſigns, from the Feaſt of the Annunciation laſt paſt, for the term of ſeven years then next enſuing. That by virtue thereof the ſaid *Rowe* entred, and was poſſeſſed, until the ſaid *Robert Huntington*, the ſaid firſt of *April*, 21 of the King, by Force and Arms, by the command of the foreſaid *Robert* late Biſhop of *Oxford*, into the ſaid two hundred acres, upon the poſſeſſion of the ſaid *Thomas Rowe*, to him demiſed by the ſaid *Wiſe*, as aforeſaid, for the ſaid term, not yet paſt, entred and ejected him. But whether upon the whole matter, the ſaid *Robert* be culpable of the ſaid Treſpaſs and Ejectment, they refer to the Court.

By this Verdict, in the recited Indenture (if any ſuch were) of 29 H. 8. the Farm of Hooknorton and the Manor of Hooknorton were the ſame thing, and the Manor known and demiſed by the name of the Farm, as well as the Farm by name of the Manor: The Manor of Hooknorton being called the Farm of Hooknorton, becauſe it was lett to Farm, and rented out; and the Farm called the Manor, becauſe it had the Requiſites of a Manor, viz. Demeſnes and Services. Ant. 67.

Therefore where it is recited in the Deed 1 Mar. That the Abbot and Covent of Oſeney had by their Deed of 29 *H.* 8. demiſed to *John Croker* all that their Farm of *Hooknorton*, it was the ſame as if it had been the Manor of Hooknorton.

1. For that the next words are, And all that Manſion Demeſne, Lands, Meadows, Leaſows, and Paſtures to the ſaid Manor belonging; and no Manor is named before, but the Farm, which was known to be the Manor.

2. The Habendum of the premiſſes demiſed, is, To have and to hold the ſaid Farm or Manor of Hooknorton; which alſo ſhews they were the ſame.

3. In the render of the Rent, it is, Yielding and paying for the ſaid Manor and Farm Nine pounds.

4. By the Demiſe of 1 Mar. ſubſequent, the ſaid Manor or Farm is demiſed.

And the 200 acres in queſtion being found to be parcel of the ſaid Manor, conſequently they are recited to be demiſed by that Indenture ſuppoſed of 29 H. 8. But the Jury find not the Manor and Farm to be the ſame.

The next thing to be noted is, That by that recited Indenture of 29 H. 8. if any ſuch were, ſeveral Rents were reſerved upon ſeveral particulars, and not one entire Rent upon the whole; namely, 9 l. upon the Manor or Farm; another Rent upon the Parſonage; another on the Vicarage; and ſo upon ſeveral other particulars.

And by the Leaſe of 1 Mariæ, it is yielding and paying ſuch and the like Rents, in the Plural Number, as are reſerved by the ſaid firſt Indenture. So as the Rents were ſeveral in the firſt Indenture, by the meaning of that of 1 Mariæ.

And yielding and paying ſuch and like Rent as is reſerved by the latter Indenture, for the premiſſes therein contained. Here it is ſuch Rent in the Singular Number, as is reſerved, not as are reſerved, as in the former.

Then in the Clauſe of Re-entry for Nonpayment, it is, That the Re-entry ſhould be into ſuch of the premiſſes whereupon ſuch Rent being behind was reſerved; therefore not into all the premiſſes.

Whence it follows, that there being ſeveral Rents, ſeveral Demands were reſpectively to be made before Re-entry, as well for thoſe reſerved in the firſt Indenture, as for that in the ſecond Indenture recited.

And it being found, that the Demand made by the Biſhop at the Parſonage-houſe in 43. was for the half-years Rent reſerved of all the premiſſes demiſed by the Indenture of 1 Mar. it follows, that more Rent was demanded than was payable in any one place, conſequently the Demand not good, nor the Re-entry purſuing it; And thus far the Caſe is clear againſt the Defendant; for the Leaſe of 1 Mar. could not be avoided by that Re-entry, in all, nor in part, if the Leaſes of 29 H. 8. and 1 E. 6. were well and ſufficiently found by the Jury to have been made.

Note, The Jury finding that the Rent reſerved for all the premiſſes was behind for half a year, ending at Michaelmas, 1643. not expreſſing the Sum of the Rent, is no more than to find, that no Rent was paid for the ſaid half year.

And their finding, that the Biſhop did demand the ſaid half years Rent, finding no Sum by him demanded, is no more than to find, that he demanded ſuch Rent as was due for the ſaid half year. So as notwithſtanding the Juries finding, that no Rent was paid for the ſaid half year, and their finding of the Biſhop's demanding of what was due for the ſaid half year, it doth not therefore follow, that they find any Rent to be reſerved by the ſaid Leaſe of 1 Mar. or that there was a Demand of any Rent admitted to be ſo reſerved.

But if the Leaſes of 29 H. 8. and 1 E. 6. be not well and ſufficiently found by the Jury to have been made, the Conſequent then is, that in Law there are no ſuch Leaſes; for, de non apparentibus, & non exiſtentibus, eadem eſt ratio ad omnem juris effectum.

And then it follows, that the Leaſe of 1 Mar. of all the premiſſes ſpecified in the Indenture of 29 H. 8. and of all ſpecified in the Indenture of 1 E. 6. for 90 years, habendum from the reſpective expirations of the terms ſpecified, and under the reſpective Rents reſerved by thoſe Indentures, will be void as to the terms intended to be granted, and the Rents reſerved, becauſe the beginning of the Terms, and particulars of the Rents,

can

can be known, but from the Demiſes 29 H. 8. and 1 E. 6. when no ſuch Demiſes are, becauſe the Jury hath found no ſuch.

For this, the Caſe of 3 E. 6. reported by the Lord Brooks, in in his Title of Leaſes, n. 62. is clear, and in ſeveral Caſes ſince adjudged, is admitted for good Law.

The Caſe is, If a man leaſes Land for certain years to J. S. habendum poſt dimiſſionem inde factam to J. N. finitam, and J. N. hath no Leaſe of the Land, the Leaſe to J. S. ſhall commence immediately for the term of years granted him. Br. tit. Leaſes, n. 66. ; E. 6. Poſt 80.

So in our Caſe, the Leaſe of 1 Mar. of the Manor and other the premiſſes, granted to Croker for 90 years habendum, as to ſome particulars, from the expiration of a former Leaſe granted 29 H. 8. and as to other particulars, from the expiration of a Leaſe granted 1 E. 6. when no ſuch Leaſes were granted, becauſe not found to be granted: Therefore the Leaſe of 1 Mar. for 90 years, ſhall commence immediately from the ſealing, and conſequently ended about the 21 or 22 of King Charles the Firſt. Sid. 460.

And then the Defendant Huntington's Entry, 1 Apr. 21 Car. 2. by command of the Biſhop, was lawful, the term of 90 years granted 1 Mar. and then beginning, being long before expired.

And by the ſame Reaſon, If a Leaſe be granted to J. S. for 40 years, to commence after the expiration of the term granted to J. N. and under the ſame Rents as are reſerved in the Demiſe to J. N. (who in truth had no Demiſe) the term of 40 years to J. S. ſhall commence immediately, becauſe the number of years are expreſſed; but without any Rent, becauſe the Reſervation of ſuch Rent as was reſerved in the Demiſe to J. N. who had no Demiſe, muſt be no Reſervation of Rent.

And conſequently in the preſent Caſe, tho' the Leaſe for 90 years, which number of years is expreſſed, be a good Leaſe, to commence immediately from 1 Mar. yet the Reſervation of the Rent being ſuch thereupon as was reſerved by the Leaſes of 29 H. 8. and 1 E. 6. when in truth there are no ſuch Leaſes, muſt be a void Reſervation upon the Leaſe of 1 Mar. becauſe there is no expreſſion of any Rent, but that which was reſerv'd in Leaſes, which are not at all ad omnem juris effectum in this Caſe, becauſe they are not found.

So

So as the ſole Queſtion is reduced to this, Whether by this Verdict the Jury have well and ſufficiently found any Leaſes 29 *H.* 8. and 1 E. 6. or either of them, were made to *Croker?*

1. And it ſeems clear, that the Jury have not in expreſs terms, and poſitively found, either of thoſe Leaſes to have been made, for then they muſt have found that the Abbot Commendatory of Oſeney, and the Covent there, had made ſuch Leaſe to Croker, dated 29 H. 8. &c. And in like manner, that the ſaid Abbot being then Biſhop of Oxford, had made 1 E. 6. a Leaſe to Croker for ſuch a term of years, and under ſuch Rents and Reſervations, &c. But there is no ſuch finding in this Verdict.

2. The ſecond Inquiry is, Whether the Jury having found (as they have) that the then Biſhop of Oxford did by Indenture, dated 1 Mar. leaſe to Croker the Manor of Hooknorton for Ninety years, which Indenture they find in hæc verba, in which there is a recital of a Leaſe made 29 H. 8. and of another 1 E. 6. to the ſaid Croker, (but neither in hæc verba) be not a good and ſufficient finding of ſuch recited Leaſes to have been actually made, becauſe recited in the Leaſe of 1 Mar. which is expreſly found to have been made?

But certainly, it can never follow that the reciting of the Deeds of 29 H. 8. and 1 E. 6. to have been made in the Deed
Poſt 81. of 1 Mar. which is expreſly found to have been made, is a ſufficient finding of thoſe two other Deeds to have been actually, and re vera made; for the ſtrange conſequence of that would be,

1. That no Deed really ſealed and delivered between the parties to it, and ſo agreed to be, could make recital of a thing which was falſe, or which was not according to the recital, which is a ſenſeleſs Aſſertion.

2. By that reaſon all Fables recited, nay, all ſorts of recited Lies, (at leaſt all ſuch as had poſſibility of being true) would become Truths, whether orally recited, or in Books, Letters, or other Writings; for the difference of recital any other way, and recital in a Deed, will not vary the Caſe, becauſe the recital in a Deed may as equally be falſe as in other ways of recital; unleſs a man think that any falſe recital in a Deed ſhall
Poſt 82. be a concluſion againſt the parties, and ſuch as claim from them; which I anon ſhall make appear to be falſe.

3. It

3. It were petniciouſly dangerous, that Recitals in a true Deed, that other Deeds were ſealed and delivered, ſhould make ſuch Deeds recited in Law to be true Deeds; for then by feign'd Recitals of other Deeds in a true Deed, men might make what Titles they pleaſed.

4. It would be worſe than actual forging of ſuch recited Deeds, becauſe the forgery of Deeds is puniſhable, and thereby ſuch Deeds made ineffectual; but falſe Recitals are neither puniſhable, nor the effect of them deſtroy'd, if they ſhould be admitted. But this is ſo clear, that I ſhall ſay no more in it.

If then thoſe two Deeds be neither directly found, nor the finding a Recital of ſuch Deeds in the Deed of 1 Mar. be a ſufficient finding of them, it remains, if they be found at all, they muſt be found by Inference and Argument only. And as for that, tho' in a general Verdict, finding the point in Iſſue, by way of Argument, for the Plaintiff or Defendant, be never permitted, not tho' the Argument be neceſſary and concluding.

As in an Action of Debt brought for 20 l. the Defendant pleaded payment, and Iſſue thereupon. The Jury found that the Defendant debet the 20 l. This was no good Verdict; for the matter in Iſſue, Payment or not, was not directly found, but by way of Argument, tho' the Argument was neceſſary there, that the Defendant did not pay the 20 l. which he did owe, for he could not both pay it, and yet owe it. And this Caſe was affirmed in Error. Mod. 192. Rolls 693. Barry & Phillips, n. 30.

Yet, I confeſs, in a Special Verdict that ſtrictneſs is not rigidly obſerved, where the Jury find only the matter of fact, when in a general Verdict they find both Fact and Law, that is, the whole matter in Iſſue; yet in a Special Verdict they muſt find the Caſe in fact clear, and without Equivocation, to common intent, elſe they find nothing whereupon the Court can determine what the Law is.

There are no words in this Special Verdict that can be ſtrained to a finding of the Deeds of 29 H. 8. and 1 E. 6. by way of Inference and Collection, but theſe:

They find, That *Robert* Biſhop of *Oxford*, by Indenture dated 14 *Octob.* 1 *Mar.* demiſed to *Croker* the Manor of *Hooknorton* with the appurtenances, *inter alia*, *habendum* to the ſaid *Croker* and his Aſſigns, from the end and expiration, *prioris dimiſſionis in eadem Indentur' mentionat'*, for and during the term of 90 years then next following: The tenor of which Indenture follows *in hæc verba*; and ſo find the Indenture of 1 Mar. verbatim, but not the tenor dictæ prioris dimiſſionis; for if they had ſo found, it had varied the Caſe.

Which

Which finding only of the Deed of 1 Mar. verbatim, and that thereby the Manor of Hooknorton was demiſed for 90 years, à fine prioris dimiſſionis, in the Indenture of 1 Mar. mentioned, it cannot be made out by any rational inference, that they have clearly found ſuch a former Demiſe, or otherwiſe than as recited to have been by the Indenture of 1 Mar.

For to find that ſuch a Letter was written, or ſuch a Book made by J S. is not to find that all things, or any thing contained or mentioned in that Letter or Book are or is true.

No more finding a certain Deed, as that of 1 Mar. to be ſealed and delivered by J. S. is not a finding that every thing mentioned or recited in that Deed is true.

The Context of the Verdict explained.

I find it conceived by ſome, that by the words of the Verdict, Habendum à fine prioris dimiſſionis in Indentura p̄dict' mentionat' the Jury have found two things.

The firſt from the words, Habendum à fine prioris dimiſſionis, That there was a former Demiſe, from the expiration of which the term granted 1 Mar. begins.

The ſecond from the words, In Indentura p̄dict' mentionat', That ſuch former Demiſe is mentioned in the Indenture of 1 Mar.

And thence conclude, That a former Demiſe, mentioned in the Indenture of 1 Mar. is by the Jury found to have been actually made; and conſequently the ſenſe of the words of the Verdict, and Jury's meaning muſt be, as if they had been Habendum from the expiration of a former Demiſe, and which former Demiſe is mentioned in the Indenture of 1 Mar.

But ſurely there is a clear difference between the Juries finding a former Demiſe to be, and their finding a former Demiſe mentioned to be: for a former Demiſe may be found mentioned to be, which notwithſtanding never was.

The words therefore of the Verdict, genuinly read and expounded, are, Habendum from the expiration of a former Demiſe (not which poſitively was) but *Habendum* from the expiration of a former Demiſe mentioned in the Indenture of 1 *Mar.* to be.

But a Demiſe may be mentioned in the Indenture of 1 Mar. to be, which yet never was.

And then the meaning of the words and Jury will evidently be Habendum from the expiration of a former Demiſe, which the Indenture of 1 Mar. mentions, recites, or ſaith to be formerly made.

And by this the Jury do not find that any former Demiſe, mentioned in the Indenture of 1 Mar. was really made.

I muſt agree, that as a Witneſs may prove the Contents of a Deed or Will, ſo may a Jury find them, the Deed or Will it ſelf not being found in hæc verba.

But if a Jury by their Verdict ſhall take upon them to collect the Contents of a Deed, and yet by the ſame Verdict find that Deed in hæc verba, the Court is not to regard the Collection they have made of the Subſtance of the Deed, but the Deed it ſelf.

As for inſtance, If a Demiſe ſhould be made to J.S. for a certain term of years, Habendum, from the day of the making the Demiſe, and the Jury ſhould find the Deed made to J. S. for the term Habendum from the making of the demiſe, Cujus quidem Indent' fact' to J.S. tenor ſequitur in hæc verba.

By this Verdict, it both appeared what Collection the Jury made in their Judgment of the Habendum of the Deed to J.S. and alſo what the Deed it ſelf ſyllabically was, which varied from what the Jury conceived it to be; for the Habendum in the Deed appears to be from the day of making the Demiſe; but the Jury collected it to be from the making. Here the Court ſhall not regard the Collection by the Jury, but the Deed it ſelf, as to the commencement of the term.

1. So in the preſent Caſe, the Jury finding that the Biſhop of Oxford, by his Indenture of 1 Mar. demiſed the Manor of Hooknorton, Habendum from the expiration of a former Demiſe therein mentioned, for Ninety years, and then ſetting forth the Indenture verbatim, is not a finding at large, and as if no Leaſe verbatim were found that the Biſhop made a Leaſe for Ninety years, to begin from the expiration of a former Demiſe made 29 H. 8. or 1 E. 6. for a certain term, but is a Collection of the Subſtance, as they conceived, of the Deed of 1 Mar. which immediately they find in hæc verba.

And conſequently, the Deed it ſelf being ſyllabically found, the Court is not to regard their Collection of the purport of it.

2. Another reaſon is, That if thoſe words in the Verdict, Habendum from the end of a former Demiſe mentioned in the ſaid Indenture, had been omitted, and they had only found the Biſhop had ſealed and executed the Indenture 1 Mar. to Croker, Cujus quidem Indent' tenor ſequitur in hæc verba, &c. all that is pretended to be found by this Verdict had been as fully, and more clearly found, by finding the Indenture of 1 Mar. only.

For finding that Indenture in hæc verba, they had found that the Biſhop had demiſed the Manor of Hooknorton, Habendum from the expiration of a former Demiſe therein mentioned, for Ninety years; which is all they have now found: Therefore the finding by way of redundance, over and beſides finding the Deed it ſelf, what was equally found in finding the Deed only, is not to be regarded, but as over-doing and impertinent.

3. Beſides, ſuch a Conſtruction of the Verdict makes it abſolutely equivocal and uncertain; for if the words, Habendum à fine prioris dimiſſionis in Indentura p̄dict' mentionat', be but their Summary Collection of what the Indenture, 1 Mar. contains, then it is but finding a recital of a former Demiſe; but if otherwiſe, it is finding a former Demiſe really and poſitively, which do toto cœlo differre, and confound the Judgment of the Court.

4. Put the caſe any other perſon, having ſeen the Deed of 1 Mar. ſhould be asked, What the effect of it was? his Anſwer would be, as the Jury have found, That it was a Demiſe by the Biſhop of Oxford to Croker, of the Manor of Hooknorton, and other things, Habendum for Ninety years, from the expiration of a former Leaſe mentioned in that Demiſe.

But ſuch Anſwer did not aſſert, That there was actually ſuch a former Demiſe, as is mentioned in that Deed of 1 Mar.

Why then muſt the Jury, aſſerting but the ſame thing in the ſame words, be ſtrained to aſſert more, viz. That there actually was ſuch a former Demiſe as is recited in the Indenture 1 Mar.

5. Either

5. Either this Habendum à fine prioris dimiſſionis in the Indenture of 1 Mar. ſaid to be mentioned, is intended by the Jury to be the Habendum of the Deed of 1 Mar. or not: If the Habendum of that Deed, then nothing is found by it, but what is found by finding the Deed it ſelf of 1 Mar. and then it is Habendum à fine dimiſſionis of a Deed only recited in that of 1 Mar. and no more; but if not, and that by finding this Habendum more be found than by finding the Deed of 1 Mar. barely, then two Habendums of the ſame thing are found for the Deed of 1 Mar.

6. Beyond all this, if the Juries finding that the then Biſhop of Oxford, by his Indenture 1 Mariæ, did, inter alia, demiſe to Croker the Manor of Hooknorton, Habendum à fine prioris dimiſſionis in Indentura p̄dict' mentionat' ſhall be (as is contended) an abſolute and poſitive finding of a former Demiſe made, to whoſe expiration the Indenture 1 Mar. refers, it muſt be either the Demiſe 29 H. 8. or that of 1 E. 6. for no other are mentioned in the Indenture 1 Mar. and it can be but a finding of one of them; for the words, à fine prioris dimiſſionis in Indentur' p̄dict' mentionat', cannot poſſibly extend to both.

Be it then underſtood, the Demiſe 1 E. 6. for in that the Manor is clearly named; the Conſequence muſt be, That the Deed of 1 Mar. which is an intire Leaſe, as well of the Manor, as of the Vicarage, Parſonage, and of other things, under ſeveral Rents, for Ninety years commencing, as to the Manor, from the expiration of the ſuppoſed Demiſe 1 E. 6. ſhall be a good Leaſe for Ninety years thence forwards, becauſe that recited Demiſe is alſo ſuppoſed to be poſitively found by the Jury, by thoſe words of their Verdict. Poſt 87

But as to the Vicarage, Parſonage, and other things, and the Rents thereupon reſerved, which are demiſed by the Indenture of 1 Mar. for Ninety years, to commence from the expiration of the other recited Demiſe, ſuppoſed in 29 H. 8. the Leaſe of 1 Mar. muſt commence immediately from the date, becauſe the Jury have not found that recited Demiſe poſitively, but only as recited, and therefore not found it to be a real Demiſe, and conſequently the Leaſe of 1 Mar. as to thoſe particulars, referring the term to commence from the expiration of a term granted 29 H. 8. not in eſſe, becauſe not found, muſt begin from 1 Mar. which, doubtleſs, the Jury never intended.

Ant. 73. But now for Authority, I will reſume the Caſe formerly cited of 3 E. 6. in the Lord Brook. If A. makes a Leaſe to B. Habendum for Forty years from the expiration of a former Leaſe made of the premiſſes to J. N. and this be found occaſionally, by Special Verdict, as our Caſe is: but the Jury in no other manner find any Leaſe to be made to J. N. than as mentioned in the Leaſe to B. By the Reſolution of that Book, the Leaſe to B. for Forty years ſhall begin preſently.

And who will ſay in this Caſe, That becauſe the Jury find a Leaſe made to B. for Forty years, Habendum from the expiration of a former Leaſe made to J. N. that therefore they find a Leaſe formerly made to J. N. when in truth J. N. had no ſuch Leaſe; for they only find what the Habendum in the Leaſe to B. is, which makes a falſe mention of a former Leaſe to J. N. but had no Evidence to find a Leaſe which was not.

Exactly parallel to this is our preſent Caſe: The Jury find, the Biſhop of Oxford, by a Leaſe dated the 14th of October, 1 Mar. demiſed to Croker the Manor of Hooknorton, Habendum to him and his Aſſigns for Ninety years from the expiration of a former Demiſe mentioned in the ſaid Indenture of Leaſe 1 Mar. But do not affirm or find, explicitly or implicitly, any former Demiſe made, when they only find ſummarily the Habendum of the Leaſe 1 Mar. which mentions ſuch a former Demiſe.

Cr. 10 Car. 1. f. 397. Another Caſe I ſhall make uſe of, is, the Caſe of Miller and Jones verſus Manwaring, in an Ejectment brought in Cheſter, upon the Demiſe of Sir Randolph Crew: The Jury in a Special Verdict found, That John Earl of *Oxford* and *Elizabeth* his Wife, were ſeized in Fee, in Right of *Elizabeth*, of the Manor of *Blacon*, whereof the Land in queſtion was parcel, and had Iſſue *John*: The ſaid *John* Earl of *Oxford*, by Indenture dated the Tenth of *February*, 27 *H.* 8. demiſed the Manor to *Anne Seaton* for Four and Thirty years; *Elizabeth* died 29 *H.* 8. and the ſaid Earl of *Oxford* died *March* 31 *H.* 8.

After-

Afterwards *John* the Son, then Earl of *Oxford*, the 30th of *July*, 35 *H.* 8. by Indenture reciting the Demiſe to *Anne Seaton* to be dated the 10th of *February*, 28 *H.* 8. demiſed the ſaid Manor to *Robert Rocheſter*, *Habendum* after the End, Surrender or Forfeiture of the ſaid Leaſe to *Anne Seaton*, for Thirty years.

It was adjudged firſt in Cheſter, and after, upon Error, brought in the King's-Bench: It was reſolved by all the Judges (who affirmed unanimouſly the firſt Judgment) That the Leaſe to Rocheſter began preſently at the time of the ſealing, for ſeveral Reaſons.

1. Which is directly to our purpoſe, Becauſe there was no ſuch Leaſe made to Anne Seaton, having ſuch beginning and ending as was recited in Rocheſter's Leaſe.

2. Becauſe the Leaſe made by John, firſt Earl of Oxford, was determined by his death, three years before Rocheſter's Leaſe, and conſequently no Leaſe in eſſe when the Leaſe was made to Rocheſter; which Reaſons are in effect the ſame, viz. That a Leaſe made to commence from the end of any Leaſe ſuppoſed to be in eſſe, which indeed is not, the Leaſe ſhall commence preſently.

From this Caſe theſe Concluſions are with clearneſs deducible.

1. That if a Leaſe be found ſpecially by a Jury, in which one or more other Leaſes are recited, the finding of ſuch Leaſe is not a finding of any the recited Leaſes: Therefore the finding of the Leaſe made to Rocheſter, was not a finding of the Leaſe therein recited, to be made to Anne Seaton in any reſpect. Ant. 74.

2. The ſecond thing clearly deducible out of this Caſe, is, That although the Jury by their Special Verdict did find that John the Son, Earl of Oxford, did by his Indenture demiſe to Rocheſter for Thirty years the Manor of Blacon, Habendum from the End, Surrender or Forfeiture of a former Leaſe thereof made to Anne Seaton, dated the 10th of February, 28 H. 8. yet this was not a finding of any ſuch Leaſe made to Anne Seaton, but only a finding of the Habendum, as it was in the Leaſe made to Rocheſter, which mentioned ſuch a Leaſe to be made to Anne Seaton.

So

So in our preſent Caſe, the Jury finding that the Biſhop of Oxford, 1 Mar. did demiſe the Manor of Hooknorton to John Croker, Habendum for Ninety years from the expiration of a former Demiſe mentioned in the Indenture of 1 Mar. is not a finding of any ſuch former Demiſe to be made, but a finding that in the Indenture 1 Mar. it is ſuggeſted there was ſuch a former Demiſe, and no more.

And if any man ſhall object, That in Rocheſter's Caſe the reaſon why no ſuch Leaſe is found to be made to Anne Seaton in 28 H. 8. to be, becauſe it is found that the Leaſe made to Anne Seaton was in 27 H. 8. that is not to the purpoſe, becauſe the Jury might find, and truly, that a Leaſe was made to her, dated the 10th of February, 27 H. 8. but that was no hinderance but that another Leaſe was made to her in 28 H. 8. as is mentioned in Rocheſter's Leaſe, which had been a Surrender in Law of that made in 27 H. 8.

Therefore it is manifeſt, That the ſole Reaſon why no ſuch Leaſe was admitted to be in 28 H. 8. is no other than becauſe the Jury find no ſuch to have been made, but find a ſuggeſtion of it only in Rocheſter's Leaſe: And it is the ſame exactly in our preſent Caſe.

The third thing deducible from the Caſe, is, That a Demiſe by Indenture for a term, Habendum from the expiration of another recited or mentioned term therein, which is not, (or not found to be, which is the ſame thing) is no Eſtoppel or Concluſion to the Leſſee or Leſſor, but that the Leſſee may enter immediately, and the Leſſor demiſe or grant in Reverſion after ſuch immediate Leaſe.

35 H. 6. 34 Br. tit. Faits, p. 4. 12 H. 4. 23 Br. Faits, 21. Ant. 74.

There is another Caſe, reſolved at the ſame time, between the ſame perſons, and concerning the ſame Land, and publiſhed in the ſame Report, and ſpecially found by the ſame Jury. Edward Earl of Oxford, Son of John, the Son of John Earl of Oxford, by Indenture between him and Geoffry Morley, dated the Fourteenth of July, 15 Elizabethæ, reciting, That John his Father, by Indenture the Thirtieth of July, 35 H. 8. had demiſed to Robert Rocheſter the ſaid Farm or Manor of Blacon, Habendum for Thirty years, from the end or determination of the Leaſe made to Anne Seaton, the Tenth of February, 27 H. 8. which is a falſe recital; for the Leaſe to Rocheſter was to commence from the end or determination of a Leaſe made to Anne Seaton, that is recited to be made the Tenth of February, 28 H. 8. and that after-

afterwards, the ſaid John Earl of Oxford, had granted by Indenture, dated the 26th of March, 35 H. 8. reciting the Leaſe to Anne Seaton the 10th of February, 27 H. 8. to Hamlet Freer, the Reverſion of the ſaid Manor of Blacon, Habendum the ſaid Manor and premiſſes from ſuch time as the ſame ſhall revert or come to the poſſeſſion of the ſaid Earl, or his Heirs, by Surrender, Forfeiture, or otherwiſe, for Sixty years, for ſo is the Caſe put in one part of the Report; but in another part of it, it ſeems to be, That the Demiſe to Freer was when it ſhould revert, after the Expiration, Surrender or Forfeiture, omitting the words, or otherwiſe of the Leaſe made to Anne Seaton, which will nothing vary the Caſe. The ſaid Edward Earl of Oxford demiſed the ſaid Manor or Farm of Blacon, to the ſaid Geoffry Morley, Habendum from the end of the ſaid Leaſes for Fifty years.

The Queſtion was, Whether any of theſe Leaſes, made either to Hamlet Freer or Moreley, be good, or were in eſſe at the time of the Leaſe, made by Sir Randolph Crew to the Plaintiff: Sir Randolph Crew claiming the Inheritance from the Earl of Oxford, and Sir William Norris the Leaſes from Freer and Morley, and under him the Defendant. And Judgment was given in Cheſter for the Plaintiff.

And upon a Writ of Error of this Judgment brought in the King's-Bench, wherein the Error aſſigned was, The giving of Judgment for the Plaintiff. After ſeveral Arguments at Bar, and at the Bench, Seriatim by the Juſtices, it was unanimouſly agreed, The Judgment in *Cheſter* for the Plaintiff ſhould be affirmed.

And that neither the Leaſe to Freer, nor that to Morley, was good to avoid the Plaintiff's Title.

As for the Leaſe to Freer, it being a Grant of a Reverſion nominally, and by agreement of parties, there being no Reverſion, becauſe no Leaſe at the time of the Grant was in eſſe, either of Seaton's or Rocheſter's, upon a point of raſure in Rocheſter's Demiſe found in the Caſe, and for that Land in poſſeſſion could not paſs by the name of a Reverſion, tho' by the name of Land a Reverſion may paſs; for he who will grant Land in poſſeſſion, cannot be thought not to grant the ſame, if only in Reverſion, according to the Doctrine of Throgmorton's Caſe in the Commentaries. L. Chandois Caſe, 6 Rep.

And

And for that Morley's Leaſe was to commence after the Leaſe granted to Rocheſter, which was to commence after that granted to Seaton, February 10. 27 H 8. whereas no ſuch Leaſe was granted to Rocheſter, but a Leaſe to commence after one granted to Seaton in 28 H. 8. it was reſolved, None of thoſe Leaſes were in eſſe, and that Morley's Leaſe commenced therefore preſently.

The words of the Reſolution are theſe, as to Morley's Leaſe. It was reſolved, that *Morley*'s Leaſe was not *in eſſe*, for that miſrecites the former Leaſes, and ſo hath the ſame Rule as the former, where it recites Leaſes, and there be none ſuch: therefore it ſhall begin from the date, which being in the 15th of the Queen, for 50 years, ended 1623. which was before the Leaſe made to the Plaintiff. For theſe Reaſons Judgment was affirmed.

The ſame Concluſions are deducible from this Leaſe to Morley, as from the former to Rocheſter, and therefore I will not repeat them. But here are two Judgments in the very point of our Caſe, and affirmed in a Writ of Error unanimouſly in the King's-Bench.

And where it is thought material that the Jury have found a half-years Rent to have been behind at Michaelmas, 1643. and thence inferred the Jury have found the Leaſes by which that Rent was aſcertained, namely, the Leaſes of 29 H. 8. and 1 E. 6.

Surely if a Leaſe be for a term of years, to commence from the end of a former term, and for ſuch Rent as is reſerved upon ſuch former Demiſe that never was; as no term can commence from the end of another which never was, ſo no Rent can be behind, which cannot appear but by a Demiſe which was never made, that is, which is never found to be made.

And further, That if the Jury had found the Leaſes of 29 H. 8. and 1 E. 6. to have been made, as is mentioned in the Leaſe of 1 Mar. that had not been a ſufficient finding of them.

For a Deed is not found at all, nor a Laſt Will, when only the Jury find but part of the Deed or Will; for the Court cannot judge but upon the whole, and not upon part.

If it be found in Aſſize the Defendant was Tenant, and diſſeized the Plaintiff, niſi verba contenta in ultima voluntate W. M. give a lawful Eſtate from W. M. to R. M. and find the words contained in the Will, but not the Will at large; the Court cannot judge upon this Verdict, whoſe Office it is to judge upon

upon the whole Will, which is not found, 38,39 El. B. R. Weſt & Mounſon's Caſe, Rolls 696. tit. Tryal.

38,39 El. B. R. Weſt and Mounſon's C. Roll. 696. tit. Tryal.

So for the ſame reaſon, finding but part of a recited Deed, and not the whole, is as if no part were found; and it appears by the Deed of 1 Mar. that both Deeds of 29 H. 8. and 1 E. 6. are recited therein but in part; for after as much as is recited of either Deeds reſpectively, is ſaid, as more plainly appears among other Grants and Covenants in the ſaid Deed.

And if other Grants were in the Deed of 29 H. 8. beſides thoſe recited, then the expreſs Grant of the very Manor of Hooknorton might be one of thoſe Grants which is urged not to be granted, becauſe not recited in 29 H. 8. nominally: And if ſo, here being two former Demiſes of the Manor mentioned in the Indenture 1 Mar. and for different terms; the one, 29 H. 8. for Eighty years, the other 1 E. 6. for Ninety years, and ſo expiring at different terms, it is uncertain from which expiration the Demiſe of the Manor 1 Mar. ſhall commence; and conſequently, the Demiſe having no certain commencement, will be void by the Rector of Chedington's Caſe, 1 Rep.

But admitting the Manor not demiſed by 29 H. 8. yet the Jury finding the Demiſe 1 Mar. Habendum à fine prioris dimiſſionis, and not prioris dimiſſionis ejuſdem Manerij, it is uncertain ſtill, whether the Habendum à fine prioris dimiſſionis, as the Jury have found it, ſhall refer to the end of the Demiſe 29 H. 8. or to that of 1 E. 6. both of them being prior Demiſes mentioned in the Indenture 1 Mar. for if only the Demiſe 29 H. 8. had been mentioned in that of 1 Mar. the Demiſe 1 Mar. for its commencement, muſt of neceſſity have referred to the expiration of the Demiſe by 29 H. 8. though the Manor paſſed not by it, and it will not then change the uncertainty, becauſe the Demiſe 1 E. 6. is mentioned.

Nor ſhall you, to this finding of the Jury, ſuppoſe a different finding from their finding barely the Indenture of 1 Mar. call in aid any thing from the recitals in 1 Mar. and ſo make up a Medley Verdict, partly from what the Jury find expreſly, and partly from what is only recited, and not otherwiſe found.

As for inſtance, The Jury find the Manor demiſed for Ninety years, Habendum from the end of a former Demiſe mentioned 1 Mar. This Verdict in it ſelf, finds no commencement of the term, by not finding from the expiration of which term it begins, nor find no Rent reſerved. But the Demiſe of 1 Mar. as to them, muſt be made out from the recitals of Deeds not found to be real, which is a way of confounding all Verdicts.

When the Jury ſay, The Manor of Hooknorton was demiſed à fine prioris dimiſſionis in Indentura p̄dict' mentionat' for Ninety years, they do not ſay, a fine prioris dimiſſionis ejuſdem Manerij.

So as if nothing elſe were, the former Indenture mentioned might be of the Vicarage, or any other thing, and not at all of the Manor; and yet by the Indenture of 1 Mar. the Demiſe of the Manor was to commence from the expiration of ſuch former Demiſe, whatever was demiſed by it.

But the Indenture of 1 Mar. demiſeth all the premiſſes contained in the firſt Indenture, Habendum from the expiration of the term.

Ergo, If the Manor be not compriſed in the firſt Indenture, it cannot be demiſed by 1 Mar. from the expiration of the firſt term in the firſt Indenture.

But admitting this, Who can ſay the Manor of Hooknorton is not compriſed in the firſt Indenture?

For firſt, What if only part of the firſt Indenture is recited, and not all, in the Deed of 1 Mar. and ſo the Manor omitted in the recital, tho' it were compriſed in the Indenture of 29 H. 8. and perhaps the Jury might, if that Indenture were produced to them, ſee it was compriſed in the Indenture, tho' not recited to be ſo?

2. What if the Indenture of 29 H. 8. were miſrecited in 1 Mar. and inſtead of the Manor the word Manſion recited?

3. It is apparent, that the Indenture of 29 H. 8. was not recited, nor pretended to be recited verbatim in that of 1 Mar. becauſe after ſo much of the Indenture of 29 H. 8. as is recited in that of 1 Mar. it is ſaid, as by the ſaid Indenture, *viz.* 29 *H.* 8. among divers other Covenants and Grants, more plainly appeareth.

So as there were other Grants in the ſaid Indenture of 29 H. 8. than are recited 1 Mar. and the Grant of the Manor by name might be one of them.

4. How

4. How can it appear to us, but that the Jury did find the Manor of Hooknorton to be expreſly demiſed by the firſt Indenture, if any thing were demiſed by it?

If then the Jury did conceive the Manor of Hooknorton was demiſed by the firſt recited Indenture, as moſt probably they did:

When they find, that by the Indenture of 1 Mar. the ſaid Manor was conveyed à fine prioris dimiſſionis in Indentur' p̃dict' mentionat', and there are mentioned in the Indenture of 1 Mar. two former Demiſes of the Manor, viz. that of 29 H. 8. for a term of Eighty years, and that of 1 E. 6. for a term of Ninety years, there is no certain commencement of the term of 1 Mar. becauſe it is as uncertain from which of the two former Demiſes it takes its commencement, as if ten former Demiſes were mentioned, and for different terms, and then it could commence from neither of them.

But admit it ſhould be taken to commence from the end of the term of 1 E. 6. and not from the other, becauſe in that term (if any ſuch were) the Manor is without ſcruple demiſed; yet we muſt remember the preſent Queſtion is not of the Manor, but of 200 acres, parcel of the Manor. And in the Leaſe of 1 E. 6. tho' the Manor be demiſed, yet there is an exception of certain Lands and Tenements in the Town or Hill of Hooknorton, which Croker then held for certain years enduring. Ant. 79.

How doth it appear, that the two hundred acres in queſtion were not thoſe Lands excepted out of the Demiſe of 1 E. 6? For tho' they were parcel of the Manor, they might be ſeverally demiſed and excepted; and tho' it be found, that at the time of the Demiſe, and at the time of the Treſpaſs, the 200 acres were parcel of the Manor, it is not found that they were not part of the Lands in the Hill of Hooknorton at the time of the Demiſe made 1 E. 6. then in Leaſe to Croker, and excepted out of the ſaid Demiſe of 1 Mar. for if they were, the Plaintiff makes no Title to them. Co. Lit. 325. a.

If the Iſſue be, Whether by Cuſtom of the Manor a Copyhold is grantable to Three for the Life of Two? and it be found that by the Cuſtom it is grantable for Three Lives, that is not well found; for it is but an Argument, That becauſe a greater Eſtate may be granted, a leſs may; and a new Venire facias granted, becauſe the matter in fact, whereupon the Court was to judge, and was the point of the Iſſue, was not found. 15 Jac. B. R. between Ven and Howel. Rolls 693. tit. Tryal.

Hill. 10 Car. 1. B. R. Wilkinſon & Meriam's Caſe, Rolls 700 & 701. tit. Tryal.

If a Jury find that J. S. was ſeized in fee of Land, and poſſeſſed of certain Leaſes for years of other Land, made his Will in writing, and thereby deviſed his Leaſes to J. D. and after deviſed to his Executors the reſidue of his Eſtate, Mortgages, Goods, &c. his Debts being paid, and Funeral Expences diſcharg'd. It being referred by the Jury to the Court, Whether by this Deviſe the Executor hath an Eſtate in fee or not? This is no perfect Special Verdict, becauſe the Jury find not the Debts paid, and the Funeral Expences diſcharged, which is a Condition precedent to the Executors having an Eſtate in fee, and without finding which the Court cannot reſolve the matter to them referred by the Jury: Therefore a Venire facias de novo was awarded.

Judgment was given for the Defendant.

Trin.

Trin. 22 *Car.* 2. *C. B. Rot.* 461.

Richard Edgcomb Knight of the Bath, Executor of *Pierce Edgcomb* Eſq; his Father, is Plaintiff:
Rowland Dee, Adminiſtrator of *Charles Everard* Eſq; during the Minority of *Charles Everard*, Son of the Inteſtate, Defendant.

In an Action of the Caſe upon an *Aſſumpſit*.

The Plaintiff declares, That the Inteſtate, the 13th of July, 1664. at London, in the Pariſh of St. Mary Bow, in the Ward of Cheap, in conſideration that the ſaid Pierce Edgcomb would, at his requeſt, lend him 500 l. promiſed the ſaid Pierce to repay it within ſeven days after demand, with Intereſt after the rate of 4 l. per Centum. 1 Levinz 281.

That thereupon the ſaid Pierce Edgcomb after, at the time and place aforeſaid, did lend the ſaid Inteſtate 500 l.

That the ſaid Pierce the Teſtator, afterwards, the 14th of July, 17 Car. 2. at the place aforeſaid, required the Inteſtate to pay the ſaid 500 l. with Intereſt after the rate aforeſaid, both which amounted to the Sum of 520 l.

He lays further, That the ſaid Inteſtate was indebted to Pierce the Teſtator, the 14th day of July, 1664. in the Sum of 500 l. for Money before that time to him lent by the ſaid Pierce.

And in conſideration thereof, the ſaid 14th of July, 1664. in the ſaid Pariſh and Ward, promiſed to pay when required.

But that neither the Inteſtate in his life-time, nor the Defendant, to whom the Adminiſtration of his Goods were committed during the Minority of Charles Everard, Son of the ſaid Inteſtate, at London, in the Pariſh and Ward aforeſaid, did pay the ſaid Sums, nor either of them, amounting to 1020 l. to the ſaid Pierce Edgcomb in his life-time, nor to the ſaid Richard the Plaintiff, after his death; tho' required by the Inteſtate afterward in his life-time, that is, upon the firſt of Auguſt,

17 Car. 2.

17 Car. 2. And the ſaid Defendant, after the death of the Inteſtate, viz. the 10th day of March, 18 Car. 2. and often after, at the ſaid Pariſh and Ward, by the Teſtator Pierce were required. And the ſaid Defendant, after the death of the Teſtator, the firſt day of January, 21 Car. 2. was required, at the place aforeſaid, by the Plaintiff to pay the ſaid Money, which he did not, and ſtill refuſes, to his damage of 800 l.

The Defendant pleads payment, after the Plaintiff's Writ purchaſed, of ſeveral great Debts due by Bond and Bills obligatory from the Inteſtate, to ſeveral perſons at his death, in number one and thirty.

That the Inteſtate, the 22d of December, 16 Car. 2. became bound in a Recognizance in the Chancery to Sir Harbottle Grimſtone Baronet, Maſter of the Rolls, and to Sir Nathaniel Hobart, one of the Maſters of the Chancery, in 2000 l.

And that the ſaid 2000 l. is ſtill due and unpaid, and the ſaid Recognizance in its full force, unſatisfied or diſcharged.

He pleads, The City of London is an ancient City, and that within it, time out of mind, hath been held a Court of Record of the King's, &c. before the Mayor and Aldermen of the ſaid City, in Camera *Guildhall* ejuſdem Civitat', of all perſonal Actions ariſing and growing within the ſaid City.

That the Inteſtate at the time of his death, was indebted apud London p̄dict', in the Pariſh and Ward p̄dict', to one William Allington in 2670 l. 17 s. 7 d. and who after the purchaſe of the Plaintiff's Writ, the 10th of March, the 18th of the King, came to the ſaid Court, before Sir Thomas Bludworth then Mayor, and the Aldermen in the ſaid Chamber, according to the Cuſtom of the ſaid City, held, uſed, and approved.

Et p̄dict' *Willielmus Allington* tunc & ibidem in eadem Curiâ, ſecundum conſuetudinem p̄dict' Civitatis, affirmabat contra p̄dict' *Rolandum Dee*, ut Adminiſtratorem, &c. quandam Billam Originalem de placito debiti ſuper demand' Mille ſexcentarum & ſeptuaginta librarum, & decem & ſeptem ſolidorum, & ſeptem denariorum, legalis monetæ, &c.

And that it was ſo proceeded, according to the Cuſtom of the ſaid City, that the ſaid William Allington had Judgment to recover againſt the Defendant the ſaid Debt, and 85 l. 16 s. for Damages, &c.

And

And that after, the Defendant, in full ſatisfaction of the ſaid Judgment, paid to the ſaid William Allington the Sum of 2670 l. and 17 s.

Then pleads about Four and twenty Recoveries, and Judgments thereupon in the King's-Bench, in Pleas of Debt without Specialties, all ſatisfied but one of 7000 l. and more, due to one Cornwallis.

Then pleads Plene adminiſtravit, all the Goods of the Inteſtate, at the time of his death to be adminiſtred, and that he had not die impetrationis Brevis Originalis p̄dict' nec unquam poſtea aliqua bona ſeu catalla p̄dict' *Car. Everard* tempore mortis ſuæ in manibus ſuis adminiſtrand' p̄terquam bona & catalla ad valenciam ſeparalium denariorum ſum̄arum per ipſum ſic ut p̄fertur ſolutarum in exonerationem ſeperalium Judiciorum ſcriptorum obligatoriorum & billarum obligatoriarum p̄dict'.

Ac p̄ter alia bona & catalla ad valenciam decem ſolidorum quæ executioni Recognitionis p̄dict' ac Judicij p̄dict' per p̄fat' *Carolum Cornwallis* verſus ipſum ut p̄fertur recuperat' onerabilia & onerata exiſtunt.

Et quod ipſe *Rolandus* modo non habet aliqua bona ſeu catalla quæ fuerunt p̄dict' *Caroli* tempore mortis ſuæ adminiſtrand' p̄ter p̄dict' bona & catalla ad valenciam p̄dictorum decem ſolidorum quæ executioni Recognitionis p̄dict' ac Judicij p̄dict' per p̄fatum *Carolum Cornwallis* recuperat' ſic ut p̄fertur onerata & onerabilia exiſtunt. Et hoc paratus eſt, &c. Et petit Judicium.

Then avers the Debts, ſo as aforeſaid by him paid, to be bonâ fide paid, & p̄ veris & juſtis debitis owing and unpaid by the Inteſtate at the time of his death.

And that the ſeveral Judgments aforeſaid, againſt him recovered, were for true and juſt Debts of the Inteſtate, owing by him at the time of his death.

The Plaintiff, taking by Proteſtation that nothing alledged by the Defendant was true, demurs upon the Plea.

The Cauſes offered to maintain the Demurrer, are theſe:

1. That one of the Judgments pleaded in Bar, obtained by William Allington in the Court of London, before the Mayor, &c. againſt the Defendant for 2670 l. 17 s. 7 d. due to the ſaid Allington by the Inteſtate Everard, was not duly obtained, and is inſufficient to bar the Plaintiff.

2. That

2. That the Defendant's ſpecial Plea in Bar appearing in any part of it to be falſe and inſufficient, the Plaintiff ought to have Judgment for his whole Debt.

1. For the firſt Cauſe, it was urged as an Exception to the Defendant's Plea, That by the Plea it appears, that time out of mind a Court hath been held in the City of London, before the Mayor and Aldermen; of all perſonal Actions ariſing and growing within the ſaid City.

And that the Inteſtate was at the time of his death indebted to the ſaid Allington at London, within the Pariſh and Ward of St. Mary Bow and Cheapſide.

But it is not alledged, That the ſaid Debt did ariſe and grow due in London, within the ſaid Pariſh and Ward; for whereſoever the Debt did ariſe and grow due, yet the Debtor is indebted to the Creditor in any place where he is, as long as the Debt is unpaid.

And therefore to ſay, The Inteſtate was indebted to Allington in the ſaid Sum apud London, &c. affirms not that the Debt did ariſe and grow due at London; and if not, the Court had no Juriſdiction of the Cauſe.

The effect of the Defendant's Bar is only to ſhew, That ſuch a Judgment was obtain'd in ſuch a Court againſt him, and not to ſet forth the whole Record of obtaining it; for it were vaſt expence of Time and Money ſo to do, as often as occaſion is to mention a Record; and refers to the Record, put per Record' plenius liquet, where the Plaintiff may take advantage of any defect therein. But if that were neceſſary, it is well ſet forth; for his Plea is,

Et pdictus *Willielmus Allington* tunc & ibidem in eadem Curia, ſecund' conſuetud' Civitat' pdict' affirmabat contra pdict' *Roland' Dee* ut Adminiſtratorem, *&c.* quandam Billam Originalem de placito debiti, *&c.*

And the Cuſtom being to hold Plea of perſonal Actions ariſing within the City, if he affirmed a Bill of Debt, according to the Cuſtom,

It muſt be of a Debt ariſing and growing due within the City.

2. A ſecond Exception was, That it is not ſet forth for what the Debt was, whereby the Court may judge whether it were payable or not by the Adminiſtrator.

To

To this it was anſwered, That the Courſe in *London* is for the Plaintiff to declare that the Debtor being indebted to him at ſuch a time and place, *conceſſit ſolvere*, ſuch a Sum to him, at ſuch a time: for they enter not there at large, as at *Weſtminſter*, all the Pleading; and the City Cuſtoms have been often confirmed by Parliament; and if exception be taken to the Juriſdiction, it muſt come from the Defendant.

However, that will not avoid the Judgment, and is but Error.

3. A third Exception was, It is not ſet forth that the Inteſtate was indebted to *Allington* in his own Right.

But it muſt be intended, if he were indebted to him by Law, that it was in his own Right.

4. A fourth Exception was, That the Defendant pleads Judgment was given for the Plaintiff, *quod recuperaret debitum prædict'*, where the Judgment ſhould be, *quod recuperet*.

It is not the Defendant's concern to recite the words of the Judgment as it was given by the Court, but the effect of it relating to the Defendant, and ſo it is more proper to ſay Judgment was given quod recuperaret. The Court ſay, ideo conſideratum eſt per Curiam; but he who relates what they did, ſaith, ideo conſideratum fuit per Curiam. But my book is, quod recuperet.

5. A fifth Exception was, That the Plea ſets forth the Action was brought againſt the Defendant *Dee* in *London*, as Adminiſtrator of the Inteſtate, omitting *durante minori ætate Caroli Everard filij*.

That will not avoid the Judgment, tho' the Minor were of age ſufficient to adminiſter himſelf; nor is it of prejudice to any, as was reſolved in the Caſe of one Pincent. Hob. 251. Yelv. 128. Roll. Good & Pincent's caſe tit. Executors f. 910.

But if an Adminiſtrator, durante minori ætate, brings an Action, he muſt aver the Adminiſtrator or Executor to be under the age of ſeventeen years. 14 Car. 1. B. R. Piggot's caſe, 5 Rep. 29.

6. Sixthly, it was urged as reſolved in Turner's Caſe, That the recital of *Allington*'s Declaration in *London*, not mentioning the Debt to be *per ſcriptum obligatorium*, it ſhall not be intended to be ſo. Turner's Caſe, 8 Rep. f. 132.

And it was urged as reſolved in that Caſe of Turner alſo, That it being a Debt but by ſimple Contract, the Adminiſtrator was not chargeable with it.

That is a Reſolution in Turner's Caſe ſupernumerary, and not neceſſary to ſupport the Judgment given, and conſequently no Judicial Reſolution; for the Judgment given in Turner's Caſe was well given, becauſe the Judgments given before the Mayor of Ciceſter, pleaded in bar of the Plaintiff's Action,

were reſolved to be coram non Judice, becauſe it appeared not that the Mayor of Ciceſter had any Juriſdiction to hold Plea by Patent or Preſcription.

But admitting that an Executor or Adminiſtrator, according to that Reſolution, is not chargeable (if by chargeable be meant compellable) at the Common Law in an Action of Debt brought upon a ſimple Contract of the Teſtator or Inteſtate, to pay ſuch Debt: what would it avail the Plaintiff in that Caſe, or can in this Caſe, unleſs the Reſolution had been, That tho' the Juriſdiction of the Court of Ciceſter had been well ſet forth, yet a Judgment there obtained againſt the Executor, upon a ſimple Contract of the Teſtator's, had been no Bar in an Action of Debt brought upon an Obligation of the Teſtator's? (But there is no ſuch Reſolution there.) For a Judgment obtained upon ſuch a ſimple Contract, is as much a Judgment when had, as any other upon Obligations; and the Books and Uſe are clear, that Judgments muſt be ſatisfied before Debts due by Obligation. It is true, it is a Waſte of the Goods of the Dead in the Executor, to pay voluntarily a Debt by ſimple Contract before a Debt by Obligation whereof he had notice, (and not otherwiſe in that Caſe.) But no man ever thought it a Devaſtavit in the Executor, to ſatisfie a Judgment obtained upon a ſimple Contract, before a Debt due by Obligation.

1 Mod. 175.
3 Mod. 115.
1 Vent. 199.
2 Saund. 49.

Yet I ſhall agree, the Executor by the Common Law might have prevented this Judgment, by abating the Plaintiff's Writ at firſt, which he had power lawfully to do: but he had equal power lawfully not to abate it, and uſed that laſt lawful power, and not the firſt, and wrong'd none in uſing it.

To this may be added, That the Judgment upon a ſimple Contract is the Act of the Court, and compulſory to the Executor: and he hath then no election, but muſt obey the Judgment.

In concluſion, Tho' it were agreed, that in the Action of Debt brought by Allington upon a ſimple Contract, Judgment ought not to have been given againſt the Defendant being Adminiſtrator, but the Writ ſhould have abated, becauſe the Adminiſtrator was not chargeable; and tho' the Judgment given were erroneous, and for that cauſe reverſible: yet ſtanding in force unreverſed, it is a good Bar to the Plaintiff's Action.

1 Sid. 333.

But

But leſt this ſhould countenance Judges abating the Writ ex Officio, in ſuch Actions brought, or Plaintiffs to bring Error upon Judgments given in ſuch Actions, I conceive the Law is clear, that Judges ought not, ex Officio, to abate ſuch Writ, nor otherwiſe, than when the Executor or Adminiſtrator, Defendant in ſuch Action, demurs, and demands Judgment of the Writ; and that Judgment given againſt ſuch Defendants not demurring to the Writ, is not erroneous, unleſs for other cauſe. Yelv. 56. Ant. 79

If it be urged further, That tho' a Judgment obtained upon a ſimple Contract be a Bar to an Action of Debt brought after upon an Obligation, or to an Action of the Caſe upon an Aſſumpſit to pay Money, as the preſent Caſe is.

Yet it ſhould not bar, if the Action upon which it was obtained were commenced pending a former Action upon an Obligation, or upon an Aſſumpſit for Money, in which the Inteſtate could not have waged his Law.

The Anſwer is as before, Such Judgment bars until reverſed, if admitted to be reverſible; as it is not.

But the Law is ſettled, That whereſoever an Action of Debt, upon Bond or Contract, is brought againſt a man, he may lawfully confeſs the Action, and give way to a Judgment, if there be no fraud in the Caſe, altho' he have perfect notice of ſuch former Suit depending; nor is there any reſtraint or limit of time for confeſſing an Action brought upon a ſimple Contract, more than upon a Bond. Keilw. 74. Sid. 21.

And to ſatisfie any Debt upon Obligation, before a Judgment ſo obtained, is a Devaſtavit in the Executor or Adminiſtrator, and ſo it is to ſatisfie any latter Judgment, if there be not Aſſets to ſatisfie the firſt alſo. So are the expreſs Books, to thoſe points of 5 H.7. per Cur' and Scarle's Caſe, in Moore, and Green and Wilcock's Caſe in Cro. Eliz. 5 H.7. f. 27. b. Moor, Scarles Caſe, f. 678. Cro. 38 El. f. 462. Green & Wilcock's Caſe.

Yet in 25 El. when an Action of Debt for 100 l. was brought againſt an Executor in C. B. and pending that, Debt was brought againſt him in B. R. for 100 l. which latter he confeſſed, and the Judgment there had, pleaded in Bar to the firſt Action.

And upon queſtion if the Plea were good, Fenner and Walmeſley held it good, but Anderſon, Mead, Wyndham and Periam argu'd to the contrary, and that he ought to have pleaded the firſt Action pending to the ſecond Action brought. The Arguments of both ſides you may ſee in Moore, f. 173. where it is left a Quære, the Judges doubting the Caſe: But ſince the Law is taken, That the Judgment is a good Bar to the firſt Action. Moore 25 El. f. 173.

It will be ſtill objected, That if the Law be, that Executors or Adminiſtrators may pay Debts upon ſimple Contracts of the deceaſed, to which they are not bound, and thereby prevent the payment of a Debt to which they are bound: it is repugnant to Reaſon, and conſequently cannot be Law; for that is in effect at the ſame time to be bound, and not bound to pay: for he who may not pay being bound, is not bound at all. For clearing this, we muſt know,

Tho' Executors or Adminiſtrators are not compelled by the Common-Law to anſwer Actions of Debt for ſimple Contracts, yet the Law of the Land obligeth payment of them. For,

1. Upon committing Adminiſtration, Oath is taken to adminiſter the Eſtate of the dead duly, which cannot be without paying his Debts.

2. Oath is taken to make true Account of the Adminiſtration to the Ordinary, and of what remains, after all Debts, Funeral Charges, and juſt Expences of every ſort deducted.

3. This appears alſo by the Statute of 31 E. 3. c. 11. That Adminiſtrators are to adminiſter and diſpend for the Soul of the dead, and to anſwer to others to whom the dead perſons were holden and bound; which they cannot better do, than by paying their Debts.

Plowd. Com. 185. a. b. And as this was the ancient Law and Practice before in the Spiritual Court, ſo by the new Act in 22 & 23 of the King, for the better ſetling of Inteſtates Eſtates, it is enacted accordingly, That upon the Adminiſtrators Account deductions be made of all ſorts of Debts.

This appears to be the ancient Law, by the Great Charter, c. 18. and long before by Glanvill in H. 2.'s time, and Bracton in H. 3.'s time.

4. And by Fitzherbert in the Writ de rationabili parte bonorum, the Debts are to be deducted before diviſion to the Wife and Children. And upon the Executors Account all the Teſtators Debts are to be allowed before payment of Legacies; which were unjuſt, if the payment of them were not due, as appears by Doctor and Student.

Executors be bound to pay Debts before Legacies by the Law of Reaſon, and by the Law of God; for Reaſon wills that they ſhould do firſt that is beſt for the Teſtator, that is, to pay Debts which he was bound to pay, before Legacies which he was not bound to give.

2. It is better for the Teſtator his Debts ſhould be paid, for not payment of which his Soul ſhall ſuffer pain, but none for not performing his Legacy. Doct. & Stud. l. 2. c. 11.

The Ordinary upon the Account, in all the Caſes before rehearſed, will regard much what is beſt for the Teſtator. And I conceive the Ordinary may inforce the payment of Debts upon Contracts, as well as Legacies or Marriage-money, and no Prohibition lies. L. 2. c. 10. f. 158

An Executor or Adminiſtrator may retain for his own ſatisfaction a Debt by ſingle Contract, due from the Teſtator or Inteſtate, which he could not do unleſs the payment were lawful.

If at the Common-Law the Executors payments of Debts upon ſimple Contracts were not juſt, why have the Judges in all Ages given Judgment for the Plaintiffs, unleſs the Defendant either demurs in the commencement of the Plea, or avoids the Debt by ſpecial matter pleaded, and put in iſſue? But he ſhall never in ſuch caſe either arreſt the Judgment, or bring Error after Judgment for that cauſe. Ant. 97.

And ſo it is agreed for Law in Read and Norwood's Caſe in Plowden, where the Judges had view of numerous Judgments in that kind, as there appears. Plowd. 182. a. Yelv. 56.

And if ſuch Debts were not juſtly to be ſo demanded and paid, it had been againſt the Judges Oath to paſs ſuch Judgments; for the Defendant is not bound to demur, but leaves the Juſtice of the Plaintiff's demand to the Court.

In 10 H. 6. Cotſmore, who gave the Rule in the Caſe in queſtion, hath theſe words: The Law will not charge Executors with a duty due by a ſimple Contract made by the Teſtator. Then if ſuch Action be brought againſt Executors upon a ſimple Contract made by the Teſtator, and they will not take advantage at the beginning of the Pleas in abatement of the Writ, but plead other matter which is found againſt them, they never ſhall have advantage to ſhew that before Judgment (that is, in Arreſt of Judgment) and that I have known adjudged in this place once before this time. 10 H. 6. f. 24. b. 25. a.

Here is not only his own Opinion, but a Judgment by him cited in that Court formerly in the point.

I ſhall add another Caſe to this purpoſe. A man brought a Writ of Debt againſt another, and counted that he ſold certain goods to his Teſtator for the Sum in demand. Littleton cauſed the Attorney of the Plaintiff (as printed, but ſhould be Defendant) to be demanded; and ſo he was; and Littleton demanded 15 E. 4. f. 25. a.

of

of him, Si'l avoyder ſon Suite; not his own, but his who counted againſt him; que dit, que voyl; and after Littleton ſaid to the Attorney of the Plaintiff, The Court awards, that you take nothing by the Writ; for know, that a man ſhall never have an Action againſt Executors, where the Teſtator might have waged his Law in his life-time. *Quod nota.*

It was not proper to ask the Plaintiff's Attorney, whether he would avoid his Client's Suit? and an unlikely Anſwer of his to ſay, Yes: but a rational demand to the Defendant's Attorney, whether he would avoid his Suit who counted againſt him? and probably he ſhould anſwer, Yes. And after Littleton ſaid to the Attorney of the Plaintiff, The Court awards you take nothing by your Writ. If he had been the perſon to whom the queſtion was firſt asked, and who immediately before had anſwered, Yes, the Book had not been that after Littleton ſaid to the Attorney of the Plaintiff, but that Littleton ſaid to him who was the ſame he diſcourſed with.

The Print thus rectified, this Caſe agrees with the Law delivered by Cotſmore. An Executor is ſued, and declared againſt in Court (for ſo was the courſe then) upon a ſimple Contract of his Teſtator's; The Judge asks his Attorney, Whether he had a mind to avoid the Suit? who anſwered, Yes. If the Judge had thought fit, he might have avoided the Suit without making any Queſtion: but knowing it was not conſonant to Law to avoid a Suit upon a ſimple Contract, unleſs the Executor himſelf deſired it, he therefore asked him the Queſtion; and finding he did deſire it, the Judge preſently told the Plaintiff's Attorney, he could take nothing by the Writ. Elſe you ſee the conſequence of this Judgment, That the Judges, ex Officio, ſhould prevent any Judgment for the Plaintiff in Debt, brought upon a ſimple Contract againſt an Executor, whether the Executor would or not, againſt former and ſubſequent uſage.

Brook in abridging this Caſe, and not reflecting upon it rightly, abridges it, That Littleton demanded the Plaintiff's Attorney, If he would avow his Suit; whereas the word is clearly avoid, and not avow: And to what purpoſe ſhould he ask that Queſtion? for ſure it was avowed as much as could be, when counted upon at that inſtant in Court.

Then

Then Brook makes a Note, Nota ceſt Judgment ex Officio. Br. Executor pl. 80.

And this Note of Brook's miſled the Lord Anderſon once to the ſame miſtake, if the Report be right; but the like hath not been before or ſince. An Action was brought againſt an Adminiſtrator, upon a Contract of the Inteſtate's, who pleaded fully adminiſtred, and found againſt him: Anderſon ſaid that ex Officio the Court was to ſtay Judgment, and did ſo, becauſe the Adminiſtrator was not chargeable upon a ſimple Contract. 1 And. 182. 1 Leon 165. Rob. Hughſon's Caſe. Gouldsborough's Rep. 30 El. f. 106, & 107.

But ſince that Caſe of Hughſon, one Germayne brought an Action of Debt againſt Rolls, as Executor of Norwood, for Fees, as an Attorney in the Common Bench, and for ſolliciting in the Queens Bench, and for Money expended about a Fine for Alienation. Rolls pleaded Ne unque Executor, which was found againſt him, and Judgment given: Upon which Rolls brought a Writ of Error, and the Error aſſign'd was, That the Action lay not againſt an Executor, becauſe the Teſtator could have waged his Law. But it was reſolved, That for Attorney's Fees the Teſtator could not wage his Law, but for the reſt he might; and that the Executor might have demurred at firſt, but pleading a Plea found againſt him, it was ſaid he was concluded. Some difference of Opinion was, Germayne verſ. Rolls, 37 & 38 El. Cro. 425. pl. 24.

But agreed, That the Executor confeſſing the Action, or pleading Nil debet, in ſuch Caſe, and that found againſt him, he hath no Remedy.

And Popham remembred Hughſon's Caſe in the Common Pleas, and would ſee the Roll; for he doubted, that both in that Caſe, and this of Germayne, the Executor had not confeſſed the Debt in effect.

But after it was moved again, and all the Judges but Gawdy were of opinion, that the Judgment was well given as to that cauſe; but it was reverſed for a cauſe not formerly moved, which was, Hill. 38 Eliz. Cro. 459. pl. 4.

That an Action of Debt would not have lain againſt the Teſtator himſelf for part of the Money in demand and recovered; that is, for the Money for ſolliciting, which was not a certain Debt, but to be recovered by Action on the Caſe.

Some Caſes in the old Books may ſeem to colour this Opinion, That the Judges, ex Officio, in an Action of Debt brought againſt an Executor or Adminiſtrator for a ſimple Contract of the Teſtator's or Inteſtate, ought to abate the Writ.

The

25 E. 3. f. 40. The firſt is, 25 E. 3. f. 40. where an Action was brought againſt an Executor upon a Tally ſtruck by the Teſtator. The Judges ſaid, Nil capiat per Breve, if he have no better ſpecialty.

12 H. 4. f. 23. The like Caſe is, 12 H. 4. f. 23. where a like Action was brought againſt the Executor or Adminiſtrator upon a Tally of the Teſtators; and there it appears the Defendant's Council would have demurred, and the cauſe is mentioned, That the writing of the Tally might be waſhed out by water, and a new put in the place, and the Notches changed; and the Judgment was, Nil capiat per Breve.

This being the ſame Caſe with the former, the reaſon of the Judgment was the ſame as grounding an Action upon a Specialty not good in Law.

Beſides it appears in the latter Caſe, the Executor oppoſed the Action by offering to demur; and for any thing appearing, he did ſo in the firſt.

f. 13. The other Caſe is, 41 E. 3. f. 13. where an Action upon the Teſtator's ſimple Contract was brought againſt an Executor, and the Executor of a Co-Executor to him: The Writ was abated for that reaſon, and ſaid withal, There was no Specialty ſhewed; but the firſt reaſon abating the Writ neceſſarily, it no ways appears the Judges would, ex Officio, have abated the Action for the laſt cauſe, if the Executor deſired it not.

So as when the Executor or Adminiſtrator hath once pleaded to an Action of Debt upon a ſingle Contract, he is equally bound up for the event, as in any Action wherein the Teſtator or Inteſtate could not have waged his Law.

1 Sid. 333.

It is therefore an ill conſequence for the Plaintiff to ſay, I have brought an Action upon a ſimple Contract, wherein the Inteſtate could not have waged his Law; therefore I muſt be paid before another Creditor by ſimple Contract, bringing an Action wherein the Inteſtate might wage his Law: For it is in the Adminiſtrator's power, by omitting to abate the Writ at firſt, to make the Debt demanded by Action in which the Inteſtate might have waged his Law, to be as neceſſarily and coercively paid, as the other Debt demanded by Action, wherein he could not wage his Law.

And if the Executor believes the Debt by ſimple Contract demanded by Action of Debt to be a juſt Debt, it is againſt honeſty, conſcience, and the Duty of his Office, to demur, whereby to delay, or prevent the payment of it.

Beſides,

Beſides, tho' ſince that illegal Reſolution of Slade's Caſe, grounded upon Reaſons not fit for a Declamation, much leſs for a Deciſion of Law, Mod. 163

The natural and genuine Action of Debt upon a ſimple Contract, be turned into an Action of the Caſe, wherein a man is deprived of waging his Law: It is an abſurd Opinion to think that therefore Debt demanded by it ought to have precedency for payment of a Debt due by ſimple Contract, but quite the contrary.

For Actions of the Caſe are all Actiones injuriarum, & contra pacem, and it is not a Debt certain, in reaſon of Law, that can be recovered by thoſe Actions, but Damage for the Injury enſuing upon the breach of promiſe, which cannot be known until a Jury aſcertain what the Damage is: Therefore a man did never wage his Law for a demand incertain, for he could not make Oath of paying that which he knew not what it was, as conſiſting in Damage.

Now, altho' the Jury give in Damages regularly, the Money promiſed to be paid, yet that changeth not the reaſon of the Law, nor the form; for ſtill it is recovered by way of Damage, and not as a Debt is recovered.

Which ſhew the Action much inferiour and ignobler than the Action of Debt, which by the Regiſter is an Action of Property; and no reaſon a Damage incertain in its own nature ſhould be paid before a certain Debt by ſimple Contract, which were the firſt Debts, and will probably be the laſt in the World; for Contracts by writing were much later, and there are many Nations yet where Letters are unknown, and perhaps ever will be. Dr. & Stud. l. 2. c. 10. p. 75. b.

And that which is ſo commonly now received, That every Contract executory implies a promiſe, is a falſe Gloſs, thereby to turn Actions of Debt into Actions on the Caſe; for Contracts of Debt are reciprocal Grants. A man may ſell his Black Horſe for preſent Money at a day to come, and the Buyer may, the day being come, ſeize the Horſe, for he hath Property then in him; which is the reaſon in the Regiſter that Actions in the Debet, and alſo in the Detinet, are Actions of Property; but no man hath Property by a breach of promiſe, but muſt be repaired in Damages.

The laſt Exception was, That a Recognizance in the nature of a Statute Staple of 2000 l. in the Chancery, is pleaded in Bar.

And it is not ſaid, That it was per ſcriptum obligatorium, or ſealed, as the Statute of 23 H. 8. requires, nor that it was ſecundum formam Statuti.

Cro. 10 Car. 1. f. 362. Goldſmith's Caſe, verſ. Sydnor. And Goldſmith and Sydnor's Caſe was urged to be adjudged in the point, which Caſe is ſo adjudged by the major part of the Court.

But in that Caſe it is pleaded, That Sydnor before the Chief Juſtice of the Common Pleas, conceſſit ſe teneri *Ed. Hobart* in 400 l. to be paid at Pentecoſt next enſuing, & ſi defecerit, &c. voluit & conceſſit per idem ſcriptum quod incurreret ſuper ſe hæredes & executores pœna in Statuto Stapulæ.

So as it appears the Recognizance was taken before the Chief Juſtice of the Common Pleas, and that the Conuſor was to incur the penalty of the Statute Staple; and therefore a Recognizance in the nature of a Statute Staple was there intended to be pleaded, but it was not pleaded that it was taken ſecundum formam Statuti in general, nor ſpecially per ſcriptum obligatorium under Seal, as it ought to be.

But here it is not pleaded, That the Conuſor was to incur the penalty of the Statute Staple, nor that it was taken before any perſon authorized to take a Recognizance in the nature of a Statute Staple, by the Stat. of 23 H. 8. c. 6. for the Chancellor is not ſo authorized.

But that it was a bare Recognizance entred into in the Court of Chancery, which all Courts of Weſtminſter have power to take, and that it remains there inroll'd. And that the ſaid Sum of 2000 l. ſhould, for default of payment, be levied of the Conuſor's Lands, Goods and Chattels, and Execution of ſuch Recognizances are to be made by Elegit of the Lands as well as Goods.

And it appears by the Statute of Acton Burnel, 13 E. 1. which is the Law for the Statute Merchant, That ſuch Recognizances for Debt were before the Statute Merchants taken by the Chancellor, the Chief Juſtices, and Judges itinerant; but the Execution of them not the ſame as of the Statute Merchant; nor are they hindered by that Statute from being as before expreſſly.

And

And in 4 Mar. upon a great ſearch of Preſidents, it was reſolved, That every Judge may take a Recognizance in any part of England, both in Term and out of Term. Br. Recogn. p. 20. Hill. 4 Mar.

The like Reſolution was in the Lord Hobart's time. Hob. f 195.

So as the Recognizance here pleaded, is not a Recognizance in the nature of a Statute-Staple, nor ſo pleaded, but a Recognizance entred into in the Court of Chancery, as Recognizances are entred into in the Court of Common-Pleas or Kings Bench, and as they were entred before Recognizances by Statute-Merchant or Staple. But Hall&Wingfield's Caſe.

Such Recognizances are to be ſatisfied before Debts by ſimple Contracts, and before Debts by Obligations alſo, which avoids the Exception. Rolls Exec. f. 925. 14 Jac. B. R. Robſon & Francis Caſe.

Now as to the ſecond Queſtion.

Admitting the Judgment in London as pleaded, be no ſufficient Bar of the Plaintiff's Action; or if it be, that the Recognizance as pleaded, is no ſufficient Bar; for if thoſe will bar, there is no further Queſtion:

If then Judgment ought to be for the Plaintiff, upon the Defendant's Plea to the whole matter? And I conceive it ought not. 1 Saund. 336. & 2. 48.

I ſhall agree, That if the Defendant plead ſeveral Judgments againſt the Inteſtate, or himſelf as Adminiſtrator, and Statutes entred into by the Inteſtate, and concludes his Plea, That he hath not, nor at any time had, Aſſets in his hand of the Inteſtate's Eſtate, *præterquam bona & catalla*, ſufficient to ſatisfie thoſe Judgments and Statutes; and avers they are unſatisfied, and which Aſſets are chargeable with the ſaid Judgments and Statutes, that this is a good Plea in bar of the Plaintiff's Action, and ſo it is admitted to be in Meriel Treſham's Caſe; and the Plaintiff muſt reply, That he hath Aſſets ultra what will ſatisfie thoſe Judgments and Statutes, as is there agreed. M. Treſham's Caſe, 9 Rep. 109.

But if the Plaintiff reply, That any one of thoſe Judgments was ſatisfied by the Inteſtate in his life-time, ſaying nothing to any of the reſt; And the Defendant demur upon this Replication, the Plaintiff muſt have Judgment, for the Plea was falſe, and the falſhood detrimental to the Plaintiff, and beneficial to the Defendant; for having pleaded, He had no more Aſſets than would ſatisfie thoſe Judgments, one of them being ſatisfied before, he hath confeſſed there are more Aſſets than will ſatisfie the other Judgments, by as much as the Judgment already ſatisfied amounts unto; which would turn to his gain, and the Plaintiff's loſs, if his Demurrer were good.

Turner's Caſe, 8 Rep.

But to plead, that he hath not bona & catalla ꝑterquam bona quæ non attingunt, to ſatisfie the ſaid Judgments and Statutes, is not good, for the incertainty; for if the Judgments and Statutes amount to 500 l. 20 l. are bona quæ non attingunt, to ſatisfie them; ſo is 40 l. ſo is 100 l. ſo is 200 l. and every Sum leſs than will ſatisfie: So as by ſuch Plea there is no certain Iſſue for the Jury to enquire, nor no certain Sum confeſſed towards the payment of any Debt, as is well reſolv'd in Turner's Caſe.

So if a man pleads he hath not Aſſets ultra what will ſatisfie thoſe Judgments, the Plea is bad for the ſame reaſon; for 20 l. is not Aſſets ultra that will ſatisfie them, nor 40. nor 100. nor 200. nor doth that manner of pleading confeſs he hath Aſſets enough to ſatisfie: As to ſay, I have not in my Pocket above 40 *l.* is not to ſay, I have in my pocket 40 *l.*

But in this Caſe, the Defendant hath pleaded payment of ſeveral Bonds, Bills and Judgments, and pleads one Recognizance of 2000 l. and one Judgment of 7000 l. wholly unſatisfied, and concludes his Plea with plene adminiſtravit.

And that he had not, *die impetrationis brevis, nec unquam poſtea, aliqua bona ſeu catalla* of the Inteſtate's, *in manibus ſuis adminiſtranda præterquam bona & catalla, ad valenciam ſeparalium denariorum ſummarum per ipſum, ſic ut præfertur ſolutarum,* in diſcharge of the ſaid ſeveral Judgments, Bonds and Bills.

Et ꝑterquam alia bona & catalla ad valenciam decem ſolidorum quæ executioni recognitionis ꝑdict', & judicij ꝑdict', per ꝑfat' *Car. Cornwallis* recuperat' onerabilia exiſtunt.

Now upon this Plea, if Allington's Judgment of 2670 l. or the Statute of 2000 l. or both, be avoided, yet the Plaintiff hath no right to be paid until the Judgment of 7000 l. be ſo ſatisfied, and that ſome Aſſets remain after the ſatisfaction of it in the Adminiſtrator's hands; for before the Plaintiff hath no wrong, nor the Adminiſtrator doth none, nor hath any benefit by not ſatisfying the Plaintiff.

That ſpungy Reaſon, that the Defendant's Plea is all intire, and therefore if any part be falſe, as either in that of Allington's Judgment or the Recognizance, the Plea is bad, is not ſenſe; for if the falſhood be neither hurtful to the Plaintiff, nor beneficial to the Defendant, why ſhould the Plaintiff have what he ought not, or the Defendant pay what he ought not?

Suppoſe the Defendant pleaded a Judgment obtain'd againſt the Inteſtate or himſelf, and that the Inteſtate or himſelf were married at the time of the Judgment obtain'd, (which in truth was

was falſe, for that the one or the other was unmarried at that time) his Plea being otherwiſe good: Should this falſeneſs cauſe the Plaintiff to recover? Surely no, for the falſeneſs is not material, nor any way hurtful to the Plaintiff.

Beſides, the uſual Pleading, as appears both by Turner's and Treſham's Caſe, is, that the Plaintiff muſt avoid all payments pleaded in bar, until ſome Aſſets appear in the Adminiſtrators hands remaining, and then he is to have Judgment.

Much noiſe hath been about this Caſe, and without reaſon, as I ſuppoſe, tho' there were no precedent Judgment in the point; but there is a Judgment per Curiam.

An Action of Debt was brought againſt Executors, who pleaded a former Recovery againſt them of 200 l. and Execution iſſued, and pleaded likewiſe another Recovery againſt them of 100 l. and traverſed that they had no Aſſets but to ſatisfie that Execution of 200 l. The Plea was adjudged good by the Court, and that the Plaintiff muſt reply, They had Aſſets in their hands ultra the ſaid 200 l. and ultra the ſaid 100 l. for before the 100 l. were alſo ſatisfied, the Plaintiff was not intitled to his Debt, as the Book is. 9 E. 4. f. 12. b.

Hill.

Hill. 18 & 19 *Car.* 2. *C. B.*

Thomas Price is Plaintiff, againſt *Richard Braham*, *Elizabeth White*, *Elianor Wakeman*, and *Richard Hill*, Defendants, In an Action of *Treſpaſs* and *Ejectment*.

The Plaintiff declares, That one Henry Alderidge, the firſt of November, 18 Car. 2. at the Pariſh of St. Margarets Weſtminſter, demiſed to the Plaintiff and his Aſſigns an acre of Land, with the appurtenances, in the Pariſh of St. Margarets aforeſaid.

Habendum from the 30th of October then laſt paſt, for the term of Five years next enſuing; by virtue whereof he entred, and was poſſeſſed, until the Defendants afterwards, the ſame day, entred upon him, and did eject him, to his damage of 20 l.

To this the Defendants pleaded, That they are not Culpable.

Special Verdict is found; by which it is found, That the Defendants are not culpable of Entry and Ejectment in the ſaid Acre, excepting a piece thereof, containing One hundred and eighty Foot thereof in length, and Eight and twenty Foot in breadth.

And as to that piece, they find, That the ſame time out of mind was a Pool, until within Twenty years laſt paſt, during which Twenty years it became filled with Mud.

They find, That before the Treſpaſs ſuppoſed, that is, the firſt of Auguſt, 1606. King James was ſeized, in Right of the Crown, of the ſaid Pool, and three Gardens, with the Appurtenances, in St. Margarets aforeſaid, in his Demeſne as of Fee.

They find again, That the ſame firſt day of Auguſt, 1606. a Water-work was built in the ſaid Gardens, and the ſaid Pool was thence uſed with the ſaid Water-work, until the 12th day of March, in the 11th year of King James.

That

That King James ſo ſeized, the ſaid 12th of March, by his Letters Patents under the Great Seal of England, bearing date the ſaid 12th of March, 11 Jac. in conſideration of 70l. 10s of lawful Money of England, paid by Richard Prudde, and for other conſiderations him moving, at the nomination and requeſt of the ſaid Richard. Et de gratia ſua ſpeciali, ex certa ſcientia, & mero motu, for him, his heirs and ſucceſſors, granted to the ſaid Richard Prudde and one Toby Matthews Gent. and to their heirs and aſſigns, among other things, the ſaid three Gardens and Water-work thereupon erected, to convey Water from the River of Thames to divers houſes and places in Weſtminſter, and elſewhere, with all and ſingular the Rights, Members and Appurtenances, of what nature and kind ſoever.

They further find, That the ſaid King James, by his ſaid Letters Patents, for the conſideration aforeſaid, for him, his heirs and ſucceſſors, granted to the ſaid Richard Prudde and Toby Matthew, their heirs and aſſigns, (inter alia) omnia & ſingula ſtagna, gurgites, aquas, aquarum curſus, aquæductus, to the ſaid premiſſes, granted by the ſaid Letters Patents, or to any of them, or to any parcel of them, quoquo modo ſpectantia, pertinentia, incidentia, vel appendentia, or being as member, part or parcel thereof, at any time theretofore had, known, accepted, occupied, uſed or reputed, or being together with the ſame, or as part, parcel or member thereof, in account or charge, with any of his Officers, as fully and amply as the ſame were formerly held by any Grant or Charter. Ac adeo plene libere & integre, ac in tam amplis modo & forma, ꝓut idem nuper Rex aut aliquis ꝓgenitorum ſive p̄deceſſorum ſuorum p̄miſſa p̄dict' per eaſdem Literas Patent' præ-conceſſ. & quamlibet ſeu aliquam inde partem, ſive parcellam habuerunt, habuiſſent, vel gaviſi fuiſſent & habuiſſent vel habere uti & gaudere debuiſſent aut debuit.

They further find, That the ſaid Pool was neceſſary for the Water-work aforeſaid, and that it could not work without the ſaid Pool.

They further find, That the King who now is, by his Letters Patents, dated at Weſtminſter the 15th of February, the 18th of his Reign, inrolled in the Exchequer, in conſideration that Henry Alderidge Gent. a piece of Land, and other the premiſſes granted by the ſaid Letters Patents, covered with Water and hurtful Mud, would fill up at his proper Charges, and perform the Covenants and Agreements in the Letters Patents contained, for him, his heirs and ſucceſſors, granted

the

the aforeſaid piece of Land, containing as aforeſaid in length and breadth, by the name of all that piece of Land, or broad Ditch, lying and being in the Pariſh of St. *Margarets Weſtminſter*, with particular Boundaries thereto expreſſed,

To have and to hold from the Feaſt of the Annunciation laſt paſt, for the term of One and twenty years thence next enſuing.

They find, That the ſaid Henry Alderidge entred into the premiſſes, then in the poſſeſſion of the Defendants, and ſo poſſeſſed, made the Leaſe to the Plaintiff, Habendum to him and his Aſſigns, as in the Declaration.

That the Plaintiff entred by virtue thereof into the ſaid piece of Land, and was poſſeſſed, till the Defendants ejected him.

And if, upon the whole matter, the Defendants be culpable, they aſſeſs Damages to 12 d. and Coſts to 40 s. And if they be not, they find them not culpable.

The firſt Queſtion is, What can paſs by the name of Stagnum or Gurges? for if only the Water, and not the Soyl, paſſeth thereby, the Queſtion is determined; for the piece of Land containing ſuch length and breadth, cannot then paſs.

Fitz. N. Br. 191. b. Let. H. By the name of Gurges, Water and Soyl may be demanded in a Precipe.

34 Aſſ. pl. 11. Co. Lit. f. 5, 6. ad finem. By the name of Stagnum, the Soyl and Water is intended.

Plowd. 157. b. 158. 1. Where a man had granted to an Abbot, totam partem piſcariæ ſuæ, from ſuch a limit to ſuch a limit, reſervato mihi Stagno molendini mei, and the Abbot for a long time after the Grant had enjoyed the Fiſhing of the Pool: It was adjudged the Reſervation extended to the Water and Soyl, but the Abbot had the Fiſhing by reaſon of long Uſage after the Grant, which ſhewed the intent.

1606. 4 Jac. 6 Co. 64, 65, 66. Cro. Car. 308. The next Queſtion is, When the Soyl may paſs by the word Stagnum, whether it may, as belonging and pertaining to the Water-work erected 6 Jac. and granted away with the Pool, as pertaining to it in 11 Jac. as it is found: or to the Gardens, which ſeems a ſhort time, eſpecially in the Caſe of the King, to gain a Reputation, as belonging and appertaining?

As

As to this Queſtion, things may be ſaid pertaining in relation only to the extent of the Grant. As, an ancient Meſſuage being granted, with the Lands thereto appertaining; and if ſome Land newly occupied, and not anciently with that Meſſuage, ſhall paſs as appertaining? is a proper Queſtion: But that is a Queſtion only of the Extent of the Grant, and what was intended to paſs, and not of the Nature of the Grant.

Four Cloſes of Land, part of the Poſſeſſions of the Priory of Lanceſton, came to King Hen. 8. and after to Queen Eliz. uſually called by the name of Drocumbs, or Northdrocumbs. A Houſe was built 21 Eliz. as the Book is, by the Farmers and Occupiers of theſe Cloſes upon part. In 24 Eliz. ſhe granted Totum illud Meſſuagium vocat' Drocumbs, ac omnia terras & tenementa dicto meſſuagio ſpectantia in Lanceſton.

After, King James made a Leaſe of the Four Cloſes called Northdrocumbs, or Drocumbs; and upon Queſtion between the Queen's Patentee and the King's, Judgment was given for the Queen's Patentee; becauſe, tho' the Houſe was newly erected before the Queen's Grant, yet the Land ſhall be ſaid belonging to it, and it ſhall paſs by ſuch name as it was known at the time of the Patent; And that was a ſtronger Caſe than this, there being but three or four years to give reputation of belonging or appertaining. Gennings verſ. Lake, 5 Car. 1. Cro. 168.

Another meaning of the words belonging or appertaining, is, when they relate not to the extent or largeneſs of the Grant, but to the nature of the thing granted. As, If a man newly erect a Mill in ſtructure, and hath no Water-courſe to it, if he grants his Mill with the Appurtenances, nothing paſſes but the Structure. But if he, after the Structure, acquire or purchaſe a Water-courſe to it, and grant it with the Appurtenances, the Water-courſe paſſes, becauſe the Mill cannot be uſed without it. So it is for the Mill-Dam or Bank, or the like. So if he acquire an enlargement or bettering of his Water-courſe, that additional Water ſhall paſs as pertaining, how lately ſoever acquired.

So if a man grants his Saddle with all things thereto belonging, Stirrops, Girths, and the like, paſs.

So if a man will grant his Viol, the Strings and Bow will paſs.

And the Pool was belonging and appertaining to the Water-work in this laſt ſenſe, as pertaining to the nature of the thing granted, without which it could not be uſed; for the Jury find,

Quod Stagnum p̄dict' fuit neceſſarium p̄ ſtructura (Anglicè Water-work) p̄dict' quodque eadem ſtructura ſine eodem Stagno operare non potuit.

And where a thing is ſo pertaining to the nature of the thing granted, it is belonging and pertaining immediately as ſoon as the thing is erected, and it is annexed to it.

And note, the Jury do not find that aqua Stagni p̄dict', but the Stagnum it ſelf, was neceſſary for the Water-work. Nor do they find that the Water-work could not operare ſine aqua Stagni, but ſine Stagno p̄dict'. And thereby they find that the Water and Soyl, which Stagnum ſignifies, was neceſſary for the work, and it could not work without it.

Paſch.

Paſch. 19 *Car.* 2.

Henry Stiles Plaintiff; *Richard Coxe* Baronet, *Richard Coxe*, Eſq; *John Cromwell*, *Thomas Merret*, and *Charles Davies*, Defendants; In an Action of Treſpaſs, of Aſſault, Battery, and Falſe Impriſonment.

1. The Plaintiff declares, That the Defendants, the laſt day of December, in the 17th year of the King, in the Pariſh of St. Mary Bow, in the Ward of Cheap in London, aſſaulted, wounded, and kept him in Priſon by the ſpace of two days next following, to his damage of One hundred Pounds.

2. The Defendants plead, They are not Culpable of the Treſpaſs, Aſſault, Battery, &c. aforeſaid.

3. The Jury find Richard Coxe Eſq; and Charles Davies not Culpable accordingly.

4. And as to the reſt of the Defendants, they find ſpecially, That before the ſuppoſed Treſpaſs, that is, the 28th day of September, in the 17th year of the King, one Rich. Baughes Eſq; one of the Juſtices of the Peace of the County of Glouceſter, iſſued his Warrant under his Hand and Seal to the Conſtable and Tythingmen of Dumbleton in the ſaid County, to apprehend and bring before him the Plaintiff Henry Stiles and others, to anſwer to ſuch matters of Miſdemeanor as on his Majeſty's behalf ſhould be objected againſt them by Sir Richard Coxe Baronet, then High-Sheriff of the ſaid County.

They find the Warrant in hæc verba.

5. That the ſaid Warrant was afterwards, and before the Treſpaſs, delivered to one Samuel Williams, Conſtable of Dumbleton, to be executed; and that upon the ſaid laſt day of December, mentioned in the Declaration, being Sunday, immediately before Divine Service, the Plaintiff ſitting in a Seat of the ſaid Church of Dumbleton, by order of Rich. Daſney Eſq; his Maſter, who claimed Right to the ſaid Seat, the ſaid Plaintiff being no Pariſhioner there, nor dwelling in the ſaid Pariſh, the ſaid Samuel being then Conſtable, arreſted the ſaid Plaintiff.

6. That the ſaid Plaintiff at firſt reſiſted, and refuſed to obey the ſaid Warrant, and after obey'd it. That the ſaid Samuel the Conſtable required the ſaid Defendant Thomas Merrett to aſſiſt him to convey him before a Juſtice of the Peace: But the ſaid Samuel, Thomas Merrett, and John Cromwell, conveyed him to the houſe of the ſaid Samuel in Dumbleton.

7. Et tunc the aforeſaid Richard Coxe Miles ſent for the ſaid Samuel, at the houſe of the ſaid Samuel in Dumbleton aforeſaid, Et p̄cepit eidem Samueli, to lay the Plaintiff in the Stocks; and thereupon the ſaid Samuel, John and Thomas conveyed the Plaintiff fromwards the way to the ſaid Rich. Baughes, Juſtice of the Peace, and about Eleven of the Clock of the ſame day in the morning, put the Plaintiff in the Stocks.

8. They find the Act of 21 Jac. particularly cap. 12. and the recital therein of the Act of 7 Jac. cap. 5. being an Act entituled, An Act for eaſie Pleading againſt troubleſome and contentious Suits againſt Juſtices of the Peace, Mayors, Conſtables, &c.

9. And find particularly, That it was enacted by the ſaid Parliament, Quod ſi aliqua Actio, Billa, &c.

10. But whether upon the whole matter by them found, the ſaid Sir Richard Coxe Baronet, John and Thomas are Culpable, they know not. Et petunt adviſamentum Curiæ in p̄miſſis.

11. And if upon the whole matter ſo found, the Court ſhall think, quod Actio p̄dicta poſſit commenſari in London: then they find the ſaid Richard Coxe Baronet, John and Thomas Culpable of the Treſpaſs, and aſſeſs Damages to One hundred Marks, and Coſts to Three and fifty ſhillings and four pence.

12. But if the ſaid Court be of Opinion, That the aforeſaid Action could only be laid in the County of Glouceſter, then they find the ſaid Richard Coxe Baronet, John and Thomas not Culpable.

The words of the Act of 21 Jac. cap. 12. and which are particularly found by the Jury, are,

1. That if any Action, Bill, Plaint, or Suit upon the Caſe, Treſpaſs, Beating, or Falſe Impriſonment, ſhall be brought againſt any Juſtice of the Peace, Mayor or Bailiff of City or Town-Corporate, Headborough, Portreeve, Conſtable, Tythingman, &c. or any of them, or any other, which in their Aid or Aſſiſtance,

ance, or by their Commandment, ſhall do any thing touching or concerning his or their Office or Offices, for or concerning any matter, cauſe, or thing, by them or any of them, done by virtue or reaſon of their, or any of their Office or Offices. That the ſaid Action, Bill, Plaint or Suit ſhall be laid within the County where the Treſpaſs or Fact ſhall be done and committed, and not elſewhere.

2. And that it ſhall be lawful to every perſon and perſons aforeſaid, to plead the General Iſſue, and to give the ſpecial matter in Evidence; as by the Act of *7 Jac. cap.* 5.

3. That if upon the Tryal of any ſuch Action, Bill, Plaint or Suit, the Plaintiff therein ſhall not prove to the Jury, Treſpaſs, Beating, Impriſonment, or other Fact or cauſe of Action, Bill, Plaint, *&c.* was or were had, made, or committed within the County wherein ſuch Action, Bill, Plaint or Suit ſhall be laid, That then the Jury ſhall find the Defendant or Defendants, in every ſuch Action, Bill, Plaint or Suit, *Not Guilty*, without having any regard or reſpect to any Evidence given by the Plaintiff touching the Treſpaſs, or other cauſe of the Action, Bill, Plaint or Suit, *&c.*

4. If Verdict ſhall paſs with the Defendant or Defendants, or if the Plaintiff therein become Nonſuit, or ſuffer any Diſcontinuance thereof, the Defendant or Defendants ſhall have ſuch double Coſts, and other Advantages, as by the Act of *7 Jac. cap.* 5. is provided.

The firſt Queſtion upon this Special Verdict, is,

Whether if any Officer in the Act mentioned, or any in his Aſſiſtance, ſhall do things by colour of their Office, not touching or concerning their ſaid Office, and ſhall be therefore impleaded? Or if they or any of them ſhall be impleaded for or concerning any matter, cauſe or thing, by them or any of them done by pretence of their Offices, and which is not ſtrictly done by virtue or reaſon of their Office, but is a misfeaſance in Law, ſhall have the benefit of this Act, of having the matter tryed in the County where the Fact was done, and not elſewhere?

If ſo,

1. They ſhall not have the Tryal for any matter touching their Offices in the County where the fact was done, unleſs the Plaintiff

Plaintiff pleaſe to lay it there; and if he ſo pleaſed, it might have been laid there before the Act of 21. which was purpoſely made to compel the laying of the Action where the Fact was done.

2. By ſuch Expoſition of the Act, the Action ſhall never be laid where the Fact was done; for if it may be laid elſewhere at all, if it be found upon the Tryal that the Officers queſtioned did not according to their Office, there will be no cauſe to lay the Action in the proper County; for the Jury where the Action is laid will find for the Plaintiff for the Misfeaſance; and if it be found the Defendants have purſued their Office, whereever the Action is laid, the Jury will find for the Defendants, and then no cauſe to lay an Action in the County where the Fact was done: So Quacunque via data, the Act will be uſeleſs.

3. If it can be laid in another County, without hearing Evidence, it cannot be known whether the Officer hath miſdone or not: How then can the Jury (as the Act directs) find the Defendants Not guilty, without regard or reſpect to the Plaintiffs Evidence? For then the Jury muſt regard the Evidence, to find whether the Officer hath miſ-done, and not regard the Evidence at all, to find the Officers Not guilty, as the Act doth order.

Nor is there any inconvenience, becauſe by the intention of Law, whether the Officers have done juſtifiably or not, without this Act of 21. the Action ought to be laid where the Fact was done; and the Act is but to compel the doing of that where an Officer is concerned, that otherwiſe fieri debuit, tho' factum valet not being done.

The ſecond Queſtion is, Whether upon the ſpecial points referred to the Court by the Jury, they have found all the Defendants, or any of them, and whom, Not guilty?

It hath been admitted at the Bar, That the Defendants, excepting Sir Richard Coxe, cannot be found culpable by this Act of 21. and it being a Treſpaſs, that ſome may be guilty, and not others; which is true.

But the Queſtion is not, Whether ſome of the Defendants might have been found guilty, and others not? but whether, as this Verdict is, all or none muſt be Culpable?

1. The Jury refer to the Court, Si actio ꝑdicta potuit commenſari in London, then they find all the Defendants culpable. And if actio ꝑdicta potuit comenſari tantuñodo in the County of Gloceſter, then they find all the Defendants by name Not guilty.

So

So as the matter is, Whether this individual Action brought jointly againſt all the Defendants, might be laid in London? For that is the Actio p̄dict' not whether an Action might be laid in London for the Treſpaſs againſt any of theſe Defendants? And in that firſt ſenſe Actio p̄dict' could not be in London; for it could not be there laid as to ſome of the Defendants.

2. Secondly, They refer to the Court, Whether Actio p̄dict' which is this Action, jointly brought againſt all the Defendants, could only be laid in the County of Gloceſter? And if ſo, they find for the Defendants. To which the Court muſt anſwer, That this Action, ſo jointly brought, could only be laid, according to Law, ad omnem Juris effectum, in the County of Gloceſter.

3. Thirdly, If the Court ſhould be of Opinion, That the Action was well laid as to Sir Richard Coxe, but not the reſt; the Jury find not him Guilty, and not the reſt; for they find all equally Guilty, or equally Not guilty.

4. Fourthly, That which differs his Caſe from the reſt, is, That he was not aſſiſtant or aiding to the Conſtable; for he had, that is, p̄cepit, or commanded the Conſtable to put the Plaintiff in Cippis.

But as to that, the ancient Law was both adjudged in Parliament, and allowed, That it was contra conſuetudinem Regni that a man ſhould be condemned in a Treſpaſs de p̄cepto or auxilio, if no man were convicted of the Fact done.

It was the Caſe in Parliament of Bogo de Clare, 18 E. 1. John Wallis Clerk entred his Houſe, and brought Letters of Citation from the Archbiſhop of Canterbury. Some of the Family of Bogo made Wallis eat the ſaid Proceſs, and Wax thereto affixed; Et impriſonaverunt & maletractaverunt: For which, and the Contempt to the King, he brought his Action againſt Bogo; who pleaded, That he named no perſons in certain, nor alledged that the Fact was done by his command, and demanded Judgment thereupon, and was diſcharged.

Notwithſtanding, by the King's pleaſure, for ſo enormous a Treſpaſs, done in Contempt of the Church, for the Contempt done within the Verge, and in time of Parliament, and for the bad Example,

Bogo was commanded to anſwer the King of the Treſpaſs done in his Houſe, Et per Manupaſtos & Familiares ſuos; and a day given him to produce before the King and his Council thoſe of his Family; which was accordingly done, but they who were ſaid to have done the Fact were fled.

Et

Et ſuper hoc idem *Bogo* petit Judic', ſi de p̄cepto, miſſione vel aſſenſu, ſi ſibi imponeretur ad ſectam Dñi Regis reſpondere debeat, antequam factores principales, aliquo modo de facto illo convincantur. **Whereupon Judgment was given.** Et quia per conſuetudinem & legem *Angliæ*, nullus de p̄cepto vi & auxilio aut miſſione reſpondere debeat antequam factores aliquo modo convincantur, conſideratum eſt quod p̄dict' *Bogo* ad p̄ſens eat inde ſine die, & p̄dict' *Jo. le Wallis* ſequatur verſus factores principales ꝓut ſibi viderit expediri ſi voluerit, & **ſix perſons** manuceperunt p̄dict' *Bogonem* ad habendum ipſum coram Dño Rege ad reſpondendum ipſi Dño Regi ad voluntatem ſuam, cum p̄dicti factores de facto illo fuerint convicti, ſi Dominus Rex verſus eum inde loqui voluerit.

A Judgment **in** Parliament **at the** King's Suit, **That it was againſt the Cuſtom and Law of the Kingdom, to convict a man** de p̄cepto, auxilio, aut miſſione, **in a Treſpaſs, before ſome who did the** principal Treſpaſs **were convicted.**

And the reaſon of that Law **is very preſſing, for elſe a man may be found** culpable **of** aiding **or** precepting **a** Treſpaſs **to be done, when the** Doers **of the** Treſpaſs **are acquitted, and** not culpable; **which is to be** culpable **of** aiding **the doing of a thing never done, which is impoſſible.**

It will be ſaid, The Law in that Caſe is ſince altered, and otherwiſe practiſed. **But who could alter a** Law, **affirmed by** Judgment **in** Parliament **to be the** Cuſtom **and** Law **of the Kingdom, without an** Act of Parliament **to alter it, which was not; or at leaſt an** Error **in another** Parliament, **if that might be, which is not ſo clear?**

For this is not like a Judgment **given in one Court, and after contraried in another, or in the** Chequer Chamber: **Any Law of the Kingdom might as well be altered without** Act of Parliament, **as this.**

5. **However, letting that paſs, but as the** Law **is** now **taken, no man can be guilty of** aid **or** aſſiſtance **to a** Treſpaſs not done, **and which is the ſame whereof the** Actors **are acquitted.**

But in this Caſe, they that put the Plaintiff in the Stocks **are found** Not Guilty, **and another** Defendant **found** Guilty **for** bidding him be put in the Stocks.

6. **Another Reaſon is, That** Coxe **cannot be** culpable **of a** Treſpaſs **which** cannot **or** muſt not be proved, **(which is the ſame) But by the** Statute **no regard or reſpect is to be had of the** Evidence **proving the** Treſpaſs, **if the** Fact **be not proved to be** done **where the** Action **is** laid: **Therefore there can be no**

Evidence

Evidence againſt Coxe; for Evidence not to be regarded, and not at all, is the ſame.

7. If the other Defendants cannot by the Statute be found culpable, becauſe they were aiding and aſſiſting the Conſtable, tho' in an undue execution of his Office, no more can Coxe: For Aid or Aſſiſtance may be by Direction or Precept, as well as by corporal ſtrength; and therefore, if they be free for aſſiſting to put the Plaintiff in the Stocks forcibly, Coxe is free for adviſing and bidding him be put there directively.

8. Laſtly, the Statute intends like benefit to the Defendants, when the Fact is not proved to be done where the Action is laid, as if the Plaintiff became Nonſuit, or ſuffered a Diſcontinuance: But in caſe of Nonſuit or Diſcontinuance, all the Defendants were to have their double Coſts, both by 7 and 21 Jac. For a Nonſuit or Diſcontinuance cannot be againſt ſome of the Defendants, for the Nonſuit and Diſcontinuance are of the entire Action; therefore here all the Defendants ſhall have double Coſts.

And if the Jury had not meant the Defendants equally free, or equally faulty, they would have added in their Verdict, That if upon the whole matter found, the Court ſhould think that *Actio prædicta* would lie in *London* againſt ſome of the Defendants, and not others, then they found ſuch againſt whom it might be laid in *London* Culpable, and the reſt Not culpable.

The Record is, Et p̄dictus Richardus Coxe Miles, accerſivit the Conſtable, whereas there is no p̄dictus Richardus Cox Miles, but Baronettus; and there is another p̄dictus Richardus Coxe Armiger, which makes the Verdict incertain in this point.

Quærens nil Capiat, &c.

Paſch. 21 *Car.* 2. In Banc.

William Hayes Plaintiff, and *Charles Bickerſtaff* Defendant; In Arreſt of Judgment.

CHarles Bickerſtaff being poſſeſſed of a long term of years in certain Woodlands and Coppices in Cobham in the County of Kent, demiſed, ſett, and to farm lett the ſame for ſix years, part of his term, to the Plaintiff, under a Rent, and other Reſervations, and covenanted; The Plaintiff keeping and performing the Agreements of his part to be kept and performed,

Quod p̄dictus *Willielmus Hayes* legitime haberet, teneret, & gauderet, & habere, tenere, & gaudere potuiſſet, p̄dicta dimiſſa p̄miſſa juxta conventionem p̄antea, in & per Indenturam p̄dict' dimiſſ. abſque aliquo impedimento, perturbatione, evictione, vel interruptione quacunque, de vel per dictum *Carolum Bickerſtaff*, Executores, Adminiſtratores, vel Aſſignatos ſuos, aut aliquem eorum put per Indenturam p̄dict' plenius apparet.

That by virtue of the ſaid Demiſe he entred, and was poſſeſſed; and that after, the Defendant being poſſeſſed for a longer term, granted the Reverſion to Charles Duke of Lenox, to whom the Plaintiff attorned; and that afterwards the ſaid Duke, and others by his command, entred upon the Plaintiff, (although he obſerved all Agreements of his part) and carried away many Loads of Faggots and Wood, and kept, and ſtill keeps him out of poſſeſſion, to his Damage of Eight hundred Pounds.

And brings his Action for breach of the Covenant aforeſaid.

The Defendant pleads Enjoyment according to the Demiſe, and traverſeth the Grant of the Reverſion to the Duke, modo & forma.

All Covenants between a Leſſor and his Leſſee, are either Covenants in Law, or Expreſs Covenants.

By Covenant in Law, the Leſſee is to enjoy his Leaſe againſt the lawful Entry, Eviction, or Interruption of any man, but not againſt tortious Entries, Evictions, or Interruptions, and

and the Reaſon of Law is ſolid and clear, becauſe againſt tortious Acts the Leſſee hath proper Remedy againſt the Wrong-doers.

So are the expreſs Books of 22 H. 6. where a man leaſed by Deed-poll without expreſs Covenant, and 32 H. 6. where the Leaſe was by Deed indented. 22 H. 6. f. 52. b. 32 H. 6. f. 32. b. N. Br. 145. b. Letter L.

If the Leſſor leaſeth the term by Deed-poll, and outeth the Leſſee, he ſhall have a Writ of Covenant upon that Deed-poll, altho' he hath no Indenture of it. But if a ſtranger, who hath no Right, outs the Leſſee, then he ſhall not have a Writ of Covenant againſt the Leſſor, becauſe he hath Remedy by Action againſt the ſtranger; but if a ſtranger enter by elder Title, then he ſhall have a Writ of Covenant, for he hath no other Remedy. Nat. Br.

This ſhews the Law gives no Remedy to the Leſſee upon the Covenant, when he hath a proper and natural Remedy againſt another who doth the Wrong.

By the ſame Reaſon, if the Leſſee be by expreſs Covenant to enjoy his term (or enjoy it againſt all men, which is the ſame) he ſhall not have an Action of Debt againſt the Leſſor, unleſs he be legally outed or evicted: for if he be outed tortiouſly by any ſtranger, he hath his Remedy.

So is the expreſs Book of 26 H. 6. f. 3. b. where it is agreed that the Warranty of a Leaſe for years is but an Action of Covenant, which extends not to tortious Entries, for the former Reaſon.

Yet I agree, If the Leſſor expreſly covenants that the Leſſee ſhall hold and enjoy his term without the Entry or Interruption of any, whether ſuch Entry or Interruption be lawful or tortious, there the Leſſor ſhall be charged by an Action of Covenant for the tortious Entry of a ſtranger, becauſe no other meaning can be given to his Covenant.

Accordingly the new Authorities run grounded upon that ſound and ancient Reaſon of Law, That the Leſſor ſhall not be charged with an Action upon his expreſs Covenant for enjoyment of the term againſt all men, where the Leſſee hath his proper Remedy againſt the wrong-doer.

Againſt this Truth there is one Book that hath, or may be pretended, which I will cite in the firſt place, becauſe the Anſwer to it may be more perſpicuous from the Authority I ſhall after deliver to redargue that Caſe.

Dyer 15, 16 Eliz. 328. a. pl. 8. It is the Caſe of Mountford and Catesby in the Lord Dyer: Catesby, in conſideration of a Sum of Money and a Horſe, made a Leaſe to Mountford for a term of years, Et ſuper ſe aſſumpſit, quod the Plaintiff Mountford pacifice & quiete haberet & gauderet the Land demiſed, durante termino, ſine evictione & interruptione alicujus perſonæ. After Catesby's Father entred upon him, and ſo interrupted him; whereupon Mountford brought his Action upon this Aſſumpſit, and Catesby pleaded he did not aſſume, and found againſt him. It was moved in Arreſt of Judgment for the Defendant, That the Entry might be wrongful, for which the Plaintiff had his Remedy; but diſallowed, and Judgment affirmed for the Plaintiff: Becauſe (ſaith the Book) it is an expreſs preſumption and aſſumption that the Plaintiff ſhould not be interrupted. And this Caſe is not expreſly denied to be Law in Eſſex and Tiſdale's Caſe in the Lord Hobart, as being an expreſs Aſſumption.

Tho' the L. Dyer's Caſe be an Action of the Caſe upon an Aſſumpſit, and our Caſe an Action of Covenant; yet in the nature of the Obligation there ſeems no difference, but in the form of the Action: For to aſſume that a man ſhall enjoy his term quietly, without interruption, and to covenant he ſhall ſo enjoy it, ſeems the ſame undertaking.

Poſt 121. But if the Reaſon of Law differ in an Aſſumpſit from what it is in a Covenant, as ſeems implied in Tiſdale's Caſe, then this Caſe of the Lord Dyer makes nothing againſt the Caſe in queſtion, which is upon a Covenant, not an Aſſumpſit.

Hob. f. 34, 35. 1. Elias Tiſdale brought an Action of Covenant againſt Sir William Eſſex, and declared, That Sir William convenit, pmiſit, & agreavit, ad & cum pdict' Elia, quod ipſe idem Elias haberet, occuparet & gauderet certain Lands for ſeven years, into which he entred; and that one Elſing had ejected him, and kept him out ever ſince. Reſolved, Becauſe no Title is laid in *Elſing*, he ſhall be taken to enter wrongfully, and the Leſſee hath his Remedy againſt him. Therefore adjudged for the Defendant Eſſex.

Here is a Covenant for enjoying during the term, the ſame with enjoying without interruption, (for if the enjoyment be interrupted, he doth not enjoy during the term) the ſame with enjoying without any interruption, the ſame with enjoying without interruption of any perſon; which is the Lord Dyer's Caſe: but here adjudged the interruption muſt be legal, or an Action of Covenant will not lie, becauſe there is Remedy againſt the Interrupter. So is there in the Lord Dyer's Caſe.

And

And a Rule of that Book is, That the Law ſhall never judge that a man covenants againſt the wrongful acts of ſtrangers, unleſs the words of the Covenant be full, and expreſs to that purpoſe: which they are not in our preſent Caſe, becauſe the Law defends againſt wrong.

Brocking brought an Action upon an Aſſumpſit againſt one Cham, and declared, That the Defendant aſſumed the Plaintiff ſhould enjoy certain Lands according to his Leaſe, without the lett, interruption or incumbrance of any perſon; and ſhews in fact, that this Land was extended for Debt due to the King by Proceſs out of the Exchequer, and ſo incumbred. After Verdict for the Plaintiff, it was moved in Arreſt of Judgment, That no good Breach was aſſigned, becauſe he did not ſhew that the Incumbrance was a lawful Incumbrance, for elſe he might have his Remedy elſewhere; and Judgment was given for the Defendant. Brocking verſ. Cham, Cr. 15 Jac. f. 425. p. 10.

This Caſe was upon an Aſſumpſit, as the Lord Dyer's was, and by as ample words; for the Land was to be enjoyed without any lett, which is equivalent to the words of quiete & pacifice in the Lord Dyer's Caſe; which is a Caſe in terminis adjudged contrary to that in the Lord Dyer; and upon the ſame reaſon of Law in an Aſſumpſit, as if it had been a Covenant, viz. becauſe the Plaintiff had his Remedy againſt the Wrong-doer. Ant. 120.

Chantfloure brought an Action of Covenant againſt one Priſtly and Dr. Waterhouſe, as Executors of John Mountfitchet, and declared, That the Teſtator had ſold him 29 Tuns of Copperas, and agreed, that if the Teſtator failed of payment of a certain Sum of Money upon a day certain, that the Plaintiff might quietly have and enjoy the ſaid Copperas; That the Money was not paid at the day, and that he could not have and enjoy the ſaid 29 Tuns of Copperas. Judgment was given by Nihil dicit againſt the Defendants; and upon a Writ of Enquiry of Damages, 260 l. Damages given. Upon motion in Arreſt of Judgment, it was reſolved by the whole Court, That the Breach of Covenant was not well aſſigned, becauſe no lawful Diſturbance was alledged; and if he were illegally hindred or diſturbed of having the Copperas which he had bought, he had ſufficient Remedy againſt the Wrong-doers. Cr. 45 El. f. 914. pl. 4.

Dod was bound in an Obligation to Hammond, conditioned that Hammond and his heirs might enjoy certain Copyhold-Lands ſurrendred to him. The Defendant pleaded the Surrender, and that the Plaintiff entred, and might have enjoy'd the Lands. To which the Plaintiff replied, That after his Entry, 1 Cro. p. 3.

one

one Gay entred upon him, and outed him; It was adjudged the Replication was naught, becauſe he did not ſhew that he was evicted out of the Land by lawful Title, for elſe he had his Remedy againſt the Wrong-doer.

This was in an Action of Debt upon a Bond, conditioned for quiet Enjoyment: So as neither upon Covenant, upon Aſſumpſit, or Bond conditioned for quiet enjoying, unleſs the Breach be aſſigned for a lawful Entry or Eviction, (and upon the ſame Reaſon of Law, becauſe the Leſſee may have his Remedy againſt the Wrong-doers) an Action of Covenant cannot be maintained.

Cok. 4 Rep. Nokes's Caſe. To theſe may be added a Reſolution in Nokes's Caſe in the 4th Rep. where a man was bound by Covenant in Law, That his Leſſee ſhould enjoy his term, and gave Bond for performance of Covenants: In an Action of Debt brought upon the Bond, the Breach was aſſigned, in that a ſtranger had recovered the Land leaſed in an Ejectione firmæ, and had Execution; tho' this Eviction were by courſe of Law, yet for that an elder and ſufficient Title was not alledged upon which the Recovery was had, it was no breach of the Covenant.

Inconveniencies if the Law ſhould be otherwiſe.

1. A Man's Covenant, without neceſſary words to make it ſuch, is ſtrain'd to be unreaſonable, and therefore improbable to be ſo intended; for it is unreaſonable a man ſhould covenant againſt the tortious acts of ſtrangers, impoſſible for him to prevent, or probably to attempt preventing.

2. The Covenantor, who is innocent, ſhall be charged when the Leſſee hath his natural Remedy againſt the Wrong doer: and the Covenantor made to defend a man from that from which the Law defends every man, that is, from Wrong.

Poſt 123. 3. A man ſhall have double Remedy for the ſame Injury againſt the Covenantor, and alſo againſt the Wrong-doer.

Ibid. 4. A way is opened to damage a third perſon (that is, the Covenantor) by undiſcoverable practiſe between the Leſſee and a ſtranger; for there is no difficulty for the Leſſee ſecretly procure a ſtranger to make a tortious Entry, that he may therefore charge the Covenantor with an Action.

Ap-

Application of the Reaſon of Law to the Caſe in queſtion.

1. When a man covenants his Leſſee ſhall enjoy his term againſt all men, he doth neither expreſly covenant for his enjoyment againſt tortious Acts, nor doth the Law ſo interpret his Covenant.

So here, when the Leſſor covenants the Leſſee ſhall enjoy againſt his Aſſigns, he doth not covenant expreſly againſt their tortious Acts, nor ought the Law to interpret that he doth, more than in the other Caſe.

2. It is as unreaſonable he ſhould covenant againſt the tortious Entries of his Aſſigns, as againſt the tortious Entries of other ſtrangers; for he hath no proſpect who of his Aſſigns may wrongfully eject his Leſſee, more than what other ſtranger may do it; nor any power to prevent the Tort of the one, more than of the other, as being equally unknown to him. Nor is there any ſenſible difference to be found, where a man covenants his Leſſee ſhall enjoy quietly againſt all the Johns and all the Thomaſſes in the world, than where againſt all men; for tho' the one Covenant be narrower than the other, yet the Covenantor can no more prevent the wrongs may be done by the Johns and Thomaſſes, than he can the wrongs may be done by any man; nor can the Covenantee fear more a wrong to be done by them, than by any other perſon not ſo named. Poſt 125.

3. If the Aſſignee of the Leſſor enters tortiouſly upon the Leſſee, he hath his proper and natural Remedy equally againſt him, as againſt any other ſtranger that ſo doth.

4. If the Leſſee may charge the Covenantor with an Action in this Caſe for his Aſſignee's tortious Entry, then he may be doubly ſatisfied for the ſame Damage, viz. by the Covenantor upon his Covenant, and by the Aſſignee for his Treſpaſs, which the Law permits not but in rare Caſes, and upon ſpecial Reaſons. Ant. 122.

5. The Leſſee may as well combine with ſome remote Aſſignee of the Leſſors to make a wrongful Entry, to the end to charge the Covenantor therewith upon his Covenant, as with any other ſtranger. Ant. 122.

6. Laſtly,

6. Laſtly, By the very words of this Covenant, the Leſſor cannot be charged with breach of Covenant for the tortious Entry or interruption of his Aſſignee. The words are, That the Leſſee ſhould lawfully, *legitime haberet, teneret, & gauderet, & tenere, & gaudere potuiſſet*, the premiſſes, without the lett, interruption, &c. of the Defendant, his Executors, Adminiſtrators and Aſſigns.

If the Leſſor were to be charged with the tortious Acts of his Aſſigns, there needed no more (if thoſe words would do it) than to ſay, That the Leſſee ſhould have, hold and enjoy the Lands demiſed, without interruption of the Leſſor, his Executors, Adminiſtrators; and the word *lawfully* was uſeleſs and ſenſleſs in the Covenant alſo.

But when it is ſaid, That he ſhould and might lawfully have, hold, and enjoy it againſt the Leſſor, his Executors, Adminiſtrators and Aſſigns, what other meaning can be given the words, than that he might, according to Law, enjoy it; and that the Leſſor, his Executors, Adminiſtrators or Aſſigns, ſhould not have power lawfully to hinder him?

For a man then is ſaid to enjoy a thing lawfully, when no man lawfully can hinder his enjoying it.

So as by all the Authorities cited, by all the Reaſons of Law anciently and modernly, and by the particular words of the Covenant in queſtion, the Defendant cannot be charged with breach of his Covenant for the tortious Entry of his Aſſignee upon the Plaintiff.

A Replevin brought, and the Beaſts returned Elongata, whereupon there was a Capias in Withernam, and Nine Oxen taken. The Plaintiff in the Replevin gave the Sheriff's Bailiff a Bond of Ten Pounds to ſave him harmleſs for thoſe Oxen. The Defendant in the Replevin, whoſe Beaſts they were, brought a Detinue againſt the Bailiff, and thereupon he ſued his Bond for his Damage in being diſtrained in the Detinue. This appearing to the Court, and Judgment demanded in the Action of Debt, Brintſley ſaid, Que dites vous que il doit defender encounter touts le mond? Non ferra, ne encounter nul Action, au quel vous poies aver droiture defence ſans luy per la Ley, per que aviſes vous. And ſo was the general Opinion, but it was not adjudged.

The

The difference between this Covenant and a general Covenant againſt all men.

1. It is ſaid this is not a general Covenant to enjoy againſt all men, wherein the Law is clear, but rather a Covenant againſt particular men.

2. That there is Authority, that if a man covenant for quiet Enjoyment againſt a particular perſon, that Covenant ſhall extend to the tortious, as well as legal Entries of ſuch particular perſon. Poſt 127, 128.

The Covenant in queſtion is no particular Covenant, tho' it be not the moſt general; no more is a Covenant to enjoy againſt all of the Names of Thomas and John, or againſt all men now living, or againſt all claiming under the Covenantor; yet no man conceives it more rational to charge the Covenantor for tortious Entries done by ſuch, than for the tortious Entries of men of any other Name. And it is as uncertain to the Covenantor and Covenantee who are Aſſignees, or what Aſſignee of the Leſſor will make a tortious Entry, as what other man will do it. Ant. 9, 123.

But not ſo of a particular perſon, who is in the Covenantor's proſpect to prevent, and the Covenantee's to fear.

1. In a Covenant for Enjoyment againſt all men, a man covenants for enjoyment againſt himſelf, Executors, Adminiſtrators and Aſſigns (for they are a part of all men) but not againſt their tortious Entries, more than againſt all other mens tortious Entries.

If a man covenant for enjoyment againſt his Executors, Adminiſtrators and Aſſigns, and all others, it is not a different Covenant from that of enjoyment againſt all men; for a man's Executors, Adminiſtrators and Aſſigns, and all others, are all men.

So if a man covenants for enjoyment againſt A. B. and C. and all others, it is the ſame as to covenant for enjoyment againſt all men; for A. B. and C. and all others, are all men: Therefore that difference that this is not a general Covenant, is, Differentia ſoni non ponderis, and hath no reaſon of Law to diverſifie it from a general Covenant. Moore 175.

Objections.

It was ſmartly objected by my Brother Broome, If the Leſſor ſhall not be charged upon his Covenant for the tortious Entry of his Aſſignee by this expreſs Covenant, then is the Covenant uſeleſs; for by a Covenant in Law upon the Leaſe it ſelf, he was to be charged for a legal Entry made by his Aſſignee, if this Covenant had not been at all.

I anſwer, It is not neceſſary the Leſſor and Leſſee ſhould underſtand what are Covenants in Law, and therefore they might impertinently make an expreſs Covenant which they underſtood, which was already ſupplied by an implied Covenant, which they underſtood not.

As where a Feoffment is made by Dedi & conceſſi, which is a Warranty in Law, it is not rare to have an expreſs Warranty of the ſame extent with the Warranty in Law.

But there is a more cloſe and ſolid reaſon why they are named in the Covenant; for if they had not been expreſſed, the Demiſe it ſelf had been a Covenant in Law againſt the legal Interruptions both of them, and all men elſe. But by expreſſing a Covenant againſt them, the general Covenant againſt all men is thereby reſtrained, and not enlarged againſt them; for now the Leſſor hath covenanted for enjoyment againſt the legal Evictions of himſelf, his Executors, Adminiſtrators and Aſſigns, and of no other.

This was clearly reſolved in Nokes's Caſe, where a man by his Deed granted and demiſed certain Lands for years, which Demiſe imported in it ſelf a Covenant in Law, and he further expreſly covenanted for Enjoyment, againſt himſelf and all others, claiming from or under him, which expreſs Covenant was narrower than his Covenant in Law, and gave Bond for performance of Covenants. Two points were reſolved:

1. That this Bond extended to the Covenant in Law.

2. That by the expreſs Covenant, the Covenant in Law was reſtrained, by Popham's Opinion, and all the Court.

3. It was agreed that the ſame had been reſolved before, about 14 El. in the Caſe of one Hammond; And Sir Ed. Coke in the cloſe of the Caſe ſaith, Much inconvenience would elſe happen againſt the intention of parties; the expreſs Covenants in Deeds being different from the Covenants in Law uſually.

4. It

4. It is there agreed, That it is not ſo in real Warranties as in Covenants, but it is at choice to take the Warranty in Law, or the expreſs Warranty.

Another Objection is upon the Caſe in 46 E. 3. where the Leſſor outed his Leſſee for years, and infeoffed another of the Land, who held him out. It is agreed, That the Leſſee may have a quare ejecit infra terminum againſt the Feoffee, yet his Action was good againſt his Leſſor. But this Caſe makes nothing to the preſent Caſe. 46 E. 3. f. 4.

For at the Common-Law the Leſſee had no Action but of Covenant againſt his Leſſor, or an Ejectione firmæ, at his choice.

The Quare ejecit infra terminum is given by the Stat. of Weſtm 2. c. 24. for recovery of his term againſt the Feoffee; for an Ejectione firmæ lies not againſt him becauſe he came to the Land by Title of Feoffment, and not by Tort; And this new Remedy by Statute takes not away the ancient at Common-Law; but the Common-Law gives not two Satisfactions for the ſame Injury, as it would if the Covenantor and the Treſpaſſor were both charged to anſwer the Leſſee; and ſo the Book reſolves.

The Book of 2 E. 4. f. 15. may be objected: A man infeoffed another, and entred into Bond to warrant and defend the Land for twelve years: Two Judges, the Court riſing, ſeemed to doubt whether the word defend might not extend to defend from Entries, &c.

The difference ſome take of a Covenant to enjoy againſt one or more particular men, and to enjoy againſt all men; as if in the firſt Caſe the Covenantor were to be charged for the tortious Entries of particular men, but not where the Covenant is againſt all men, I underſtand not: As if all particular men, could they be enumerated, were not the ſame with all men; and as if ſome particular men were not a part of all particular men; and the reaſon of Law is the ſame for one as for all; the party hath his Remedy againſt the Wrong doer, and the Covenant meaning no more, whether againſt one or all, than that the Leſſee ſhould have an indefeaſible Title in Law, and being but in nature of a Warranty. Ant. 125.

The Caſe which gave colour to this Opinion, That if a man covenants for enjoyment againſt a particular perſon or perſons, that he covenants as well againſt their tortious Entries as legal. Ibid.

The Caſe of Wilſon and Foſter againſt Leonard Mapes, 32 El. remembred in Tiſdale's Caſe in the Lord Hobart, and reported by Crook. Hob. f. 35. Cro. 32 El. f. 212. pl. 4.

Mapes made a Leaſe of the Parſonage of Brankiſter to Wilſon and Foſter for a year, and covenanted to ſave them harmleſs for that years Profits, againſt one Blunt, then Parſon of Brankiſter, who entred upon them, and took the Tithes.

In an Action of Covenant brought againſt Mapes by Wilſon and Foſter, tho' they did not ſet forth any good Title in Mr. Blunt for that years Profits, it was judged for the Plaintiffs, Becauſe, ſaith the Lord Hobart, the Covenant was to ſave them harmleſs for that years Profits, againſt ſuch a man particularly.

Which imported they ſhould not be damnified in that years Profits by Blunt, which was more than to warrant the Title; for Blunt might go beyond the Seas, dye inſolvent, and ſo prevent them of their Remedy for the Profits.

So in Crook it is ſaid, That the Covenant being againſt a particular man, it extends to his tortious Entries, arguendo; but there it appearing that Blunt was Parſon of the Rectory, the Court was of Opinion that his Entry was legal and good, and therefore the Covenantor in that Caſe was charged for a legal Entry, and not a wrongful. So is the Book expreſs in the end of the Caſe.

If a man upon ſale of Land refuſes to give a general Warranty againſt all men, but narrows his Warranty, and gives only againſt him and his heirs, this alters not the nature of the Warranty (as to make him any way anſwer for tortious Entries, or to ſubject him to any thing more than his Warranty againſt all men ſubjected him:) So in a Covenant upon a Leaſe for Enjoyment againſt him and his Aſſigns, (which is in the nature of a Warranty for a Chattel) he ſhall not otherwiſe be charged by his Covenant, than if he had covenanted, that is, warranted, againſt all men.

Hill.

Hill. 22 & 23 *Car.* 2. *C. B. Rot.* 680.

William Shute Plaintiff, *John Higden* Defendant; In Treſpaſs and Ejectment.

The Plaintiff declares, That Hugh Ivy Clerk, the 10th day of May, 22 Car. 2. at Wringlington demiſed to the ſaid William one Meſſuage, twenty acres of Land, twenty acres of Meadow, twenty acres of Paſture, with the Appurtenances in Wringlington; and alſo the Rectory and Pariſh-Church of Wringlington, Habendum to the ſaid William and his Aſſigns, from the 5th day of May aforeſaid, for the term of five years next enſuing. 2 Jones 18.

By virtue whereof, he entred into the ſaid Tenements and Rectory, and was poſſeſſed, until the Defendant the ſaid 10th day of May, in the ſaid year, entred upon him, and ejected him, to his Damage of Forty Pounds.

The Defendant, by words of courſe, pleads he is not culpable, and Iſſue is joined, and the Verdict was taken by default of the Defendant, and the Jury find ſpecially.

Upon the Special Verdict, the Caſe appears to be this:

John Higden the Defendant was lawfully preſented, admitted, inſtituted and inducted into the Rectory of Wringlington in the County of Somerſet, and Dioceſe of Bath and Wells, in February 1664. being a Benefice with Cure of Souls, and of clear yearly value of 50 l. per annũ, and in the King's Books of no more than 5 l. yearly; and that the Premiſſes demiſed were time out of mind, and yet are, parcel of the ſaid Rectory.

That the ſaid John Higden, being lawful Incumbent of the ſaid Church and Rectory of Wringlington, the 31ſt of March, 1669. was lawfully preſented, admitted, inſtituted and inducted into the Rectory of Elme in the ſaid County and Dioceſe, being a Benefice with Cure of Souls alſo, of clear yearly value, ultra repriſas, of 40 l. per annũ, and of the value of 10 l. per annũ in the King's Books, and ſubſcribed the Articles of

of Religion, according to the Act of the 13th of the Queen, and was lawful Incumbent of the ſaid Rectory of Elme, but after did not read the Articles of Religion within two months after his Induction in the Church of Elme, according to the Act of 13 Eliz.

Primo Maij, 1669. Hugh Ivy, Leſſor of the Plaintiff, was lawfully preſented, admitted, inſtituted and inducted into the Rectory of Wringlington, as ſuppoſed void, and performed all things requiſite for a lawful Incumbent of the ſaid Rectory to perform, both by ſubſcribing and reading the Articles of Religion, according to the Statute of 13 Eliz.

And that he entred into the ſaid Rectory and Premiſſes, and made the Leaſe to the Plaintiff, as in the Declaration.

That the ſaid Higden the Defendant did enter upon the Plaintiff the ſaid 10th of May, 1669. as by Declaration.

The Queſtions ſpoken to at the Bar in this Caſe have been two:

1. Whether the Rectory of Wringlington, being a Benefice with Cure, and of clear yearly value of 50 l. and but of 5 l. in the King's Books, ſhall be eſtimated according to 50 l. per annũ, to make an Avoidance within the Statute of 21 H. 8. by the Incumbent's accepting another Benefice with Cure?

But that is no Queſtion within this Caſe; for be it of value or under value, the Caſe will be the ſame.

2. Whether not reading the Articles according to the Statute of 13 Eliz. within two months after Induction into the Church of Elme, ſhall exclude Higden not only from the Rectory of Elme, but from the Rectory of Wringlington? which is no point of this Caſe; for whether he read or not read the Articles in the Church of Elme, he is excluded from any Right to the Church of Wringlington.

For this Caſe depends not at all upon any Interpretation of the Statute of 21 H. 8. of Pluralities: but the Caſe is ſingly this:

Higden being actual and lawful Incumbent of Wringlington, a Benefice with Cure, be it under the value of 8 l. yearly, or of the value, or more, accepts another Benefice with Cure, (the Rectory of Elme) and is admitted, inſtituted and inducted lawfully to it, be it of the value of 8 l. or more, or under.

The

The Patron of Wringlington within one month after Admiſſion, Inſtitution and Induction of Higden, the Incumbent of Wringlington, to the Rectory of Elme, preſents Hugh Ivy, the Plaintiff's Leſſor, to Wringlington, who is admitted, inſtituted and inducted thereto the ſame day; and after, as by the Declaration, enters and makes a Leaſe to the Plaintiff, who is ejected by the Defendant Higden.

The Doubt made by the Jury is, If Higden's Entry be lawful?

It hath been reſolved in Holland's Caſe, and likewiſe in Digby's Caſe, in Rep. 4. and often before, ſince the Council of Lateran, Anno Dñi 1215. That if a man have a Benefice with Cure, whatever the value be, and is admitted and inſtituted into another Benefice with Cure, of what value ſoever, having no Qualification or Diſpenſation, the firſt Benefice is *ipſo facto* ſo void, that the Patron may preſent another to it if he will.

Under Pope Innocent 3. Digby's Caſe. Vid. Bon. C. pur Pluralities. Anderſ. 1 part f. 200. b. p. 236. Vid. Moore's Rep. a large Caſe to the ſame effect, viz. Holland and Digby's Caſe.

But if the Patron will not preſent, then, if under the value, no Lapſe ſhall incur until Deprivation of the firſt Benefice, and notice; but if of the value of Eight Pounds, or above, the Patron at his peril muſt preſent within ſix months, by 21 H. 8.

As to the ſecond Queſtion, Whether the Defendant's not reading the Articles in the Church of Elme within two months after his Induction there, have excluded him not only from being Incumbent of Elme, but alſo from Wringlington? The Anſwer is,

Firſt, His not reading the Articles in the Church of Elme according to the Statute of 13. is neither any cauſe of, nor doth contribute to his not being ſtill Incumbent of Wringlington; though, as his Caſe is, he hath no Right to the Rectory of Wringlington, ſince the Admiſſion, Inſtitution and Induction of Hugh Ivy, the Plaintiff's Leſſor, into it, as hath already appeared.

Secondly, As for the Rectory of Elme, although it doth not appear that the Patron of Elme hath preſented, as he might have done, or perhaps hath, any other Clerk; or that any other is admitted and inſtituted into that Church, yet Mr. Higden can be no Incumbent there, nor can ſue for Tythes, nor any other Duty, becauſe by not reading the Articles he ſtands deprived ipſo facto.

For

For clearing this, certain Clauſes of the Act of 13 Eliz. are to be opened.

The firſt is,

Every perſon, after the end of this Seſſion of Parliament, to be admitted to a Benefice with Cure, except that within two months after his Induction he publickly read the ſaid Articles in the ſame Church whereof he ſhall have Cure, in the time of Common-Prayer there, with Declaration of his unfeigned aſſent thereto, &c. ſhall be upon every ſuch default, *ipſo facto*, immediately deprived.

There follows relative to this Clauſe,

Provided always, That no Title to confer or preſent by Lapſe, ſhall accrue upon any Deprivation *ipſo facto*, but after ſix months after notice of ſuch Deprivation given by the Ordinary to the Patron.

By theſe Clauſes, immediately upon not reading the Articles according to the Statute, the Incumbent is deprived ipſo facto.

And the Patron may preſently upon ſuch Deprivation preſent if he will, and his Clerk ought to be admitted and inſtituted; but if he do not, no lapſe incurs until after ſix months after notice of the Deprivation given to the Patron by the Ordinary, who is to ſupply the Cure until the Patron preſent.

Another Clauſe of the Statute is, No perſon ſhall hereafter be admitted to any Benefice with Cure, except he then be of the Age of Three and twenty years at the leaſt, and a Deacon, and ſhall firſt have ſubſcribed the ſaid Articles in the preſence of the Ordinary, &c.

And relative to this Clauſe there is a third, That all Admiſſions to Benefices, Inſtitutions and Inductions of any perſon, contrary to any Proviſion of this Act, ſhall be utterly void in Law, as if they never were.

Now tho' the Church of Wringlington became void immediately, of what value ſoever it were, by Admiſſion and Inſtitution of the Defendant into the Church of Elme, by the ancient Canon-Law received in this Kingdom, which is the Law of the Kingdom in ſuch Caſes, if the Patron pleaſed to preſent.

And for that the Patron accordingly did within a month after the Defendant's Admiſſion and Inſtitution into the Rectory of Elme, preſent his Clerk, Hugh Ivy, to the Church of Wringlington, who was thereto admitted, inſtituted and inducted within that time, which was a month before the Defendant was deprived for not reading the Articles in the Church of Elme.

Where-

Whereby any Intereſt the Defendant had to Wringlington was wholly avoided, as the Caſe is.

Yet if the Church of Wringlington had been under value, and the Patron had not preſented to it his Clerk before Higden's Deprivation of the Church of Elme, he might not have ſtill continued Parſon of Wringlington, as if never admitted, inſtituted or inducted to the Rectory of Elme.

But if he had not ſubſcribed the Articles before the Ordinary, upon his Admiſſion and Inſtitution to the Rectory of Elme, he had never been Incumbent of Elme, and conſequently never accepted a ſecond Benefice to diſable him of holding the firſt.

And ſo it is reſolv'd in the laſt Caſe of the Lord Dyer, 23 of the Queen, where a man having a Living with Cure under value, accepted another under value alſo, having no Qualification or Diſpenſation, and was admitted, inſtituted and inducted into the ſecond, but never ſubſcribed the Articles before the Ordinary, as the Stat. of 13 requires. Upon queſtion, Whether the firſt Living vacavit per mortem of him, or not? the Court reſolved, That the firſt Living became vacant by his death, and not by accepting the ſecond, becauſe he was never Incumbent of the ſecond, for not ſubſcribing the Articles before the Ordinary, whereby his Admiſſion, Inſtitution and Induction into the ſecond Living became void, as if they had never been.

This Caſe was urged at the Bar for the Defendant, as if his not reading the Articles within two months after his Induction into Elme, had ſtill (as in the Lord Dyer's Caſe) left him Incumbent of the firſt Living.

But that was miſtaken; for not ſubſcribing the Articles made that he never was Incumbent of the ſecond Living, and conſequently then there was no cauſe to loſe the firſt.

But the Defendant having ſubſcribed the Articles upon his Admiſſion and Inſtitution, was perfect Incumbent, *pro tempore*, of the ſecond Living, and thereby loſt the firſt, and afterwards loſt the ſecond, for not reading the Articles within two months after his Induction, ſo as he was complete Incumbent by Admiſſion, Inſtitution and Induction of the ſecond Living full two months before he loſt it.

It was upon this Clauſe of the Statute ſmartly urg'd by my Brother Baldwyn, That if the Statute makes the Defendant's Admiſſion, Inſtitution and Induction to the ſecond Living void as if they had never been; for what reaſon doth he not ſtill retain his firſt? The Anſwer is as before.

1. That his not retaining the firſt, is no effect nor conſequent of his loſing the ſecond.

But the firſt was loſt becauſe he accepted a ſecond, and the right Patron thereupon preſented to the firſt; ſo as he loſt the firſt, whilſt he was, and for being, lawful Incumbent of the ſecond, and therefore could be no effect nor conſequent at all proceeding from his loſs of the ſecond, by not reading the Articles after, more than if he had loſt the ſecond by Deprivation for Hereſie, or other cauſe.

2. The Clauſe of 13. is not, That all Admiſſions, Inſtitutions and Inductions to Benefices, where any perſon is deprived by virtue of that Act, ſhall be void as if they never were; for ſo ſhould the Clauſe have been to warrant the Objection made at the Bar.

But the Clauſe is, That all Admiſſions, Inſtitutions and Inductions made contrary to any Proviſion of the Act, ſhall be void, as if they never were.

But Higden's Admiſſion, Inſtitution and Induction to the Church of Elme, was not contrary to any Proviſion of the Act, but every way legal; but had he not ſubſcribed the Articles before the Ordinary, then his Admiſſion, Inſtitution and Induction had been contrary to the Proviſion of the Act, and ſo void, as if they never were.

The Chief Juſtice delivered the Opinion of the Court, and Judgment was given for the Plaintiff.

Buſhell's Caſe.

THe King's Writ of Habeas Corpus, dat. 9 die Novembris, 22 Car. 2. iſſued out of this Court, directed to the then Sheriffs of London, to have the Body of Edward Buſhell, by them detained in Priſon, together with the Day and Cauſe of his Caption and Detention, on Friday then next following, before this Court, to do and receive as the Court ſhould conſider; as alſo to have then the ſaid Writ in Court. Mod. 119. 184. 2 Jones 13. 3 Keb. 322.

Of which Writ Patient Ward and Dannet Foorth, then Sheriffs of London, made the Retorn following, annexed to the ſaid Writ.

That at the King's Court of a Seſſion of *Oyer and Terminer*, held for the City of *London*, at *Juſtice-Hall* in the *Old-Bailey*, *London*, in the Pariſh of S. *Sepulchres* in *Farringdon* Ward without *London*, on *Wedneſday*, 31 *die Auguſt*, 22 *Car.* 2. before Sir *Samuel Sterling* then Mayor of *London*, and divers other His Majeſty's Juſtices, by virtue of His Majeſty's Letters-Patents under the Great Seal of *England*, to them, any Four or more of them, directed, to enquire, hear and determine, according to the tenor of the ſaid Letters-Patents, the Offences therein ſpecified; and amongſt others, the Offences of unlawful Congregating and Aſſemblies, within the limits appointed by the ſaid Commiſſion within the ſaid City, as well within Liberties as without: *Edward Buſhell*, the Priſoner at the Bar, was committed to the Gaol of *Newgate*, to be there ſafely kept, under the Cuſtody of *John Smith* Knight, and *James Edwards*, then Sheriffs of the ſaid City, by virtue of a certain Order then and there made by the ſaid Court of Seſſions, as followeth:

Ordinatum eſt per Curiam hic quod Finis 40 Marcarum ſeparatim ponatur ſuper *Edwardum Buſhell*, and other Eleven perſons particularly named, and upon every of them, being the Twelve Jurors then and there ſworn, and charged to try ſeveral Iſſues, then and there joined between our Lord the King and *William Penn* and *William Meade*, for certain Treſpaſſes, Contempts, Unlawful Aſſemblies and Tumults, made and perpetrated by the

ſaid *Penn* and *Mead*, together with divers other unknown perſons, to the number of Three hundred, unlawfully and tumultuouſly aſſembled in *Grace-Church-ſtreet* in *London*, to the diſturbance of the Peace, whereof the ſaid *Penn* and *Mead* were then indicted before the ſaid Juſtices. Upon which Indictment the ſaid *Penn* and *Mead* pleaded they were not guilty. For that they the ſaid Jurors then and there the ſaid *William Penn* and *William Mead* of the ſaid Treſpaſſes, Contempts, Unlawful Aſſemblies and Tumults, Contra Legem hujus Regni *Angliæ*, & contra plenam & manifeſtam Evidentiam, & contra directionem Curiæ in materia Legis, hic, de & ſuper p̃miſſis eiſdem Juratoribus verſus p̃fatos *Will. Penn* & *Will. Mead*, in Curia hic aperte datam, & declaratam de p̃miſſis iis impoſitis in Indictamento p̃dicto acquietaverunt, in contemptum Dñi Regis nunc, Legumque ſuarum, & ad magnum impedimentum & obſtructionem Juſtitiæ, necnon ad malum exemplum omnium aliorum Juratorum in conſimili caſu delinquentium. Ac ſuper inde modo ulterius ordinatum eſt per Cur' hic quod p̃fatus *Edw. Buſhell* capiatur & committatur Gaolæ dicti Dñi Regis de *Newgate*, ibidem remanſurus quouſque ſolvat dicto Dño Regi 40 Marcas p̃ fine ſuo p̃dicto, vel deliberatus fuerit, per debitum legis curſum. Ac eodem *Edwardo Buſhell* ad tunc & ibidem capto & commiſſo exiſtente ad dictam Gaolam de *Newgate*, ſub cuſtodia p̃fat' *Johannis Smith* & *Jacobi Edwards*, adtunc Vic. Civitatis *London* p̃dict', & in eorum Cuſtodia in Gaola p̃dict' exiſtente & remanente virtute ordinis p̃dict' iidem *Johannes Smith* & *Jacobus Edwards*, poſtea in eorum exitu ab Officio Vic' Civitatis *London* p̃dict' ſcilicet 28 die *Septembris*, año 22. ſup̃dicto, eundem *Edwardum Buſhell* in dicta Gaola dicti Dñi Regis adtunc exiſtentem, deliberaverunt nobis p̃fatis nunc Vicecomitibus Civitatis p̃dict' in eadem Gaola, ſalvo cuſtodiendum, ſecundum tenorem & effectum Ordinis p̃dictæ. Et quia p̃dictus *Edwardus* nondum ſolvit dicto Dño Regi p̃dictum finem 40 Marcarum, nos iidem nunc Vicecomites corpus ejuſdem *Edwardi* in Gaola p̃dicta, hucuſque detinuimus, & hæc eſt cauſa captionis & detentionis p̃fati *Edwardi*, cujus quidem corpus coram p̃fatis Juſticiariis paratum habemus.

The Writ of Habeas Corpus is now the moſt uſual Remedy by which a man is reſtored again to his Liberty, if he have been againſt Law deprived of it.

There-

Therefore the Writ commands the Day and the Cauſe of the Caption and Detaining of the Priſoner to be certified upon the Retorn; which if not done, the Court cannot poſſibly judge whether the cauſe of the Commitment and Detainer be according to Law, or againſt it.

Therefore the cauſe of the Impriſonment ought by the Retorn to appear as ſpecifically and certainly to the Judges of the Retorn, as it did appear to the Court, or Perſon authoriſed to commit; elſe the Retorn is inſufficient, and the conſequence muſt be,

That either the Priſoner, becauſe the cauſe returned of his Impriſonment is too general, muſt be diſcharged, whenas if the cauſe had been more particularly returned, he ought to have been remanded; or elſe he muſt be remanded, when if the cauſe had been particularly returned he ought to have been diſcharg'd: both which are inconveniencies not agreeing with the Dignity of the Law. (There is a ſpecious Exception to this Rule, but doth not materially vary it, as ſhall appear.)

In the preſent Caſe it is returned, That the Priſoner being a Juryman, among others, charged at the Seſſions Court of the *Old-Bailey*, to try the Iſſue between the King and *Penn* and *Mead*, upon an Indictment for aſſembling unlawfully and tumultuouſly, did, *contra plenam & manifeſtam Evidentiam*, openly given in Court, acquit the Priſoners indicted, in contempt of the King, &c. Sid. 58.

The Court hath no knowledge by this Retorn whether the Evidence given were full and manifeſt, or doubtful, lame, and dark, or indeed Evidence at all material to the Iſſue, becauſe it is not returned what Evidence in particular, and as it was delivered, was given: for it is not poſſible to judge of that rightly, which is not expoſed to a man's judgment. But here the Evidence given to the Jury is not expoſed at all to this Court, but the Judgment of the Court of Seſſions upon that Evidence is only expoſed to us, who tell us it was full and manifeſt: but our Judgment ought to be grounded upon our own Inferences and Underſtandings, and not upon theirs.

It was ſaid by a Learned Judge, If the Jury might be fined for finding againſt manifeſt Evidence, the Retorn was good, tho' it did not expreſs what the Evidence particularly was, whereby the Court might judge of it, becauſe returning all the Evidence would be too long. A ſtrange Reaſon! For if the Law allow me Remedy for wrong Impriſonment, and that muſt be by judging whether the cauſe of it were good or not, to ſay the cauſe is

to

too long to be made known, is to say the Law gives a Remedy which it will not let me have, or I must be wrongfully imprisoned still, because it is too long to know that I ought to be freed? What is necessary to an end, the Law allows is never too long. Non sunt longa quibus nihil est quod demere possis is as true as any Axiom in Euclid. Besides, one manifest Evidence return'd had sufficed, without returning all the Evidence. But the other Judges were not of his mind.

If the Retorn had been, That the Jurors were committed by an Order of the Court of Sessions, because they did, minus juste, acquit the persons indicted.

Or because they did, contra Legem, acquit the persons indicted.

Or because they did, contra Sacramentum suum, acquit them.

The Judges cannot upon the present more judge of the legal cause of their Commitment, than they could if any of these causes, as general as they are, had been return'd for the cause of their Commitment. And the same Argument may be exactly made to justifie any of these Retorns, had they been made as to justifie the present Retorn, they being equally as legal equally as certain, and equally as far from possessing the Court with the Truth of the Cause. And in what condition should all men be for the just Liberty of their persons, if such causes should be admitted sufficient causes to remand persons to Prison?

To those Objections made by the Prisoner's Council against the Retorn, as too general.

1. It hath been said, That Institutum est quod non inquiratur de discretione Judicis.

Post 140. 2. That the Court of Sessions in London is not to be looked on as an Inferiour Court, having all the Judges Commissioners. That the Court having heard the Evidence, it must be credited that the Evidence given to the Jury of the Fact was clear, and not to be doubted.

As for any such Institution pretended, I know no such, nor believe any such, as it was applied to the present Cause; but taking it in another, and in the true sense, I admit it for truth: that is, when the King hath constituted any man a Judge under him, his ability, parts, fitness for his place, are not to be reflected on, censured, defamed, or vilified by any other person, being allowed and stamp'd with the King's Approbation, to whom

whom only it belongs to judge of the fitness of his Ministers.

And such scandalous Assertions or Enquiries upon the Judges of both Benches is forbidden by the Statute of Scandalum Magnatum, 2 R 2. c. 5. Nor must we, upon supposition only, either admit Judges deficient in their Office, for so they should never do any thing Right; nor, on the other side, must we admit them unerring in their places, for so they should never do any thing Wrong. 2 R. 2. c. 5.

And in that sense the saying concerns not the present Case.

But if any man thinks that a person concerned in Interest, by the Judgment, Action, or Authority exercised upon his Person or Fortunes by a Judge, must submit in all, or any of these, to the implied discretion and unerringness of his Judge, without seeking such redress as the Law allows him, it is a persuasion against common Reason, the received Law and Usage both of this Kingdom and almost all others.

If a Court, Inferiour or Superiour, hath given a false or erroneous Judgment, is any thing more frequent than to reverse such Judgments by Writs of False Judgment, of Error, or Appeals, according to the Course of the Kingdom?

If they have given corrupt and dishoneſt Judgments, they have in all Ages been complained of to the King in the Star-Chamber, or to the Parliament.

Andrew Horne, in his Mirror of Justices, mentions many Judges punished by K. Alfred before the Conquest, for corrupt Judgments, and their particular Names and Offences, which could not be had but from the Records of those times. Horne's Mirror, f. 296.

Our Stories mention many punished in the time of Edw. 1, Our Parliament Rolls of Edw. 3. and of Ric. 2's time, for the pernicious Resolutions given at Nottingham-Castle, afford Examples of this kind. In latter times, the Parliament-Journals of 18 & 21 Jac. the Judgment of the Ship-money in the time of Car. 1. questioned, and the particular Judges impeached. These instances are obvious, and therefore I but mention them.

In Cases of Retorns too general upon Writs of Habeas Corpus, of many I could urge, I will instance in two only.

One Astwick brought by Ha' Cor' to the King's-Bench, was returned to be committed per Mandatum Nicholai Bacon Mil', Dñi Custodis Magni Sigilli Angliæ, virtute cujusdam Contemptus in Cur' Cancellar' facti; and was presently bailed. 9 El. Moore f. 839.

One

13 Jac. Moore f. 839.

One Apsley, Prisoner in the Fleet, upon a Ha' Cor' was returned to be committed per considerationem Cur' Cancellar' p contemptu eidem Curiæ illato; and upon this Return set at liberty.

In both these Cases no enquiry was made, or consideration had, whether the Contempts were to the Law Court or Equitable Court of Chancery, either was alike to the Judges, lest any man should think a difference might arise thence.

The reason of discharging the Prisoners upon those Returns, was the generality of them being for Contempts to the Court, but no particular of the Contempt expressed, whereby the King's Bench could judge whether it were a cause for Commitment or not.

And was it not as supposable, and as much to be credited, that the Lord Keeper and Court of Chancery did well understand what was a Contempt deserving Commitment, as it is now to be credited, that the Court of Sessions did understand perfectly what was full and manifest Evidence against the persons indicted at the Sessions, and therefore it needed not to be revealed to us upon the Return?

Hence it is apparent, That the Commitment, and Return pursuing it, being in it self too general and uncertain, we ought not implicitely to think the Commitment was re vera, for cause particular and sufficient enough, because it was the Act of the Court of Sessions.

Ant. 138.

And as to the other part, That the Court of Sessions in London is not to be resembled to other inferiour Courts of Oyer and Terminer, because all the Judges are commissioned here (which is true) but few are there at the same time, and, as I have heard, when this Tryal was, none of them were present. However, Persons of great Quality are in the Commissions of Oyer and Terminer through the Shires of the Kingdom, and always some of the Judges; nor doth one Commission of Oyer and Terminer differ in its Essence, Nature, and Power from another, if they be General Commissions; but all differ in the Accidents of the Commissioners, which makes no alteration in their actings in the eye of the Law.

Another fault in the Return is, That the Jurors are not said to have acquitted the persons indicted, against full and manifest Evidence, corruptly, and knowing the said Evidence to be full and manifest against the persons indicted; for how manifest soever the Evidence was, if it were not manifest to them, and that they believ'd it such, it was not a finable fault, nor deserving

Impri-

Impriſonment, upon which difference the Law of puniſhing Jurors for falſe Verdicts principally depends.

A paſſage in Bracton is remarkable to this purpoſe, concerning attainting Inqueſts.

Committit Jurator perjurium ꝑpter falſum Sacramentum, ut ſi ex certa ſcientia aliter juraverit quam res in veritate ſe habuerit, ſi autem Sacramentum fatuum fuerit licet falſum, tamen non committit perjurium licet re vera res aliter ſe habeat quam juraverat, & quia jurat ſecundum conſcientiam eo quod non vadit contra mentem. Sunt quidam qui verum dicunt, mentiendo, ſed ſe pejerant---- quia contra mentem vadunt. Bract. l. 4. c. 4. f. 288. b.

The ſame words, and upon the ſame occaſion, are in effect in Fleta. Committit enim Jurator perjurium quandoque ꝑpter falſum Sacramentum, ut ſi ex certa ſcientia aliter juraverit quam res in veritate ſe habuerit ſecus enim ꝑpter factum quamvis falſum. Fleta. l. 5. c. 22 f. 336. n. 9.

And leſt any ſhould think that theſe paſſages are to be underſtood only of Jurymens Perjuries in foro conſcientiæ, it is clearly otherwiſe by both thoſe Books, which ſhew how, by the diſcreet Examination of the Judge, the Error of the Jury, not wilful, may be prevented and corrected, and their Verdict rectified.

And in another place of Bracton, in the ſame Chapter; Judex enim ſive Juſticiarius ad quem pertinet examinatio, ſi minus diligenter examinaverit, occaſionem ꝑbet perjurij Juratoribus. And after, Bract. l. 4. f. 289. a. 296. a.

Et ſi examinati cum juſto deducantur errore dictum ſuum emendaverint, hoc bene facere poſſunt, ante judicium & impune, ſed poſt judicium non ſine pœnâ.

After theſe Authorities,

I would know, Whether any thing be more common, than for two men, Students, Barriſters, or Judges, to deduce contrary and oppoſite Concluſions out of the ſame Caſe in Law? And is there any difference that two men ſhould infer diſtinct Concluſions from the ſame Teſtimony? Is any thing more known, than that the ſame Author, and place in that Author, is forcibly urged to maintain contrary Concluſions, and the deciſion hard which is in the right? Is any thing more frequent in the Controverſies of Religion, than to preſs the ſame Text for oppoſite Tenents? How then comes it to paſs, that two perſons may not apprehend with Reaſon and Honeſty, what a Witneſs, or many, ſay, to prove, in the underſtanding of one plainly one thing, but in the apprehenſion of the other clearly

the contrary thing? Must therefore one of these merit Fine and Imprisonment, because he doth that which he cannot otherwise do, preserving his Oath and Integrity? And this often is the Case of the Judge and Jury.

Of this mind were 10 Judges of 11; the Ch. Baron Turnor gave no Opinion, because not at the Arguments.

I conclude therefore, That this Retorn, charging the Prisoners to have acquitted Penn and Mead, against full and manifest Evidence first; and next, without saying that they did know and believe that Evidence to be full and manifest against the indicted persons, is no cause of Fine or Imprisonment.

And by the way I must here note, That the Verdict of a Jury and Evidence of a Witness are very different things, in the truth or falshood of them. A Witness swears but to what he hath heard or seen generally, or more largely to what hath fallen under his senses: but a Juryman swears to what he can infer and conclude from the Testimony of such Witnesses, by the act and force of his Understanding, to be the Fact inquired after; which differs nothing in the Reason, tho' much in the Punishment, from what a Judge, out of various Cases consider'd by him, infers to be the Law in the Question before him. Therefore Bracton,

Bra. f. 289. a. Et licet narratio facti contraria sit Sacramento, & dicto p̄cedenti, tamen falsum non faciunt Sacramentum licet faciunt fatuum Judicium, quia loquuntur secundum conscientiam quia falli possunt in Judiciis suis, sicut ipse Justiciarius.

There is one Objection, which hath been made by none as I remember, to justifie this general Return, I would give Answer to.

A man committed for Treason or Felony, and bringing a Habeas Corpus, hath return'd upon it, That he was committed for High Treason or Felony; and this is a sufficient Retorn to remand him, tho' in truth this is a general Return; For if the specifical Fact for which the party was committed, were expressed in the Warrant, it might then perhaps appear to be no Treason or Felony, but a Trespass; as in the Case of the Earl of Northumberland, 5 H. 4. questioned for Treason in raising Power; the Lords adjudged it a Trespass, for the Powers raised were not against the King, but some Subjects.

Why then by like reason may not this Retorn be sufficient, tho' the Fact for which the Prisoners stood committed particularly expressed, might be no cause of Commitment?

The

The Cases are not alike; for upon a general Commitment for Treason or Felony, the Prisoner (the cause appearing) may press for his Tryal, which ought not to be denied or delayed; and upon his Indictment and Tryal, the particular cause of his Imprisonment must appear, which proving no Treason or Felony, the Prisoner shall have the benefit of it. But in this Case, tho' the Evidence given were no full nor manifest Evidence against the persons indicted, but such as the Jury upon it ought to have acquitted those indicted, the Prisoner shall never have any benefit of it, but must continue in Prison when remanded, until he hath paid that Fine unjustly imposed on him, which was the whole end of his Imprisonment. Answ.

We come now to the next part of the Retorn, viz. That the Jury acquitted those indicted against the direction of the Court in matter of Law, openly given and declared to them in Court.

1. The words, That the Jury did acquit against the direction of the Court in matter of Law, literally taken, and de plano, are insignificant, and not intelligible; for no Issue can be joined of matter in Law, no Jury can be charged with the tryal of matter in Law barely, no Evidence ever was, or can be given to a Jury of what is Law or not; nor no such Oath can be given to, or taken by a Jury, to try matter in Law, nor no Attaint can lie for such a false Oath.

Therefore we must take off this veil and colour of words, which make a shew of being something, and in truth are nothing.

If the meaning of these words, finding against the direction of the Court in matter of Law, be, that if the Judge having heard the Evidence given in Court, (for he knows no other) shall tell the Jury upon this Evidence, The Law is for the Plaintiff, or for the Defendant, and you are under the pain of Fine and Imprisonment to find accordingly, then the Jury ought of duty so to do: Every man sees that the Jury is but a troublesome delay, great charge, and of no use in determining Right and Wrong, and therefore the Tryals by them may be better abolish'd than continued; which were a strange new-found conclusion, after a Tryal so celebrated for many hundreds of years.

For if the Judge, from the Evidence, shall by his own Judgment first resolve upon any Tryal what the Fact is, and so knowing the Fact, shall then resolve what the Law is, and order the Jury penally to find accordingly: what either necessary or convenient use can be fancied of Juries, or to continue Tryals by them at all?

But if the Jury be not obliged in all Tryals to follow such Directions, if given, but only in some sort of Tryals, (as for instance, in Tryals for Criminal matters upon Indictments or Appeals) why then the consequence will be, tho' not in all, yet in Criminal Tryals, the Jury (as of no material use) ought to be either omitted or abolished, which were the greater mischief to the people, than to abolish them in Civil Tryals.

And how the Jury should in any other manner, according to the course of Tryals used, find against the Direction of the Court in matter of Law, is really not conceptible.

True it is, if it fall out upon some special Tryal that the Jury being ready to give their Verdict, and before it is given the Judge shall ask, Whether they find such a particular thing propounded by him? or whether they find the matter of Fact to be as such a Witness or Witnesses have deposed? and the Jury answer, They find the matter of Fact to be so; if then the Judge shall declare, The matter of Fact being by you so found to be, the Law is for the Plaintiff, and you are to find accordingly for him:

If notwithstanding they find for the Defendant, this may be thought a finding in matter of Law against the Direction of Court; for in that Case the Jury first declare the Fact as it is found by themselves, to which Fact the Judge declares how the Law is consequent.

And this is ordinary when the Jury find unexpectedly for the Plaintiff or Defendant, the Judge will ask, How do you find such a Fact in particular? And upon their Answer, he will say, Then it is for the Defendant, tho' they found for the Plaintiff; or è contrario; and thereupon they rectifie their Verdict.

And in these Cases the Jury, and not the Judge, resolve and find what the Fact is.

Therefore always in discreet and lawful assistance of the Jury, the Judge's Direction is hypothetical, and upon supposition, and not positive, and upon coercion, viz. If you find the Fact thus (leaving it to them what to find) then you are to find for the Plaintiff; but if you find the Fact thus, then it is for the Defendant.

But in the Case propounded by me, where it is possible in that special manner, the Jury may find against the Direction of the Court in matter of Law, it will not follow they are therefore finable; for if an Attaint will lie upon the Verdict so given by them, they ought not to be fined and imprisoned by the Judge for that Verdict; for all the Judges have agreed upon a full

full Conference at Serjeants-Inn in this Case. And it was formerly so agreed by the then Judges, in a Case where Justice Hide had fined a Jury at Oxford, for finding against their Evidence in a Civil Cause, That a Jury is not finable for going against their Evidence where an Attaint lies; for if an Attaint be brought upon that Verdict, it may be affirmed and found upon the Attaint a true Verdict, and the same Verdict cannot be a false Verdict; and therefore the Jury fined for it as such by the Judge, and yet no false Verdict, because affirmed upon the Attaint.

Another Reason that the Jury may not be fined in such Case, is, Because until a Jury have consummated their Verdict, which is not done until they find for the Plaintiff or Defendant, and that also be entred of Record; they have time still of deliberation, and whatsoever they have answered the Judge upon an interlocutory Question or Discourse, they may lawfully vary from it if they find cause, and are not thereby concluded.

Whence it follows upon this last Reason, That upon Tryals wherein no Attaint lies, as well as upon such where it doth, no Case can be invented wherein it can be maintained that a Jury can find, in matter of Law, nakedly against the Direction of the Judge.

And the Judges were (as before) all of Opinion, That the Return in this latter part of it, is also insufficient, as in the former, and so wholly insufficient.

But that this Question may not hereafter revive, if possible, it is evident by several Resolutions of all the Judges, That where an Attaint lies, the Judge cannot fine the Jury for going against their Evidence, or Direction of the Court, without other Misdemeanor.

For in such Case, finding against, or following the Direction of the Court barely, will not bar an Attaint; but in some Case, the Judge being demanded by, and declaring to, the Jury, what is the Law, tho' he declares it erroneously, and they find accordingly, this may excuse the Jury from the forfeitures; for tho' their Verdict be false, yet it is not corrupt, but the Judgment is to be reversed however upon the Attaint; for a man loseth not his Right by the Judge's mistake in the Law. Post 148. Ingersal's C. Cr. 35 El. f. 309. n. 18.

Therefore if an Attaint lies upon a false Verdict upon Indictment not Capital (as this is) either by the Common or Statute-Law, by those Resolutions the Court would not fine the Jury in this Case for going against Evidence, because an Attaint lay.

But

But admitting an Attaint did not lie, (as I think the Law clear it did not, for there is no Case in all the Law of such an Attaint, nor Opinion but that of Thyrning's, 10 H. 4. Attaint 60, & 64. for which there is no Warrant in Law, tho' there be other specious Authority against it, touch'd by none that argued this Case)

The Question then will be, Whether before the several Acts of Parliament, which granted Attaints, and are enumerated in
Reg. f. 122. a. their order in the Register, the Judge by the Common-Law, in all Cases, might have fined the Jury finding against their Evidence, and direction of the Court, where no Attaint did lie, or could so do yet, if the Statutes which gave the Attaints were repealed?

If he could not in Civil Causes before Attaints granted in them, he could not in Criminal Causes, upon Indictment (wherein I have admitted Attaint lies not) for the fault in both was the same, viz. finding against Evidence and the direction of the Court, and by the Common-Law; the Reason being the same in both, the Law is the same.

That the Court could not fine a Jury at the Common-Law, where Attaint did not lie, (for where it did, is agreed he could not) I think to be the clearest Position that ever I consider'd, either for Authority or Reason of Law.

After Attaints were granted by Statutes generally; as, by Westm. 1. c. 38. in Pleas Real, and by 34 E. 3. c. 7. in Pleas Personal, and where they did lie at Common-Law, (which was only in Writs of Assize) the Examples are frequent in our Books of punishing Jurors by Attaint.

But no Case can be offered, either before Attaints granted in general, or after, that ever a Jury was punished by Fine and Imprisonment by the Judge, for not finding according to their Evidence and his Direction, until Popham's time; nor is there clear proof that he ever fined them for that Reason, separated from other Misdemeanor. If Juries might be fined in such Case before Attaints granted, why not since? for no Statute hath taken that power from the Judge. But since Attaints granted, the Judges resolved they cannot fine where the Attaint lies, therefore they could not fine before. Sure this latter Age did not first discover that the Verdicts of Juries were many times not according to the Judges opinion and liking.

But the Reasons are, I conceive, most clear, That the Judge could not, nor can, fine and imprison the Jury in such Cases.

Without

Without a Fact agreed, it is as impossible for a Judge or any other to know the Law relating to that Fact, or direct concerning it, as to know an Accident that hath no Subject.

Hence it follows, that the Judge can never direct what the Law is in any matter controverted, without first knowing the Fact; and then it follows, that without his previous knowledge of the Fact, the Jury cannot go against his Direction in Law, for he could not direct.

But the Judge, quà Judge, cannot know the Fact possibly, but from the Evidence which the Jury have, but (as will appear) he can never know what Evidence the Jury have, and consequently he cannot know the matter of Fact, nor punish the Jury for going against their Evidence, when he cannot know what their Evidence is.

It is true, if the Jury were to have no other Evidence for the Fact, but what is deposed in Court, the Judge might know their Evidence, and the Fact from it, equally as they, and so direct what the Law were in the Case, tho' even then the Judge and Jury might honestly differ in the result from the Evidence, as well as two Judges may, which often happens.

But the Evidence which the Jury have of the Fact is much other than that: For,

1. Being returned of the Vicinage whence the Cause of Action ariseth, the Law supposeth them thence to have sufficient knowledge to try the matter in Issue, (and so they must) tho' no Evidence were given on either side in Court; but to this Evidence the Judge is a stranger. 13 H. 7. 30. a. per Vavasor. Hob. 227.

2. They may have Evidence from their own personal knowledge, by which they may be assured, and sometimes are, that what is deposed in Court is absolutely false; but to this the Judge is a stranger, and he knows no more of the Fact than he hath learned in Court, and perhaps by false Depositions, and consequently knows nothing.

3. The Jury may know the Witnesses to be stigmatised and infamous, which may be unknown to the parties, and consequently to the Court.

4. In many Cases the Jury are to have View necessarily, in many by consent, for their better Information; to this Evidence likewise the Judge is a stranger.

Ant. 145.

5. If they do follow his direction, they may be attainted, and the Judgment reversed, for doing of that which if they had not done they should have been fined and imprisoned by the Judge, which is unreasonable.

6. If they do not follow his direction, and be therefore fined, yet they may be attainted, and so doubly punished by distinct Judicatures for the same Offence, which the Common Law admits not.

Chevin and Paramours Case, 3 El. Dyer 201. a n. 63.

A Fine reversed in Banco Regis for Infancy, per inspectionem & per testimonium del 4 fide dignorum. After, upon examination of divers Witnesses in Chancery, the supposed Infant was proved to be of age, tempore finis levati, which Testimonies were exemplified, and given in Evidence after, in Communi Banco, in a Writ of Entry in the quibus there brought. And tho' it was the Opinion of the Court that those Testimonies were of no force against the Judgment in the King's Bench, yet the Jury found with the Testimony in Chancery, against direction of the Court, upon a point in Law, and their Verdict after affirmed in an Attaint brought, and after a Writ of Right was brought, and Battle joyned.

The progress in this Writ of Right till Judgment for Paramour the Defendant, is at large 13 El. Dyer f. 301. n. 40.

7. To what end is the Jury to be returned out of the Vicinage whence the Cause of Action ariseth? To what end must Hundredors be of the Jury, whom the Law supposeth to have nearer knowledge of the Fact than those of the Vicinage in general? To what end are they challenged so scrupulously to the Array and Poll? To what end must they have such a certain Freehold, and be probi & legales homines, and not of Affinity with the parties concerned? To what end must they have in many Cases the View, for their exacter Information chiefly? To what end must they undergo the heavy punishment of the villanous Judgment, if after all this they implicitly must give a Verdict by the Dictates and Authority of another man, under pain of Fines and Imprisonment, when sworn to do it according to the best of their own knowledge?

A man cannot see by another's Eye, nor hear by another's Ear, no more can a man conclude or infer the thing to be resolved by another's Understanding or Reasoning; and tho' the Verdict be right the Jury give, yet they being not assured it is so from their own Understanding, are forsworn, at least in foro conscientiæ.

9. It

9. It is abſurd a Jury ſhould be fined by the Judge for going againſt their Evidence, when he who fineth knows not what it is, as where a Jury find without Evidence in Court of either ſide, ſo if the Jury find upon their own knowledge; as the courſe is if the Defendant plead Solvit ad diem to a Bond proved, and offers no proof, the Jury is directed to find for the Plaintiff, unleſs they know payment was made of their own knowledge, according to the Plea. 14H. 7. f. 29. per Vavaſor in Cam' Scac' without contradiction. Hob. f. 227.

And it is as abſurd to fine a Jury for finding againſt their Evidence, when the Judge knows but part of it; for the better and greater part of the Evidence may be wholly unknown to him; and this may happen in moſt Caſes, and often doth, as in Graves and Short's Caſe.

Error of a Judgment in the Common-Bench: The Error aſſigned was, The Iſſue being, Whether a Feoffment were made? and the Jurors being gone together to confer of their Verdict, one of them ſhewed to the reſt an Eſcrow ꝓ petentibus, not given in Evidence by the parties, per quod, they found for the Demandant. Upon Demurrer, adjudged no Error; for it appears not to be given him by any of the parties, or any for them; it muſt be intended he had it as a piece of Evidence about him before, and ſhewed it to inform himſelf and his Fellows, and as he might declare it as a Witneſs that he knew it to be true. They reſolved, If that might have avoided the Verdict, which they agreed it could not, yet it ought to have been done by Examination, and not by Error. Graves verſ. Short, 40 El. Cro. f. 616.

That Decantatum in our Books, Ad quæſtionem facti non reſpondent Judices, ad quæſtionem legis non reſpondent Juratores, literally taken, is true: For if it be demanded, What is the fact? the Judge cannot anſwer it; if it be asked, What is the Law in the Caſe? the Jury cannot anſwer it.

Therefore the parties agree the Fact by their pleading upon Demurrer, and ask the Judgment of the Court for the Law.

In Special Verdicts the Jury inform the naked Fact, and the Court deliver the Law; and ſo is it in Demurrers upon Evidence, in Arreſt of Judgments upon Challenges; and often upon the Judges Opinion of the Evidence given in Court, the Plaintiff becomes Nonſuit, when if the matter had been left to the Jury, they might well have found for the Plaintiff.

But upon all General Issues, as, upon Not culpable pleaded in Trespass, Nil debet in Debt, Nul tort, Nul disseisin in Assize, Ne disturba pas in Quare Impedit, and the like: tho' it be matter of Law whether the Defendant be a Trespassor, a Debtor, Disseisor or Disturber in the particular Cases in Issue, yet the Jury find not (as in a Special Verdict) the Fact of every Case by it self, leaving the Law to the Court; but find for the Plaintiff or Defendant upon the Issue to be tryed, wherein they resolve both Law and Fact complicately, and not the Fact by it self; so as tho' they answer not singly to the Question, What is the Law? yet they determine the Law in all matters where Issue is joined, and tryed in the principal Case, but where the Verdict is Special.

Hob. f. 227. To this purpose the Lord Hobart in Needler's Case against the Bishop of Wincheſter, is very apposite, —— Legally it will be very hard to quit a Jury that finds against the Law, either Common-Laws, or several Statute-Law, whereof all men were to take knowledge, and whereupon Verdict is to be given, whether any Evidence be given to them or not; as, if a Feoffment or Devise were made to one *imperpetuum*, and the Jury should find croſs, either an Estate for Life, or in Feesimple, against the Law, they should be subject to an Attaint, tho' no man informed them what the Law was in that Case.

Devant 147, 149.

The legal Verdict of the Jury to be recorded, is, Finding for the Plaintiff or Defendant. What they answer, if asked to Questions concerning some particular Fact, is not of their Verdict essentially, nor are they bound to agree in such particulars; if they all agree to find their Issue for the Plaintiff or Defendant, they may differ in the Motives wherefore, as well as Judges in giving Judgment for the Plaintiff or Defendant may differ in the Reasons wherefore they give that Judgment, which is very ordinary.

I conclude with the Statute of 26 H. 8. c. 4. That if any Jurors in *Wales* do acquit any Felon, Murderer or Accessary, or give an untrue Verdict against the King, upon the Tryal of any Traverse, Recognizance, or Forfeiture, contrary to good and pregnant Evidence ministred to them by persons sworn before the King's Justiciar: That then such Jurors should be bound to appear before the Council of the Marches, there to abide such Fine or Ransom for their Offence, as that Court should think fit.

If Jurors might have been fined before by the Law for going againſt their Evidence in matters Criminal, there had been no cauſe for making this Statute againſt Jurors for ſo doing in Wales only.

Objections out of the Ancient and Modern Books.

A Juror kept his Fellows a day and night, without any reaſon or aſſenting, and therefore awarded to the Fleet. 8 Aſſ. pl. 35.

This Book rightly underſtood is Law; That he ſtaid his Fellows a day and a night, without any reaſon or aſſenting, may be underſtood, that he would not at that time intend the Verdict at all, more than if he had been abſent from his Fellows, but wilfully not find for either ſide: In this ſenſe it was a Miſdemeanor againſt his Oath, for his Oath was truly to try the Iſſue, which he could never do that reſolved not to confer with his Fellows.

And in this ſenſe it is the ſame with the Caſe 34 E. 3. where Twelve being ſworn, and put together to treat of their Verdict, one ſecretly withdrew himſelf, and went away, for which he was juſtly fined and impriſoned; and it differs not to withdraw from a man's duty by departing from his Fellows, and to withdraw from it tho' he ſtay in the ſame Room; and ſo is that Book to be underſtood. 34 E. 3. Bra. tit. Jurors, n. 46.

But if a man differ in judgment from his Fellows for a day and a night, tho' his Diſſent may not be as reaſonable as the Opinion of the reſt that agree, yet if his Judgment be not ſatisfied, one diſagreeing can be no more criminal than four or five diſagreeing with the reſt.

2. A Juror would not agree with his Fellows for two days, and being demanded by the Judges, If he would agree? ſaid, He would firſt die in Priſon; whereupon he was committed, and the Verdict of the Eleven taken; but upon better Advice the Verdict of the Eleven was quaſh'd, and the Juror diſcharged without Fine; and the Juſtices ſaid, The way was to carry them in Carts until they agreed, and not by fining them; and as the Judges err'd in taking the Verdict of Eleven, ſo they did in impriſoning the Twelfth. And this Caſe makes ſtrongly that the Juror was not to be fined who diſagreed in Judgment only. 7 Aſſ. pl. 11

Much of the Office of Jurors, in order to their Verdict, is
36 H. 6. f. 27. Br. Jurors 18. ministerial; as, Not withdrawing from their Fellows after they are sworn; Not withdrawing after Challenge, and being try'd in before they take their Oath; Not receiving from either side Evidence after their Oath not given in Court; Not eating and drinking before their Verdict; Refusing to give a Verdict; and the like; wherein if they transgress, they are finable: But the Verdict it self, when given, is not an Act ministerial, but judicial, and according to the best of their Judgment, for which they are not finable, nor to be punished, but by Attaint.

3. The Case of 7 R. 2. Tit. Coronæ, Fitzh. 108. was cited, where, upon Acquittal of a Common Thief, the Judge said, The Jury ought to be bound to his good behaviour during his life: But, saith the Book, quære per quel Ley? But that was only gratis dictum by the Judge, for no such thing was done as binding them.

Hob. f. 114. 4. Bradshaw and Salmon's Case was urged, where a Jury had given excessive Damages upon a Tryal in an Action of Covenant, and the Court of Star-Chamber gave Damages to the Complainant almost as high as the Jury had given upon the Tryal: But the Jury who gave the Damages were not questioned: Tho', saith the Book, they might have been, because they received Briefs from the Plaintiff, for whom they gave Damages, which was a Misdemeanor; but the express Book is, That the Jury could not be punished by Information for the excessive Damages, but only by Attaint, therefore not for their false Verdict, without other Misdemeanour; which answers some other Cases alledged.

Nor can any man shew (tho' it was said) that a Jury was ever punished upon an Information, either in Law or in the Star-Chamber, where the Charge was only for finding against their Evidence, or giving an untrue Verdict, unless Imbracery, Subornation, or the like, were joined.

5. It was said, A Perjury in facie Curiæ is punishable by the Judge; and such is it, if Jurors go against their Evidence. Perhaps a Witness may be punished for Perjury in facie Curiæ, (which I will not maintain to be Law) but a Jury can never be so punished, because the Evidence in Court is not binding Evidence to a Jury, as hath been shewed.

6. Some

6. Some Records were cited of Fines p concelamento; No doubt it is an Article inquirable in every Oyer and Terminer, and one Jury may find it upon another.

7. Braynes Case was urged; but the Jurors were there fined for a manifest Combination to delude the Court, by agreeing upon two Verdicts, and concealing the latter, if the Court would be satisfied with the former. 42El. Cr. 778. Noy 171. Yelv. 13.

8. Wharton's Case, reported by two Reporters. Yelverton saith, That the Judges, whereof *Popham* was one, and a Privy-Councellor, were very angry, and fined the Jury for their Verdict, and finding against direction. Yelv. 23.

In those Reports that pass under the name of Noy's, the same Case is reported with this, That the Judges conceived the Jury had been unlawfully dealt with to give that Verdict; which, if true, the fining was lawful, and the Case therein reported short by Yelverton. Noy 48.

9. Wagstaff's Case, in the Kings-Bench lately, was the same with the present Case; but by the Record it is reasonable to think the Jurors committed some fault besides going against their Evidence, for they were unequally fined.

But however, all the Judges having, upon this Return, resolv'd, That finding against the Evidence in Court, or Direction of the Court barely, is no sufficient cause to fine the Jury, answers all these Cases, if not answered before.

10. There remains Southwell's Case, reported by Leonard; some Cases out of the Court of Wards in Lannoy's Case, reported by Serjeant Moore, f. 730. where Jurors were sent to the Fleet, or threatned to be sent, for not finding Offices according to direction of the Court. Lannoy's C. Moore 730.

1. An Inquest of Office is not subject to an Attaint.

2. It neither determines any man's Right, nor doth any party put any Tryal upon them.

3. They are only to find naked matter of fact, as the Books are of 3 H. 7. f. 10. b. and 2 H. 4. f. 5. a. but principally an Office for the King is in many cases as necessary as an Entry for a common person, without which he can never come by, or try his Right; nor can the King, without an Office, know whether he hath Right to a Ward, a Mortmain, or the like; and as it is an injury to hinder a man from his Entry, whereby his Right may be tryed, so it is not to find an Office for the King, whereby his Right may be tried; which concludes no man, but enables the King to a Tryal of his Right, and so in truth is only a finding of matter of fact, and no more. 3 H. 7. f. 10. b. 2 H. 4. f. 5. a.

There-

Therefore perhaps it may be an Offence, as of a Witness refusing his Testimony, not to find an Office for the King, when clear proof is made of the matter of Fact; but if proof be not made at all, or be altogether doubtful, or that the matter be matter of Law, the Inquest may find an Ignoramus, which a Jury upon a Tryal can never do. But of this I shall say no more, it concerning not the Case in question.

Presidents. That the Court of *Common-Pleas*, upon *Habeas Corpus*, hath discharged persons imprisoned by other Courts, upon the Insufficiency of the Retorn only, and not for Privilege.

2 Jones 13, 14. 5 Jac. Sir A. Roper's case, 12 Rep. Sir W. Chansey's C. and E. Thicknes Case, 12 Rep. 8 Jac.

Sir Anthony Roper, committed by the High Commission Court, discharged absolutely in the Common-Pleas as unlawfully committed and detained, without any mention of Privilege.

George Milton, imprisoned for Contempt, scandalous Words of the Court, and convicted of Drunkenness; the Causes resolved insufficient, and therefore dimittitur à Prisona, and the Gaoler discharged of him; but he gave Bail to attend the pleasure of the Court.

4 Car. 1.

Elizabeth Ash, committed by the High Commission, pro lenocinio, in like manner discharged; the Cause being insufficient to detain her in Prison, or to hinder her from the Privilege of that Court, but no other mention of Privilege; put in Bail.

7 Jac.

Richard Hayes, for refusing to do Penance as enjoyned, committed by the High Commission; the Cause judged insufficient to commit, but gave Bail as before; he demanded a Habeas Corpus, by reason of Privilege.

But it is to be observed, That Privilege lies only where a man is Officer of the Court, or hath a prior Suit in the Common-Pleas depending, and is elsewhere arrested to answer, and molested, that he cannot prosecute his Suit, he is then privileged justly, and without wrong, because his Prosecutor elsewhere might have sued, if he pleased, in the Common-Pleas.

All

All Privilege is either for Officers, Clerks, or Attorneys of the Court, not to be ſued elſewhere; or for perſons impleading or impleaded, having priority of Suit in the Common-Pleas, arreſted or ſued in other Juriſdictions; or for the Menial Servants of ſuch Officers.

Theſe Privileges are not detrimental to any, becauſe whoever hath occaſion to ſue an Officer, or any other having priority of Suit as before, is not reſtrained to ſue them in the Common-Pleas, but is reſtrained from ſuing elſewhere. And this is the true Privilege of the Court.

And the way of enjoying this Privilege was, by Writs of Privilege to ſuperſede the Proceeding of other Courts againſt ſuch who had the Privilege of the Common-Pleas, as is yet ordinary in the Caſes of Attorneys, Officers and Clerks.

And in ſuch Writs the Cauſe of Privilege is mentioned; and as to their Menial Servants, if not true, may be traverſed; as, 22 H. 6. 38. Debt was brought againſt Baron & Feme, and a Superſedeas out of the Chancery was caſt for the Baron, as Menial Servant to an Officer of Chancery; whereupon the Plaintiff ſaid, it was contained in the Writ that the Husband was Menial Servant to R. J. del Chancery, whereas he was not his Menial Servant; and thereupon Iſſue was taken. But Quære if the Officers appearing of Record in the Court may be traverſed?

21 H. 6. f. 26. 22 H. 6. f. 38. 34 H 6 f. 15. Vide Dyer 12 El. f. 287. pl. 48. Vid. the Superſed. for Clerks of the Court, & for Attorneys anciently, & their great difference. Reg Jud. 84. a. But now Attorneys are inroll'd as well as Officers.

Hence it follows, tho' Proceeding in other Courts againſt a perſon privileged in Banco might be ſuperſeded, yet it was when the matter proceeded upon in ſuch Courts might as well be proſecuted in the Common Bench: But if a privileged perſon in Banco were ſued in the Eccleſiaſtical Courts, or before the High Commiſſion, or Conſtable and Marſhal, for things whereof the Common Pleas had no Conuſance, they could not ſuperſede that Proceeding by Privilege. And this was the ancient reaſon and courſe of Privilege.

1. Another way of Privilege, by reaſon of Suit depending in a Superiour Court, is, when a perſon impleading or impleaded, as in the Common Bench, is after arreſted in a Civil Action or Plaint in London, or elſewhere, and by Habeas Corpus is brought to the Common-Pleas, and the Arreſt and Cauſe returned: if it appear to the Court, that the Arreſt in London was after the party ought to have had the Privilege of the Common-Pleas, he ſhall have his Privilege allowed, and be diſcharged of his Arreſt, and the party left to pro-

prosecute his cause of Action in London in the Common-Pleas, if he will.

2. If the cause of the Imprisonment returned be a lawful cause, but which cannot be prosecuted in the Common-Pleas, as Felony, Treason, or some cause wherein the High Commission, Admiralty, or other Court, had power to imprison lawfully, then the party imprisoned, which did implead, or was impleaded in the Common-Bench before such Imprisonment, shall not be allowed Privilege, but ought to be remanded.

3. The third way is, when a man is brought by Ha' Cor' to the Court, and upon return of it, it appears to the Court that he was against Law imprisoned and detained, tho' there be no cause of Privilege for him in this Court, he shall never be by the Act of the Court remanded to his unlawful Imprisonment; for then the Court should do an act of Injustice, in imprisoning him de novo against Law, whereas the Great Charter is, Quod nullus liber homo imprisonetur nisi per legem terræ. This is the present Case, and this was the Case upon all the Presidents produced, and many more that might be produced, where upon Ha' Cor' many have been discharged and bailed, tho' there was no cause of Privilege in the Case.

This appears plainly by many old Books, if the reason of them be rightly taken: For, insufficient causes are as no causes returned; and to send a man back to Prison for no cause returned, seems unworthy of a Court.

9 H. 6. 54, 58. Br. n. 5. 14 H. 7. f. 6. n. 19. 9 E. 4. 47. n. 24. 12 H. 4. f. 21. n. 11. Br.

If a man be impleaded by Writ in the Common-Pleas, and is after arrested in London upon a Plaint, there upon a Ha' Cor' he shall have Privilege in the Common-Pleas, if the Writ upon which he is impleaded bear date before the Arrest in London, and be returned, altho' the Plaintiff in the Common-Pleas be Nonsuit, Essoin'd, or will not appear, and consequently the Case of Privilege at an end, before the Corpus cum causa returned; but if the first Writ be not returned, there is no Record in Court that there is such a Defendant.

The like where a man brought Debt in Banco, and after for the same Debt arrested the Defendant in London, and became Nonsuit in Banco; yet the Defendant, upon a Ha' Cor', had his Privilege, because he had cause of Privilege at the time of the Arrest, 14 H. 7. 6. Br. Privilege, n. 19.

The like Case, 9 E. 4. where a man appeared in Banco, by a Cepi corpus, and found Mainprise, and had a day to appear in Court, and before his day was arrested in London, and brought a Corpus cum causa in Banco Regis, at which day the Plaintiff became

came Nonsuit, yet he was discharged from the Serjeant at London, because his Arrest there was after his Arrest in Banco, and consequently unlawful, 9 E. 4. f. 47. Br. Privil. 24. and a man cannot be imprisoned at the same time lawfully in two Courts. Coke Magna Charta, f. 53, & 55.

The Court of King's Bench cannot pretend to the only discharging of Prisoners upon a Habeas Corpus, unless in case of Privilege, for the Chancery may do it without question.

And the same Book is, That the Common-Pleas or Exchequer may do it, if upon Return of the Habeas Corpus it appear the Imprisonment is against Law. 3 Mod. 198.

An Ha' Cor' may be had out of the King's Bench or Chancery, tho' there be no Privilege, &c. or in the Court of Common-Pleas or Exchequer, for any Officer or privileg'd person there; upon which Writ the Gaoler must return by whom he was committed, and the cause of his Imprisonment; and if it appeareth that his Imprisonment be just and lawful, he shall be remanded to the former Gaoler; but if it shall appear to the Court that he was imprisoned against the Law of the Land, they ought, by force of this Statute, to deliver him; if it be doubtful and under consideration, he may be bailed. The King's Bench may bail, if they please, in all cases; but the Common Bench must remand, if the cause of the Imprisonment return'd be just. Mic. C. 2. Coke f. 55. 2 Jones 13, 14

The Writ de homine replegiando is as well returnable in the Common-Pleas as in the King's Bench.

All Prohibitions for incroaching Jurisdiction, issue as well out of the Common-Pleas as King's Bench.

Quashing the Order of Commitment upon a Certiorari, which the King's Bench may do, but not the Common-Pleas, is not material in this Case.

1. The Prisoner is to be discharged or remanded barely upon the Return, and nothing else, whether in the King's Bench or Common-Pleas.

2. Should the King's Bench have the Order of Commitment certified and quash'd before the Return of the Habeas Corpus, or after, what will it avail the Prisoners? they cannot plead Nul tiel Record in the one case or the other.

3. In all the Presidents shewed in the Common-Pleas, or in any that can be shewed in the King's Bench, upon discharging the Prisoner by Habeas Corpus, nothing can be shewed of quashing the Orders or Decrees of that Court that made the wrong Commitment.

Glanvill's C. Moore, f. 836.

4. It is manifest, where the King's Bench hath upon Ha' Cor' discharged a Prisoner committed by the Chancery, the person hath been again re-committed for the same cause by the Chancery, and re-deliver'd by the King's Bench; but no quashing of the Chancery Order for Commitment ever heard of.

5. In such Cases of re-commitment, the party hath other and proper Remedy, besides a new Habeas Corpus, of which I shall not speak now.

6. It is known, that if a man recover in Assize, and after in a Re-disseisin, if the first Judgment be reversed in the Assize, the Judgment in the Re-disseisin is also reversed. So if a man recover in Waste, and Damages given, for which Debt is brought (especially if the first Judgment be reversed before Execution) it destroys the Process for the Damages in Debt, tho' by several Originals. But it may be said, That in a Writ of Error in this kind, the foundation is destroy'd, and no such Record is left.

Drury's Case 8 Rep.

But as to that in Drury's Case, 8 Rep. an Outlawry issued, and Process of Capias upon the Outlawry; the Sheriff returned, Non est inventus, and the same day the party came into Court, and demanded Oyer of the Exigent, which was the Warrant of the Outlawry, and shewed the Exigent to be altogether uncertain and insufficient, and consequently the Outlawry depending upon it to be null. And the Court gave Judgment accordingly, tho' the Record of the Outlawry were never reversed by Error; which differs not from this Case, where the Order of Commitment is judicially declared Illegal, tho' not quashed or reversed by Error, and consequently whatever depends upon it, as the Fine and Commitment doth; and the Outlawry in the former Case was more the King's Interest, than the Fine in this.

The Chief Justice delivered the Opinion of the Court, and accordingly the Prisoners were discharged.

Hill.

Hill. 23 & 24 *Car.* 2. *B. C. Rot.* 615.

Edmund Sheppard Junior, Plaintiff; In Treſpaſs, againſt *George Goſnold*, *William Booth*, *William Haygard*, and *Henry Heringold*, Defendants. Suff. ff.

The Plaintiff declares for the forcible taking and carrying away, at Gyppin in the ſaid County, the Eight and twentieth of January, 22 Car. 2. Five and twenty hundred and three quarters of a hundred of Wax of the ſaid Edmund's, there found, and keeping and detaining the ſame under Arreſt, until the Plaintiff had paid Forty nine ſhillings to them the ſaid Defendants, for the delivery thereof, to his Damage of 40l. Mod. 224.

The Defendants plead Not Culpable; and put themſelves upon the Country, &c. The Jury find a Special Verdict.

1. That before the Caption, Arreſt and Detention of the ſaid Goods, and at the time of the ſame, Edmund Sheppard the younger was and is Lord of the Manor of Bawdſey in the ſaid County, and thereof ſeized in his Demeſne, as of Fee; and that he, and all thoſe whoſe Eſtate he hath, and had at the time of the Treſpaſs ſuppoſed, in the ſaid Manor, with the Appurtenances, time out of mind had, and accuſtomed to have, all Goods and Chattels wreck'd upon the high Sea, caſt on ſhoar upon the ſaid Manor, as appertaining to the ſaid Manor

2. They further ſay, The ſaid Goods were ſhipped in Foreign parts, as Merchandiſe, and not intended to be imported into England, but to be carried into other Foreign parts.

3. That the ſaid Goods were wreck'd upon the High Sea, and by the Sea-ſhoar, as wreck'd Goods caſt upon the Shoar of the ſaid Manor, within the ſame Manor, and thereby the ſaid Edmund ſeiſed as Wreck belonging to him as Lord of the ſaid Manor.

They further find, That at the Parliament begun at Weſt-
Cap. 4. minſter the Five and twentieth day of April, the Twelfth of the King, and continued to the Nine and twentieth of December following, there was granted to the King a Subſidy called Poundage,

Of all Goods and Merchandiſes of every Merchant, natural-born Subject, Denizen and Alien, to be exported out of the Kingdom of *England*, or any the Dominions thereto belonging, or imported into the ſame by way of Merchandiſe, of the value of Twenty ſhillings, according to the particular Rates and Values of ſuch Goods and Merchandiſes, as they are reſpectively rated and valued in the Book of Rates, entituled, *The Rates of Merchandiſe*, after in the ſaid Act mentioned and referred to, to One ſhilling, *&c.*

Then they ſay, That by the Book of Rates, Wax inward, or imported, every hundred weight, containing One hundred and twelve pounds, is rated to Forty ſhillings, and hard Wax the pound Three ſhillings four pence.

They find, at the time of the Seiſure of the Goods, That the Defendants were the King's Officers, duly appointed to collect the Subſidy of Poundage by the ſaid Act granted; And that for the Duty of Poundage, not paid at the ſaid time, they ſeiſed and arreſted the ſaid Goods until the Plaintiff had paid them the ſaid Fine of Forty nine ſhillings.

But whether the Goods and Chattels aforeſaid, ſo as aforeſaid wreck'd, be chargeable with the ſaid Duty of Poundage or not, they know not.

And if not, They find the Defendants Culpable, and aſſeſs Damages to the Plaintiff to Nine and forty ſhillings, ultra miſas & cuſtagia.

And if the ſaid Goods be chargeable with the ſaid Duty, They find the Defendants Not culpable.

It is clear, That formerly, in the times of Henry the Eighth, Queen Mary, and Queen Elizabeth, it was ſuppoſed that ſome Cuſtoms were due by the Common-Law, (wherein the King had an Inheritance) for certain Merchandiſe to be tranſported out of the Realm; and that ſuch Cuſtoms were not originally due by any Act of Parliament. So is the Book, 31 H. 8. Dyer 31 H 8. 45. b. n. 22.

It was the Opinion likewiſe of all the Juſtices in the Chequer Chamber, when Edward the Sixth had granted to a Merchant Alien, that he might tranſport or import all ſorts of Merchandiſe, not exceeding in the value of the Cuſtoms and Subſidies thereof Fifty pounds, paying only to the King, his Heirs and Succeſſors, p Cuſtumis Subſidiis, & oneribus quibuſcunque, of ſuch Merchandiſes, ſo much, and no more, as any Engliſh Merchant was to pay.

That this Patent remained good for the old Cuſtoms, wherein the King had an Inheritance by his Prerogative, but was void by the King's death, as to Goods cuſtomable for his life only, by the Statute of Tonnage, &c. Dyer 1 Mar. f. 92. a. n. 17.

So upon a Queſtion raiſed upon occaſion of a new Impoſition laid by Queen Mary upon Clothes, the Judges being conſulted about it, 1 Eliz. the Book is, Dyer 1 Eliz. f. 165. a. b. n. 57.

Nota, That *Engliſh* Merchants do not pay at Common Law any Cuſtom for any Wares or Merchandiſes whatever, but three, that is, Wools, Woolfells, and Leather; that is to ſay, *pro quolibet ſacco Lanæ continent'* 26 *pierres*, & *cheſcun pierr* 14 *pound*, *un demy Marke*, and for three hundred Woolfells half a Mark, and for a Laſt of Leather Thirteen ſhillings four pence; and that was equal to Strangers and *Engliſh* Merchants. 2 Inſt.

This was, in thoſe ſeveral Reigns, the Opinion of all the Judges of the times; whence we may learn how fallible even the Opinion of all the Judges is, when the matter to be reſolved muſt be cleared by Searches not common, and depends upon Caſes not vulgarly known by Readers of the Year-Books.

For ſince theſe Opinions, it is known, thoſe Cuſtoms, called the Old, or Antiquæ Cuſtumæ, were granted to King Edward the Firſt, in the third year of his Reign, by Parliament, as a new thing, and was no Duty belonging to the Crown by the Common Law. Poſt 407.

But

But the Act of Parliament it ſelf, by which this Cuſtom was granted, is no where extant now, but undeniable Evidence of it appears:

For King Edward the Firſt, by his Letters-Patents, dated November, the Third of his Reign, reciteth, Cum Prælati, Magnates, & tota Communitas, quandam novam conſuetudinem nobis, & hæredibus noſtris de Lanis, Pellibus & Coriis, viz. de ſacco Lanæ dimidium Marcæ, de 300 Pellibus dimidium Marcæ, & de laſto Corii 13 s. 4 d. conceſſerint, &c. Whence Sir Edward Coke rightly obſerves, the Grant was to Edward the Firſt himſelf, and his heirs, from the words, Nobis & hæredibus noſtris, in the Patent.

Cok. Mag. Chart. c. 30. f. 58, 59.

2. That no ſuch Cuſtom was before, from the words, quandam novam cuſtumam, and ſome other pertinent Obſervations he makes.

And he cites the year of the Letters Patents truly, to be the Third Year of Edward the Firſt, which was the year of the Statute of Weſtminſter the Firſt; but he makes the date of the Letters Patents to be November the Tenth of that Year, which in truth was November the Fifteenth. He cites likewiſe the Patent-Rolls of Edward the Firſt for it, M. 1. but omits the n. which is n. 1. alſo. He alſo cites the Fine-Roll of 3 E. 1. to the ſame purpoſe, M. 26.

Rot Pat. 3 E. 1. M. 1. n. Rot. Finium, 3 E. 1. M. 24.

But his Citation differs in remarkable things from the Patent-Roll, 3 E. 1. which runs, Cum Prælati, & Magnates, & tota Communitas Mercatorum Regni noſtri, (and not tota Communitas) nobis conceſſerint quandam novam Conſuetudinem de Lanis, Pellibus & Coriis, tam in Anglia, quam in Hibernia & Wallia, Regnum noſtrum exeuntibus (which are omitted alſo in Sir Edward Coke) in perpetuum nobis, & hæredibus noſtris, capiendam ſicut in forma inde proviſa, & communiter conceſſa plenius continetur; and the particulars are mentioned of the Grant.

It appears by the Preface of it, the Statute of Weſtminſter the Firſt was made 3 E. 1. A ſon primer Parlement general apres ſon Coronment, lendemaine de la clauſe de Paſchæ, that is, on the Monday of Eaſter utas, in the third year of his Reign; ſo as there was no Parliament of Edward the Firſt before this his third year. The Antiquæ Cuſtumæ upon Wools, Wool-fells and Leather, were granted to Edward the Firſt by Parliament, as appears both by the Patent and Fine-Rolls of 3 E. 1. dated November the Fifteenth, which muſt be by a Parliament before the date of the Letters Patents. Whence it follows, they were granted

granted by the Statute of Weſtminſter the Firſt, or by the ſame Parliament, and probably therefore it was by a Rider (as Proviſoes now uſually are) annexed, by tacking to the Bill or Law of Weſtminſter the Firſt, and from it after caſually loſt.

So as it is now clear, that Antiqua Cuſtuma upon Wools, Pells and Leather, was not by the Common-Law, but by Act of Parliament, 3 E. 1.

And if any ſcruple remained of a Power at Common-Law to charge Merchandiſe in any other manner, the Act of the 12th of the King, which grants him Tonnage and Poundage, clears it from queſtion in theſe words, And becauſe no Rates can be impoſed upon Merchandiſe imported or exported by Subjects or Aliens, but by common conſent in Parliament, it enacts, That Rates upon Merchandiſe ſhall be according to the Book of Rates eſtabliſh'd by the Act, &c.

Upon this Suppoſition, That by the Common-Law Merchandiſe might be charged with Cuſtom, as Wools, Pells and Leather were, Queen Mary by her Abſolute Prerogative, laid an Impoſition of Fourteen pence upon a Cloth tranſported by Natives, and One and twenty pence by Strangers, as appears in Dyer, 1 Eliz. Dyer 1 Eliz. f. 165. b. 2 Inſt.

And upon the ſame ground King James, about the 12th of his Reign, laid an Impoſition upon Currans; but theſe obtained not for Law: And ſo poſſibly like Impoſitions might be laid on Wax, or any other Merchandiſe, but no ſuch were laid de facto, unleſs by the Grants of Tonnage and Poundage to the Kings for life by Parliament. 2 Inſt.

Nor is it a true Inference, That if the Antiquæ Cuſtumæ were at Common-Law, (as every thing in one ſenſe is taken for Common-Law, if it be Law, when it appears not to be by Act of Parliament) therefore it was by Arbitrary Impoſition of the King; for it might be by Act of Parliament not extant, as this of 3 E. 1. And in truth moſt of the Common-Law cannot be conceived to be Law, otherwiſe than by Acts of Parliament, or Power equivalent to them, whereof the Rolls are loſt; for always there was a power and practiſe of making new Laws. Spelm. Law terms, 99. Poſt 358.

1. But it is not pretended that any Cuſtom is laid upon Wax in any manner by the Common-Law, nor by Statute, but by that of Tonnage and Poundage the 12th of this King.

2. This

2. This Seiſure and Arreſt appears by the Special Verdict to be for Poundage, according to the Book of Rates, by the Statute made the twelfth of the King, cap. 4. which gives Two ſhillings to the King for every hundred weight of Wax, and therefore not for any other Duty.

3. At the Common-Law, Wreck'd Goods (as theſe are found to be) could not be chargeable with Cuſtom (if other Goods were) for at the Common-Law all Wreck was wholly the King's, and he could not have a ſmall Duty of Cuſtom out of that which was all his own: And by Weſtminſter the firſt, Where Wreck belongeth to another than to the King, he ſhall have it in like manner, that is, as the King hath his.

Weſt. 1. c. 4. Vid. Stat.

It remains clear then, that Wax is a Merchandiſe ſubject to pay the Duty of Poundage by, and according to, the Act of the twelfth of this King, and not otherwiſe.

The Queſtion then before us (being narrowed) will be, Whether Wax, or any other Goods ſubject to the Duty of Tonnage and Poundage by the Act and Book of Rates the twelfth of the King, ſhipp'd in Foreign Parts, as Merchandiſe not intended for England, but for other Foreign Parts, proving to be Wreck, and caſt by the Sea upon a Manor to which Wreck belongs by Preſcription, ought to anſwer the Duty of Tonnage and Poundage, as if imported as Merchandiſe in Ships, and not as Wreck? for if any kind of Merchandiſe wreck'd be ſubject to the Duty, all Merchandiſe mentioned in the Book of Rates is.

Molloy 241, 242.

To reſolve this Queſtion, I ſhall obſerve, that all Wreck caſt on ſhoar in the Kingdom, muſt be conceived as Goods imported; for tho' Goods exported may be wreck'd at Sea equally as Goods to be imported, yet Goods exported, if wreck'd, are not caſt upon any ſhoar of the Kingdom as Wreck, under the notion of being Exported, but under the notion of being ſome way Imported.

So as in this Queſtion of Wreck, to ſpeak of any Goods or Merchandiſe, quatenus Exported, will be uſeleſs.

And becauſe the Reſolution of this Caſe depends upon the words and intendment of the Act of 12th of the King, cap. 4. And that if any Merchandiſe in kind, ſubject to the Duties by that Act, proving Wreck, caſt on ſhoar, may be charged with the Duty, every Merchandiſe within the Act, proving Wreck, will be charged with it; and if any wreck'd Goods be free, all wreck'd Goods are free; for the Act makes no difference in the kinds or ſpecies of the Merchandiſe.

I ſhall therefore recite ſome Clauſes of the Act. The firſt is, That there is given to the King of every Tun of Wine of the growth of *France*, or of any the Dominions of the *French* King, that ſhall come into the Port of *London*, and the Members thereof, by way of Merchandiſe, by your natural-born Subjects, the Sum of Four pounds and ten ſhillings of current *Engliſh* Money, and ſo after that rate. And by Strangers and Aliens Six pounds of like Money. 12 Car. 2. c. 4.

And of every Tun of like Wines, which ſhall be brought into all and every the other Ports and places of this Kingdom, and the Dominions thereof, by way of Merchandiſe, by your natural-born Subjects, the Sum of Three pounds; and by Aliens Four pounds and ten ſhillings.

From thoſe words I obſerve, That Wines liable to pay Tonnage by the Act, muſt have theſe Properties:

1. They muſt be Wines which ſhall come or be brought into the Ports and places of the Kingdom.

2. They muſt come or be brought into ſuch Ports or places as Merchandiſes, that is, for ſale, and to that end; for no other conception can be of Goods brought as Merchandiſe.

3. They muſt come and be brought as Merchandiſe, and for ſale, by the King's natural-born Subjects, or by Strangers and Aliens, as diſtinguiſhed from the natural Subjects.

4. The Duty payable to the King is to be meaſured by the quality of him that imports the Commodity; that is, if the Importer be a natural Subject, he pays leſs to the King; and if an Alien, more.

5. All thoſe Wines, charged with the Duty by the Act, ſo to come or be brought into the parts or places of the Kingdom, are to be Foreign; as, of the growth of France, the Levant, Spain, Portugal, Rheniſh Wines, or of the growth of Germany.

1. Whence it follows, that Wines of Foreign growth, and which by their kind are to pay Duty, if they ſhall come or be brought into the parts or places of the Kingdom, neither by the King's natural Subjects nor by Aliens, they are not chargeable with the Duties of this Act.

2. If they be not brought into the Ports and places of the Kingdom as Merchandiſe, viz. for ſale, they are not chargeable with the Duty.

But Wines, or other Goods, coming or brought into the Realm as Wreck, are neither brought into the Kingdom by any the King's natural Subjects, nor by any Strangers, but by the Wind and Sea; for ſuch Goods want a Proprietor until the Law appoints one.

3. Wreck'd Goods are not brought into the Kingdom, being caſt on ſhoar, as Merchandiſe, viz. for ſale, but are as all other the Native Goods of the Kingdom, indifferent in themſelves, for ſale, or other uſe, at the pleaſure of the Proprietor.

4. All Goods, Foreign or Domeſtick, are in their nature capable to be Merchandiſe, that is, to be ſold; but it follows not thence, that whereſoever they are brought into the Kingdom, they are brought as Merchandiſe, and to be ſold, or ſhould pay Cuſtom; for they are transferred from place to place more for other uſes than for ſale.

Nor are Goods which are brought to the Markets of the Kingdom to the end to be ſold, therefore to pay Cuſtom; for ſo all the Goods of the Kingdom would be cuſtomable: but they muſt be Goods brought ab extra, within the intention of the Act, or for Exportation to be carried out of the Kingdom.

5. All Goods charged with the Duties of the Act, muſt be proprieted by a Merchant natural-born or Merchant Alien, and the greater or leſs Duty is to be paid, as the Proprietor is an Alien or Native Merchant; for ſo are the words of the Act in the Clauſe for Poundage of all manner of Goods and Merchandiſe of every Merchant natural-born Subject, Denizen and Alien, to be brought into the Realm, of the value of every Twenty ſhillings of the ſame Goods, according to the Book of Rates.

But wreck'd Goods are not the Goods of any Merchant, natural-born, Alien or Denizen, whereby the Duty payable ſhould be either demanded, diſtinguiſhed or paid.

Therefore a Duty impoſſible to be known can be no Duty; for civilly, what cannot be known to be, is as that which is not.

Grotius l. 2. cap. 10. §. 11.

And it is a poor ſhift to ſay, The Lord of the Manor, who hath the Wreck, is Merchant Proprietor; for if ſo, I ask, Is he an Alien Merchant Proprietor, or a Native?

If

If he be a natural Subject, (as he muſt be, having his Manor) he cannot be an Alien, and conſequently the King can have no Alien Duty of wreck'd Goods; but Goods intended by the Act to be charged with the Duty, might be indifferently the Goods of Aliens or Natives. But to clear this more, put the Caſe,

The Act had only charged Merchandiſe imported by Aliens, and not by Natives, with the Duty;

Then the King could have had no Duty from wreck'd Goods at all; for they could not be the Goods of an Alien Merchant: Nor is Wreck brought into the Manor by the Lord, more than a Waif or Eſtray is, which if brought thither by him, is no Waif or Eſtray.

Beſides, it is clear, the Lord of a Manor is no more a Merchant, Native or Alien, by reaſon of the Property he hath in Wreck Goods, than he is a Merchant, Native or Alien, by the Property he hath in his Horſes or Cows; for his Property in a Wreck is not qua Merchant of any kind, but qua Lord of his Manor; and every Proprietor of Goods, by what Title ſoever, is as much Merchant as he.

6. All Goods ſubject to the Duty of Tonnage and Poundage, may be forfeited by the Diſobedience and Misbehaviour of the Merchant-Proprietor, or thoſe truſted by him, by the Act: The words are, If any Merchandiſe, whereof the Subſidies aforeſaid ſhall be due, ſhall at any time be brought from the parts beyond the Sea into any Port, Place or Creek of this Realm, by way or Merchandiſe, and unſhipped to be laid on Land, the Duties due for the ſame not paid, nor lawfully tendered, nor agreed for, according to the true meaning of this Act, then the ſame Goods and Merchandiſes ſhall be forfeit to your Majeſty.

1. But wreck'd Goods cannot be imported into any Creek or Place of the Realm by way of Merchandiſe, and unſhiped to be laid on Land; for if ſo imported and unſhiped, to be laid on Land, it is no Wreck, and therefore are not Goods forfeitable by the Misbehaviour of any within the Act, and conſequently not Goods intended to be charged with the Duties by the Act.

2. By this Clauſe the Owner or Proprietor of Goods chargeable with the King's Duty is to pay or agree for the Duty with the Cuſtomers before the unſhiping or landing of the Goods, elſe they are forfeited.

Et ſunt alia quædam quæ nullius bonis eſſe dicuntur ſicut Wreccum Maris, groſſus piſcis, &c. Bract. l. 3. de Coron. f. 120. c. 3. n. 4. Conſtable's Caſe, 5 Rep. f. 108. b.

But wreck'd Goods are caſt on Land, and conſequently landed, having no Owner or Proprietor, and therefore the Duty impoſſible to be paid or agreed for before their landing; and when ſo landed, and not before, the Law makes the King or Lord of the Manor their Proprietor; but not fully neither, until after a year and a day allowed to the firſt Owners to claim them, if any ſuch be, by Stat. Weſtminſter the Firſt, cap. 4.

Whence it follows, That Wrecks ſhould be rather forfeited to the King (which is not pretended) as Goods landed (the King's Duty not paid or agreed for) then ſeized until payment were according to the Act.

3. By this Clauſe, Imported Goods, intended to be charged by the Act, are Goods to be brought from the parts beyond the Seas.

And therefore alſo wreck'd Goods are not to pay the Duty; for the Native Commodities of the Kingdom, Shipwreck'd in their paſſage by Sea for Exportation, may be imported into the Realm as Wreck, yet never brought from the parts beyond the Sea, as the Clauſe intends Goods charged ſhould be.

4. Goods caſt into the Sea to unburden a Ship in a Storm, and never intended for Merchandiſe, are Wreck, when caſt on ſhoar without any Shipwreck.

Bract. l. 2. f 41. b.

5. Goods derelicted, that is, deſerted by the Owners, and caſt into the Sea, which happens upon various occaſions, as coming from infected Towns or places, and for many other reſpects, will be Wreck if caſt on ſhoar afterwards, tho' never purpoſed for Merchandiſe: (But Goods caſt over-board to lighten a Ship, are not by Bracton, nor from him in Sir H. Conſtable's Caſe, eſteemed Goods derelicted; which is a Queſtion not throughly examined.) Si autem ea mente ut nolit eſſe Dominus, aliud erit per Bract.

Bract. l. 2. f. 41. b. n. 3. Conſtable's Caſe, 5 Rep. Bract. l. 3. de Coron. c. 3. n. 5 f. 120. a. more fully.

But by all the Clauſes of the Act, Goods imported into the Realm as Merchandiſe only are to pay the King's Subſidy, therefore not Wreck imported, and not as Merchandiſe.

6. If

6. If a Law were made, That Horſes and Oxen brought to Market to be ſold, ſhould pay the King a Poundage of their value, and a Horſe or Ox coming to Market happen to ſtray, and be ſeized in a Manor that had Strays, and there uſed according to the Law for Strays, until a year and a day were paſt, without claim of the Owner, whereby the Property of the Horſe or Ox was altered, and the Lord of the Manor had gained it: will any man ſay Poundage ſhould be paid for this Horſe or Ox to the King, for being brought to Market to be ſold? And the Caſe is the ſame, or harder, to pay Poundage for Wreck.

It remains that ſome Objections be cleared.

Firſt, It is ſaid, That by Fraud of the Merchant, or his Agents, and the Lord of the Manor, Goods not Shipwreck'd at all may be caſt over-board, ſo as to be caſt on ſhore on the Manor by the Tide, and ſo the King's Duty avoided by confederacy.

1. This Suppoſal is remote, and cannot be of ſome Wrecks poſſible; as, of Wrecks of dereliƈted Goods, or of Goods caſt into the Sea to unburden a Ship.

2. If the Fraud appear, there is no Wreck, and the King will be righted. But to charge a legal Property, which the Lord of the Manor hath in a Wreck, with payments, becauſe a Fraud may be poſſible, but appears not, will deſtroy all Property; for what appears not to be, muſt be taken in Law as if it were not.

The ſecond Objection is, That the King's Officers by Uſage have had in ſeveral Kings times the Duties of Tonnage and Poundage from Wrecks.

1. We deſired to ſee ancient Preſidents of that Uſage, but could ſee but one in the time of King James, and ſome in the time of the laſt King, which are ſo new, that they are not conſiderable.

2. Where the penning of a Statute is dubious, long Uſage is a juſt medium to expound it by; for *Jus & Norma loquendi* is governed by Uſage. And the meaning of things ſpoken or written muſt be, as it hath conſtantly been received to be by common Acceptation.

But

But if Uſage hath been againſt the obvious meaning of an Act of Parliament, by the vulgar and common acceptation of the words, then it is rather an Oppreſſion of thoſe concerned, than an Expoſition of the Act, eſpecially as the Uſage may be circumſtanced.

As for inſtance: The Cuſtomers ſeize a man's Goods, under pretence of a Duty againſt Law, and thereby deprive him of the uſe of his Goods until he regains them by Law, which muſt be by engaging in a Suit with the King; rather than do ſo, he is content to pay what is demanded for the King. By this Uſage all the Goods in the Land may be charged with the Duties of Tonnage and Poundage; for when the Concern is not great, moſt men (if put to it) will rather pay a little wrongfully, than free themſelves from it over-chargeably.

And in the preſent Caſe, the genuine meaning of the words and purpoſe of the Act, is not according to the pretended Uſage, but againſt it, as hath been ſhewed: Therefore Uſage in this Caſe weighs not.

The third Objection is from the words, Imported and brought into the Realm, or Dominions thereof, and that Wrecks are Goods and Merchandiſes imported into the Realm, and therefore chargeable with the Duty.

There are no Goods (as hath been ſaid) but may in a ſenſe be termed Merchandiſe, becauſe all Goods may poſſibly be ſold, and when ſold, or intended to be, they are Merchandiſe; and in that ſenſe wreck'd Goods are Merchandiſe, and ſo are all Goods elſe.

It is alſo true, that the Goods in queſtion are by the Verdict found to be ſhiped in Foreign parts, as Merchandiſe, but not intended to be brought into England, but to be carried to ſome other Foreign parts (ſo are the words.)

But by the words, or ſome other Foreign parts, they might be intended to be carried as Merchandiſe into ſome Foreign parts which are of the King's Dominions, or of the Dominions of the Kingdom of England, for the Act mentions both.

And the Act limits the Duty, not upon Goods in the former ſenſe, but upon Goods brought by way of Merchandiſe, by Natives or Aliens, into any the King's Dominions, which muſt be intended his Dominions as of the Crown of England; for nothing could be enacted here concerning his Dominions not of the Crown of England.

But the Verdict is uncertain, whether they were to be carried to Foreign parts of the Dominions of England, or into parts not of the Dominion of England; nor follows it, becauſe Goods were intended to be ſold, (that is, as Merchandiſe) in a place where good Market was for them, that they were intended to be ſold at any other place, where no Profit could be made, or not ſo much, or where ſuch Goods were perhaps prohibited Commodities; therefore the words of the Act, brought as Merchandiſe, muſt mean that the Goods are for Merchandiſe at the place they are brought unto.

And Goods brought or imported any where as Merchandiſe, or by way of Merchandiſe, that is, to be ſold, muſt neceſſarily have an Owner to ſet and receive the Price for which they are ſold, unleſs a man will ſay that Goods can ſell themſelves, and ſet and receive their own Prices.

But wreck Goods imported or brought any where, have no Owner to ſell or prize them at the time of their Importation, and therefore are not brought by way of, or as Merchandiſe to *England*, or any where elſe.

Secondly, Tho' in a looſe ſenſe inanimate things are ſaid to bring things; as, in certain Seaſons, Rain to bring Graſs; in other Seaſons, ſome Winds to bring Snow and Froſt; ſome Storms to bring certain Fowl and Fiſh upon the Coaſts.

Yet when the bringing in or importing, or bringing out and exporting, hath reference to acts of deliberation and purpoſe; as, of Goods for ſale, which muſt be done by a rational Agent, or when the thing brought requires a rational Bringer or Importer; as, be it a Meſſage, an Anſwer, an Accompt, or the like: no man will ſay, that things to be imported or brought by ſuch deliberative Agents, who muſt have purpoſe in what they do, can be intended to be imported or brought by caſual and inſenſible Agents, but by Perſons, and Mediums, and Inſtruments proper for the actions of reaſonable Agents.

Therefore we ſay not, That Goods drowned or loſt in paſſing a Ferry, a great River, an Arm of the Sea, are exported, tho' carried to Sea; but Goods exported are ſuch as are convey'd to Sea in Ships, or other Naval Carriage of man's artifice; and by like reaſon Goods imported, muſt not be Goods imported by the Wind, Water, or ſuch inanimate means, but in Ships, Veſſels, and other Conveyances uſed by reaſonable Agents; as, Merchants, Mariners, Sailors, &c. Whence I conclude, That Goods or Merchandiſe imported within the meaning of the Act, can only be ſuch as are imported with

delibe-

deliberation, and by reaſonable Agents, not caſually, and without reaſon; and therefore Wreck'd Goods are no Goods imported within the intention of the Act, and conſequently not to anſwer the King's Duties; for Goods, as Goods, cannot offend, forfeit, unlade, pay Duties, or the like, but Men, whoſe Goods they are. And Wreck'd Goods have not Owners to do theſe Offices, when the Act requires they ſhould be done; therefore the Act intended not to charge the Duty upon ſuch Goods.

Judgment for the Plaintiff. The Chief Juſtice delivered the Opinion of the Court.

Hill.

Hill. 23 & 24 *Car.* 2. *C. B. Rot.* 695.

Richard Crowley Plaintiff, in a *Replevin*, againſt *Thomas Swindles, William Whitehouſe, Roger Walton*, Defendants.

The Plaintiff declares, That the Defendants, the 30th of December, 22 Car. 2. at King's Norton, in a place there called Hurley-field, took his Beaſts, four Cows and four Heifers, and detained them, to his Damage of Forty pounds. 3 Cro. 420.

The Defendants defend the Force; and as Bailiffs of Mary Aſhenhurſt Widow, juſtifie the Caption; and that the place contains, and did contain when the Caption was ſuppoſed, 20 acres of Land in Kings Norton aforeſaid.

That long before the Caption, one Thomas Greaves Eſq; was ſeized of 100 acres of Land, and of 100 acres of Paſture in Kings Norton aforeſaid, in the ſaid County of Worceſter; whereof the locus in quo is, and at the time of the Caption, and time out of mind, was parcel in his Demeſne, as of fee, containing 20 acres.

That he long before the Caption, that is, 18 die Decembr. 16 Car. 1. at Kings Norton aforeſaid, by his Indenture in writing under his Seal, which the Defendants produce, dated the ſaid day and year, in conſideration of former Service done by Edmund Aſhenhurſt to him the ſaid Thomas, did grant by his ſaid Writing to the ſaid Edmund and Mary his Wife, one yearly Rent of 20 l. iſſuing out of the ſaid 20 acres, with the appurtenances, by the name of all his Lands and Hereditaments ſcituate in *Kings Norton* aforeſaid.

Habendum the ſaid Rent to the ſaid Edmund and Mary, and their Aſſigns, after the deceaſe of one Anne Greaves, and Tho. Greaves, Uncle to the Grantor, or either of them, which firſt ſhould happen, during the lives of Edmund and Mary, and the longer liver of them, at the Feaſts of the Annunciation of the B. Virgin Mary and St. Michael the Archangel, by equal portions: The firſt payment to begin at ſuch of the ſaid Feaſts as ſhould firſt happen next after the deceaſe of the ſaid Anne Greaves and Thomas the Uncle, or either of them.

That if the Rent were behind in part or in all, it ſhould be lawful for the Grantees, and the Survivor of them, to enter into all and ſingular the Lands in *Kings Norton* of the Grantor, and to diſtrain and detain until payment. By virtue whereof the ſaid Edmund and Mary became ſeized of the ſaid Rent in their Demeſne, as of Freehold, during their lives, as aforeſaid.

The Defendants ſay further in Fact, That after, that is to ſay, the laſt day of *February*, in the Two and twentieth year of the now King, the ſaid *Anne Greaves* and *Thomas* the Uncle, and *Edmund* the Husband, died at *Kings Norton*.

That for Twenty pounds of the ſaid Rent for one whole year, ending at the Feaſt of St. *Michael* the Archangel, in the Two and twentieth year of the King, unpaid to the ſaid *Mary*, the Defendants juſtifie the Caption, as in Lands ſubject to the ſaid *Mary*'s Diſtreſs, as her Bailiffs; And averr her to be living at *Kings Norton* aforeſaid.

The Plaintiff demands Oyer of the Writing indented, by which it appears that the ſaid Annuity was granted to Edmund and Mary, and their Aſſigns, in manner ſet forth by the Defendants in their Conuſance.

But with this variance in the Deed: And if the aforeſaid Yearly Rents of Ten Pounds, and of Twenty Pounds, ſhall be unpaid at any the days aforeſaid, in part or in all, That it ſhall be lawful for the ſaid *Edmund* and *Mary*, at any time during the joynt natural Lives of the ſaid *Anne Greaves*, and *Thomas Greaves* the Uncle, if the ſaid *Edmund* and *Mary*, or either of them, ſhould ſo long live, and as often as the ſaid Rents of Twenty Pounds, or any parcel, ſhould be behind, to enter into all the ſaid *Thomas Greaves* the Grantor's Lands in *Kings Norton* aforeſaid, and to diſtrain.

Upon Oyer of which Indenture, the Plaintiff demurs upon the Conuſance.

Two Exceptions have been taken to this Conuſance made by the Defendants.

1 Rolls 422. The firſt, for that it is ſaid, The Rent was granted out of the twenty acres, being the locus in quo, by the name of all the Grantor's Lands and Hereditaments in *Kings Norton*, and that a per nomen in that Caſe is not good.

The

The Caſe of Grey and Chapman was urged, where by Indenture S. one Prudence Couſin lett a Houſe and twenty acres of Land, by the name of all her Tenements in S. But it was not alledged in what Vill the acres were. 43 Eliz. Cro f. 822.

The Court was of Opinion in Arreſt of Judgment, that the naming of the Vill in the per nomen was not material.

Another Caſe to the ſame purpoſe was urged of Gay againſt Cay, where a Grant in poſſeſſion was pleaded, and not as in Reverſion: And upon view of the Record, the Grantor had granted Tenementa p̄dicta per nomen of a Meſſuage which A. P. held for life, where the per nomen was adjudged not to make good the Grant. 41 Eliz. Cro f. 662. pl. 10 Carter 240, 242. 2 Leon. 255. 3 Leon. 9.

The Court is of Opinion, notwithſtanding theſe Caſes, That in the preſent Caſe the per nomen is well enough, becauſe it is alledged the Grantor was ſeized of two hundred acres of Land in Kings Norton, whereof the locus in quo, being twenty acres, is parcel; by reaſon whereof, the Rent being granted out of every parcel of the two hundred acres, it is well enough to ſay it was granted out of the twenty acres per nomen of all his Lands in Kings Norton, becauſe the twenty acres are alledged to be parcel of all his Lands there, being two hundred acres.

But in Chapman's Caſe it is not alledged that the twenty acres of Land demiſed were parcel of all the Tenements in S. per nomen of which the twenty acres were to paſs.

As for the ſecond Caſe of Gay, it was not poſſible that Lands granted as in Poſſeſſion, ſhould paſs per nomen of Land that was in Reverſion.

The ſecond Exception is, Becauſe the Clauſe of Entry and Diſtreſs in the Deed, upon Oyer of it, differs from the Clauſe of Entry and Diſtreſs alledged in the Conuſance; For in the Conuſance it is ſaid, It ſhould be lawful to enter and diſtrain, if the Rent were unpaid and behind after any of the Feaſts whereon it was due, that is, at any Feaſt which ſhould firſt happen after the death of *Anne* or *Thomas Greaves*, for the Rent did not commence before.

But by the Deed, If the Rent were behind at any the Feaſts, the Entry and Diſtreſs is made to be lawful for it during the joynt Lives of *Anne*, and *Thomas Greaves* the Uncle: And during their joynt Lives it could not be behind, for it commenced not till one of them were dead.

Scarplus & Handkinſon 37 El. Cro. f. 420. words repugnant & ſenſeleſs to be rejected.

So as the ſenſe muſt run, That if the Rent were behind, it ſhould be lawful to diſtrain during the joint Lives of *Anne* and *Thomas Greaves*, which was before it could be behind; for it could not be behind till the death of one of them. Therefore thoſe words, during their joint natural Lives, being inſenſible, ought to be rejected. For words of known ſignification, but ſo placed in the Context of a Deed, that they make it repugnant and ſenſeleſs, are to be rejected equally with words of no known ſignification.

Judgment *p* Defendente. The Chief Juſtice delivered the Opinion of the Court.

Trin.

Trin. 16 *Car.* 2. *C. B. Rot.* 2487. *But Adjudg'd Mich.* 20 *Car.* 2.

Bedell verſus *Conſtable.*

By the Act of 12 Car. 2. cap. 24. it is among other things Enacted, That where any perſon hath, or ſhall have, any Child or Children under the age of One and twenty years, and not married at the time of his death, it ſhall and may be lawful to and for the Father of ſuch Child or Children, whether born at the time of the deceaſe of the Father, or at that time *in ventre ſa mere*; or whether ſuch Father be within the age of One and twenty years, or of full Age, by his Deed executed in his life-time, or by his laſt Will and Teſtament in writing, in the preſence of two or more credible Witneſſes, to diſpoſe of the Cuſtody and Tuition of ſuch Child or Children, for and during ſuch time as he or they ſhall reſpectively remain under the age of One and twenty years, or any leſſer time, to any perſon or perſons in poſſeſſion or remainder, other than Popiſh Recuſants: And ſuch diſpoſition of the Cuſtody of ſuch Child or Children made ſince the 24th of *February*, 1645. or hereafter to be made, ſhall be good and effectual againſt all and every perſon or perſons claiming the Cuſtody or Tuition of ſuch Child or Children, as Guardian in Soccage, or otherwiſe. And ſuch perſon or perſons, to whom the Cuſtody of ſuch Child or Children hath been, or ſhall be ſo diſpoſed or deviſed as aforeſaid, ſhall and may maintain an Action of Raviſhment of Ward, or Treſpaſs, againſt any perſon or perſons which ſhall wrongfully take away or detain ſuch Child or Children, for the Recovery of ſuch Child or Children, and ſhall and may recover Damages for the ſame in the ſaid Action, for the uſe and benefit of ſuch Child or Children.

And ſuch perſon or perſons to whom the Cuſtody of ſuch Child or Children hath been, or ſhall be ſo diſpoſed or deviſed, ſhall and may take into his or their Cuſtody, to the uſe of ſuch Child or Children, the Profits of all Lands, Tenements and Hereditaments of ſuch Child or Children, and alſo the Cuſtody, Tuition and Management

nagement of the Goods, Chattels, and Perſonal Eſtate of ſuch Child or Children, till their reſpective Age of One and twenty years, or any leſſer time, according to ſuch Diſpoſition aforeſaid, and may bring ſuch Action or Actions in relation thereto, as by Law a Guardian in Common Soccage might do.

By the Will is deviſed in theſe words;

I do bequeath my Son *Thomas* to my Brother *Robert Towray* of *Rickhall*, to be his Tutor during his Minority.

Before this Act, Tenant in Soccage of Age might have diſpoſed his Land, by Deed or laſt Will, in Truſt for his Heir, but not the Cuſtody and Tuition of his Heir; for the Law gave that to the next of Kin, to whom the Land could not deſcend. Poſt 179.

But Tenant in Soccage under Age could not diſpoſe the Cuſtody of his Heir, nor deviſe or demiſe his Land in Truſt for him in any manner: Now by this Statute he may grant the Cuſtody of his Heir, but cannot deviſe or demiſe his Land in Truſt for him for any time directly; for if he ſhould, the Deviſe or Demiſe were as before the Statute (as I conceive) which is moſt obſervable in this Caſe.

I ſay directly he cannot, but by a mean, and obliquely, he may; for nominating who ſhall have the Cuſtody, and for what time, by a conſequent the Land follows, as an Incident given by the Law to attend the Cuſtody, not as an Intereſt deviſed or demiſed by the party.

This difference is very material; for if the Father could deviſe the Land in Truſt for him until his Son came to One and twenty, as he can grant the Cuſtody, then, as in other Caſes of Leaſes for years, the Land undoubtedly ſhould go to the Executor or Adminiſtrator of him whom the Father named, for the Tuition and the Truſt ſhould follow the Land, as in other Caſes where Lands are conveyed in Truſt.

But when he cannot, ex directo, deviſe the Land in Truſt, then the Land follows the Cuſtody, and not the Cuſtody the Land; and the Land muſt go as the Cuſtody can go, and not the Cuſtody as the Land can go.

Coke Litt. f. 49. a. 1 H. 7. 28. 9 H. 7. 4. Plowd. Com. 169. a.

As, where a Houſe or Land belongs to an Office, or a Chamber to a Corody, the Office or Corody being granted by Deed, the Houſe and Land follows as incident, or belonging, without Livery, becauſe the Office is the principal, and the Land but pertaining to it.

A ſecond Conſideration is, That by this Act no new Cuſtody is inſtituted, but the Office of Guardian, as to the Duty and Power of the place, is left the ſame as the Law before had preſcribed and ſettled of Guardian in Soccage.

But the modus habendi of that Office is altered by this Act in two Circumſtances. The firſt,

1. It may be held for a longer time, viz. to the age of the Heir of One and twenty, where before it was but to Fourteen.

2. It may be by other perſons held; for before it was the next of Kindred not inheritable, could have it; now who the Father names ſhall have it. Ant. 178.

So it is, as if an Office grantable for life only before, ſhould be made grantable for years by Parliament, or grantable before to any perſon, ſhould be made grantable but to ſome kind of perſons only.

The Office, as to the Duty of it, and its Eſſence, is the ſame it was: but the modus habendi altered.

If therefore this new Guardian is the ſame in Office and Intereſt with the former Guardian in Soccage, and varies from it only in the modus habendi, then the Ward hath the ſame legal Remedy againſt this Guardian as was againſt the old: but if this be a new Office of Guardianſhip, differing in its nature from the other, the Heir hath no Remedy againſt him at all in Law: for tho' this new Guardian be enabled to have ſuch Actions as the old might have, yet this Act enables not the Heir to have like Actions, or any other againſt him, as he might againſt the Guardian in Soccage.

The intent of this Statute is to privilege the Father againſt common Right to appoint the Guardian of his Heir, and the time of his Wardſhip under One and twenty; but leaves the Heirs of all other Anceſtors Wards in Soccage, as before: Therefore I hold,

1. That ſuch a Special Guardian cannot transfer the Cuſtody of the Ward by Deed or Will to any other.

2. That he hath no different Intereſt from a Guardian in Soccage, but for the time of the Wardſhip.

1. When an Act of Parliament alters the Common-Law, the meaning ſhall not be ſtrained beyond the words, except in Caſes of publick Utility, when the end of the Act appears to be larger than the enacting words. But by the words the Father only can appoint the Guardian, therefore the Guardian ſo appointed, cannot appoint another Guardian.

2. The

2. The Mother hath the ſame concern for her Heir as the Father hath: but ſhe cannot by the Act name a Guardian, therefore much leſs can the Guardian named by the Father.

3. The Father cannot by the Act give the cuſtody to a Papiſt: but if it may be transferred over by him whom the Father names, or by Act in Law go to his Executor or Adminiſtrator, it may come to a Papiſt, againſt the meaning of the Act.

4. Offices or Acts of perſonal Truſt cannot be aſſign'd, for the Truſt is not perſonal which any man may have.

Dyer 2 & 3 El. f. 189. b. 5. At the Common-Law none could have the Cuſtody and Marriage of a man's Son and Heir-apparent from the Father: yet the Father could not grant or ſell the Cuſtody and Marriage of his Heir-apparent, tho' the Marriage was to his own Benefit, as was reſolved by the greater number of the Judges in the Lord Bray's Caſe, who by Indenture had ſold for 800 l. the Cuſtody and Marriage of his Son and Heir-apparent, in the time of Hen. 8. to the

Lord Audley, Chancellor of England,
Lord Cromwell, Lord Privy-Seal,
Sir William Paulett, Treaſurer of the Houſhold,
The Marquis of Wincheſter, Lord Treaſurer.

Dyer ſupra f. 190. b. pl. 19. Co. 7. 12. b. Plowd. Com. 335. b. The Reaſon given is, That the Father hath no Intereſt to be granted or ſold to a ſtranger in his eldeſt Son, but it is inſeparably annexed to the perſon of the Father.

Two Judges differed, becauſe an Action of Treſpaſs would lie for taking away a man's Heir-apparent and marrying him; whence they conclude he might be granted as a Chattel.

11 H. 4. f. 23. a. Fitz. N. Br. Treſp. f. 90. b. Lett. G. f. 89. Lett. O. But an Action of Treſpaſs will lie for taking away ones Servant.

For taking away a Monk where he was cloyſter'd in Caſtigationem.

Pro Uxore abducta cum bonis Viri; yet none of theſe are aſſignable.

Weſt. 1. c. 48. 2 Inſt. By the Stat. of Weſtm the Firſt, if the Guardian in Chivalry made a Feoffment of the Ward's Lands in his Cuſtody during his Minority, the Heir might forthwith have a Writ of Novel diſſeiſin againſt the Guardian and Tenant, and the Land recovered ſhould be delivered to the next of Kin to the Heir, to be kept and accompted for to him at his full age.

This

This was neither Guardian in Soccage nor Chivalry, but a ſpecial Guardian appointed by the Statute, and ſuch a Guardian could not aſſign over, nor ſhould it go to his Executors by the expreſs Book.

Co. 2 Inſt. f. 260. b. By 4,5 P.M.c. 8. no woman child under 16 can be taken againſt his will whom the Father hath made Guardian by Deed or Will, yet this is no Leaſe of the Cuſtody till 16, nor is it aſſignable. Ratcliffs C. 3 Rep. Shoplands C. 3 Jac. Cr. f. 99.

This Caſe likewiſe, and common experience proves, that Guardian in Soccage cannot aſſign, nor ſhall the Cuſtody go to his Executors, tho' ſome ancient Books make ſome doubt therein.

For expreſly by the Stat. of 52 H. 3. the next of Kin is to anſwer and be accountable to the Heir in Soccage, as this ſpecial Guardian is here by Weſtminſter the firſt.

These ſeveral ſorts of Guardians truſted for the Heir, could neither aſſign their Cuſtody, nor did it go to their Executors, becauſe the Truſt was perſonal, and they had no Intereſt for themſelves.

The Truſt is as perſonal in this new Guardian, nor hath he any Intereſt in it for himſelf, and therefore he ſhall not aſſign it.

1 Inſt. 112. b. 181. b. 236. a.

A Guardian in Soccage cannot transfer his Cuſtody, becauſe it is a perſonal Truſt; but the Truſt of this ſpecial Guardian is more perſonal, therefore that he ſhall transfer it, concludes ſtrangely.

The Office of a Philizer is an Office of perſonal Truſt to do the buſineſs of the Court, and not aſſignable, no Execution can be upon it.

28 H. 8. f. 7. Dyer.

Sir George Reynel's Caſe: An Office of Truſt and Confidence cannot be granted for years, becauſe then it might go to perſons (that is, to Executors or Adminiſtrators) never truſted or confided in.

So is Littleton expreſly, That all Offices of Truſt, as Steward, Conſtable, Bedlary, Bailiffwick, muſt be perſonally occupied, unleſs they be granted to be occupied by a Deputy, and are not aſſignable.

Sect. 379.

And a more near or tenderer Truſt cannot be, than the Cuſtody and Education of a Man's Child and Heir, and preſervation of his Eſtate.

It may be ſaid, that in theſe Caſes the Law doth particularly appoint the Guardians, and therefore no others can be: But in the Caſe at Bar the Father appoints the perſon, not the Law.

It is true, there is a difference in the Caſes, but not to make the Truſt more aſſignable in the one Caſe than the other.

Where the Law appoints who ſhall be truſted, the Truſt cannot be refuſed, as in the ſeveral Guardians before mentioned.

But where the Perſon names the Truſtee, the Truſt may be refuſed; but once accepted, it cannot be transferred to others, more than where the Law names the Truſtee.

An Executor hath a private Office of Truſt (for we ſpeak not of publick) and is named by the Teſtator, not by the Law: therefore he may refuſe, but cannot aſſign his Executorſhip.

But it is true, an Executor may make an Executor (due Circumſtances obſerved) who ſhall diſcharge the firſt Teſtator's Truſt; but the reaſon is, that after Debts paid, and Legacies, the Surplus of the Goods belongs to the Executor, proprio jure.

An Adminiſtrator hath a private Office of Truſt; he cannot aſſign, nor leave it to his Executor; he is not named by the Inteſtate, but by the Law, in part for him, but not peremptorily; he may not claim it if he will, becauſe it muſt paſs through the Ordinary.

A man's Bailiff or Receiver are Offices of perſonal Truſt, and not aſſignable: ſo is the Office of every Servant.

1 Inſt. 49. b. An Arbitrator, or one authoriſed to ſell a man's Land, to give Livery, or receive it, cannot aſſign; it is a perſonal Confidence.

1. A Cuſtody is not in its nature Teſtamentary; it cannot pay Debts nor Legacies, nor be diſtributed as Alms.

2. It is not accountable for to the Ordinary, as Inteſtates Goods are.

3. The Heir ought to have a Guardian without interruption, but an Executor may be long before he proves the Will, and may at length refuſe. An Adminiſtration, long before it be granted, and after, may be ſuſpended by Appeal; and in theſe times the Ward hath no certain Guardian reſponſal for his Eſtate or Perſon.

Shoplands C. 3 Jac. Cr. f. 99. And where it may be ſaid, that theſe are naked Authorities, and the perſons have no Intereſt, but a Guardian hath Intereſt; he may lett and ſett the Ward's Land during Minority, avow in his own name, grant Copyhold-Eſtates, and the like,

It is an Intereſt conjoyned with his Truſt for the Ward, (I ſpeak not here of equitable Truſts, without which Intereſt he could not diſcharge the Truſt) but it muſt be an Intereſt for himſelf, which is transferrable, or ſhall go to his Executor.

All Executors and Adminiſtrators have Intereſt and Property neceſſary to their Truſts; for they may ſell the Goods or Leaſes of the Teſtator or Inteſtate, without which they could not execute the Truſt.

A Monk made an Executor might do the like, who in his own Right could have no Intereſt or Property.

But ſuch Intereſt proves not that the Executors or Adminiſtrators may aſſign their Truſt, or that it ſhall go their Executors; for it is agreed in that Caſe of Shopland, that ſuch Intereſt as a Guardian in Soccage hath, ſhall not go to his Executor, but is annexed to his Perſon, and therefore not transferrable.

Guardian in Soccage may demiſe his Guardianſhip and grant over his Eſtate, N.Br.f.145 b. Letter H. quod nota.

So as I take the ſenſe of the Act, collected in ſhort, to be,

Whereas all Tenures are now Soccage, and the next of Kin to whom the Land cannot deſcend is Guardian until the Heirs age of Fourteen: yet the Father, if he will, may henceforth nominate the Guardian to his Heir, and for any time, until the Heirs age of One and twenty; and ſuch Guardian ſhall have like remedy for the Ward, as the Guardian in Soccage by the Common Law hath.

Another Expoſition of this Act hath been offered, as if the Father did deviſe his Land by way of Leaſe, during the Minority of the Heir, to him to whom he gave the Cuſtody in Truſt for the Heir, and ſo the Land was aſſignable over, and went to the Executors, but followed with the Truſt.

1. This is a forc'd Expoſition, to carry the Cuſtody to any Stranger to the Father or to the Child, or to any that may inherit the Land, contrary to the ancient and excellent Policy of the Law.

2. By ſuch an Expoſition, the Heir ſhould have no Accompt of ſuch a Leſſee, as he may againſt a Guardian, but muſt ſue in Equity; for this Statute gives Actions, ſuch as Guardians might have, to him who hath the Cuſtody, but gives none againſt him.

3. If ſuch Leſſee ſhould give the Heirs Marriage, the Heir hath no Remedy, but the Guardian in Soccage ſhall accompt for what the Marriage was worth. Co. Litt. f.89.

Stat. Malbr. c. 17. The Statute only ſaith, That ſuch perſon nominated by the Father may take to his Cuſtody the Profits of all Lands, Tenements and Hereditaments of ſuch Child and Children, and alſo the Cuſtody, Tuition and Management of the Goods, Chattels and Perſonal Eſtate of ſuch Child or Children; and may bring ſuch Action in relation thereto, as a Guardian in Soccage might do.

None of which words will charge him with the value of the Marriage, if he had nothing for it.

N.Br.f.139.b. Lett. H. 4. If the Heir be in cuſtody of ſuch a Leſſee, and be Guardian by nearneſs of Kin to another Infant, the Guardian of the Heir by Law is Guardian to both: But ſuch a Leſſee hath no pretence to be Guardian of the ſecond Infant by any word of the Act; for he is neither an Hereditament, or Goods, or Chattels of the firſt Infant.

As to the ſecond part:

2 Leon. 221. If the Father, being of age, ſhould deviſe his Land to J. S. during the Minority of his Son and Heir, in Truſt for his Heir, and for his Maintenance and Education until he be of age,

This is no deviſing of the Cuſtody within this Statute, for he might have done this before the Statute.

If the Father, under age, ſhould make ſuch a Deviſe, it were abſolutely void; for the ſame Syllables ſhall never give the Cuſtody of the Heir by the Father under age, which do not give it by the Father which is of age.

But in both Caſes a Deviſe of the Cuſtody is effectual, and there is no reaſon that the Cuſtody deviſed ſhall operate into a Leaſe, when a Leaſe deviſed ſhall not operate into a Cuſtody, which it cannot do.

If a man deviſe the Cuſtody of his Heir-apparent to J. S. and mentions no time, either during his Minority, or for any other time, this is a good Deviſe of the Cuſtody within the Act, if the Heir be under Fourteen at the death of the Father, becauſe by the Deviſe the Modus habendi Cuſtodiam is changed only as to the Perſon, and left the ſame it was as to the time:

But if above Fourteen at the Father's death, then the Deviſe of the Cuſtody is meerly void for the incertainty.

For the Act did not intend every Heir ſhould be in Cuſtody until One and twenty, Non ut tamdiu ſed ne diutius, therefore he ſhall be in this Cuſtody but ſo long as the Father appoints; and if he appoint no time, there is no Cuſtody.

If a man have power to make Leaſes for any term of years, not exceeding One hundred, and he demiſes Land, but expreſſeth no time, ſhall this therefore be a Leaſe for One hundred years? There is no reaſon it ſhould be a Leaſe for the greateſt term he could grant, more than for the leaſt term he could grant, or indeed for any other term under One hundred; therefore it is void for incertainty: And the Caſe is the ſame for the Cuſtody.

For if the Father might intend as well any time under that, no Reaſon will enforce that he only intended that.

And to ſay he intended the Cuſtody for ſome time, therefore ſince no other can be, it muſt be for that, will hold as well in the Leaſe, and in all other Caſes of incertainty. If a man deviſes Ten pounds to his Servant, but having many, none ſhall have it for the incertainty. Co. 5 68. b.

It may be demanded, If the Father appoint the Cuſtody until the age of One and twenty, and the Guardian dye, what ſhall become of this Cuſtody?

It determines with the death of the Guardian, and is a Condition in Law; and the ſame as if a man grant to a man the Stewardſhip of his Manor for Ten years, or to be his Bailiff, it is implied by way of Condition, if he live ſo long.

A Copyholder in Fee ſurrenders to the Lord, ad intentionem that the Lord ſhould grant it back to him for term of life, the Remainder to his Wife till his Son came to One and twenty, Remainder to the Son in tail, Remainder to the Wife for life. The Husband died; the Lord at his Court granted the Land to the Wife till the Son's full age; the Remainders ut ſupra; the Wife marries, and dies Inteſtate; the Husband held in the Land; the Wifes Adminiſtrator, and to whom the Lord had granted the Land during the Minority of the Son, enters upon the Husband. Dyer 8 Eliz. f. 251. pl. 90.

This Entry was adjudged unlawful, becauſe it was the Wifes term; but otherwiſe it had been, if the Wife had been but a Guardian, or next Friend of this Land.

The like Caſe is in Hobart. Balder and Blackburn, f. 285. 17 Jac.

If it be inſiſted, that this new Guardian hath the Cuſtody, not only of the Lands deſcended or left by the Father, but of

all

all Lands and Goods any way acquired or purchaſed by the Infant, which the Guardian in Soccage had not.

That alters not the Caſe; for if he were Guardian in Soccage without that particular power given by the Statute, he is equally Guardian in Soccage with it, and is no more than if the Statute had appointed Guardian in Soccage to have care of all the Eſtate of the Infant, however he came by it.

Beſides, that proves directly that this new Guardian doth not derive his Intereſt from the Father, but from the Law; for the Father could never give him Power or Intereſt of or in that which was never his.

The Court was divided, *viz.* The Chief Juſtice and Juſtice *Wylde* for the Plaintiff; Juſtice *Tyrrell* and Juſtice *Archer* for the Defendant.

Hill.

Hill. 19 & 20 *Car.* 2. *C. B. Rot.* 506.

Holden verſus *Smallbrooke.*

IN Trover and Converſion, and Not guilty pleaded, the Jury gave a Special Verdict to this effect, That Dr. *Mallory*, Prebendary of the Prebend of *Wolvey*, founded in the Cathedral of *Litchfield*, ſeized of the ſaid Prebend, and one Meſſuage, one Barn, and the Glebe appertaining thereto, and of the Tythes of *Wolvey* in Right of his Prebend, 22 *April*, 13 *Car.* 2. by Indenture demiſed to *Giles Aſtly* and his Aſſigns the ſaid Prebend, together with all Houſes, Barns, Tenements, Glebe-Lands and Tythes thereto belonging, for three Lives, under the ancient Rent of Five pounds ten ſhillings, *Aſtly* (being one of the Lives) died ſeized of the premiſſes; at whoſe death one *Taverner* was Tenant for one year (not ended) of the Demiſe of *Aſtly*, of the Meſſuage, Barn and Glebe-Lands, and in poſſeſſion of them, whereupon the Plaintiff entred into the Meſſuage and Glebe, and was in the poſſeſſion of the ſame, and of the Tythes, as Occupant. And afterwards *Frances Aſtly*, Relict of the ſaid *Giles Aſtley*, enters upon the Meſſuage, and claims the ſame as Occupant, *in hæc verba*, *Frances Aſtly*, Widow of *Giles Aſtly*, enters upon the Houſe, and claims the ſame, with the Glebe and Tythe, as Occupant; *Taverner* attorns to *Frances Aſtly*, and afterwards grants and aſſigns all his Eſtate in the premiſſes to the Plaintiff; afterward *Conqueſt*, the Husband of *Frances Aſtly*, took one Sheaf of Corn in the name of all the Tythes, and afterwards demiſed the Tythes to the Defendant. The Tythes are ſet forth, and the Defendant took them, whereupon the Plaintiff brought this Action. *Robinſon.*

Before I deliver my Opinion concerning the particular Queſtions before opened, ariſing upon this Record, I ſhall ſay ſomewhat ſhortly of Natural Occupancy and Civil Occupancy.

Firſt opening what I mean by thoſe terms, then briefly ſhewing their difference, as far only as is material to the Queſtions now before me,

Poſt 190. I call Natural Occupancy the poſſeſſion either of ſuch natural things as are immovable, fix'd and permanent; as, Land, a Pool, River, Sea, (for a Sea is capable of Occupancy and Dominion naturally, as well as Land, and hath naturally been in Occupancy, as is demonſtrated in Mr. Selden's Mare Clauſum at large,) which lie unpoſſeſſed, and in which no other hath prior Right.

Or of things natural and movable, either animate, as a Horſe, a Cow, a Sheep, and the like, without number; or inanimate, as Gold, precious Stones, Grain, Honey, Fruit, Fleſh, and the like, numberleſs alſo, wherein no man, until the poſſeſſion thereof by Occupancy, had any other Right than every man had, which is as much as to ſay, wherein no man had Right, for that which is equally every man's Right, is no man's Right.

Whence it follows (for I ſhall not ſpeak of the uſage or extent of ſuch a poſſeſſion by natural Occupancy, it being a ſubject too large, and not neceſſary for my preſent purpoſe,)

Poſt 189. 1. That there can be no Occupancy natural of any thing wherein another than the Occupant hath Right; for by the definition made, natural Occupancy is the firſt Right.

2. A Claim, without actual poſſeſſion, cannot make a man a natural Occupant: For,

1. When a Claim is, cannot be poſſibly known to all concerned in the Occupancy of a natural thing; and what cannot be known, is (as to all effect of Right) as if it had not been; nor is there any Character of a natural Claim, but the poſſeſſion and uſe of the thing; but civilly there may, either by word, or other ſign agreed on.

2. The end of a natural Right to any natural Thing, is the ſeparate uſe of the thing to a part of Mankind, which cannot be uſed by all Mankind; but if Claim only would give a Right to the things of nature, they might ſtill remain as much without uſe after the Claim as before, which agrees not with the end of Nature in giving a Right to natural things.

3. If Claim could give a Natural Right, one might claim all things in the Univerſe not already appropriated, and might have done ſo in the beginning of Time, when nothing almoſt was appropriated.

4. A Natural Occupant hath no Eſtate of Fee, Freehold, or the like, which are Eſtates formed and raiſed by Municipal Laws, but hath only a bare Poſſeſſion to keep or forſake.

5. That Land poſſeſſed by a Natural Occupant muſt be without any ſort of Vaſſalage of Service, Rent, Condition, or other Charge whatſoever; for thoſe Servitudes upon the Land cannot be conceived without a former Right in him that laid them, but Natural Occupancy of things wherein none had any former Right, or having any, have deſerted it; for naturally a man can have nothing againſt his own will. Poſt 190.

6. Two or more cannot at the ſame time have ſeverally plenary poſſeſſion, that is, Occupancy of the ſame thing; therefore none can have Right to that by reaſon of poſſeſſion, whereof another is already poſſeſſed; for then there would be two plenary Poſſeſſors ſeverally of the ſame thing at the ſame time, which is impoſſible. Poſt 192, 337.

And altho' every Nation hath, by Conſent and Agreement among the People of it, its proper Laws to guide and determine mens Properties to all things capable of Property and Ownerſhip, yet the ancienteſt Nations of the World have no other Right againſt each other in their own Countries and Territories, than this Original and Natural Occupancy; And that Nation that will not admit a Right by Occupancy to another Nation in the Land ſo poſſeſſed by it, muſt at the ſame time confeſs they have no Right to their own, which they hold but in like manner.

They who would be further ſatisfied concerning this kind of Occupancy, may reſort, for exactneſs above other Books upon this Subject, to Mr. *Selden*'s *Mare Clauſum*, *lib.* 1. and to *Hugo Grotius* his firſt Book *de Jure Belli & Pacis*, c. 3. *de acquiſitione originaria rerum*; & c. 4. *de derelictione præſumpta, & eam ſecuta occupatione*, &c. Seld. Mare Clauſ. l. 1. Grot. de Jur. Belli l. 1. c. 3, 4.

1. By Civil Occupancy, I mean ſuch an Occupancy, either of things immovable, as Lands; or of things movable, as is according to Inſtitution and the Law of the place, and particularly according to the Law of England, as to the deciſion of the Queſtion before us.

2. By the Law of England there is no Occupancy by any perſon, of any thing which another hath a preſent Right to poſſeſs, wherein the Law of the Land agrees with that of Natural Occupancy. Ant. 188.

Occupancy by the Law must be of things which have natural exiſtence, as of Land or of other natural things, not of things which have their being and creation from Laws and Agreements of men; for there is no direct and immediate Occupancy of a Rent, a Common, an Advowſon, a Fair, a Market, a Remainder, a Dignity, and the like.

Carter 48. Poſt 194.

Co. Lit. f. 41. b. Cr. 41 El. f. 721. Crauly's C. p. 50. no occupancy of a Rent. Ant. 188.

There can be no Occupant of any thing that lieth in grant, and cannot paſs without Deed, becauſe every Occupant muſt claim by a *Que Eſtate*, and aver the Life of *Ceſtuy que vie*. And in this the Civil Occupancy with us of Land agrees with Natural Occupancy, which muſt be of a thing that hath Natural Exiſtence, and not only Legal.

But altho' the Occupancy be always of a natural thing, yet the Occupant doth thereby by the Law enjoy ſeveral things many times that have their being by Law only, as an Occupant of Land may thereby enjoy a common Occupant of a Houſe, Eſtovers of the Demeſne Lands of a Manor, the Services and Advowſons appendant, which are not themſelves natural things, but things created by Law; nor are they immediately and by themſelves capable of Occupancy, but with reference to, and as Adjuncts of the Land; and herein the Civil Occupancy differs from the Natural.

Poſt 196.

And the reaſon is clear, becauſe the Occupancy of the Land, which ought not to lie void, doth not ſever or ſeparate any thing from the Land which the Law hath joined with it; and if it doth not ſeparate from it that which is joined with it by Law, tho' that be not capable of Occupancy in it ſelf, as an Advowſon or Common, it muſt follow that ſuch things continue joined or belonging to the Land as before, notwithſtanding the Occupancy of the Land.

Ibid.

Co Lit. f. 41. b. Poſt 204. Co. Lit. 41. Ant. 189.

In Civil Occupancy the Land in Occupancy is charg'd with all the Servitude impoſed by the firſt Leſſor or by the Law; as, 1. To the payment of Rent. 2. To be ſubject to Waſte. 3. To Forfeiture. 4. To other Conditions, wherein it differs from Land whereof a man is a Natural Occupant.

As to the Civil Occupancy of movable things, which are commonly termed Perſonal Things or Goods, there are few of thoſe in our Law that have not a Proprietor (and conſequently no Occupant can be of them:) Thoſe which fall under Occupancy of that kind, are for the moſt part found in things feræ naturæ, whoſe acquiſition is either per piſcationem, as in Fiſh, or per aucupium, as in Fowl, or per venationem, by Hunting. Theſe do cedere occupanti communi Jure.

Bract. l. 2. c. 1.

1. Hence

1. Hence it follows by way of Inference or Corollary, That there can be no primary and immediate Occupancy of a Tythe; for it is not in its own nature capable of Occupancy more than a Rent or Common is, and is in truth in its nature but a Rent; it cannot paſs by it ſelf, but by Deed, and as other things which lie in grant.

A ſecond thing that follows out of the former premiſſes, is, That the Freehold, qua Freehold, is not the thing whereof there is an Occupancy; for the Freehold is not a natural thing, but hath its eſſence by the poſitive Municipal Law of the Kingdom; it cannot, abſtract from the Land in this matter of Occupancy, be either entred into, or poſſeſſed. The Freehold is an immediate conſequent of the Poſſeſſion; for when a man hath gotten the Poſſeſſion of Land that was void of a Proprietor, or other thing capable of Occupancy, the Law forthwith doth caſt the Freehold upon the Poſſeſſor, to make a ſufficient Tenant to the Præcipe. Therefore, Poſt 195.

As to the firſt Queſtion, Whether Holden the Plaintiff's Entry upon the Leſſee Taverner's Poſſeſſion, into the Houſe, Glebe and Barn, the firſt of March, 1666. and openly ſaying, I enter and take poſſeſſion of this Houſe, Glebe and Barn, and the Ground thereto belonging, and the Tythes of *Woolney*, in my own Name and Right, as Occupant upon a Leaſe made to *Giles Aſtry* and his Aſſigns for three Lives, by Dr. *Mallory* Prebend of *Woolney*, did make him Occupant of the Houſe, Land and Tythe, or either of them, the Leſſee Taverner not having made any Claim as Occupant to any of them? Queſt. 1.

I hold clearly, this Entry and Claim did not make Holden Occupant of the Houſe, Land, or Tythe, or of any of them.

To every Occupant of Land, or other thing capable of Occupancy, two things are requiſite: 1. Poſſeſſion of the Land, which was void and without Owner. 2. The having of the Freehold, to avoid an abeyance, which is had as well where the Poſſeſſion is not void, as where it is.

The firſt, that is, the Poſſeſſion, is acquired by the party, and is his Act; but the Freehold is acquired by the Act of Law, which caſts it upon the Poſſeſſion as ſoon as there is a Poſſeſſor, or where it finds a Poſſeſſor when the Freehold is in none.

1. This Claim and Entry was in order to gain the firſt Poſſeſſion of the Land which was void; but that was impoſſible to be had, for the Leſſee Taverner had the poſſeſſion before he held it then, therefore the Claim was to no end.

2. Secondly, A man cannot be an Occupant but of a void Poſſeſſion, or of a Poſſeſſion which himſelf hath; but here was no void Poſſeſſion when Holden enter'd and claimed as Occupant, for the Leſſee was in lawful poſſeſſion of the Houſe and Barn and Land at the time of the Entry and Claim.

Poſt 195.

3. Thirdly, If this Entry and Claim ſhould make Holden a legal Occupant, which cannot be without gaining the poſſeſſion, then there would be two plenary legal Poſſeſſors of the ſame thing at the ſame time, Holden by his Entry and Claim, and Taverner the Leſſee by virtue of his Leaſe: but that is impoſſible there ſhould be two plenary Poſſeſſors of the ſame thing at the ſame time; therefore Holden can be no Occupant by ſuch Entry and Claim.

Ant. 189.

4. This very Caſe in every point hath been reſolved in the Caſe of Skelton and Hay, 17 Jac. where upon an Ejectment brought, a Special Verdict found, That the Biſhop of Worceſter made a Leaſe to Sir William Whorewood of certain Land for his own, and the lives of two of his Sons. Sir William did let the Land to John Mallett at will, rendring Rent, and died; Mallett continued the Poſſeſſion, not claiming as Occupant; one of Sir William's Sons entred as Occupant, and made a Leaſe to the Plaintiff in the Action: It was adjudged, That Mallett the Defendant being in poſſeſſion, the Law caſt the Freehold upon him without Claim; and had he diſclaim'd to hold as Occupant, keeping the Poſſeſſion he muſt have been the Occupant; for where one entred to the Uſe of another, he that entred was adjudged the Occupant.

Skelton and Hay, 17 Jac. Cr. 554. b.

Chamberlayn and Eue's C. Roll. part 2. f. 151. Lett. H.

Which Caſe proves one may be an Occupant againſt and beſides his own intention, and therefore a Claim to denote his intention.

Poſt 195.

5. To be an Occupant is not neceſſary, and Tenant for years, as well as at will, is Occupant by that Caſe.

Poſt 195.

Beſides, claiming to be Occupant, is to claim to be in poſſeſſion, or to claim the Freehold, or both: but the Law binds not a man to claim that which he hath already; and therefore he that hath poſſeſſion, and doth occupy the Land, is not to claim poſſeſſion, or to be Occupant of it; no more is he to claim a Freehold which he already hath, for the Law hath caſt it where it finds the poſſeſſion; ſo having both poſſeſſion and Freehold, the Law binds him not to claim what he hath.

Carter 61.

6. Claim

6. Claim is never to make a Right which a man hath not, but to preſerve that which he hath from being loſt: As, Claim to avoid a Deſcent, whereby a man had loſt his Right to enter; ſo a man makes no Claim to be remitted, when by an act of Law he is in his Remitter.

As to the ſecond Queſtion, Whether Frances Aſtly, the Relict of Giles, entring the 25th of March, 1667. upon the Leſſee Taverner's Poſſeſſion, and claiming the Houſe, Glebe and Tythe, as Occupant, and the Leſſee Taverner attorning to her, makes her an Occupant of the Houſe, Land or Tythe? The Queſtion hath nothing in it differing from the former, but only the Attornment; and it is clear, the Attornment of Taverner the Leſſee doth not diſclaim his poſſeſſion, but affirms it; for Attornment is the act of a Tenant by reaſon of his being in poſſeſſion. Beſides, admitting the Tenant a perfect Occupant, he might, continuing ſo, attorn to whom he pleaſed, as well as Aſtly might have done in his life-time, yet ſtill continue the Eſtate that was in him. Queſt. 2.

It follows then that Taverner was the undoubted Occupant, after Aſtly's death, of the Houſe, Land and Barn: But whether he had the Tythe of Woolney by ſuch his Occupancy, whereof Aſtly died ſeized, is the difficult Queſtion.

Another Queſtion will ariſe, When Taverner the Leſſee, who had by Leaſe the Houſe, Barn and Land, and ſo found, and was Occupant certainly of thoſe, when afterwards Taverner the Leſſee, conceſſit & aſſignavit totum ſtatum ſuum de & in p̄miſſis to Holden the Plaintiff, and gave him Livery and Seiſin thereupon, what ſhall be underſtood to paſs by the word p̄miſſis? If only what was leaſed and his Eſtate therein as Occupant, and likewiſe the Tythe, if the Tythe accrued to him by reaſon of being Occupant of the Land? 12 June 1667.

For if he were Occupant of the Tythe by Act in Law, by being Occupant of the Land, it follows not that if he paſt all his Eſtate to Holden in the Houſe and Land, and gave him Livery, that therefore he paſt his Eſtate in the Tythe; nor is ſuch paſſing found to be by Deed.

To

To clear the way then towards reſolving the principal Queſtion.

1. At the time of Giles Aſtly's death, the Tythes and the Houſe and Lands were ſevered in Intereſt; for the Leſſee Taverner had a Leaſe of the Houſe, Glebe and Barn, and the Tythe continued in Aſtly.

2. This ſeverance was equally the ſame, as if the Tythe had been demiſed to Taverner, and the Houſe and Land had remained ſtill in Aſtly's poſſeſſion.

3. Tho' the Freehold of both remained ſtill in Aſtly at his death, notwithſtanding the divided Intereſt in the Land and Tythe; yet the Freehold being a thing, quatenus Freehold, not capable in it ſelf of Occupancy, nor no natural, but a legal thing, which the Law caſts upon him that is Occupant, that will not concern the Queſtions, either Who was Occupant? or Of what he was Occupant?

Co.Lit.f.41.b. Ant. 190. 4. I take it for clear, That a naked Tythe granted by it ſelf *pur auter vie*, and the Grantee dying without Aſſignment, living *Ceſtuy que vie*, is not capable of Occupancy, more than a Rent, a Common in groſs, an Advowſon in groſs, a Fair, or the like, are; it being a thing lying in Grant equally as thoſe others do. Coke's Littleton; There can be no Occupant of any thing which Ibid. lieth in Grant, and cannot paſs without Deed. I cited the place at full before, with other Authorities, againſt Occupancy of a Rent.

5. If a man die ſeized of Land which he holds pur auter vie, and alſo dies ſeized of Rent held pur auter vie, or of an Advowſon or Common in groſs, held by diſtinct Grants pur auter vie, Poſt 202. and the ſame Ceſtuy que vie, or the ſeveral Ceſtuy vies (for that will not differ the Caſe) living: Tho' the Grantee died ſeized of a Freehold in theſe ſeveral things, I conceive that he which enters into the Land firſt, after his death, will be Occupant of the Land which was capable of Occupancy; but neither of the Tythe, Advowſon nor Common, which are not capable of Occupancy, and have no more coherence with, dependence upon, nor relation to the Land, than if they had been granted pur Poſt 195. auter vie to another, who had happened to die in like manner as the Grantee did of the Land.

And

And that which hath intricated men in this matter, hath been a conception taken up, as if the Occupant had for his object in being Occupant, the Freehold which the Tenant died ſeized of; which is a miſtake; for the Subject and Object of the Occupant are only ſuch things which are capable of Occupancy, not things which are not, and not the Freehold at all, into which he neither doth, nor can enter; but the Law caſts it immediately upon him that hath made himſelf Occupant of the Land or other real thing whereof he is Occupant, that there may be a Tenant to the Præcipe. But, as was well obſerved by my Brother Wilmott, No Præcipe lies for ſetting out Tythe at Common-Law. And I doubt not, by the Stat. of 32 H. 8. c. 7. tho' Sir Edw. Coke in his Litt. f. 159. a. ſeems to be of opinion, that a man may at his election have remedy for with-holding Tythe, after that Statute, by Action, or in the Eccleſiaſtical Court, by that Statute doubtleſs he hath for the Title of Tythe, as for Title of Land, or for the taking of them away, but not perhaps for ſetting them out.

Ant. 191.

Co. Lit. 159. a.

6. When a ſeverance therefore is once made of the Land and Tythe, it is as much ſeverance of them, tho' the Tythe remain in Aſtly's poſſeſſion, as if he had leaſed the Land to Taverner, and the Tythe to another; if then Taverner becoming Occupant of the Land, ſhould have had nothing in the Tythe leaſed to another, as the Land was to him, no more ſhall he have the Tythe remaining in Aſtly himſelf at his death.

Still we muſt remember the ground inſiſted on, That no Occupancy begins with the Freehold, but begins by poſſeſſing the Land, or other real thing, which was void and ownerleſs; and that by Act of Law the Freehold is caſt upon the Poſſeſſor, either entring where the poſſeſſion was void, or being in poſſeſſion when Tenant pur auter vie died, either as Leſſee for years, or at will to Tenant pur auter vie; for the Law equally caſts the Freehold upon him, as was reſolved in Chamberleyne and Eure's Caſe, Reported by Serjeant Rolls and others, Part 2. f. 151. Letter E. and in Caſtle and Dod's Caſe, 5 Jac. Cr. f. 200.

Ant. 192.

Ibid.

Therefore after ſuch ſeverance made by the Tenant pur auter vie, the Land and Tythe are as diſtinct and ſurrendred from each other, as if Tenant pur auter vie had held them by diſtinct Grants, or leaſed them to diſtinct perſons.

Ant. 194

In

In the next place I ſhall agree,

Ant. 190. That the Occupant of a Houſe ſhall have the Eſtovers, or way pertaining to ſuch Houſe, the Occupant of the Demeſne of a Manor, or of other Land, ſhall have the Advowſon appendant, or Villain regardant to the Manor or Common belonging to the Land, and the Services of the Manor not ſevered from the Demeſne before the Occupancy.

Ibid. For a Poſſeſſor of a Houſe, Land, Demeſne of a Manor, as Occupant, doth not by ſuch his Poſſeſſion ſever any thing belonging to the Land, Houſe or Demeſne, more than the Poſſeſſor by any other Title than Occupancy doth; and if they be not ſevered, it follows they muſt remain as before to the Poſſeſſor of that to which they pertain.

Poſt 197. So if a Manor, being an entire thing, conſiſting of Demeſnes and Services, which are parts conſtituent of the Manor; the poſſeſſing and occupancy of the Demeſnes, which is one part, can make no ſeverance of the Services from the entire, and therefore the Occupant hath all. And theſe things, tho' primarily there can be no Occupancy of them, being things that lye in Grant, and paſs not without Deed; yet when they are Adjuncts, or pertaining to Land, they do paſs by Livery only, without Deed.

Co.Lit f.121. 8. Sect. 183. Whatſoever paſſeth by Livery of Seiſin, either in Deed or in Law, may paſs without Deed, and not only the Rent and Services, parcel of the Manor, ſhall, with the Demeſnes, as the more principal and worthy, paſs by Livery without Deed; but all things regardant, appendant, or appurtenant to the Manor, as Incidents or Adjuncts to the ſame, ſhall, together with the Manor, paſs without Deed. without ſaying *cum pertinentiis*. And if they paſs by Livery, which muſt be of the Land, they muſt likewiſe paſs by any lawful Entry made into the Land, and ſuch the Entry of the Occupant is.

But as by Occupancy of the Demeſne Lands of a Manor, the Services are not ſevered; ſo if they be ſevered at the time when the Occupancy happens, that ſhall never of it ſelf unite them again.

Now in the Caſe before us, The Tythe is neither appendant or appurtenant, or any ſort of Adjunct to the Glebe or Houſe; nor are they to the Tythe; nor will a Leaſe and Livery of the Glebe ſimply, with the Appurtenances, paſs the Tythe at all, nor a Grant of the Tythe paſs the Glebe; nor are either of

of them conſtituent parts of the Prebendary or Rectory, as the Services are of a Manor; for a total ſeverance of the Services and Demeſne deſtroy the Manor, but a ſeverance of the Tythe or Glebe will not deſtroy the Rectory, more than the ſeverance of a Manor, parcel of the Poſſeſſions of a Biſhoprick, will deſtroy the Biſhoprick; for the Glebe and the Tythe are but ſeveral Poſſeſſions belonging to the Rectory. Ant. 196.

But it is true, that in the Caſe before us, and like Caſes, a Grant of the Prebendary, or of the Rectory, una cum terra Glebali, & Decimis de Woolney, the Tythe, which alone cannot paſs without Deed, doth paſs by Livery of the Rectory; and ſo paſs, that tho' the Deed mentions the Tythe to be paſſed, yet if Livery be not given, which muſt be to paſs the Land, the Tythe will not paſs by the Deed, becauſe the intention of the parties is not to paſs them ſeverally, but una cum, and together. Brownlow part 2. f. 201. Rowles and Maſon's caſe. Yelv. 124. 11 Co. 48. a.

Therefore the Tythe in ſuch Caſe muſt paſs in time by the Livery, which did not paſs without it, tho' granted by the Deed.

Yet it is a Queſtion, Whether in ſuch Caſe the Tythe paſſeth by the Livery or by the Deed? For tho' the paſſing it by Deed is ſuſpended by reaſon of the intention to paſs the Land and Tythe together, and not ſeverally, it follows not but that the Tythe paſſeth by the Deed where Livery is given, tho' not until Livery given.

If a man be ſeized of a Tenement of Land, and likewiſe of a Tythe, and agrees to ſell them both, and without Deed gives Livery in the Tenement to the Bargainee, in name of it and of the Tythe, I conceive the Tythe doth not paſs by that Livery.

But a Prebend or Church-man cannot now by the Statute of 13 Eliz. cap. 10. make a Leaſe of the Poſſeſſions of his Prebendary without Deed. 18 Eliz. c. 10.

A Prebendary or Rectory is in truth neither the Glebe, nor Tythe, nor both; for the one or the other may be recovered, and might at Common-Law have been alienated, the Rectory remaining. But the Rectory is the Church Parochial, whereof the Incumbent taketh the Cure and Seiſin by his Induction after his Inſtitution, which is his Charge, and Sid. 91.

without other Seiſin than of the Ring or Key of the Church-door, by Induction into the Rectory the Parſon is ſeized of all the Poſſeſſions belonging to his Rectory, of what kind ſoever.

But tho' by the name of the Rectory the Poſſeſſions belonging to it, of what nature ſoever, actually veſt in the Incumbent upon Induction, and may paſs from the Prebendary by Livery of the Prebend or Rectory to his Leſſee, according to the parties intention,

Yet it follows not, That therefore an Occupant, who can be Occupant but of ſome natural and permanent thing as Land is, ſhould, by being Occupant of that whereof Occupancy may be, have thereby ſome other thing heterogene to the nature of Land, and not capable of Occupancy, as a Tythe is, being neither appendant or appurtenant, or neceſſary part of that whereof he is Occupant; nor will it follow, that becauſe by giving Seiſin of the Rectory, the Tythe and Glebe belonging to it will paſs, that therefore giving Livery of the Glebe will paſs the Tythe. For it is obſervable, that if a man be Tenant in Tail of a Manor to which an Advowſon is appendant, or of a Tenement to which a Common is belonging, and diſcontinue, the Iſſue in Tail ſhall never have the Advowſon or Common, until he hath recontinued the Manor or Tenement.

But if a man be ſeized in Tail of a Rectory, conſiſting of Glebe and Tythe, and diſcontinue it; after the death of Tenant in Tail, the Heir in Tail ſhall have the Tythe which lay in grant, but muſt recover by Formedon the Rectory and Glebe. This was agreed in this Court in a Caſe between Chriſtopher Baker and Searl in Ejectment, upon a Demiſe by the Earl of Bedford of the Rectory of D. & de Decimis inde pvenientibus for Lives of three other perſons, and that Caſe ſeems to admit an Occupancy of the Tythe, the Queſtion being concerning the Tythe only.

Cro. 37 El. f. 407. p. 19. Baker and Searl's Caſe.

Queſt. 3. The next Queſtion will be, That if Taverner, being Occupant of the Houſe and Land, ſhall not have the Tythe whereof Aſtly was in poſſeſſion at the time of his death, what ſhall become of this Tythe during the lives of the Ceſtuy que vies? which is the hard Queſtion.

And

And as to this Queſtion;

If a Rent be granted to A. for the life of B and A dies, living B. I conceive this Rent to be determined upon the death of A. equally, as if granted to him for his own life. I ſay, determined, becauſe it is not properly extinguiſhed, nor is it ſuſpended. Carter 48.

For Extinguiſhment of a Rent is properly when the Rent is abſolutely conveyed to him who hath the Land out of which the Rent iſſues, or the Land is conveyed to him to whom the Rent is granted.

And Suſpenſion of a Rent is when either the Rent or Land are ſo conveyed, not abſolutely and finally, but for a certain time after which the Rent will be again revived.

The Reaſons why it is determined are, Becauſe a thing ſo granted, as none can take by the Grant, is a void Grant, that is, as if no ſuch Grant had been. Therefore a Grant to the Biſhop of L. and his Succeſſors, when there is no Biſhop in being at the time, or to the Dean and Chapter of Pauls, or to the Mayor and Commonalty of ſuch a place, when there is no Dean or Mayor living at the time of the Grant, is a void Grant, that is, as if it had not been, tho' ſuch a Grant by way of Remainder may be good. By the ſame Reaſon it follows, That when any thing is ſo granted, that upon ſome Contingent happening, none can take by the Grant, nor poſſibly have the thing granted, both the Grant and Thing granted muſt neceſſarily determine: For what difference is there between ſaying that Rent can no longer be had, when it is determined by his Death for whoſe Life it was granted, and ſaying none can longer have this Rent when it determines by the death of the Grantee *pur auter vie*? For there is no Aſſignee, Occupant, or any other, can poſſibly have it; and it is therefore determined.

In an Action of Trover and Converſion brought by Salter againſt Boteler, the Defendant juſtifies for that one Robert Baſh was ſeized in Fee of twenty Acres in Stanſted, and granted a Rent-charge to another Robert Baſh, his Executors and Aſſigns, during the life of Frances the Grantees Wife, of Sixteen Pounds per Annum. The Grantee dies, and Frances his Wife takes Letters of Adminiſtration, and the Defendant, as her Servant, and by her Command, took a Diſtreſs in the ſaid twenty Acres for Rent-arrear, and impounded them; Salter verſus Boteler, 44 El. Cr. 901.

And traverſeth the Converſion and taking in other manner.

Upon Demurrer to this Plea, all the Court held the Plea to be bad, and gave Judgment for the Plaintiff.

1. Becauſe the Rent was determined by the death of the Grantee, becauſe no Occupant could be of it.

2. Becauſe the Feme was no Aſſignee by her taking of Adminiſtration.

3. None can make Title to a Rent to have it againſt the Terr-tenant, unleſs he be party to the Deed, or make ſufficient Title under it.

Moore 664. p. 907. Salter verſ. Boteler. The ſame Caſe is in Moore, reported to be ſo adjudged, becauſe the Rent was determined by the death of the Grantee; and Popham ſaid, That if a Rent be granted *pur auter vie*, the Remainder over to another, and the Grantee dies, living *Ceſtuy que vie*, the Remainder ſhall commence forthwith, becauſe the Rent for Life determined by the death of the Grantee. Which laſt Caſe is good Law; for the particular Eſtate in the Rent muſt determine when none could have it; and when the particular Eſtate was determined, the Remainder took place.

Carter 48.

Co. Lit. H. 6. And as the Law is of a Rent, ſo muſt it be of any thing which lies in Grant, as a ſeveral Tythe doth, whereof there can be no Occupant, when it is granted pur auter vie, and the Grantee dies in the life of Ceſtuy que vie.

20 H. 6. f. 7, 8. This is further cleared by a Caſe in 20 H. 6. A man purchaſed of an Abbot certain Land in Fee-farm, rendring to the Abbot and his Succeſſors Twenty pounds yearly Rent: If all the Monks die, this Rent determined, becauſe there is none that can have it: It lies not in Tenure, and therefore cannot Eſcheat; and tho' new Monks may be made, it muſt be by a new Creation wholly.

In vacancy of a Parſon or Vicar, the Ordinary *ex Officio* ſhall cite to pay Tythes, Fitz. N. Br. Conſultation, Let. G. This Caſe agrees exactly with the Grant of a Rent or other thing which lies in Grant, pur auter vie, the Grantee dying, the Rent determines, tho' it were a good Grant, and enjoyed at firſt, yet when after none can have it, it is determined. So was the Rent to the Abbot and his Succeſſors a good Rent, and well enjoyed. But when after all the Covent died, ſo as none could have the Rent, for the Body Politick was deſtroyed, the Rent determined abſolutely.

By this I hold it clear, that if a man demiſe Land to another and his Heirs, habendum pur auter vie, or grant a Rent to a man and his Heirs pur auter vie, tho' the Heir ſhall have this Land or Rent after the Grantee's death, yet he hath it not as a ſpecial Occupant (as the common expreſſion is;) for if ſo, ſuch Heir were an Occupant, which he is not, for a ſpecial Occupant muſt be an Occupant; but he takes it as Heir, not of a Fee, but of a deſcendible Freehold; and not by way of limitation, as a Purchaſe to the Heir, but by Deſcent, tho' ſome Opinions are, that the Heir takes it by ſpecial limitation; as, when an Eſtate for Life is made, the Remainder to the right Heirs of J. S. the Heir takes it by ſpecial limitation, if there be an Heir when the particular Eſtate ends. But I ſee not how, when Land or Rent is granted to a man and his Heirs pur auter vie, the Heir ſhould take by ſpecial limitation after the Grantee's death, when the whole Eſtate was ſo in the firſt Grantee, that he might aſſign it to whom he pleaſed, and ſo he who was intended to take by ſpecial limitation after the Grantee's death, ſhould take nothing at all. Carter 211.

But to inherit as Heir a deſcendible Freehold, when the Father or other Anceſtor had not diſpoſed it, agrees with the ancient Law, as appears by Bracton, which obiter in Argument is denied in Walſingham's Caſe.

Si autem fiat donatio ſic, Ad vitam donatoris donatorio & hæredibus ſuis, ſi donatorius præmoriatur hæredes ei ſuccedent, tenendum ad vitam donatoris, & per Aſſiſam mortis Anteceſſoris recuperabunt qui obiit ut de feodo. Bract. l. 2. de acquirendo rerum dominio, c. 9.

Here it is evident, that Land granted to a man and his Heirs for the life of the Grantor, the Grantee dying in the life of the Grantor, the Heirs of the Grantee were to ſucceed him, and ſhould recover by a Writ of Mortdanceſter in caſe of Abatement, (which infallibly proves the Heir takes by deſcent) who died ſeized as of a Fee, but not died ſeized in Fee. 1 Inſt. 43. b.

1. Hence I conclude, That if a man die ſeized pur auter vie of a Rent, a Tythe, an Advowſon in groſs, Common in groſs, or other thing whereof there can be no Occupancy, either directly or by conſequence, as Adjuncts of ſomething elſe by the Death of the Grantee, in all theſe Caſes the Grant is determined, and the Intereſt ſtands as before any Grant made.

2. If

2. If any man die ſeized of Land pur auter vie, as alſo of many of theſe things in groſs pur auter vie, by diſtinct Grant from the Land, the Occupant of the Land ſhall have none of theſe things, but they are in the ſame ſtate, and the Grants determine as if the Grantee had died ſeized of nothing whereof there could be any Occupancy.

Ant. 194.

But I muſt remember you, that in this laſt part of my Diſcourſe where I ſaid, That if a Rent, a Tythe, a Common, or Advowſon in groſs, or the like, lying in Grant, were granted *pur auter vie*, and the Grantee died, living *Ceſtuy que vie*, that theſe Grants were determined: my meaning was, and is, where ſuch Rent, Tythe, or other things, are ſingly granted, and not where they are granted together with Land, or any other thing out of which Rent may iſſue, with Reſervation of a Rent out of the whole.

2 Saund.

For altho' a Rent cannot iſſue out of things which lie in Grant, as not diſtrainable in their nature, yet being granted together with Land, with reſervation of a Rent, tho' the Rent iſſue properly and only out of the Land, and not out of thoſe things lying in Grant, as appears by Littleton; yet thoſe are part of the Conſideration for payment of the Rent, as well as the Land is.

2 Saund. 303, 304. Co. Lit. f. 142. a. 144. a.

In ſuch Caſe, when the Rent remains ſtill payable by the Occupant, it is unreaſonable that the Grant ſhould determine as to the Tythe, or as to any other thing lying in Grant, which paſſed with the Land, as part of the Conſideration for which the Rent was payable, and remain to the Leſſor as before they were granted; for ſo the Leſſor gives a Conſideration for paying a Rent which he enjoys, and hath notwithſtanding the Conſideration given back again.

And this is the preſent Caſe, being ſtript and ſingled from ſuch things as intricate it: That Doctor Mallory, Prebend of the Prebendary of Woolney, conſiſting of Glebeland, a Houſe, Barns, and Tythe of Woolney, and thereof ſeized in the Right of his Prebendary, makes a Leaſe to Aſtly of the Prebend', una cum the Glebe, Houſe, Barn, and Tythe, for three Lives, rendring the accuſtomed and ancient Rent of Five pounds twelve ſhillings; Aſtly demiſeth to Tavern er

verner the Houſe, Glebe and Barn for a year, reſerving Twenty ſhillings, and dies, the Ceſtuy que vies living.

As I concluded before, Taverner is Occupant of the Houſe, Barn and Glebe-land, and conſequently liable to pay the whole Rent, being Five pounds twelve ſhillings yearly, tho' the Land, Houſe and Barn be found of the yearly value of Twenty ſhillings only: but becauſe the Rent cannot iſſue out of Tythes, or things that lie in Grant, it iſſues only out of the Houſe, Barn and Land, which may be diſtrained on. Ant. 202.

2. If Taverner, being Occupant of the Land, ſhall not have the Tythes which remained in Aſtly, according to his Leaſe for three Lives at the time of his death, and whereof by their nature there can be no direct Occupancy: it follows, that the Leaſe made by Dr. Mallory is determined as to the Tythe, for no other can have them; yet continues in force as to the Land and Houſe, and all the Rent reſerved; which ſeems ſtrange, the Land and Tythe being granted by the ſame Demiſe for three Lives, which ſtill continue: yet the Leaſe to be determined as to part.

3. Tho' the Rent iſſue not out of the Tythe, yet the Tythe was as well a Conſideration for the payment of the Rent, as the Land and Houſes were; and it ſeems unreaſonable that the Leſſor, Dr. Mallory, ſhould by Act in Law have back the greateſt Conſideration granted for payment of the Rent, which is the Tythe, and yet have the Rent wholly out of the Land by Act in Law too, which cannot yield it.

4. Tho' Dr. Mallory could not have reſerved a Rent out of the Tythe only, to bind his Succeſſor upon a Leaſe for Lives, more than out of a Fair, tho' it were as the ancient Rent, and had been uſually anſwered for the Fair; as is reſolved in Jewell Biſhop of Sarum's Caſe: Yet in this Caſe, where the Tythe, together with Land, out of which Rent could iſſue, was demiſed for the accuſtomed Rent, the Succeſſor could never avoid the Leaſe, either in the whole, or as to the Tythe only. Co. Lit. 47. a. Jewell's Caſe, 5 Rep.

This

13 Eliz. c. 10. This ſeems clear by the Statute of 13 Eliz. cap. 10. which ſaith, All Leaſes made by any Spiritual or Eccleſiaſtical perſons, having any Lands, Tenements, Tythes or Hereditaments, parcel of the Poſſeſſions of any Spiritual Promotion, other than for One and twenty years, or three Lives, whereupon the accuſtomed yearly Rent, or more, ſhall be reſerved, ſhall be void.

Co. Lit f. 142. a. f. 144. a. Whence it is apparent, this Statute intended that Leaſes in ſome ſenſe might be made of Tythes for One and twenty years, or Three Lives, and an ancient Rent reſerved; but of a bare Tythe only a Rent could not be reſerved, according to Jewell's Caſe; for neither Diſtreſs nor Aſſize can be of ſuch Rent, though an Aſſize may be de Portione Decimarum, as is clear by the Lord Dyer, 7 E. 6. and the difference rightly ſtated.

Therefore a Leaſe of Tythe and Land, out of which a Rent may iſſue, and the accuſtomed Rent may be reſerved, muſt be good within the intention of the Statute, or Tythe could in no ſenſe be demiſed.

5. Taverner the Leſſee being Occupant here by his poſſeſſion becomes ſubject to the payment of the Rent, to Waſte, Ant. 190. to Forfeiture, Conditions, and all things that Aſtly the Leſſee, or his Aſſignee, if he had made any, had been ſubject to: Alſo,

Co. Litt. 41. He muſt claim by a Que Eſtate from Aſtly, he muſt aver the Life of Ceſtuy que vie, ſo as he becomes, to all intents, an Aſſignee in Law of the firſt Leſſee.

6. Without queſtion, the Occupant being chargeable with the Rent, ſhall by Equity have the Tythe, which was the principal Conſideration for payment of the Rent, when no man can have the benefit of the Tythe but the Leſſor, Dr. Mallory, who gave it as a Conſideration for the Rent, which he muſt ſtill have. Therefore

I conceive the Reaſon of Law here ought neceſſarily to follow the Reaſon of Equity; and that the Occupant ſhall have the Tythe, not as being immediate Occupant of the Tythe, whereof no Occupancy can be; but when by his poſſeſſion of the Land he becomes Occupant, and the Law caſts the Freehold upon him, he likewiſe thereby becomes an Aſſignee in Law of Aſtly's Leaſe and Intereſt, and conſequently of the Tythe.

An ancient Rent reſerved within the Stat. of 1 & 13 of the Queen upon a Leaſe of One and twenty years, or three Lives, is by expreſs intention of that Statute a Rent for publick Uſe and Maintenance of Hoſpitality by Church-men, as is reſolved in Elſemere's Caſe, Rep. 5. and therefore if the Leſſee provide not an Aſſignee to anſwer the Rent to the Succeſſors of the Leſſor for the ends of that Law, the Law will do it for him, and none fitter to be ſo than the Occupant, in caſe of a Leaſe pur auter vie, as this is. Elſemere's C. 5 Rep.

And if the Occupant, being Aſſignee, hath paſſed all his Eſtate and Intereſt to the Plaintiff, the Plaintiff hath good cauſe of Action for the Tythe converted by the Defendant.

Paſch. 22 *Car.* 2. Judgment for the Defendant. Three Juſtices againſt the Chief-Juſtice.

Trin. 20 *Car.* 2. *C. B. Rot.* 2043.

2 Ventris 9.

Harriſon verſus Doctor *Burwell.*

In a *Prohibition* for his Marriage with *Jane*, the Relict of *Bartholomew Abbot*, his Great Uncle.

The Queſtions are,

Queſt. 1. WHether the Marriage of *Thomas Harriſon* the Plaintiff with *Jane* his now Wife, being the Relict of *Bartholomew Abbot* his Great Uncle, that is, his Grandfather's Brother by the Mothers ſide, be a lawful Marriage within the Act of 32 *H.* 8. *cap.* 38?

Queſt. 2. Admitting it to be a lawful Marriage within the meaning of that Act, Whether the King's Temporal Courts are properly Judges of it, becauſe the unlawfulneſs or lawfulneſs of it, by that Act, doth depend upon its being a Marriage within or without the *Levitical Degrees?* For if within thoſe Degrees, it is not a lawful Marriage by that Act; and the right knowledge of Marriages within or without thoſe Degrees, muſt ariſe from the Poſt 208. right knowledge of the Scriptures, of the *Old Teſtament* ſpecially, the Interpretation of which hath been, and regularly is, of Eccleſiaſtick Conuſance, and not of Lay or Temporal Conuſance, in regard of the Language wherein it was writ, and the received Interpretations concerning it in all Succeſſion of Time.

Queſt. 3. Admitting the King's Temporal Courts have by that Act of 32. or any other, ſpecial Conuſance of the *Levitical Degrees*, and of Marriages within them: and tho' this be no Marriage within the *Levitical Degrees*, (it being articled in general to be an *Inceſtuous Marriage*,) Whether the Temporal Courts of the King can take Conuſance in general, that it is not an Inceſtuous Marriage, by the Act of 32 *H.* 8. and conſequently prohibit the queſtioning of it in the Eccleſiaſtical Courts? becauſe the words of that Act are, **That no Marriage ſhall be impeached (God's Law except) without the Levitical Degrees**, and therefore within

within the meaning of that Act, ſome Marriages might be impeached according to God's Law, tho' ſuch Marriage were out of the Levitical Degrees, whereof this may be one.

As to the firſt Queſtion, The Marriage of Harriſon and Jane his Wife is a lawful Marriage, by the Act of 32 H. 8. cap. 38. Reſp. 1.

As to the ſecond, I hold the Judges of the Temporal Courts have, by that and other Acts of Parliament, full Conuſance of Marriages within or without the Levitical Degrees. Reſp. 2.

As to the third, I hold, that, as the Law ſtands at this time, the King's Temporal Courts at Weſtminſter have full Conuſance what Marriages are Inceſtuous or not, according to the Law of the Kingdom, and may prohibit the Eccleſiaſtick Courts from queſtioning Marriages as Inceſtuous, which the ſaid Courts in their Judgment ſhall conceive not to be ſo: Yet I ſhall agree the Eccleſiaſtick Courts may proceed in order to Divorcement and Puniſhment concerning divers Marriages, and the King's Courts at Weſtminſter ought not to prohibit them, tho' ſuch Marriages be wholly without the Levitical Degrees. Reſp. 3.

I ſhall begin in ſome meaſure, firſt to clear the ſecond Queſtion, viz. Whether the King's Temporal Courts have any Conuſance of the Subject-matter; namely, What Marriages are within or without the Levitical Degrees? Queſtions of that nature being (as muſt be confeſſed) regularly to be decided by the Law Divine, whereof the Eccleſiaſtick Courts have generally the Conuſance: For it were improper for us to reſolve a Queſtion in Law, when it was left to an after-inquiry Whether we had any Conuſance of, or Skill in that Law, by which the Queſtion was to be determined?

There was a time when the Temporal Courts had no Conuſance of lawful or unlawful Marriages; ſo was there a time when the Eccleſiaſtical Courts had no Conuſance of Matters Teſtamentary and Probat of Wills: but the Law-making Power of the Kingdom gave them that which they had not before, and the ſame hath given the Temporal Courts this now, which they had not in former times. By Conuſance in this ſenſe, I intend Juriſdiction and Judicial Power, as far as it extends, concerning the lawfulneſs of Marriages, which an Act of Parliament hath given them. Henſloe's C. 9 Rep.

Notwithſtanding it will be ſaid, They want knowledge or skill in the Law by which it muſt be determined what are, or are not, the Levitical Degrees; for they are not ſtudied in
Ant. 206. that Divine Law, they want skill in the Original in which it was written, and in the Hiſtory by which it is to be interpreted.

As ſpecious as this ſeems, it is a very empty Objection; for no man is ſuppoſed neceſſarily ignorant of a Law which he is bound to obſerve. It is irrational to ſuppoſe men neceſſarily ignorant of thoſe Laws for breach of which they are to be puniſhed, and therefore no Canon of Divine or Human Law ought to be ſuppoſed unknown to them who muſt be puniſhed for tranſgreſſing them. We are obliged not to marry in the prohibited Degrees, not to be Heretical, or the like: therefore we are ſuppoſed to know both.

2 Ven. 21. Nor is it an Exception to diſable a man of having any Church Dignity whatever, that he is not knowing in the Hebrew or Greek Tongue. All States receive the Scriptures in that Language wherein the ſeveral States think fit to publiſh them for common uſe; and it is but very lately that the Chriſtian Churches have become knowing in the Original Tongues wherein the Scriptures were written, which is not a Knowledge of Obligation, and required in all, or any, but a Knowledge accidental, and enjoyed by ſome.

Poſt 213,304. If it were enacted by Parliament, That matters of Inheritance, of Theft and Murther, ſhould be determined in the Courts of Weſtminſter according to the Law of Moſes, this Objection would not ſtand in the way, no more can it in this particular concerning Inceſtuous Marriages.

The Laws of one People have frequently been transferred over and become the Laws of another; as thoſe of the Twelve Tables from Greece to Rome; in like manner thoſe Laws of the Rhodians for Maritime Affairs made the Law of the Romans; the Laws of England into Ireland; and many ſuch might be inſtanced.

As another Limb of this Objection, it is ſaid, This Act 32 H. 8. ſeems rather a directing Act how the Courts Eccleſiaſtical ſhould proceed touching Marriages out of the Levitical
Poſt 304. Degrees, than an Act impowering the Temporal Courts to prohibit their Proceeding.

When the King's Laws prohibit any thing to be done, there are regular ways to puniſh the Offender; as, for common Offences, by Indictment or Information; Erroneous Judgments are remedied by

by Writs of Error or Appeal; Incroaching Juriſdiction by Courts where no Writ of Error lies, is corrected by the King's Writs of Prohibitions. It is moſt proper for the King to hinder the violating of his Laws, by impeaching of Marriages which the Law will not have impeached, by incroaching Juriſdiction, as to hinder them from impeaching or drawing into queſtion Contracts for Lands, or other things whereof they have not Conuſance. And the King hath never otherwiſe remedied that fault againſt his Laws, but by his Prohibitions out of his Courts of Juſtice.

Nor is it conſonant to Law or common Reaſon, that they who offend by incroaching Juriſdiction againſt Law, ſhould be the Redreſs allowed by Law only againſt ſuch Incroachment; which were to provide againſt doing Wrong by him who doth it.

By the Act, no perſon of what Eſtate or Condition ſoever, is to be admitted to any of the Spiritual Courts, and to any Proceſs, Plea or Allegation, contrary to the Act. Rep. 1 & 2 P. & M. but that was rep. again 1 El. c. 1.

This Act therefore never intended the Eccleſiaſtick Courts ſhould have any Judicial Power to determine or judge what Marriages were within or without the Levitical Degrees, contrary or not contrary to the Act, when it admits not any Proceſs, Plea or Allegation in a Spiritual Court, contrary to the Act.

For it is impoſſible that Court ſhould have Conuſance to determine the lawfulneſs or unlawfulneſs of a Marriage, which is forbid to admit Proceſs, Plea or Allegation againſt ſuch Marriage, if it be lawful.

1. This Marriage not prohibited in the 18th of Leviticus, nor the ſame Degree with any there prohibited.

2. If Marriages neither prohibited in terminis in Leviticus, nor being in the ſame Degree with a Marriage there prohibited, ſhould be unlawful, there would be no ſtop or terminus of unlawful Marriages.

3. The 20th of Leviticus prohibits no other Marriages than the 18th of Leviticus doth, but appoints the Puniſhments, which the 18th doth not.

4. Not now to determine whether the Marriages mentioned within Leviticus 18. be only prohibited, or Marriages within the Degrees there mentioned: The Talmudiſts hold the firſt; the Karaits the ſecond ſtrongly, who in moſt concur with our Parochial Table.

5. This

5. This Marriage not prohibited by the Canons, 1 Jac. Can. 99. nor contained in the Parochial Table.

6. Marriages between the Children and Parents in the aſcending Line intermediately prohibited; and for what Reaſons.

7. How the words (God's Law except) in the Act of 32 H. 8. and the words (or otherwiſe by Holy Scripture) in the Act of 28 H. 8. cap. 16. are to be intended.

8. The Defendant doth not article, That the Uncle, Bartholomew Abbot, did carnally know Jane his Wife, and then the Marriage is not againſt God's Law by 28 H. 8. c. 7.

The miſchief by the Act of 32 H. 8. was, That the Biſhop of Rome had always troubled the meer Juriſdiction and Regal Power of the Realm of England, and unquieted the Subject by making that unlawful, which by God's Word is lawful, both in Marriages and other things.

Therefore it is thought convenient for this time, that two things be with diligence provided for.

The firſt was againſt diſſolution of Marriages conſummate with bodily knowledge, upon pretence of Pre-Contracts.

The other by reaſon of other Prohibitions to marry than God's Law admitteth, as in Kindred or Affinity between Couſin-Germans, and ſo to the fourth and fifth Degree, which elſe were lawful, and be not prohibited by God's Law. —— Again, that freedom in them was given by God's Law.

To remedy theſe two miſchiefs, All Marriages conſummate with bodily knowledge between lawful perſons, and all perſons are declared to be lawful to marry which be not prohibited by God's Law, are made lawful by Authority of Parliament, notwithſtanding any Pre-Contract, *&c.*

But this part of the Clauſe to make good Marriages notwithſtanding Pre-Contracts, is repealed, 2 E. 6. c. 23. 1 El. c. 1.

The other Clauſe remains, which declares all perſons lawful to marry who are not prohibited by God's Law, but is of no uſe to remedy the ſecond miſchief.

For if the Pope ſhall expound what perſons of Conſanguinity or Affinity are prohibited by God's Law to marry, he will expound God's Law as the Canons and Popes formerly did.

That by the Word of God no man is to uncover the nakedneſs of the Kindred of his fleſh, and therefore Marriage is prohibited as far as there are Names of Kindred, and memory, which is the reaſon of the Old Canon-Law to prohibit to the ſeventh Degree, for further they had not Names of Kindred. And if it would have remedied the inconvenience, to ſay in the Act, That all Mar-

Marriages were lawful not prohibited by God's Law, and leave the Pope then to reſolve what was prohibited by God's Law, it was to no purpoſe to have added more words to the Act, but to have ended there, and the inconvenience of prohibiting Marriages for Conſanguinity or Affinity, when God did not prohibit, had ſtill remained.

But the Act goes on, And that no Prohibition or Reſervation (God's Law except) ſhould impeach any Marriage for Conſanguinity or Affinity; for ſo it muſt be underſtood without the Levitical Degrees, for that was the ſecond thing ſpecially to be provided for, as the Act ſaith.

Not that no Marriage ſhould be impeached without the Levitical Degrees, which the Act intended not at all, nor was it the thing to be provided for, but not to be impeached for Kindred or Affinity without the Levitical Degrees, as in Couſin-Germans, and ſo forth.

For who will ſay, That by thoſe words, No Marriage ſhall be impeached without the Levitical Degrees, the Act intended that no Marriage for Natural Impotency, for plurality of Husbands, Poſt 221.
or Wives for Adultery, and the like, ſhould not be impeached, tho' it were out of the Levitical Degrees?

For the Act had no Aſpect upon ſuch Marriages, but to hinder impeaching Marriages for Conſanguinity or Affinity, without the Levitical Degrees, which was the ſecond thing by the Act to be at that time diligently provided for.

Therefore thoſe words, God's Law except, muſt refer to ſuch other Marriages, as by God's Law might be impeached, and not to any for Conſanguinity or Affinity; for had not thoſe words been, the generality of the expreſſion, No Marriage ſhall be impeached without the Levitical Degrees, had excluded the impeaching Marriages for plurality of Wives or Husbands at any time, for Impotency, and for Adultery, as Sir Edw. Coke obſerves at the end of his Comment upon this Statute in his ſecond Inſtitutes.

But if thoſe words, No Marriage ſhall be impeached, God's Law except, ſhall be underſtood, that no Marriage ſhould be impeached not prohibited by the Scripture, viz. God's Law, Then,

1. There was no uſe of naming the Levitical Degrees at all.

2. The

2. The Pope would have interpreted the Scripture (which belonged to him) to have prohibited all Marriages between Kindred, as anciently, and then the end of the Act had been fruſtrate.

3. Wherein was the King's Juriſdiction and Regal Power righted, if prohibiting of Marriage for Conſanguinity or Affinity, were to be proceeded in as formerly?

But all Marriages without the Levitical Degrees being made lawful, becauſe the Secular Judges by the Act of 28 H. 8. c. 7. had certain Conuſance of them both expreſly, and in conſequence they were no more of Eccleſiaſtical Conuſance than Contracts concerning Land or Lay-Chattels were, and therefore the queſtioning of them to be prohibited as the other.

This was to complain of the Pope as a Wrong-doer againſt the Law of God, *viz.* Holy Scripture, and diligently to provide remedy for it according to the Scripture, whereof the Wrong-doer was the only deciſive and infallible Interpreter, as the Church then believed; which is redreſſing a Wrong by the Judgment of the Wrong-doer.

Anciently, before any Act of Parliament alter'd the Law, the lawfulneſs or unlawfulneſs of Marriages, and which were Inceſtuous which not, were only of Eccleſiaſtical Conuſance, and the Temporal Courts meddled not to ratifie or prohibit any Marriage.

The Statute *de circumſpecte Agatis.*

13 E. 1. Circumſpecte Agatis de Negotiis tangentibus Epiſcopum Norwic' & ejus Clerum non puniendo eos, ſi placitum tenuerint in Curia Chriſtianitatis de his quæ mere ſunt ſpiritualia, viz. de Correctionibus quas faciant pro mortali peccato, viz. pro Fornicatione, Adulterio, & hujuſmodi.

Mag. Chart. Cok. f. 488. upon that Statute. Sir Edw. Coke in his Comment upon this Statute, and thoſe words, viz. pro Fornicatione, Adulterio, & hujuſmodi, which by the expreſs words of the Statute are ſaid to be mere ſpiritualia, ſaith, and truly, That the word *hujuſmodi* muſt be underſtood

Hob. 195. of Offences of like nature with Fornication and Adultery; as, for ſollicitation of a Womans Chaſtity, which is leſs than Fornication or Adultery; and for Inceſt, which is greater. So as the Conuſance of Inceſt was meerly ſpiritual, and concerned not the Lay-Law at all originally.

2. There

2. There was no time wherein ſome Marriages were not lawful and others unlawful, but the Judgment of both was meerly Eccleſiaſtick; inſomuch that if a man were queſtioned in the Spiritual Court for a lawful Marriage, the Temporal Law would afford him no Remedy by Prohibition or otherwiſe, becauſe they neither had any Juriſdiction of that Subject-matter, nor were preſumed to have any knowledge in thoſe Laws, by which ſuch matters were to be determined, which were the Laws of God, contained in the Scriptures and the Canon-Law, either by Councils or the Pope's Decretals admitted in the Kingdom.

3. Altho' the Canon-Law had been formerly relaxed, and the lawfulneſs of Marriage enlarged by Councils and Decretals, as they might be, and were, ſo as ſundry Marriages became lawful which were before Canonically prohibited.

Thus it happened in the Council of Lateran, under Pope Innocent 3. In quo Sancitum prohibitionem Copulæ Conjugalis quartum Conſanguinitatis & Affinitatis gradum, non excedere, quoniam in ulterioribus gradibus, jam non poteſt abſque gravi diſpendio hujuſmodi prohibitio generaliter obſervari; (for before many Degrees beyond the Fourth were forbid) yet could the Common-Law take no notice of this enlargement of lawful Marriages, nor did not. Concil. Lat. ſub Innoc. 3. 1215. Seld. de Jure Natur. f 608. Poſt 232, 245.

Becauſe the lawfulneſs ſtill depended upon the Law Divine, and the Canon-Law, as then it ſtood by that alteration whereof the Secular Judges had no conuſance or skill to judge; nor is there any Prohibition in the Regiſter or elſewhere to be found, concerning the queſtioning of any Marriage in the Spiritual Court, in all the time preceding the Acts of Parliament, nor long after ſome of them.

But if at the time of this Council it had been enacted by Parliament, That all Marriages ſhould be lawful after the Fourth Degree from Couſin-Germans inclusively, then if ſuch Marriages had been queſtioned in the Spiritual Courts, a Prohibition had lain, becauſe a Marriage was queſtioned which an Act of Parliament had expreſly made lawful, and whereof the Secular Judges were the moſt conuſant. Ant. 208. Poſt 304.

But if then by an Act of Parliament all Marriages had been made lawful, not prohibited by God's Law, or not prohibited in the Old or New Teſtament, tho' by that Act all Marriages prohibited by Canon-Law, and not by Scripture, had been made lawful, yet the Temporal Courts had thereby no manner of Juriſdiction in Caſes of Marriage, becauſe the lawfulneſs of them were ſtill to be meaſured by a Law out of their conuſance, Ibid.

that is, by the Divine Law; And ſuch an Act of Parliament was directory only to the Proceeding of the Spiritual Judges in Caſes of Matrimony, and no way advancing the Juriſdiction of the Temporal Courts, nor enabling them to prohibit the queſtioning of any Marriage.

25 H. 8. c. 22. 28 H. 8. c. 7. 28 H. 8. c. 16. 32 H. 8. c. 38.

The Law and Reaſon of it being thus ſtated before the Acts of Parliament of 25 H. 8. c. 22. 28 H. 8. c. 7. 28 H. 8. c. 16. 32 H. 8. c. 38. We will ſee what alteration was induced by theſe reſpective Statutes in order.

And firſt the Act of 25 H. 8. hath theſe words——Since many inconveniencies have fallen, as well within this Realm as in others, by reaſon of marrying within the Degrees prohibited by God's Law,

(That is to ſay)

The Son to marry the Mother.
The Son to marry the Stepmother.
The Brother to marry the Siſter.
The Father to marry his Son's Daughter.
The Father to marry his Daughter's Daughter.
The Son to marry his Father's Daughter procreated and born by his Stepmother.
The Son to marry his Aunt, his Father's Siſter or Mother's Siſter.
The Son to marry his Uncle's Wife.
The Father to marry his Son's Wife.
The Brother to marry his Brother's Wife.
A Man to marry his Wife's Daughter.
His Wife's Son's Daughter.
His Wife's Daughter's Daughter.
His Wife's Siſter.

Which Degrees, 1. are the Degrees expreſly mentioned in the 18th Chapter of Leviticus, and were for Matter and Language by this Act firſt made of Lay Conuſance.

It declares thoſe Marriages to be plainly prohibited by God's Law, that notwithſtanding they have ſometimes proceeded by colour of Diſpenſation by Man's Power, which ought not to be: For no Man can diſpenſe with God's Law, as the Clergy in the Convocation, and moſt of the famous Univerſities of *Chriſtendom*, have affirmed, &c.

Selden Mare Clauſum 8. Still. Eccleſ. Com. 33.

Then

Then it enacts a Separation by definitive Sentence in the Spiritual Courts of the Kingdom, without Prohibition from or Appeal to *Rome* of ſuch Marriages.

The next Act of Parliament concerning Marriages prohibited, is, 28 H. 8. c. 7. 28 H. 8. c. 7.

By which Act the former Act of 25. is repealed, not for the matter of the Marriages there prohibited, as is ſaid in that Act; and therefore

In the ſame words, The Marriages within thoſe Degrees are recited again, and prohibited by God's Law.

But with theſe differences, That in the Prohibition,

1. Of the Sons marrying the Stepmother, is added, Carnally known by his Father.

2. In the Prohibition of marrying his Uncle's Wife, is added, Carnally known by his Uncle.

3. In the Prohibition of the Father to marry his Son's Wife, is added, Carnally known by his Son.

4. In that of the Brother to marry his Brother's Wife, is added, Carnally known by his Brother.

5. In thoſe of marrying a Man's Wife's Daughter, or her Son's Daughter, or her Daughter's Daughter, is added, Having the Carnal knowlege of his Wife. By this Act theſe Degrees were the ſecond time made of Lay Conuſance. So Sir *Edw. Coke* refers the Levitical Degrees to this Act, 2 Inſt. f. 683.

Another alteration in this Act from the former is, That if any Man carnally know any Woman, all perſons in any Degree of Conſanguinity or Affinity of the parties ſo offending ſhall be adjudged to be within the ſaid Prohibitions, in like manner as if the parties ſo carnally knowing one another had been married. For Example: If a Man carnally know a Woman, not marrying her, he is prohibited to marry her Daughter, or Daughter's Daughter, & è converſo.

In all other Clauſes this Act and the former of 25. are verbatim the ſame, and this Act is in force.

Obſervations upon thoſe two Acts 25 & 28 *H.* 8.

1. That by neither of theſe Acts no Marriage prohibited before, either by God's Law or the Canon-Law, differenced from it, is made lawful.

2. That the Marriages particularly declared by the Acts to be againſt God's Law, cannot be diſpenſed with; but other Marriages, not by the Acts declared in particular to be againſt God's Law, are left ſtatu quo prius, as to Diſpenſations with them.

3. That neither of theſe Acts gave any Juriſdiction to the Temporal Courts concerning Marriages, more than they had before, but were Acts directory only to the Eccleſiaſtick Proceeding in matters of Marriage.

4. Neither of theſe Acts ſay or declare, That the Degrees rehearſed in the ſaid Acts, and thereby declared to be prohibited by God's Law, are all the Degrees of Marriage prohibited by God's Law.

For take the words at moſt advantage for that purpoſe, viz. Since many inconveniencies have fallen by marrying within the Degrees prohibited by God's Law; That is to ſay, The Son to marry the Mother, the Brother the Siſter, &c. And that the enumeration in the Act of prohibited Degrees had gone no further than to the Degrees of Conſanguinity, not enumerating any Degrees of Affinity:

As then it had been no Inference to conclude that there were no more prohibited Degrees by God's Law intended by the Statute, than the Degrees of Conſanguinity only;

So now no Degrees being mentioned in the Statute to be prohibited by God's Law but thoſe which are expreſſed, it cannot thence be concluded that the Statute intended no other than thoſe to be prohibited by God's Law.

For thoſe are therefore mentioned to be prohibited, becauſe they were Degrees ſignally expreſſed, and concerning which no Queſtion or Doubt could be made.

In

In the ſame manner is it if a Statute ſhould ſay, Since many Inconveniencies have happened by doing things prohibited by the King's Laws; that is to ſay, By Depopulation of Farms, by ſubtracting of Tythes, by committing Dilapidations, and of many other things forbidden by the Law:

It would not be concluded, that the things ſo enumerated were all the things prohibited by the King's Laws; no more can it that the enumerated Degrees of prohibited Marriges in the Act by God's Law, are all the Degrees by God's Law prohibited.

The next Statute is an Act of the ſame Parliament, 28 H. 8. c. 16. making invalid Licences, Diſpenſations, Bulls, and other Inſtruments purchaſed from Rome: Which Act hath theſe words; 28 H. 8. c. 16.

That all Marriages ſolemnized within this Realm, or in any the King's Dominions, before the Third day of *November*, in the 26th year of the King, whereof there is no Divorce had by the Eccleſiaſtick Laws of the Realm, and which be not prohibited by God's Law, limited and declared in the Act made this preſent Parliament for Eſtabliſhing the King's Succeſſion, or otherwiſe by holy Scripture, ſhall be lawful and effectual by Authority of this preſent Parliament.

By this Act the Levitical Degrees are made the third time of Lay Conuſance.

1. By this Law all Marriages made before that Third of November, 26 H. 8. no Divorce being had, are made good and lawful.

2. All Marriages made before that time, and not prohibited in the Degrees limited and declared in the Act of 28 H. 8. c. 7. if the Act had reſted there, and gone no further, had been made good; and if any of them had been queſtioned, a Prohibition would have lain out of the Temporal Courts, becauſe the unlawfulneſs of marrying was reſtrained to the Degrees limited in 28 H. 8. c. 7. whereof the Temporal Judges had perfect Conuſance, as of a Lay Law.

But the Act going further, and ſaying Prohibited by God's Law, limited in the Act of 28. or otherwiſe by Holy Scripture, leaves, as is objected, all Conuſance of Marriages as before to the Eccleſiaſtick Courts, tho' not ſo amply.

So by thoſe added words, Or otherwiſe by holy Scripture, the Act made all Marriages ſolemnized before that time, not prohibited by Holy Scripture, good and lawful; by which Act, tho' Marriages prohibited only by the Canon-Law, divided from Scripture, were made good.

Yet the Tryal was, Whether the Marriage was prohibited by Holy Scripture? Which being only of Eccleſiaſtick Conuſance, they only could judge of the lawfulneſs.

And that the Temporal Courts could by that Act no more judge what Marriage was Lawful or Inceſtuous by the Holy Scripture, than what was Schiſm or Hereſie by the Holy Scripture.

3. By this Act it is evident the Law-makers thought ſome Marriages were or might be prohibited by God's Law, not limited in the Act of 28 H. 8.

So if the Act had limited all Marriages lawful, but thoſe forbidden in the Five Books of Moſes, or in the Book of Moſes called Leviticus, tho' the unlawfulneſs of Marriage had been more reſtrained under that expreſſion, than under the general expreſſion of Holy Scripture, yet

Thoſe Books being part of Holy Scripture, the Secular Judges had no more Conuſance of the Parts than of the Whole.

And ſo would it have been if the Act had reſtrained the unlawfulneſs of Marriage to the 18th Chapter of Leviticus, that being a part of the Book called Leviticus, the Temporal Courts could have no more Conuſance of that part or Chapter of the Book, than of the whole Book. This I think is the full of the Objection.

32 H. 8. c. 28. The laſt Law, and which is Cardo Quæſtionis, as being pleaded by the Plaintiff Harriſon in the Books, is the Act of 32 H. 8. cap. 38. conſiſting of ſeveral parts, ſome whereof are repealed, as the Branch concerning Pre-Contracts.

I ſhall therefore examine that Act as it ſtands in force.

1. Marriages between Couſin-Germans, and all Marriages onwards between Collateral Couſins, which were prohibited very far before the Council of Lateran, and ſince it, thoſe to the Fourth Degree, to the making of this Act, are made lawful, and declared not to be againſt the Law of God, viz. in theſe words,—And be not prohibited by God's Law.

6. Re-

2. Reſtraining of Marriage by reaſon of Carnal Knowledge within any of thoſe Degrees, is expreſly taken away, and the Marriages declared not to be againſt the Law of God. In theſe, Sir Edward Coke in his Comment upon this Statute in his Magna Charta, is expreſs. Cok. Magna Chart. f. 6. 84.

So if any Marriage within thoſe Degrees ſhall be queſtioned as Inceſtuous in the Spiritual Courts, a Prohibition will lie upon this Act, becauſe the Marriages, by one part of the Act, are declared expreſly,

1. Not to be againſt the Law of God.

2. By another, All Marriages contracted between lawful perſons, (as we declare all perſons to be lawful that are not prohibited by God's Law to marry) are lawful.

Joyning then thoſe two Clauſes together, That all Marriages are lawful, not prohibited by the Law of God; And, That ſuch Marriages of Couſin-Germans, and ſo onwards, are not prohibited by God's Law: It is manifeſt that Prohibitions will lie in ſuch Caſes.

But theſe Marriages concern not the Caſe in queſtion.

The next Clauſe in the Act, and upon which the preſent Caſe ſtands,

That no Reſervation or Prohibition (God's Law except) ſhall trouble or impeach any Marriage without the *Levitical Degrees.*

The clear ſenſe of which Clauſe muſt be, That all Marriages are lawful, which are not prohibited within the *Levitical Degrees*, or otherwiſe by God's Law.

So as the prohibiting of Marriages within the Levitical Degrees, and within God's Law, whereof the Levitical Degrees are a part, is no more or leſs in effect than to ſay, All Marriages ſhall be lawful that God's Law doth not prohibit.

Whence it is collected, That of God's Law in general, or of the Levitical Degrees in particular, being a part of that Law, the Temporal Judges had no Conuſance after this Act more than before; and that this Act, excepting in the matter of Marriages to the Fourth Degree and onwards, which it declares not to be againſt God's Law, was only directory to the Eccleſiaſtick Courts, as the former Statutes were, and gave the Temporal Courts no Juriſdiction to prohibit queſtioning any Marriage but thoſe of Couſin-Germans and onwards.

But

2 Ven. 15. to 22. Poſt 304.

But the Judges of the Temporal Courts have long ſince, and often after the Act of 32 H. 8. granted Prohibitions for queſtioning Marriages out of the Levitical Degrees, and thereby determined the lawfulneſs of ſuch Prohibitions.

So as many Parliaments having paſſed ſince Prohibitions granted in that kind, without complaint of it, as is likely, but certainly without redreſs for it; It is not ſafe, in a Caſe of Publick Law, as this is, between the Spiritual and Temporal Juriſdiction, to change the received Law, nor do I think it is expected.

Ibid.

That being taken then as ſettled, That the Spiritual Courts may be prohibited to queſtion Marriages out of the Levitical Degrees,

The firſt Queſtion will be,

Whether any Marriages be againſt God's Law, but thoſe within the Levitical Degrees? For if none elſe be, the Temporal Courts having Conuſance of Marriages within thoſe Degrees, have conſequently Conuſance of all Marriages againſt God's Law. Then muſt the words of the Statute,

No Marriage ſhall be impeached (God's Law excepted) without the Levitical Degrees, be underſtood thus:

No Marriage ſhall be impeached (God's Law excepted) viz. his Law of the Levitical Degrees.

Co. Litt. f. 235. a.

The Authority which makes for this Expoſition, is Coke in his Littleton, where theſe words are;

For by the Statute of 32 *H.* 8. *cap.* 38. it is declared, That all perſons be lawful (that is, may lawfully marry) that be not prohibited by God's Law to marry; that is to ſay, that be not prohibited by the Levitical Degrees.

By which evidently he makes all the Law of God which prohibits Marriages, to be only the Levitical Degrees.

But I conceive clearly, There are other Laws of God prohibiting Marriages to be made; and if made warranting their Diſſolution; and ſo intended to be by this Statute of 32 H. 8. beſides the Law of God in the Levitical Degrees,

1. For perſons pre-contracted to another, are prohibited by God's Law to marry againſt ſuch Pre-Contract.

2. Per-

2. Perſons of natural Impotency for Generation are prohibited to marry: For Marriage being to avoid Fornication, if it be uſeleſs for that purpoſe, as natural Impotency is, it is as null. Ant. 211. Calvin. Epiſt. 225. 1 Cor 7. v. 2.

So is the Caſe of Sabell, and another Caſe of one Bury, divorced at the Suit of their Wives for Impotency. Dy. 2 El. 178.

3. Plurality of Wives or Husbands is prohibited by God's Law, the firſt being not prohibited by the Levitical Degrees.

And Sir Edw. Coke, in the end of his Comment upon this Statute, notwithſtanding the paſſage before in his Littleton, ſaith expreſly, That Marriages made with a perſon pre-contracted, or with an impotent perſon, could not have been queſtioned in order to a Divorce by reaſon of this Statute, but becauſe ſuch Marriages are againſt God's Law; yet are they all without the Levitical Degrees. This is the reaſon of the words, God's Law except, for theſe Marriages may be impeached, tho' out of the Levitical Degrees; this anſwers the words, Or otherwiſe by Holy Scripture, in 28 H. 8. c. 16. alſo. Cok Mag. Ch. f. 687. a.

In what ſenſe any Marriages and Copulations of Man with Woman, may be ſaid to be Natural, and in what not.

In the firſt place, to ſpeak ſtrictly what is unnatural, it is evident that nothing which actually is, can be ſaid to be unnatural; for Nature is but the production of effects from cauſes ſufficient to produce them; and whatever is, had a ſufficient cauſe to make it be, elſe it had never been; and whatſoever is effected by a cauſe ſufficient to effect it, is as natural as any other thing effected by its ſufficient cauſe. And in this ſenſe nothing is unnatural but that which cannot be, and conſequently nothing that is, is unnatural; and ſo no Copulation of any Man with any Woman, nor an effect of that Copulation by Generation, can be ſaid unnatural; for if it were, it could not be; and if it be, it had ſufficient cauſe.

There are other Males and Females differing in their Species, which never have Appetite of Generation to each other, and conſequently can never have the effect of that Appetite, the kinds whereof are innumerable.

Between theſe the Acts of Generation are ſo unnatural, that they are impoſſible, and no reſtraint is neceſſary to ſuch by Laws, or by other Induſtry.

Marriages forbidden in *Leviticus* lawful before.

Thoſe Marriages and Carnal Knowledge which are amongſt the moſt Inceſtuous enumerated in Leviticus the 18th, were ſo far from being unnatural in primordiis rerum, that they were not only natural, but neceſſary, and commanded in that Command of Increaſe and multiply; that is, the Carnal Knowledge between Brothers and Siſters.

For the World could not have been peopled but by Adam's Sons going in to their Siſters, being Brothers and Siſters by the ſame Father and Mother, or by a more Inceſtuous Coupling than that; and if ſuch Carnal Knowledge had been abſolutely unnatural in any ſenſe, it had never been either lawful or neceſſary; For, whatſoever is ſimply and ſtrictly unnatural at any time, was always unnatural, and unchangeable.

Marriages lawful after reſtoring the World in *Noah*.

After the Peopling of the World, firſt from Adam, then from Noah, and to the time of Moſes giving the Levitical Law,
Poſt 237. many other Marriages prohibited in the Levitical Degrees were not only lawful, but proſecuted with the moſt ſignal Benedictions and Promiſes of God:
Gen. 20. v. 12. As the Marriage of Abraham with Sarah, who was his Siſter, that is, the Daughter of his Father, but not the Daughter of his Mother.

So is his Anſwer to Abimilech, and ſo is the Tradition of her Genealogy,

But by the 18th of Leviticus the Marriage of the Siſter by the Father's ſide is prohibited to the Son, viz.
Lev. 18. v. 9. Thou ſhalt not diſcover the ſhame of thy Siſter, the Daughter of thy Father, or the Daughter of thy Mother, whether ſhe be born at home, or born without, &c.

The next inſtance is of Amram, the Father of Moſes and Aaron, who married Jochobed his Father's Siſter, namely, the Siſter of Koath.

And

And *Amram* took *Jochebed* his father's ſiſter to his wife, and ſhe bare him *Aaron* and *Moſes*. Exod. 6. v. 20

Which Marriage is prohibited in the 18th of Leviticus *viz.* Thou ſhall not uncover the ſhame of thy father's ſiſter, for ſhe is thy father's kinſwoman. Lev. 18. v. 12.

Jacob had two Wives at the ſame time, Lea and Rachel, being Siſters; which is a known Story. Gen. c. 29, &c.

But by the 18th of Leviticus, ——Thou ſhalt not take a wife with her ſiſter during her life, to vex her in uncovering her ſhame upon her. Lev. 18 v. 18.

Before the Prohibitions in the 18th of Leviticus, and then, and after, a man not only might, but ought, in ſome caſes, to marry his Brother's Wife, that was, if his Brother died Childleſs, as appears in the Hiſtory of Thamar and Judah before the Levitical Law.

Then *Judah* ſaid to *Onan*, Go in to thy brother's wife, and do the office of a kinſman unto her, and raiſe up ſeed unto thy brother. Gen. 38. v. 8 9.

Onan would not (after a ſtrange manner) wherefore the Lord ſlew him. Lev. 18. v 16.

But in the 18th of Leviticus it is ſaid, Thou ſhalt not diſcover the ſhame of thy brother's wife, for it is thy brother's ſhame. Deut. 25. v. 5.

The ſequel of that Hiſtory is well known; and theſe inſtances fully prove, that thoſe ſeveral Marriages before inſtanced, and which are prohibited in the 18th of Leviticus, were lawful before, and practiſed by the moſt remarkable men for Holineſs of life.

Nachor, the brother of Abram, married Milcah, his brother Haran's Daughter; ſo the Uncle married the Niece, Gen. c. 11. v. 29, 30.

To this may be added, That Children from Nature know not their Parents or Kindred from other people, and therefore their Acts, whatever they be, whether of Marriage or otherwiſe, are (regarding nature only) as indifferent towards their Parents and Kindred, as towards any other Men or Women.

The Parents may poſſibly know their Children, and more eſpecially the Mother, by a knowledge that is natural; but it is impoſſible the Children ſhould naturally know their Parents: Therefore they cannot naturally know that they do tranſgreſs towards their Parents.

But the knowledge of our Parents is ſubſequent to Nature, and not coequal with her, and ariſeth from Civil Laws, Education, and common Reputation, not from Nature; we take thoſe for our Parents whom the Laws denote to be ſo.

The Theban Story of Oedipus and Jocaſta his Mother is an obvious Example in this kind, where both ignorantly marri-
Seld. de Jure Naturali & gentium juxta Diſciplinam Ebræor. l. 5. c. 11. ed each other, and had Iſſue between them. Of the Marriage with the Mother, the Siſter, the Stepmother, anciently permitted in Perſia, Greece, Egypt, and other places of the Eaſt. Vide.

Beſides, what is unnatural to Man, qua Man, muſt be ſo to all Men, and at all times: but what is unnatural to this or that individual Man, is unnatural only to him, and only for the time it is ſo, and not to other Men,

How things become Unnatural by Cuſtom.

A ſecond way by which Mens Acts are ſaid to be unnatural (and are ſo in ſome meaſure) is, When Laws Divine or Human do ſupervene upon Man's Original Nature, with great Penalty for tranſgreſſing them. Mens Education, *à teneris annis*, to obſerve thoſe Laws, the Infamy attending their violation, and the religious cuſtomary obſervance of them, implant a horror and averſeneſs to break them; ſo that by long cuſtom they are not obſerved only to avoid the Puniſhment, and as things which were otherwiſe indifferent, but are obſerved from an averſeneſs and loathing begot by cuſtom to tranſgreſs them; that tho' men were ſecure from the Puniſhment if they broke them, yet Nature denies all Appetite and Inclination to violate them.

This kind of ſecondary Nature is eminently ſeen in mens averſeneſs from ſome things for Food, which Cuſtom had made deteſtable; as, eating the Fleſh of Men, Bears, Horſes, Dogs, Cats, and many other things which nauſeate men, and are offenſive upon no other account than that Cuſtom hath made them ſo, not primitive Nature, and which upon tryals of Famine have been found both eatable and nouriſhing; and by contrary Cuſtom among ſome other Nations or People, are as deſirable as other Food, as is exampled in the Anthropophagi, the Canibals, or Men-eaters.

In this ſecondary way, the Copulation with the Mother, Siſter, and the like, do become odious and reluctant to Nature, and generally are ſo where Humanity is well planted, which in the Original ſtate of Nature, and without thoſe induced Laws, Education, and Cuſtom of Manners, had been as indifferent as with other

other Women. To this purpoſe there is a paſſage, and a true one, in Simplicius, ſpeaking when the Grecians began to deſert their Inceſtuous Marriages. —— Jam cum lex & conſuetudo, ſororis & fratriæ conſuetudine interdicat, Appetitionis non ſecus ab ipſius naturæ Imperio ſuppreſſæ, ita prorſus ſunt immobiles, niſi forte aliquos furoris intemperies, & diræ ſcelerum ultrices agitarent. Seld. de Jure Nat. c. 11. f. 605.

So Lucan of Inceſt with the Mother, Luc. l. 8.

——Cui fas implere parentem
Quid reor eſſe nefas?——

To this ſecondary Nature hath that of St. Paul to the Corinthians reference, where he ſaith, 1 Cor. c. 11. v. 13, 14, 15.

Doth not Nature it ſelf teach you, That if a Man have long Hair, it is a ſhame unto him? Where no other Nature can be underſtood but Manners and Cuſtom. Grot. l. 2. c. 12. §. 26. 2.

And for this are the Egyptians upbraided in the Prophets Iſaiah and Jeremy, for their Beſtiality in Copulation with their neareſt Relations, as is moſt frequent in Story.

That their Fleſh was like the Fleſh of Horſes, and their Iſſue as the Iſſue of Aſſes; they not obſerving any order of Coitus other than was found in Horſes and Aſſes, which is the true meaning of that place. In this way it is true, that ſuch Inceſtuous Marriages are unnatural, and ſo never made by thoſe in whom Cuſtom hath begot an horror and averſion to them; but on the other ſide, to them which have it not, there is no unnaturalneſs in them; for Nature originally hath not implanted that averſeneſs in them, nor Cuſtom prevailed to beget it, as it hath in the others.

Of

Of tranſgreſſing Natural Laws, and in what ſenſe that is to be underſtood.

A third way of mens acting unnaturally is, when they violate Laws coeval with their Original Being, tho' the Laws be but poſitive Divine, or poſitive Human Laws, and not of Nature primarily, nor in any other ſenſe, intelligible to be Natural Laws; but that they bind men as ſoon as men can be bound, and no Law can poſſibly precede them.

A ſecond Reaſon of their being Natural Laws properly, is, becauſe Man's Nature muſt neceſſarily aſſent to receive them as ſoon as it is capable of aſſenting, and hath no power to diſſent from them; for a man hath no power to diſſent from, or not to aſſent to his own preſervation, or not to diſſent from his own deſtruction: But not to aſſent to the Will, that is, to the Laws of an Infinite Power, to hurt and benefit, is to aſſent to his own deſtruction and infinite hurt, and to diſſent from his own preſervation and infinite benefit; for Infinite Power can hurt or benefit as it pleaſeth: Therefore to aſſent to the Laws of the Deity is natural to Man.

Selden de Jure Nat. The Jews with great conſtancy ſpeak of ſuch Laws as given to all Mankind in this particular matter of Marriage, and carnal mixture, and derive them traditionally through all Antiquity, as binding all Nations and People by God's Precept, and therefore call them, among others ſo given, Leges Noachidarum, or the Laws of all the Sons of Noah, by which men were from the beginning prohibited,

Poſt 230, 233, 236.

1. Marriage or Copulation with their Mother.
2. With the Father's Wife.
3. With a Siſter by the ſame Mother, or with a Soror uterina.
4. With the Wife of another Man.
5. Man with Man.
6. Man or Woman with Beaſt.

From theſe Laws they juſtifie Abram's marrying his Siſter by the ſame Father, Amram's marrying his Father's Siſter, Jacob marrying two Siſters at the ſame time, Thamar's endeavouring to marry her Huſband's Brother, as not prohibited before the Levitical Law, or any other Marriage, thoſe before mentioned excepted.

And

And as to Adam's Sons marrying their Siſters by the ſame Mother, the Law was given in the beginning prohibiting it, but God diſpenſed with it until the World was competently peopled, as they receive it. Poſt 235.

And it is obſerved by Mr. Selden, That upon the Tradition of this general Law, St. Paul rebukes the Corinthians for permitting among them ſuch a Fornication, that is, ſuch an Inceſt as was not named amongſt the Gentiles, That a man ſhould have his Father's Wife. Some Examples of which were in Syria, as in Antiochus and Stratonice. 1 Cor. 5. v. 1.

In this ſenſe it is ſaid, A man is a natural Subject when he is ſo born, and is bound by the Law of his Allegiance as ſoon as he is; and that a Prince is that Subject's natural Sovereign, becauſe he is bound to protect him as ſoon as he can be protected. Of which kind of Law of Nature much is ſaid in Calvin's Caſe, but confuſedly, and without clearneſs of conception: For theſe Laws of a man's Subjection as ſoon as he is born, being the immediate means of his Preſervation and good, cannot but be aſſented to as ſoon as it is poſſible to aſſent, and in that are called Natural Laws. Poſt 279.

Of the Natural Laws in this ſenſe, given to all Mankind by the Deity from the beginning of Time, concerning Marriage and Bodily Knowledge, ſee excellent matter in that incomparable Work of Mr. Selden, De Jure Naturali & Gentium juxta Diſciplinam Ebræorum.

And under this ſenſe of Natural Laws hath he titled that Book, De Jure Naturali & Gentium juxta Diſciplinam Ebræorum; for ſo the Jews accounted the Laws, or Leges Noachidarum, given in the beginning to all Mankind, Natural Laws; tho' they were in truth but poſitive Divine Laws, becauſe with relation to Mankind there was no time wherein they obliged not.

In

In what ſenſe a man is ſaid to act unnaturally againſt Civil Laws or Agreement.

There is a fourth way whereby a man is ſaid to act unnaturally, which acting is ſubſequent to Human Laws and Contracts between man and man, which is, when after Laws made, and Contracts civilly ſettled, a man ſhall oblige himſelf diametrally repugnant and contrary to his former Obligation. As when

A Subject ſhall by Oath, promiſe, or otherwiſe, bind himſelf to judge or force his King, when by his Obligation to his King he is bound to obey him, and be judged by him.

When a Servant ſhall command and compel his Maſter, by whom he ought to be commanded.

To contract Marriage with two Husbands, when plenary Duty and Obedience is to be paid to each, and therefore impoſſible to be performed to both. So is it with a Servant who contracts his abſolute Service to two Maſters at the ſame time. Thoſe things are unnatural, as not conſiſting with the nature of the Obligation a Man or Woman is under, whereof much hath been already ſaid.

The *Levitical Prohibitions* of Marriage are no General Law, but particular to the *Iſraelites*.

1. All the Prohibitions of the Levitical Degrees were not coeval with Mankind, as ſome were, viz. Marriage with the Mother, the Soror uterina, the Stepmother.

2. They were not in the reſtoration of Mankind declared to Noah, as a Law for Mankind: Both theſe appear by the Marriages of the Holy Men before mentioned within many of thoſe Degrees. Poſt 231.

3. They were undoubtedly delivered by Moſes to the Jews, but not to Mankind; for Moſes neither did nor could publiſh them, as the World was then peopled, to Mankind; and a Law not publiſhed is no more obligative than a Law only concealed in the mind of the Law-giver is obligative. Poſt 305.

4. As

4. As they were delivered to the Jews only by Moſes, they bind other Nations no more than other laws of the Jews do, concerning other Subjects, as the laws of ſucceſſion and inheriting lands or goods. Grot. lib. 1. c. 1. §. 16. 2. Poſt. 230.

5. They muſt then be made obligative, if at all, to the generality of Chriſtians by the New Teſtament (but by what Medium can that be proved)?

6. They are not obligative to Chriſtians any where, as to the Jews, which appears by the law of raiſing ſeed to the Brother: vid. Canon to that purpoſe de divortiis; And by the marriage of two Siſters ſucceſſively, but not together.

7. Were they obligative to Chriſtians, as to the Jews, then all Chriſtians would be bound to the ſame puniſhment as the Jews were for tranſgreſſing them, which was never heard. It remains then that Chriſtians, are bound to them upon another account.

Beſides, it is manifeſt in the Fifteenth Chapter of the Acts, that when divers taught, That if the Gentiles would be ſaved, they muſt keep the Law of *Moſes*.

It was upon that very Queſtion reſolv'd in a Council of the Apoſtles, It was a yoke, neither they, nor their Fathers, were able to bear. Poſt 231.

It ſeem'd good to the Holy Ghoſt, and to them, to lay no more burthen on the Gentiles, than to abſtain from ſome neceſſary things: that is,

1. From things offered to Idols.
2. From things Strangled.
3. From Blood.
4. From Fornication.

Which neceſſary things, are after clearly expounded by St. Paul to the Corinthians, not to be things unlawful ſimply, but convenient, to keep a Communion between the Jews and Gentiles, that is, the Old Church and the New.

It is further cleared, That this law was no more (than the other Judicial laws) given to the Gentiles.

For when the Gentiles, which have not the law, do by nature the things contained in the Law. Rom. 2. v. 14

What is then the preferment of the Jew? or what is the profit of Circumciſion?

Rom. 3. v. 1, 2. Much every manner of way, chiefly, becauſe unto them were committed the Oracles of God.

There is no colour of Argument, That the Prohibitions in the Eighteenth of Leviticus, were univerſal laws; but that it is ſaid,

Lev. 18. v. 24. Ye ſhall not defile your ſelves in any of theſe things; for in all theſe things the Nations are defiled which I caſt out before you.

Lev. 18. v. 27. For all theſe Abominations have the men of the Land done, &c.

How could the Land be defiled? or the men of the Land? Or,

How could they be Abominations, if not prohibited?

To the 24. and 27 Verſes of the Eighteenth Chapter of Leviticus, the anſwer is That thoſe words referr to thoſe univerſal laws of the Leges Noachidarum wherein Egypt and Canaan were defiled: As Inceſt with the mother, Soror uterina, the Fathers wife; and to thoſe horrid offences of lying with man or beaſt, prohibited to all mankind from the beginning. And if the Levitical Inceſt were prohibited to the people of Egypt or Canaan, by ſome extraordinary publication (which is not probable) it follows not therefore they were prohibited to all mankind, the words before referring but to thoſe Nations, or to one of them.

Poſt 236.

Concerning univerſal Obligation to the Levitical Prohibitions in Caſes of Matrimony and Inceſt.

Though it be generally receiv'd by the Chriſtian Churches from the primitive times of Chriſtianity, That all Chriſtians are obliged to obſerve thoſe Prohibitions, as ſuch which Human Authority cannot diſpenſe with; yet by what Law that Obligation was introduc'd upon the Gentiles, converted to Chriſtianity, is not known with any ſatisfactory clearneſs. For,

1. It is evident they are not bound by them, as they were Laws promulged by Moſes to the Hebrews, both becauſe a Law deliver'd to a particular man, or men, or to a particular Nation, or Nations, is not univerſal to mankind, nor binding them under any reaſon of a Law; for every Precept or Prohibition is but to him or them to whom it is given.

Devant 229.

2. There

2. There being many ſeveral States, who had their Civil Power and Juriſdiction ſeparate from that of the Jews, the promulging of a Law by Moſes to the Jews, could be no promulgation of it to different Nations, under other Civil Powers; and though the Jews believed Moſes a Meſſenger of God's (and ſo were bound to what he delivered, as by that office) other Nations, who believed not ſo of him, were not bound by his Teſtimony, had he teſtified to other Nations the ſame things to be the will of God to them, as he did to the Jews, which he never did, nor could. Nor are other Nations bound to the Decalogue, quatenus publiſhed by Moſes, for the ſame reaſon, but are bound only to what is moral of it. Ant. 228.

3. Without a ſufficient promulgation of a Law, it obligeth no more than a Law conceiv'd only in the mind of the Lawgiver. Devant. 228.

4. If Moſes his Laws, in caſes of Inceſt, extended to mankind, quatenus reveal'd to the Jews, mankind were equally bound to all other the Moſaick Laws (whereof no alteration had been made upon the coming of the Meſſias) which is contrary to the perſwaſion and practice of all the Gentile Nations converted to Chriſtianity at the beginning of it, and ever ſince.

5. It is likewiſe contrary to the determination of the Holy Ghoſt, and the Apoſtles, at the great and firſt Council of Antioch, mentioned in the Fifteenth of the Acts, where the Gentiles were directed to obſerve but four Particulars of the Moſaick Law, as neceſſary for them, but upon what reaſon more neceſſary than the reſt obſerved by the Chriſtain Jews, is not clear. Ant. 229.

6. It is true, That by ſome of our Statutes many of the Levitical Prohibitions are affirmed to be God's Law, obligative to us, yet the Particulars are not therein named the Levitical Prohibitions, or to be according to the Moſaick Law; and many Levitical Prohibitions are omitted in the enumeration of the marriages againſt God's Law, made by thoſe Statutes.

And though ſuch declaration of them to be by Divine Law, be concluding, as to any gain-ſaying of ours, yet, as to others not ſubject to the ſame Authority with us, ſuch declaration may not only be of no authority, but may be accounted ſenſleſs and abſurd.

I ſhall therefore endeavour to ſhew in what notion ſome of thoſe Prohibitions may be obligative, as univerſal poſitive Laws, and ſome obliging as moral Laws, and ſo univerſal and of Divine Obligation; the reſidue obliging not, quatenus delivered to the Jews, but as the ſame Laws delivered to them, are made univerſal by a new Obligation.

1. And firſt, All thoſe Prohibitions mentioned in the Eighteenth of Leviticus, were poſitive Laws of God to them, quatenus they relate to, and terminate in degrees of Kindred therein ſpecified; and the breach of them puniſhable by the puniſhments ordained to that end in the Moſaick Law. And in theſe reſpects none of them are binding to any other people than the Hebrews.

3. Divers of thoſe Prohibitions are likewiſe of moral prohibition, and in that ſenſe binding all men, as in the deſcending and aſcending Line of Generation.

As the Father is prohibited to marry his Daughter, his Sons daughter, and his Daughters daughter, and further, the Levitical Prohibition for nearneſs of Kin, and for the reſpects before extends not. Ant. 213.

But the Father is likewiſe morally (and univerſally therefore) prohibited, not only thoſe perſons, but all others deſcended from them interminately, that is, as far as may be known.

So in the Aſcending Line, the Son is prohibited his Mother and Grand mother, and no further, by the Moſaick Law; but morally not only them, but all other his great Grand-mothers interminately, as far as may be known; and ſo, as well as the Son, are all Males deſcended lineally from him. The reaſon of this Moral Obligation is well given by the Learned Grotius, in theſe words; Poſt. 242.

Grot. de Jure belli, l. 2. c. 5. Sect. 12. pars. 2. Poſt. 242. Ab hac generalitate eximo matrimonia parentum cujuſcunque gradus cum liberis quæ quo minus illicita ſint ratio ni fallor ſatis apparet, nam nec maritus qui ſuperior eſt lege matrimonii, eam reverentiam præſtare poteſt matri quam natura exigit, nec patri filia, quia quanquam inferior eſt in matrimonio, ipſum tamen matrimonium talem inducit ſocietatem, quæ illius neceſſitudinis reverentiam excludat, &c. And again,

Grot. de Jure belli, l. 2. c. 5. Sect. 13. pars. 3. Ut de parentibus & liberis nihil jam dicam, quippe quos, ut exiſtimo, etiam ſine expreſſa lege, ratio naturalis jungi ſatis vetat.

By the ſame reaſon, by the Moral Law the Father or Mother cannot be Servants to their Sons or Daughters; for as Father or Mothers honour is due to them from thoſe they ſerve; but as Servant, honour is due from them to thoſe they ſerve, that is, their Children, who are their Maſters and Superiors. As Parents their Children, whom they ſerve, ought to obey and reverence them. As Servants, they are to obey their Children, who are their Maſters and Superiors, and to reverence them. So as this office and relation is inconſiſtent and repugnant between Parents and Children, and unnatural, therefore morally unlawful. Poſt. 243.

3. There are other of the Levitical Prohibitions, that by the conſtant tradition of the Jews were delivered to mankind in the beginning, and which they term præcepta Noachidarum, to which they conceiv'd all the ſons of Adam obliged; and theſe Precepts ſeem warranted by ſeveral places of Holy Scripture. Theſe are, Ant. 226. Ant. 226. 230. Poſt. 236.

That a man is prohibited his Mother, his Fathers wife, his Siſter by the ſame venter, poſitively from the beginning; but a diſpenſation was, as to the Siſters, until a competent peopling of the world; they add the prohibition of another mans wife, which is alſo Moral, as that of the Mother is. Devant. 227.

4. How the reſt of the Levitical Prohibitions, in the matter of marriage, came to be ſo generally receiv'd by Chriſtians, as being authorized and preſcribed by God, ſeems to have no foundation ſo warrantable as that Council of the Apoſtles in the Fifteenth of the Acts.

Where the Gentiles are directed to obſerve, as neceſſary only, four particulars of *Moſes* his Law, among which they are required to abſtain from Fornication, which if it had been rendred from the Septuagint, from Inceſt or Turpitude of Copulation, which anſwered the Original beſt; it had much facilitated the ſolution of this Inquiry. Poſt. 237.

For it hath no colour, That Fornication there ſhould ſignifie the ſame with Stuprum and Scortum, and that it ſhould be abſtained from, as a ſpecial particular of the Law of Moſes, being an Offence, not only prohibited by him (yet not at all among the Prohibitions in the Eighteenth of Leviticus) but by all the Nations of the Gentiles reſpectively, as well as by Moſes. And it is plain, the word Πορνεία there rendred Fornication, moſt frequently ſignifies in the Septuagint, both Adultery and Inceſt; and indeed any unlawful Copulation of man and woman. Poſt. 313.

The

The ends and reaſons of this general Law to Chriſtians, might be, Firſt,

1. If the State of the Jews (as many particular men of that State did) had embraced Chriſtianity, yet the Law of Moſes had ſtill been obliging to them, as to their Civil Goverment, as far as it could conſiſt with Chriſtianity, and had been an eternal Law, not to be abrogated but by God himſelf, who was the Law-giver. Therefore if the Gentiles obſerved not ſuch of their Laws which preſerved their Communion with the Gentiles from being odious and abominated by them. The Gentiles and the Jews, thought both had embraced Chriſtianity, muſt never have had Communion; the Jews being bound by God ſtill to obſerve Moſes's Law.

2. This deteſtation among them could not ſort with the Precepts of Chriſtianity, newly received by both.

3. Marrying at what remoteneſs of Kindred they thought fit, was in the power of the Gentiles for the future, at their own election, without tranſgreſſing their local and native Laws: And therefore induc'd no inconvenience to obſerve that Precept.

4. Since all nations of the Gentiles had ſome reſtraint of marriages by humane prudence, the Apoſtles conceived theſe dictated to the Jews, to be the moſt convenient reſtraints to be voluntarily practiſed among Chriſtians.

5. Other the reſtraints directed by that Council, all which concerned Meats, which were neceſſary Mediums to make Communion between men, are prohibited upon the ſame ground, though in themſelves indifferent, and of no obligation, if not made uſe of in a Jew's preſence, who was bound from them. But Inceſt being a laſting offence and ſcandal to the Jews, could not be concealed from them, as the eating of Meats might, and therefore was to be abſtained from, with reſolution to continue it, or not at all.

The three other Precepts by that Council, by Authority of the Holy Ghoſt, as the words import, It hath ſeemed good to the Holy Ghoſt, and to us, are only concerning Meats, that is, Firſt, of things offered to Idols; Secondly, of Blood; And thirdly, of things ſtrangled; without abſtinence from which, no Communion could be between the converted Jews and Gentiles. For,

1. Generally, in all Nations, eating together is the moſt ſignal inſtance and proof of Fellowſhip and Communion; and if the meat prepared be deſirable by ſome, and odious to others of the Company, the fellowſhip muſt break.

2. Among the primitive Chriſtians, at their Sacramental Communion, which was eſſential to the Chriſtian Religion, they had their Agapæ, or Love Feaſts, wherein, if the Food were ſuch as the Chriſtian Gentiles approv'd, and was abominable to the Chriſtian Jews, a diſſolution of the Communion between them muſt neceſſarily follow, and conſequently the Precepts of Chriſtianity be fruſtrated, both as to form and Chriſtian kindneſs. 2 Cor.

And this Fraction muſt have continued as long as the Hebrews Common-wealth laſted, which might have been perpetual; but by the diſſolution of that State and Government, their Laws likewiſe vaniſhed, which were peculiar to that Nation, as it will fall out in the Caſes of all States, when diſſolved. Grot. lib. 1. c. 1. §. 16. 7.

If the State of England, France, or Spain, or of any other Nation, be diſſolved, their reſpective Laws end with their diſſolution; nor is it, as to this purpoſe, material, whether the Laws of a Nation proceed from Divine Dictates and Authority, or Humane.

For the State being diſſolved, there is no lawful Coercion left for keeping, nor puniſhment for violating the Laws; and where that is not, there is no Law common to that people: For without coercion and puniſhment, every man is free, that is, he is not bound to any Law of Community, at leaſt. But perhaps Laws may be to particular men, as to Abraham to ſacrifice his Son, to which he was bound, under the diſpleaſure of the Numen.

And thus, by the diſſolution of the Hebrew Common-wealth, the Gentiles were freed from thoſe Obligations touching Meats, becauſe the Jews were ſo too. The obſervation of them being, after the diſſolution of the State, but the pleaſure of a particular perſon or perſons, and more than in order to preſerve Communion between the people of the Jews and Gentiles, thoſe particular Precepts were of no ſanctity to oblige univerſally, more than any other the Moſaical Inſtitutions.

2. As

2. As before the diſſolution of the Hebrew Common-wealth, it was againſt Chriſtian Charity and Love, to give ſcandal and offence to an Hebrew, by eating Meat deteſtable to him, becauſe God had bound him from it; and the Chriſtian Gentile might, without offending any Law, abſtain from the Meat, and decline giving ſcandal.

So after the diſſolution of the Iſraelitiſh State, when the Jew was equally free as the Chriſtian Gentile, it grew a ſcandal to the Gentile, That the Jew ſhould abhor or deſpiſe Meats which God had made lawful to the Gentile.

It hath been obſerved by learned men, That it may be collected from the laſt part of the Eighteenth Chapter of Leviticus, that there was ſome univerſal preceding Law given, to abſtain from thoſe Carnal Mixtures forbid by Moſes.

Defile not your ſelves in any of theſe things, for in all theſe the Nations are defiled which I caſt out before you, verſe 24. And many of the ſubſequent Verſes are to the ſame purpoſe. And theſe things are called Abominations.

Whence it is infer'd The people could not be faulty of tranſgreſſing, had there not been a Law, for without Law there can be no tranſgreſſion.

But many Anſwers may be given to this, as Firſt.

1. From the Eighteenth of Leviticus no pretence can be of an univerſal Prohibition of Carnal knowledge in all the Degrees there ſpecified, though ſuch Prohibitions might be to the particular Nations mentioned in Leviticus and Deuteronomy, to be therein defiled; but that is moſt improbable too. Ant 230.

2. The defiling there mentioned may be intended of Sodomy, Buggery, Inceſt with the Mother, the Father's wife, the Soror uterina, Adultery, agreed by the Jews to be univerſally prohibited, which they term Leges Noachidarum, and which are the Offences laſt mentioned in the Eighteenth of Leviticus before, verſ. 24. before cited. Ant 226. 230.

3. The

3. The marriages of many perſons eminently in God's favour, before the Moſaical Law, as Abrahams marrying Sarah his Siſter by the Father; Jacob's marrying two Siſters; Amram's Moſes his Father, marrying Jochebed his Father's Siſter; Marrying the Brother's wife, as in the Story of Onan before the Moſaical prohibitions; Nachor's, Abraham's Brother, marrying Milcah his Brother Haram's daughter; and the ſtrong Opinion that Judah himſelf married Thamar his Daughter in law, as well as he had Coition with her, &c permits not to believe many Copulations mentioned in Moſes his Prohibitions, to have been before univerſally prohibited. Ant. 222.

4. If among the Nations caſt out before the Jews, as defiled in theſe things, Humane Laws had been made among them, as in every Nation of the Gentiles was uſual to prohibit ſome marriages for nearneſs of Cognation; and thoſe Nations had not obſerved, but tranſgreſſed their own Laws, as is uſual in all places, to offend againſt their known Laws, God might therefore puniſh them, as daily he doth, and did always the Gentiles for not keeping their own Laws, vid. Paul to the Romans per totam Epiſtolam.

5. Though men cannot juſtly make people ſuffer, but for tranſgreſſing Laws which they might have kept; yet the Numen, who is juſt when he exerciſeth abſolute Dominion over his Creatures, may inflict ſufferings upon a Nation for doing things he likes not, and therefore call ſuch things abominable; as there is an Ill which begets the making of Laws to obivate and prevent it, as well as an Ill in tranſgreſſing Laws when they are made. And he which doth contrary to natural prudence, and his own perſwaſion of what is beſt, may incur the diſpleaſure of the Numen, as well as for tranſgreſſing a Rule or Law which he might have kept. And though this way of puniſhing is not proper to men, it is as proper, as the other to the Deity, to whom mans thoughts, purpoſes, ends, and means, are open.

That the abſtaining from Inceſtuous marriages, according to Moſes his Law, was a part of the Moſaical Law, precepted to be obſerved by the Gentiles at that Council, I think can be little doubted, and not the abſtaining from what is accounted ſimple Fornication, which even by Moſes his Law was often ſatisfied by marriage of the woman, and often by mony. Ant. 223.

But it ſeems difficult, How that Precept, or the obſervance of it, could either cauſe, or preſerve Communion between the Jews and the Gentiles, as thoſe others did concerning abſtinence from Meats prohibited to the Jews, and not to the Gentiles.

For firſt, Alliance and Affinity between the Jews and the Gentiles, before, and by the Law of Moſes, was abſolutely forbid, though the Gentiles (as many of them did for many prohibited marriages) had abſtained by their own peculiar Laws from all thoſe marriages prohibited the Jews. Therefore their Communion by Alliance or Affinity had received no advancement by abſtaining from Moſaical Inceſts in that reſpect.

But beſides the general Interdict of Alliance with the Gentiles, the Jews were interdicted in a ſpecial manner, any alliance or converſation with the Nations, whoſe Land they were to enjoy and inherit, and who were caſt out before them, as being defiled in all thoſe Copulations of Kindred, prohi-
Lev. 18. v. 24, &c. bited the Jews, as appears from Verſe the Four and twentieth to the end of the eighteenth Chapter of Leviticus, and which Iniquity was viſited by making the Land vomit out the Inhabitants.

2. Verſe the Thirtieth, the Jews are charged not to commit any one of thoſe abominable Cuſtoms committed before them; and if they did, they were puniſhed by death, as appears Leviticus the Twentieth. This was enough to cauſe a particular deteſtation and abhorrency in the Jews, of ſuch who accuſtomed themſelves to ſuch marriages, or any of them, above others, of the Gentiles.

3. The Nations caſt out of their Land for committing thoſe things, appear to be Seven; The Hittite, the Girgaſhite, the
Deut. 7. v. 1. Amorite, the Canaanite, the Perizzite, the Hivite, and the Jebuſite, whoſe names they were commanded to deſtroy from under Heaven, Verſe the Four and twentieth of that Chapter; accordingly it appears they did ſo. Deuteronomy the Second and Third Chapters, The Amorite, and thoſe under Og, King of Baſhan were, Man, Woman, and Child, deſtroyed.

Chapter the Seventh, Verſe ſecond and third, no Covenant was to be made with, nor marriage between them.

Of the Cities of theſe people which the Lord thy God giveth Deut. 20.
thee for an inheritance, Thou ſhalt ſave alive nothing that breatheth, but thou ſhalt utterly deſtroy them, which ſhews their deſtruction was not for tranſgreſſing a Law given them by God, as their Law-maker, for they were deſtroy'd which had not offended againſt the Law, as well as they which had. But it was an Act of God's abſolute dominion over his Creatures, as the Potter may do what he liſteth with his Clay, which muſt not ſay why haſt thou made me thus.

Whereas they had differing commands concerning Cities far from them; As, 1. To offer them peace; 2. If they accepted it, to make them Tributaries; 3. If they refuſed it, to kill the Males with the Sword, but to ſpare the women and children, Deut. 20. from verſe 10. to verſe the Fifteenth.

It is hence not improbable the Jews had great averſneſs to the Communion of ſuch, whoſe mixtures in marriage were alike to theſe Nations, though they were not of theſe Nations; for the vengeance ordained againſt them appears not to be for other cauſes (than for thoſe inceſtuous Copulations) which were not common to all other the Nations of the Gentiles, as well as to them, that is, Idolatry: And for this reaſon,

The Apoſtles might direct the Gentiles to abſtain from marriages that would render them odious to the Jews, and which the Chriſtians ever after continued as moſt conformant to God's will in the fitneſs of marriage.

But this is not reaſon enough to make all theſe marriages to be prohibited to the Gentiles abſolutely by Divine Inſtitution, as unholy in themſelves, without relation to the communion with the Jews, ſo as to make it abſolutely unlawful to change them by any Humane Law upon any occaſion. But it is never prudent to change a Law which cannot be better'd in the ſubject matter of the Law.

Accordingly if we examine well, perhaps diſpenſations will be found given by the Chriſtian Churches for marriages, within moſt of thoſe Moſaical Degrees, and particularly in thoſe marriages inſtanc'd in which were lawful before the Law of Moſes, and which have not a moral inconſiſtency with them, and ſo a natural iniquity, and which therefore are prohibited among all civilized Nations, whether ancient or modern, as well as among the Jews, for the moſt part.

Selden de Jure Gentium.

In ſome places ſome particular examples may be to the contrary, for ſpecial reaſons of Revelation or Prophecy believ'd, as the Mother to marry the Son.

Accordingly it is affirmed by the Statutes of 28 H. 8. c. 7. & 25 H. 8. c. 22. That the marriages enumerated in both thoſe Acts to be prohibited by Gods Law, were notwithſtanding allow'd by colour of Diſpenſations by mans power. The words of the Statute of 28. are, after the recital of the prohibited marriages, All which marriages, albeit they be plainly prohibited and deteſted by the Laws of God, yet nevertheleſs, at ſome times, they have proceeded under colours of Diſpenſations by mans power, which is but uſurped, and of right ought not to be granted, admitted, nor allow'd

The ſame words are in the Statute of 25. but inſtead of, All which marriages, the words are, Which marriages, &c.

The ſecond Queſtion, What are the Levitical Degrees, I omit, becauſe the marriage in queſtion is in no ſort in the Degrees.

Obſervation.

And by the way it is very obſervable, That as we take the Degrees of Marriage, prohibited by God's Law, to be the Levitical Degrees expreſſed, or neceſſarily implyed in the Eighteenth of Leviticus, upon parity of reaſon, or by Argument, a fortiori.

So there are ſome in Leviticus, which by the Act of 28 H. 8. cap. 7. and otherwiſe in our enumeration of the Levitical Degrees, we admit as abſolutely prohibited, which in the Levitical Law, and in the meaning of the Eighteenth of Leviticus, were not abſolutely, but circumſtantially prohibited; that is,

1. The marriage of a man with his Brother's wife, which by 28 H. 8. cap. 7. is abſolutely prohibited, and commonly receiv'd to be abſolutely prohibited, by the Levitical Degrees.

But was not ſo by the Levitical Law, nor by the meaning the Eighteenth Chapter of Leviticus, but when the dead brother left Iſſue by his wife.

But if he did not, the ſurviving Brother was, by the Law, to marry his wife, and raiſe Iſſue to his Brother

This

This Law was ſo known, that by all the Evangeliſts, a Woman, who had Seven Brothers ſucceſſively, our Saviour was asked, Whoſe Wife ſhe ſhould be at the Reſurrection?

2. The ſecond of this kind is, A man is prohibited by 28 H. 8. and by the receiv'd Interpretation of the Levitical Degrees, abſolutely to marry his Wives ſiſter: but within the meaning of Leviticus, and the conſtant practice of the Common-wealth of the Jews, a man was prohibited not to marry his Wives Siſter only during her life, after he might. So the Text is, Poſt. 312.

Thou ſhalt not take a Wife with her Siſter, during her life, to vex her, by uncovering her ſhame upon her.

This perhaps is a knot not eaſily untied, how the Levitical Degrees are God's Law in this Kingdom, but not as they were in the Common-wealth of Iſrael, where firſt given.

Third Queſtion.

The third Queſtion, and chiefly concerning the Caſe in queſtion, is, Whether Harriſon's marriage with his great Uncles (that is, his Grand-father's Brother's wife) be a marriage by good and ſound deduction of Conſequence within the Levitical Degrees not particularly expreſſed? For, I think it evident, it is not among thoſe that are expreſs'd, neither in the Greek nor Latin Tranſlations, nor in the Britiſh names of Kindred, where my Father's Coſen German hath the appellation of my Uncle; nor holpen by the gloſs of being prohibited in the Twentieth of Leviticus, though not in the Eighteenth.

1. The word Uncle is an equivocal expreſſion, and in ſeveral places ſignifies ſeveral Relations; as in the Britiſh, the Father or Grand-father's Coſen German is accounted an Uncle to the Son.

2. The Father's Brother hath in Latin a ſpecifique term of Relation to the Son or Daughter, viz. Patruus. So hath the Mother's brother, Avunculus; but in the Greek it hath not, and is expreſs'd only by the word Kinſman.

But the Stat. of 28 H.8.c.7. recites this prohibition to be, To marry his Uncles Wife.

3. In

3. In Junius and Tremellius's Tranſlation, done with regard to the Septuagint and the Original, the Twentieth of Leviticus, verſe the twentieth, is rendred Quiſquis cubaverit cum Amita ſua nuditatem patrui ſui retexit, where expreſly, inſtead of, and uncovered his Uncle's ſhame it is uncover'd his Uncle, his Father's Brother's ſhame, which makes it the ſame with the Eighteenth of Leviticus, verſe the fourteenth.

I ſhall therefore firſt agree, That marriage with the Grand-mother, Great-grand mother, and with the Great-grand-father, and ſo upwards, without limit; is, though not expreſſed, equally prohibited in Leviticus, as marriage with the Father, Mother, or Grand-father, to the Son or Daughter: So as in the right Aſcending Line of Generation there can be no lawful marriage.

Ant. 232.

2 Ven. 12. 18.

1. The Father and Mother are the immediate natural Cauſes of the being of their Children, and the Grand-father and Grand-mother are natural mediate cauſes of their being, and ſo upwards, in the right aſcending Line interminately; for a man could no more be what he is, without his Grand-father and Grand-mother, and ſo upwards, than without his Father or Mother: Therefore they are really Parents, and neceſſary mediate cauſes of bringing the Children to have being, and conſequently what is due of reverence or acknowledgment for his being, from the Child to Father or Mother, is likewiſe due to thoſe other Relations in the Aſcending right Line.

But the Uncle quatenus Uncle, &c. doth no more contribute to the natural being of the Nephew or Neece, than as if he had not at all been.

The marriage of the Son or Daughter with Grand-mother or Grand father, and ſo with any Anceſtor, Male or Female, in the right Aſcending Line, is, after Laws determining the knowlege and reverence due to Parents, unnatural and repugnant in it ſelf.

For there is unnaturalneſs in Civil things, when conſtituted, ſometimes;

Though there be no Maſter or Servant originally in nature, but only parity, yet after Laws have conſtituted thoſe Relations.

A. cannot at the ſame time be both Maſter and Servant to B. there is a repugnancy in the nature of thoſe two Offices, to be conſiſtent in the ſame perſons at once.

A Father or Mother cannot be Servant to their Son or Daughter; for under the relation of Father or Mother, the Son is to obey them, but in that of Servant, they to obey him, which is repugnant, and againſt the nature of thoſe Relations. Ant. 233.

Under the Law it was not forbidden a man to Curſe his Servant, but Death to Curſe his Father or Mother. A man might correct and chaſtiſe his Servant qua ſuch, but penal alike to chaſtiſe his Father or Mother in this ſenſe.

The marriage of the Son with his Mother, or the Daughter with her Father, are unnatural.

For as a Husband to her, the Son is both to command and correct the Mother as his wife, but as a Son to be commanded, and endure her Correction as Mother. Ant. 232.

So between the Father and Daughter, there is a Reverence from the Daughter to the Father, inconſiſtent with the parity between man and wife; and Laws give often a power over the daughter, which they forbid over the wife.

And the reverence and obedience from the Grand-child to the Grand-mother, in what degree ſoever, is the ſame as to the Mother, and the ſame conſequences follow.

For if the Mother or Father have power abſolute, or in tantum, over the Son or Daughter, to create reverence to them, the ſame hath the Grand-mother, or Grand-father, and ſo forwards.

For if B. the Father have abſolute or qualified power over A. the Son, and C. the Grand-father hath the ſame over B. the Father, then hath C. the Grand-father the ſame over A. the Son, not immediately but mediately by the Father.

To this purpoſe the Caſe put in Platt's Caſe in the Com. is moſt appoſite. A woman Guardian of the Fleet marries her Priſoner in Execution, he is immediately out of Execution, for the Husband cannot be Priſoner to his Wife, it being repugnant, that ſhe, as Jaylor, ſhould have the Cuſtody of him, and he, as Husband, the Cuſtody of her. Plow. Com. 37. a. Suarez. de Leg. 132. §. 15.

To this purpoſe alſo, it is remarkable what that great Scholar and Lawyer, Hugo Grotius hath; Eximo ab hac generalitate matrimonium parentum cujuſcunque gradus cum liberis quæ quo minus licita ſint ratio, ni fallor, ſatis apparet. Nam nec maritus qui ſuperior eſt lege matrimonii eam reverentiam præſtare poteſt matri quam natura exigit, nec patri filia, quia quanquam inferior eſt in matrimonio, ipſum tamen matrimonium talem inducit ſocietatem, quæ illius neceſſitudinis reverentiam excludat. Ant. 232. Grot. de Jure belli, l. 2. c. 5. Paragr. 12.

But

But as to other Relations, the ſame Author, in the ſame place,

De Conjugiis eorum qui ſanguine aut affinitate junguntur ſatis gravis eſt quæſtio,& non raro magnis motibus agitata; nam cauſas certas, ac naturales cur talia conjugia, ita ut legibus aut moribus vetantur illicita ſint aſſignare qui voluerit, experiendo diſcet quam id ſit difficile, imo præſtari non poſſit.

I add only, That as the mutual duties of Parents and Children conſiſt not with their marrying one another; ſo the Procreations between them will have a neceſſary and monſtrous inconſiſtence of Relation.

For the Son or Daughter, born of the mother, and begot by the Son, as born of the mother, will be a Brother or Siſter to the Father, but as begot by him, will be a Son or Daughter.

So the Iſſue procreate upon the Grand-mother as born of the Grand-mother, will be Uncles or Aunts to the Father, as begot by the Son, they will be Sons or Daughters to him, and this in the firſt degrees of Kindred.

Beſides, by the Laws of England Children inherit their Anceſtors without limit in the right aſcending Line, and are not inherited by them. But in the Collateral Lines of Uncle and Nephew, the Uncle as well inherits the Nephew, as the Nephew the Uncle.

In the Civil Law the Agnati, viz. the Father, or Grandfather's Brother, are loco parentum; and the Canons borrow it thence, but that is becauſe they were Legitimi Tutores, or Guardians by Law to their Nephews; with us the Lord, of whom the Land is held, is Guardian, or the next of Kin to whom the Land cannot deſcend, and by the ſame reaſon they ſhould be loco parentum

In a Synod or Convocation holden in London, in the year 1603. of the Province of Canterbury, by the King's Writ, and with Licence under the Great Seal to conſent and agree to ſuch Canons and Conſtitutions Eccleſiaſtick as they ſhould think fit.

Several Canons were concluded, and after ratified under the Great Seal, as they ought to be; among which the Ninety ninth Canon is this:

No

No perſon ſhall marry within the Degrees prohibited by Gods Law, and expreſſed in a Table ſet forth by Authority, in the year of our Lord, 1563. and all marriages ſo made and contracted, ſhall be adjudg'd inceſtuous and unlawful: And the aforeſaid Table ſhall be in every Church publickly ſet up and fixed, at the charge of the Pariſh. Canons 1 Jac. 1603. Can. 99. Poſt. 303. 311.

This Table was firſt publiſht in Arch-biſhop Parker's time, in 1563. I know not by what Authority then, and after made a Canon of this Convocation, with the Kings Licence under the Great Seal, and ſo confirm'd, and ſince continually ſet up in Pariſhes.

By which expreſly the Degrees by Gods Law prohibited, are ſaid to be expreſſed in that Table, and is the ſame as, No perſon ſhall marry within the Degrees prohibited by Gods Law, and which are expreſſed in the Table. Any other Expoſition of the Canon will be forc'd and violent, and the Table ſet up for the Peoples direction from Inceſt, but a ſnare and a deceit to them. Poſt. 328.

And this marriage is not prohibited in that Table,

There is an Objection, That by the Canon and Civil Law this Degree of Marriage in queſtion is prohibited.

It is true; but by the Statute of 32 H. 8. c. 38. All Prohibitions by the Canon or Civil Law, quatenus Canon or Civil Law, are wholly excluded, and unleſs the marriage be prohibited by the Divine Law, it is made lawful.

But ſuppoſe the Canon or Civil Law were to be taken as a meaſure in the ſubject of marriage of what were lawful.

With the Canon Law, of what time would you begin? for it varies as the Laws Civil of any Nation do, in ſucceſſive Ages. Before the Council of Lateran, it was another Law than ſince, for marriages before were forbid to the Seventh degree from Coſen Germans inclusively, ſince to the Fourth. Ant. 213.

Every Council varied ſomewhat in the Canon Law, and every Pope from the former, and often from himſelf, as every new Act of Parliament varies the Law of England, more or leſs; and that which always changeth can be no meaſure of Rectitude, unleſs confin'd to what was the Law in a certain time, and then no reaſon will make that a better meaſure than what was the Law in a certain other time: As the Law of England is not a righter Law of England in one Kings Reign, than in another, yet much differing.

Nerva forbad it; Heraclius permitted it. Grot. Annot. 167.

So doth the Civil Law, before the marriage of Claudius the Emperour with Agrippina his Brothers daughter, the marriage of the Uncle with his Neece, was not allowed among the Romans. But by a Law of the People and Senate upon that Occaſion, ſuch marriages were permitted. Many others of the like kind.

Nor did the Canon Law, and perhaps truly, take more perſons to be prohibited within the Levitical Degrees, than are there expreſſed: What elſe is the meaning of that place in Levitico vero prohibitæ fuerunt fere duodecim perſonæ, &c. in the Expoſition of the Arbor Conſanguinitatis & Affinitatis.

Reformatio Legum Eccleſiaſticarum ex Authoritate primum Regis *Henrici* 8. inchoata, deinde per Regem *Edwardum* 6. provecta, de gradibus in Matrimonio prohibitis.

Deus in his gradibus certum jus poſuit Levitici 18. & 20. Capite, quo Jure nos, & omnem poſteritatem noſtram teneri neceſſe eſt. Nec enim illorum capitum præcepta veteris Iſraelitarum Reipub. propria fuerunt, ut quidam ſomniant, ſed idem authoritatis pondus habent quod Religio noſtra Decalogo tribuit, ut nulla poſſit humana poteſtas quicquam in illis, ullo modo conſtituere.

Hoc tamen in illis Levitici capitibus diligenter animadvertendum eſt, minime ibi omnes non legitimas perſonas nominatim explicari, nam Spiritus Sanctus illas ibi perſonas evidenter, & expreſſe poſuit ex quibus ſimilia ſpatia reliquorum graduum, & differentiæ inter ſe facile poſuit conjectari & inveniri. Exempli cauſa, cum filio non datur uxor mater, Conſequens eſt, ut ne filia quidem patri conjux dari poteſt, & ſi patrui non licet uxorem in matrimonio habere, nec cum Avunculi conjuge nobis nuptiæ concedi poſſunt.

Admitting this marriage out of the Levitical Degrees, whether it be ſo pleaded as that we ought to deny a Conſultation,

Faults

Faults in the Pleading.

The Plaintiff ſets forth the Act of 32. and particularly, That all Marriages are thereby lawful, contracted between lawful perſons, and that all perſons are lawful, not prohibited by Gods Law to marry. Then he ſets forth another Clauſe, That no marriage ſhall be impeach't (Gods Law excepted) made out of the Levitical Degrees.

Then ſets forth his marriage with his Wife, being formerly married to Bartholomew Abbot, his Grand-fathers brother (and conſequently his great Uncle) there being no pre-contract of either ſide, which was lawful Secundum Jura Divina & Humana.

And that he was libell'd for his marriage in the Spiritual Court, as inceſtuous and unlawful, and ſets forth the Articles of the Libel in particular, and the proſecution for a Divorce.

But doth not averr, That the marriage is without the Levitical Degrees, as he ſhould have done. Poſt. 302.

Upon which Declaration, the Defendant demurrs, and prays a Conſultation.

Whereas, if the Plaintiff had aver'd the marriage to be without the Levitical Degrees, the Defendant muſt either have demurr'd upon that ſingle point, or have been forc'd to have confeſs'd that it was out of the Levitical Degrees, but was notwithſtanding againſt Gods Law, upon the words of the Act, No marriage ſhall be impeach'd, Gods Law excepted, that is, without the Levitical Degrees. In ſuch caſe the Defendant muſt have ſhew'd how it was againſt Gods Law, according to Speccots C. 5. Rep.

So as by his manner of Pleading, the Court is now to Judge, not whether the marriage be without the Levitical Degrees, but whether it be againſt Gods Law in general. The Defendant hath not articled, That Abbot knew the wife carnally; and then it is not a marriage againſt Gods Law by 28 H. 8. cap. 7. nor that it is withithin the Levitical Degrees.

And upon this manner of Pleading, after a Prohibition granted a Conſultation was awarded in Mann's Caſe.

Mann had married his firſt wives ſiſters daughter, and was ſued before the High Commiſſioners; for although this was not prohibited within the Levitical Degrees, yet becauſe degrees more remote are forbidden, they gave ſentence of Divorce. And he grounded his Prohibition upon the Stature of 32 H. 8. Cr. 33 El. 228. Manns Caſe. Poſt. 321. 249.

c. 38. And a Conſultation was prayed and granted, becauſe the Prohibition is not to be, if it be not without the Levitical Degrees, and here it was general, and therefore not good.

Mann's Caſe. Moore f. 907. a. The ſame Caſe is in Moore, who Reports the Grant of a Prohibition in the Caſe, but mentions not the Conſultation which was moved for long after the Prohibition; and therefore alters nothing of Crook's Report. But the Record of this Caſe cannot be found.

Cok. Lit. f. 235. a. Poſt. 322. There is another Caſe of one Richard Pearſon, not Parſons, wherein a Prohibition was granted out of this Court in the like caſe as Manns, for marrying his wives ſiſters daughter, in Trinity Term 2 Jac. Rot. 1032.

Sir Edward Coke ſaith he was drawn into queſtion in the Eccleſiaſtical Court for the Marriage, alledging the ſame to be againſt the Canons.

And that it was reſolved by the Court of Common Pleas, upon Conſideration of the Statute of 32 H. 8. cap. 38. that the Marriage was not to be impeach'd, becauſe declared by the ſaid Act to be good, in as much as it was not prohibited by the Levitical Degrees, This Caſe is again remembred by Sir Edward Coke in his Comment upon this Statute of 32 H. 8. In the latter Editions of his Littleton it is not printed, but it ſeems omitted, not by his conſent, becauſe he remembers it in his Magna Charta upon that Statute, long after printed.

But I find there was a Conſultation granted in Hillary Term after the prohibition granted, but find no appearance or Plea of the Defendant.

But by the Record of that Caſe, the Plaintiff declares, Qui quidem Richardus & Anna fuerunt, & ſunt legales perſonæ inſimul maritati per legem Dei minime prohibitæ ac extra leges Leviticales.

Poſt. 249.

Quidam tamen machinans matrimonium prædictum ſecundum legem Dei & Hominum legitime celebratum diſſolvere, Prætendens matrimonium illud fore inceſtuoſum eoſdem Henricum & Annam, &c. in placitum trahi procuravit.

Then ſets forth the Articles of the Libel, whereof 1. is,

Item quod præmiſſorum ratione præfat. Anna fuit ac eſt Affinis tui præfati Richardi, & in gradu de Jure prohibito pro aliquo matrimonio inter te, & eandem contrahendo aut habendo notorie

rie conſtituta, videlicet filia naturalis, & ligitima de Johanne Gardiner, alias Lucas, ſorore dictæ Janæ Gardiner, alias Pearſon, uxore tua prædicta.

Nor is it material that he ſaith after, Ac licet prædict. Richardus & Anna Matrimonium prædictum fore legitimum, & per leges Leviticales minime prohibitum, & per Stat. prædict. fore bonum coram præfato Judice placitaverunt & allegaverunt, & illa inevitabili veritate probari, prædictus tamen Judex placitum illud, & allegationem admittere penitus recuſavit.

For that is not an Averment, That the Marriage was out of the Levitical Degrees to the Temporal Judges; for they can take no Iſſue, nor try what Plea was before the Spiritual Judge.

Then upon this pleading, it no way appears that the Libel was for marrying againſt the Law of God; and if it were not, then the Spiritual Court had no Conizance' though it were againſt the Canons which the Act of 32. had excluded.

Therefore the Prohibition might well be awarded, eſpecially becauſe the Libel was, That the marriage was Inceſtuous.

Next, a Conſultaion might be granted, unleſs cauſe were ſhew'd, for it was no otherwiſe. Becauſe the Suggeſtion was not, That the marriage was out of the Levitical Degrees, but that the perſons married were extra leges Leviticales, which was as if they had ſaid, They were not under the Jewiſh Common-wealth. Ant. 248.

And then a Conſultation might be granted upon this prohibition, as upon that of Mann's Caſe, becauſe the Plaintiff did not averr the marriage to be extra gradus Leviticos, and ground his Prohibition thereupon. Ant. 247.

As thoſe two Prohibitions were for marrying the wives Siſters daughter, that is, the Wives Neece by the Siſter. So there is a Caſe in the Lord Hobbard, where one Rennington who married his Wives Siſters Daughter, was queſtioned for Inceſt by the High Commiſſioners, and ſentenced, and entred into Bond to abſtain from her Company, but was not divorced, and therefore the Wife recover'd a Wives Widows Eſtate in a Copy-hold, notwithſtanding the Sentence; but no Prohibition was in the Caſe. Hobbard f. 181. a. Keppington. Poſt. 322.

The

The ſame Caſe is in the Reports which paſs for Mr. Noye's, f. 29. but miſtaken, for there in place of his Wives ſiſter, it is Fathers ſiſter.

Hill. 21 Car. II. This Caſe was, by the King's Command, adjourn'd for the Opinion of all the Judges of *England*, Trin. 22 Car. II. The Chief Juſtice delivered their Opinions, and accordingly Judgment was given, That a Prohibition ought to go to the Spiritual Court for the Plaintiff.

Mich.

Mich. 20 *Car.* II. *C. B.*

Sir *Henry North* Plaintiff, *William Coe* Defendant.

SIR Henry North hath brought an Action of Treſpaſs, Quare clauſum fregit, againſt William Coe, in a Cloſe upon the new Aſſigment, called Weſtrow-hills, containing Fifty Acres, a Cloſe called the Heyland, containing One hundred Acres, and another called the Delf and Brink, containing One hundred and fifty Acres in Milden-hall. 1. Levinz. 268. 253. 1. Saund. 350. 2. Saund. 324. Cart. Rep. 199. 1. Vent. 383.

The Defendant pleads, That the ſaid places are part of the Manor of Milden hall, whereof the Plaintiff was ſeiſ'd tempore tranſgreſſionis ſuppoſitæ, and that he was then, and yet is ſeiſed of an ancient Meſſuage, with the Appurtenances in Milden hall, being one of the free Tenements of the ſaid Mannor, and held of the ſaid Mannor, by Rents and other Services, in his demeſne as of Fee.

That there are divers freehold Tenements, time out of mind, in the ſaid Mannor, held by ſeveral Rents and ſervices, parcel of the ſaid Mannor, and that there were, and are, infra eandem Villam, divers cuſtomary Tenements, parcel of the ſaid Mannor, grantable Ad voluntatem Domini, by Copy.

That all the Tenants of the free Tenements, time out of mind, habuerunt, & uſi fuerunt, and all the Tenants of the Cuſtomary Tenements, Per conſuetudinem ejuſdem Manerii in eodem Manerio a toto tempore ſupradict. uſitat. & approbat. habuerunt & habere conſueverunt ſolam & ſeparalem Paſturam prædict. Clauſi vocat. *Weſtrow-hills*, cum pertinen. for all their Cattel (Hogs, Sheep, and Nothern Steers except) levant and couchant upon their reſpective Meſſuages and Tenements every year, for all times of the year, except from the Feaſt of St. *Edmond* to the Five and twentieth of *March* next following, as belonging and pertaining to their ſeveral Tenements. 3. Mod. 250.

And

And likewiſe had, and uſed to have, ſolam & ſeparalem Paſturam prædict. Clauſi vocat. *Weſtrow-hills*, from the Feaſt of St. *Edmund* every year, to the Five and twentieth of *March*, for feeding of all their Cattel (Hogs, Sheep, and Nothern Steers except) levunt and couchant, &c. Excepted that the Tenants of the Demeſne of the Mannor every year, from the ſaid Feaſt to the Five and twentieth of *March*, by cuſtom of the ſaid Mannor depaſtured their Sheep there.

That at the time of the Treſpaſs, the Defendant put in his own Cattel, levant and couchant, upon his ſaid Meſſuage, Prout ei bene licuit, and averreth not that none of his ſaid Cattel were, Porci, Oves, or Juvenci, called Northern Steers, but Petit Judicium.

The like Plea he makes for the Cloſes called the Haylands Delf and Brink, but that the free Tenants, as before, and cuſtomary Tenants, had ſolam & ſeparalem Paſturam pro omnibus averiis (Porcis, Ovibus, & Juvencis, called Nothern Steers, excepted) for all times of the year.

And that he put in Averia ſua, levantia & cubantia, ſuper tenementum prædictum prout ei bene bene licuit, & Petit Judicium.

Cum hoc quod verificare vult quod nullus bovium prædict. ipſius Willielmi fuerunt Juvenci, vocat. *Northern Steers.*

Whereas no mention is of putting in Oxen, but Averia ſua in general, and no averment that no Sheep were put in.

The Plaintiff demurs upon this Plea.

Exceptions to the Pleading.

The Defendant ſaith he was ſeis'd de uno antiquo Meſſuagio, being one of the freehold Tenements of the ſaid Manor, and that there are divers freehold Tenements within the ſaid Manor, and that omnes Tenentes of the ſaid Tenements, have had ſolam & ſeparalem paſturam for all their Cattel, levant and couchant, except Porcis, Ovibus, and Juvencis, called Nothern Steers, in the place called Weſtrow-hills, and that he put his Cattel, levant and couchant, prout ei bene licuit.

1. That

1. That he was ſeis'd, de uno antiquo Meſſuagio, and of no Land, is not proper; for Cattel cannot be levant in common intention, upon a Meſſuage only.

2. He ſaith he put in his Cattel levant and couchant, but avers not as he ought, That none of them were Porci, Oves, or Northern Steers; for Porci there is a Rule of Court.

3. He pleads in like manner as to the Hayland Delf and Brink, That he put in his Cattel, and avers that nullus Bovium prædict. were Northern Steers; when as there is no mention of putting in Oxen, but Averia generally, and no averment that there were no Sheep.

4. The Plea doth not ſet forth the Cuſtom of the Manor, but implicitly that the Free-hold and cuſtomary Tenants have had and enjoy'd per conſuetudinem Manerii ſolam & ſeparalem paſturam for all their Cattel, which is a double Plea, both of the cuſtom of the Manor, and of the claim by reaſon of the cuſtom, which ought to be ſeveral, and the Court ſhould judge and not the Jury, whether the claim be according to the cuſtom alledg'd.

The cuſtom may be different from the claim per conſuetudinem Manerii, if particularly alledg'd.

Laſtly, the matter in difference is not before the Court formally by this way of pleading; for the matter in queſtion muſt be, Whether the Lord of the Manor be excluded from paſturing with the Tenants in the place in queſtion, or from approving the Common? If the Defendant had diſtrained Damage feaſant, and the Plaintiff brought his Action, and the Defendant avow'd propter ſolam & ſeparalem paſturam, the Lords right to depaſture had come properly in queſtion, and by natural pleading.

Or if the Lord, upon the Tenants plea, had taken no notice of ſola & ſeparalis paſtura, but had confeſſed that the Land was a Common, and that he had approv'd the places in queſtion, leaving ſufficient Paſture for the Tenants, if then the Tenant had demurr'd upon his Plea of Sola & ſeparalis paſtura, the right of approving had properly come in queſtion.

A man hath no right to any thing for which the Law gives no remedy.

This muſt be a Common, or Nothing.

1. If diſſeis'd, the Aſſiſe is Quare diſſeiſivit eum de Communia paſturæ ſuæ.

If ſurcharg'd, an Admenſuratio paſturæ is Quare Superoneravit Communiam paſturæ ſuæ.

22 Aſſ. p. 48. Cok. Litt. 4. b. Poſt. 256.

Treſpaſs lies not for a Common, but doth for Sola & ſeparalis paſtura granted to one or more jointly; But not here, where all cannot joyn in Action, and ſeveral Actions would cauſe ſeveral Fines to the King for the ſame offence, which the Law permits not.

He cannot avow but for Damage done to his Common, not for his Sola & ſeparalis paſtura.

Foyſton & Cratchrod's Caſe, 4. Rep. f. 31.

2. No Common of Paſture can be claimed by Cuſtom within the Mannor, that may not be preſcribed for out of the Mannor, for what one might grant another might But no Preſcription can be for Sola & ſeparalis paſtura out of a Mannor to ſuch Common. Therefore they ſhall not claim it by Cuſtom in the Mannor.

For Copy-holders muſt preſcribe out of the Mannor that the Lord for himſelf, and his Tenants at will, hath always had Common in ſuch a place, which Preſcription gives the Lord what this Cuſtom would take from him.

3. No man enjoys a Real Profit, convey'd from the Lord, which he cannot re-transfer again to the Lords benefit; but a Commoner of ſuch a Common cannot Releaſe, Surrender, Extinguiſh, or otherwiſe Convey this Common to the Lords benefit.

Smith & Gatewoods Caſe. 3 Jac. Cr. f. 152. 6 Rep. f. 59.

Which is the reaſon in Gatewood's Caſe, That Inhabitants not corporate cannot preſcribe in a Common; none of them can extinguiſh or releaſe that Common he claims.

15 E. 2. Title Preſcript. pl. 51.

A man preſcribed in the ſole Paſture, after carrying off the hay, to a certain time of the year.

Fitz. pl. 55. ſuper.

So tempore E. 1. a Preſcription for all the Paſture, and the Owner of the Soyl could only plough, ſow, and carry his Corn, but not depaſture the Graſs at all.

But no Caſe, where different perſons had by different Title, as here, in the ſame ground, Solam & ſeparalem paſturam.

Nor no Caſe where Sola & ſeparalis paſtura is granted to a man and his Heirs; which ſeems the ſame as granting omne proficuum terræ: For where it is alledged there may be Mines, Woods, and the like, notwithſtanding the Grant of Solam & ſeparalem paſturam, theſe are caſual, and not conſtant profits; they may be, or not be at all.

When

When a man brings an Action, as an Entry ſur Diſſeiſin, or the like, where he muſt alledge Eſplees, the profit of a Mine will not ſerve, but for the mine it ſelf, which may be a divided Inheritance from the Soyl.

So may Woodland be a divided inheritance from the Soyl, and the profit or cutting of that is not Eſplees of the Land generally, but of the Woodland, but the profits of all and every part, are the Eſplees of the Land, and proves ſeiſin of the whole Land, which are in the form of pleading the Corn, Graſs, and Hay, which are profits pour moy & pour tout, and where Sola & ſeparalis paſtura is granted generally away, Seiſin cannot be alledg'd in taking any of theſe.

It is agreed generally for Law, That a Preſcription to have Solam & ſeparalem Communiam in certain Land, doth not exclude the Owner of the Soyl to have Paſture or Eſtovers. Cok. Litt. f. 122. a.

But by that Book a man may preſcribe to have Solam veſturam terræ from a certain day, to a certain day in the year, and ſo to have Solam paſturam terræ. And ſo are the Books of 15 E. 2. pl. 51. and of E. 1. pl. 55. in Fitz herbert, Title Preſcription, but they go no further, nor determine what Eſtate he hath who claims Solam & ſeparalem paſturam to him and his Heirs, excluding the Lord wholly from any Paſture, Hay, or Corn.

In granting or preſcribing to have ſolam & ſeparalem Communiam, why the Lord is not excluded, is not clear by that Book, or any other. For,

There are two notions or ſenſes of the word Communia, the one, as it ſignifies that Intereſt in the Common which one Commoner hath againſt another, not to have the Common ſurcharg'd. And is that Intereſt, to which the writ De Admenſuratione paſturæ relates, which only lies for Commoner againſt Commoner, and not for a Commoner againſt the Lord, or for the Lord againſt a Commoner, as is clear by Fitz-herbert. Fitz. Na. Br. de Admenſuratione paſturæ, .125. a.

And in this ſenſe there may be Sola & ſeparalis Communia, for only one may have right of Common, and no more, either by Grant or Preſcription. So in this ſenſe one part of the Tenants of a Mannor may have the ſole right of Commoning in a certain place, excluding the other part of the Tenants, and may claim there Solam & ſeparalem Communiam a cæteris Tenentibus Manerii. Royſton's C. 4. Rep.

The other notion of Communia is, when one or more hath right to Paſture with the Owner of the Soyl; and in this ſenſe it is impoſſible for a man to have ſolam & ſeparalem Communiam, for one cannot have that alone which is to be had with another, nor do that alone which is to be done with another.

So as a man may have Solam & ſeparalem Communiam in that ſenſe, that none is to be a Commoner but himſelf, but not in that ſenſe that none elſe ſhould depaſture the Land but he; for Communia cannot ſignifie an abſolute ſeveral.

Poſt. 257.

As 'tis a Contradiction, that a Common, which is to more than one, can be a ſeveral, and belong but to one.

So it is an equal Contradiction, That what in its nature is to be the right of one only, can be Common, and the right of more than one.

Others cannot have what is only to be had by me, more than I can have only what is to be had by others with me.

Therefore Sola & ſeparalis Paſtura may be enjoyed by one, or by many jointly, and by way of Survivor, but not by many by different Titles, as belonging to ſeveral Free-holds, for Sola & ſeparalis paſtura can be, but Soli & ſeparatim.

Ant. 254.

Na. Br. f. 231. a. l. c. 8 E. 4. f. 17. Br. grants. pl. 95. Co. Litt. 164.

If the King had a Corody from an Abby of two or three loaves of Bread per diem, and of ſo many meaſures of Drink, this might be granted to two or three ſeveral perſons. But if he had a Corody of one Meal a day, or Suſtenationem unius Valecti per diem, this could not be granted but to one, becauſe its nature was confin'd to one.

A man cannot have an Aſſiſe of Common in his own Soyl, nor an Admenſuratio paſturæ, and a Common being a thing that lies in grant, he cannot grant it to himſelf, and no other can grant it in his Soyl to him.

So as I conclude, one or more may have Solam & ſeparalem Communiam from other Commoners, but not from the Lord, who is no Commoner.

I cannot diſcern the uſe of this kind of Preſcription for the Tenants; for if it be to hinder the Lord from approving the Common, I think they are miſtaken.

Coke. 2. Inſtit. f. 86. 475. Weſt. 2. c. 46.

The Statute of Merton gives the Owner of the Soyl power to approve Common Grounds appendant, or appurtenant by Preſcription, as this is, if ſufficient Paſture be left for the Commoners, without conſidering whether the Commoners had the Common ſolely to themſelves, excluding the Lord, or otherwiſe For as to Approvement (which the Statute provided for) the Lord was equally

equally bound paſturing with his Tenants, or not paſturing with them. Therefore the Statute conſider'd not that, but that the Lord ſhould approve his own ground, ſo the Commoners had ſufficient, whatever the nature of the Common were

To preſcribe to have in ſuch a part of the Lord's Lands Communiam for their Cattel, excludes not the Lord.

To preſcribe to have there Paſturam Communem for their Cattel, is the ſame thing, and excludes not the Lord.

To preſcribe to have ſolam & ſeparalem Communiam, is naught by admittance. Ant. 256.

Why then to preſcribe to have ſolam & ſeparalem Paſturam Communiæ, which is agreed to be the ſame with Communiam, is naught alſo.

Now, to expreſs another way that they have ſolam & ſeparalem Paſturam Common to them, or wherein they Common, changeth not the matter in the meaning, but order of the words.

The Statute of Merton is, cap. 4.

1. The Lords could not make their profit de Vaſtis, Boſcis, & Paſturis Communibus, when the Tenants had ſufficientem paſturam quantum pertinet ad tenementa ſua.

2. Si coram Juſticiariis recognitum ſit quod tantum paſturæ habeant quantum ſufficit, &c.

3. Et quod habeant liberum ingreſſum & egreſſum de tenementis ſuis, uſque ad paſturam ſuam, tunc recedant quiet.

4. And that then the Lords faciant commodum ſuum de terris vaſtis & paſturis.

5. Et ſi per Aſſiſam recognitum fuerit quod non habent ſufficientem paſturam,

6. Tunc recuperent Seiſinam ſuam per viſum Juratorum, ita quod per Sacramentum eorum habeant ſufficientem paſturam.

7. Quod ſi Recognitum ſit quod habeant ſufficientem paſturam, &c.

Communibus paſturis is once named, Paſtura ſua for Communia ſua, ſeven times; and the word Communia not named in this Act, but where it mentions,

8. The Writ of Novel diſſeiſin de Communia paſturæ ſuæ, which makes eight times.

1. The granting ſolam & ſeparalem Paſturam of or in Black-acre, may ſignifie an excluſion only of having Paſture in White-acre, or any other place than Black-acre.

2. The

2. The granting ſolam & ſeparalem paſturam of or in Black-acre, may ſignifie the excluſion of any other perſon to have Paſture in Blackacre, but the Grantee, in which ſenſe the word Solam ſignifies as much as totam paſturam.

3. If the Grant be of all the Paſture, the Grantor reſerves nothing to himſelf of that which he grants, but all paſſes into the Grantee; but if the Grantor reſtrains the Grant, after general words of granting all the Paſture, the Reſtriction is for the benefit of the Grantor.

Therefore when the Grant is of Solam & ſeparalem paſturam of or in Black-acre, all the Paſture is ſuppoſed to paſs, without reſtriction, to the Grantee; but if words follow in the Grant, pro duabus vaccis tantum, or pro averiis levantibus & cubantibus ſuper certum tenementum, that is a reſtriction for the benefit of the Grantor; for a man cannot in the ſame Grant reſtrain for his own benefit the largeneſs of his Grant, and yet have no benefit of his reſtriction.

The Court was divided; The Chief Juſtice, and Juſtice *Tyrrell* for the Plaintiff. Juſtice *Archer* and Juſtice *Wylde* for the Defendant.

Hill.

Hill. 20 & 21 *Car.* II. *C. B. Rot.* 1552. *Adjudg'd* 23 *Car.* II. *C. B.*

Gardner verſ. *Sheldon.*

In *Ejectione Firmæ* for Lands in *Suſſex.* *Upon not Guilty pleaded,*

IT is found by the Special Verdict, that long before the ſuppoſed Trepaſs and Ejectment, 2 Crook. 415 Roll. 1 835. Plow. 853.

One William Roſe was ſeis'd of the Land in queſtion in his Demeſne, as of Fee, and ſo ſeis'd made his laſt Will and Teſtament, November the Second, 13 Jac. prout ſequitur, and ſets forth the Will; wherein among other things,

As touching the Leaſe which I have in my Farm, called *Eaſtergate* and all my Intereſt therein, I do give and aſſign the ſaid Leaſe, and all my Intereſt therein, unto my Friends *John Clark*, *George Littlebury*, and *Edward Roſe*, to the intent that, with the Rents and Profits thereof, they may help to pay my Debts, if my other Goods and Chattels ſhall not ſuffice. And after my Debts paid, my will is that the Rents and Profits of the ſaid Land ſhall wholly go for and towards the raiſing of Portions for my two Daughters, *Mary* and *Katherine*, for each of them Six hundred pounds, and for my Daughter *Mary* Two hundred pounds more, which was given her by my Father, her Grand-fathers Will. And thoſe Sums being raiſed, my Will is the Rents and Profits of the ſaid Land ſhall be wholly to the uſe and benefit of my Son *George*, &c.

Item, I give to my daughter *Mary* my greateſt Silver Bowl.

Item, I give to my Daughter *Katherine* one plain Silver Bowl, &c.

My will and meaning is, That if it happen that my Son *George*, *Mary* and *Katherine* my daughters, to die without Iſſue of their Bodies lawfully begotten, then all my Free-lands, which I am now ſeis'd of, ſhall come, remain, and be to my ſaid Nephew *William Roſe*, and his Heirs for ever.

They

They find that the ſaid William Roſe, the Teſtator, before the Treſpaſs, viz. the Firſt of June, 14 Jac. died at Eaſter-gate, in the ſaid County of Suſſex, ſeis'd as aforeſaid.

That at the time of his death, he had Iſſue of his body lawfully begotten, George Roſe his only Son, and Mary and Katherine his two Daughters.

That George, the Son, entred into the Premiſſes the Firſt of July, 14 Jac. and was ſeis'd prout Lex poſtulat.

Then after, and before the time of the Treſpaſs, viz. June the Eight and twentieth, 14 Car. 2 George died ſo ſeis'd of the Premiſſes at Eaſter-gate aforeſaid.

That at the time of his death he had Iſſue of his body two Daughters, Judith now wife of Daniel Sheldon, one of the Defendants, and Margaret now wife of Sir Joſeph Sheldon, the other Defendant.

That after the death of George their Father, the ſaid Judith and Margaret entred, and were ſeis'd before the Treſpaſs ſuppos'd, prout Lex poſtulat.

That Mary, one of the daughters of the ſaid William Roſe, July the Firſt, 1 Car. 2. died, and that Katherine her Siſter ſurviv'd her, and is ſtill living.

That the ſaid Katherine, October the Firſt, 20 Car. 2. at East-Grimſted, entred into the ſaid Tenements, and was ſeis'd prout Lex poſtulat, and the ſame day and year demis'd the ſame to the ſaid Thomas Gardner, the Plaintiff, from the Feaſt of St. Michael the Arch-angel then laſt paſt, for the term of Five years then next following; By virtue whereof the ſaid Thomas Gardner entred, and was poſſeſſed, untill the ſaid Joſeph and Daniel Sheldon, the ſame Firſt day of October, 20 Car. 2. entred upon him and Ejected him.

If upon the whole matter the Juſtices ſhall think the ſaid Joſeph and Daniel Sheldon culpable; they find them culpable, and aſſeſs Damages to Six pence, and Coſts to Twenty ſhillings. But if the Juſtices ſhall conceive them not culpable, they find them not culpable upon the words, My will is, if it happen my Son *George*, *Mary* and *Katherine* my Daughters, do dye without Iſſue of their Bodies lawfully begotten, then all my Free Lands, which I am now ſeized of, ſhall come, remain, and be to my ſaid Nephew *William Roſe* and his Heirs for ever.

The

The firſt Queſtion is, Whether by this Will any Eſtate be devis'd to the Son and Heir of the Teſtator, or to his Siſters? Q. 1.

If any Eſtate be devis'd, what Eſtate is ſo devis'd to them, or any of them? Q. 2.

The third Queſtion is, What Eſtate is by this Will devis'd to the Nephew; and if any be, how it ſhall take effect, whether as a Remainder, or as an Executory deviſe? Q. 3. Poſt. 269.

1. As to the firſt, it is clear, That no Eſtate is devis'd to the Son or Daughters, or any of them by expreſs and explicit deviſe; but if any be, it is devis'd by implication only, and collection of the Teſtators intent.

2. If any Eſtate be given by this Will by implication to the Son or Daughters, or any of them, it muſt be either a Joynt Eſtate to them for their lives, with ſeveral inheritances in tayl, or ſeveral Eſtates tayl to them in Succeſſion, that is, to one firſt, and the Heirs of his or her body, and then to another, and ſo ſucceſſively.

3. Such an Intail in Succeſſion cannot poſſibly be, becauſe it appears not by the Will who ſhould firſt take and have ſuch Eſtate, and who next, &c. and therefore ſuch an Intail were meerly void, for the incertainty of the perſon firſt taking, as was rightly obſerv'd and aſſented to at the Bar. Hob. 313. 2 Cro. 554. 565.

It remains then, That the Eſtate devis'd by this Will (if any be) to the Son and his two Siſters, muſt be a joynt Eſtate for their lives, with ſeveral Inheritances to them in tayl, by implication only.

And I am of Opinion, That no ſuch Eſtate is devis'd by this Will to the Son and two Daughters; and I ſhall firſt obſerve, That the Law doth not, in Conveyances of Eſtates, admit Eſtates to paſs by implication regularly, as being a way of paſſing Eſtates not agreeable to the plainneſs requir'd by Law, in tranſferring Eſtates from one to another. And for that the Caſe is, 1 Vent. 376.

A man according to the Cuſtom of the Mannor, ſurrendred to the uſe of *Francis Reeve*, and of *John*, Son of the ſaid *Francis*, and of the longeſt liver of them; and for want of Iſſue of *John* lawfully begotten, the Remainder to the youngeſt Son of *Mary Seagood*, *John* had only an Eſtate for life, and no Eſtate tayl by implication, it being by conveyance. Though (as the Book is) it might perhaps be an Eſtate tayl by Will; which ſhews, Eſtates by implication are not at all favour'd in Law, though in mens laſt Wills they are allow'd with due reſtrictions. Seagood and Hones Caſe, 10 C. 1 Cr. f. 366.

In a Will Eſtates are often given by implication. But I ſhall take this difference concerning Eſtates that paſs by implication, though it be by Will.

1 Vent. 323. 376. An Eſtate given by implication of a Will, if it be to the diſinheriting of the Heir at Law, is not good, if ſuch implication be only conſtructive and poſſible, but not a neceſſary implication.

I mean by a poſſible implication, when it may be intended that the Teſtator did purpoſe, and had an intention to deviſe his Land to A. But it may alſo be as reaſonably intended, that he had no ſuch purpoſe or intention to deviſe it to A.

But I call that a deviſe by neceſſary implication to A. when A. muſt have the thing devis'd or none elſe can have it.

And therefore if the implication be only poſſible, and not neceſſary, the Teſtators intent ought not to be conſtrued to diſinherit the Heir, in thwarting the Diſpoſe which the Law makes of the Land, leaving it to deſcend, where the intention of the Teſtator is not apparently, and not ambiguouſly to the contrary.

Spirt & Bences C. 8 Car. 1 Cro. 368. To this purpoſe the Caſe is 8 Car. 1. where Thomas Cann devis'd to Henry his youngeſt Son; Item I give to the ſaid *Henry* my Paſtures in the *South-fields*, and alſo I will that all Bargains, Grants, and Covenants, which I have from *Nicholas Welb*, my Son *Henry* ſhall enjoy, and his Heirs for ever; and for lack of Heirs of his Body, to remain to my Son *Francis* for ever.

It grew a Queſtion, Whether this were an Intayl to Henry of the South-fields, or only of the Bargains and Grants which the Teſtator had from Welb, which was a very meaſuring Caſe; and in determining this Caſe,

Bridgm. 132. All the Four Judges agreed That the words of a Will, which ſhall diſinherit the Heir at Common Law, muſt have a clear and apparent intent, and not be ambiguous, or any way doubtful, (So are the very words of the Book) and therefore they reſolv'd in that Caſe, That only the Bargains and Grants had from Welb were intayl'd to the youngeſt Son, and that he had only an Eſtate for life in the Paſtures in the South-fields.

1. I ſhall therefore now clear the difference I have taken, That the Heir ſhall never be diſinherited by a deviſe in a Will by implication, and not explicit, where the implication is only a poſſible implication, and not a neceſſary implication.

2. In

2. In the ſecond place I ſhall ſhew, That the words of this Will do not import a deviſe to the ſon and the two daughters for their lives joyntly, with reſpective Inheritances in tayl to the Heirs of their ſeveral bodies, by any neceſſary implication, but only by an implication that is poſſible by conſtruction. Poſt. 268.

3. In the third place I ſhall ſhew, That being ſo as to the Caſe in queſtion, it is not material whether the deviſe by way of Remainder to the Nephew, be void or not. Poſt. 268.

4. In the fourth place, ex abundante, and to make the Will of the Teſtator not ineffectual in that part of the Will, I ſhall ſhew, That the Nephew hath not the Land devis'd to him, when the ſon and the two daughters dye without Iſſue of their reſpective bodies, by way of Remainder, which cannot be but by way of Executory deviſe, which well may be.

5. That by ſuch Executory deviſe no perpetuity is conſequent to it; or if it were, ſuch a perpetuity is no way repugnant or contrary to Law. 2 Jones. 105. 3 Levinz. 370.

To manifeſt the difference taken between an implication in a Will that is neceſſary, and implication that is only poſſible, the firſt Caſe I ſhall cite is that known Caſe 13 H. 7. which I ſhall exactly put as it is in the Book at large. 13 H. 7. f. 17. Br. Deviſe pl. 52.

A man devis'd his Goods to his wife, and that after the deceaſe of his wife, his ſon and heir ſhall have the Houſe where his Goods are: The ſon ſhall not have the Houſe during the wives life; for though it be not expreſly devis'd to the wife, yet his intent appears, the ſon ſhall not have it during her life; and therefore it is a good deviſe to the wife for life, by implication, and the Deviſors intent, Quod omnes Juſtitiarii conceſſerunt. Here I obſerve,

1. That this was a deviſe of the Houſe to the wife by neceſſary implication; for it appears by the Will that the Teſtators ſon and heir was not to have it until after the death of the wife, and then it muſt either be devis'd to the wife for life by neceſſary implication, or none was to have it during the wives life, which could not be.

2. I obſerve upon this Caſe, That though the Goods were by particular deviſe given to the wife, and expreſly, that was no hindrance to the wives having the Houſe devis'd to her alſo by her husband by implication neceſſary: which I the rather note, becauſe men of great name have conceiv'd, That where the deviſee takes any thing by expreſs deviſe of the Teſtator, ſuch deviſee ſhall not have any other thing by that Will devis'd, only by implication. Poſt. 268. 1 Vent. 230. 1 Mod. 189. 2 Jones 172. 173.

Which difference if it were according to Law, it makes clearly againſt the Plaintiff, becauſe his Leſſor being one of the Daughters of the Teſtator, had devis'd to her expreſly 600 l. for a Portion, and therefore ſhe ſhould not have any Eſtate in the Land by the ſame Will, by a Deviſe by Implication, as is pretended.

But the truth is, that is a vain difference that hath been taken by many, as I ſhall anon evince, and therefore I ſhall not inſiſt upon any Aid from it to my concluſion.

3. I note that this Deviſe being before the Statute of 32 H. 8. of Wills, the Houſe devis'd muſt be conceiv'd deviſable by Cuſtom at the Common Law.

Before I proceed further, I muſt take notice that Brook, in abridging the Caſe of 13 H. 7. in the ſame numero, ſaith,

Deviſe Br. n. 52. It was agreed, tempore H. 8. per omnes, That if a man will that J. S. ſhall have his Land in Dale, after the death of his wife, the wife ſhall have the Houſe for her life by his apparent intent. I note firſt, That this Caſe is imperfectly put in Brook, for it mentions a deviſe of the Land in Dale to J. S. after the death of his wife, and then concludes that the wife ſhall have the Houſe for her life by his apparent intent; whereas no mention is made of a Houſe, but of the Land in Dale in the deviſe. And this Caſe ſeems to be only a memory of another Caſe, not abridg'd by Brook out of any other Year-book, but reported in his Abridgment in the Title Deviſe, as a Caſe happened in 20 H. 8. which is,

Br. Deviſe 29 H. 8. n. 48.

That if man will that J. S. ſhall have his Land after the death of his wife, and dies, the wife of the Deviſor ſhall have thoſe Lands for term of her life by thoſe words, ratione intentionis voluntatis. Which Caſes being in truth but one and the ſame Caſe, ſeem to go further than the Caſe of 13 H. 7. for there, as I obſerv'd before, the wife was to take by neceſſary implication, becauſe the Heir was excluded expreſly by the Will, during the life of the wife.

But by this Caſe in Br. Title Deviſe n. 48. & 52. there is no excluding of the Heir, and yet it is ſaid the wife ſhall have the Land during her life by implication, which is no neceſſary implication, as in the Caſe of 13 H. 7. but only a poſſible implication, and ſeems to croſs that difference I have taken before.

But

But this Caſe of Br. hath many times been denied to be Law, and ſeveral Judgments have been given againſt it. I ſhall give you ſome of them, to juſtifie the difference I have taken, exactly as I ſhall preſs the Caſes. 1 Vent. 323. 376. 2 Cro. 75.

Trinity 3 E. 6. A man ſeis'd of a Mannor, part in Demſne, and part in Services, devis'd all the demeſne Lands expreſly to his wife, during her life; and devis'd to her alſo all the Services and chief Rents for Fifteen years, and then devis'd the whole Mannor to a ſtranger after the death of his wife. 3 E. 6. Moores Rep. f. 7. n. 24.

It was reſolved by all the Juſtices, That the laſt deviſe ſhould not take effect for any part of the Mannor, but after the wives death; but yet the wife ſhould not have the whole Mannor by implication during her life, but ſhould have only the demeſnes for her life, and the Rents and Services for Fifteen years, and that after the Fifteen years ended the Heir ſhould have the Rents and Services as long as the wife liv'd: Here being no neceſſary Implication that the wife ſhould have all the Mannor during her life, with an excluſion of the Heir; ſhe had no more than was explicitly given her by the Will, viz. the Demeſnes for life, and the Rents and Services for Fifteen years; but after the Fifteen years the Heir had the Rents and Services, for it could be no more at moſt but a poſſible implication that the wife ſhould have the whole Mannor, during her life.

But with a ſmall variance of this Caſe if the Demeſnes had been devis'd to the wife for life, and the Services and Rents for Fifteen years, and the whole Mannor after the wives life to J. S. and that after the wives life, and the life of J. S. his Heir ſhould have had the Demeſnes, and Services, and Rents, in that Caſe it had been exactly the ſame with the Caſe of 13 H. 7. becauſe the Deviſors intent had been then apparent that the Son was not to have the Mannor, or any part, until the wife and ſtranger were both dead, and as it was adjudg'd the ſtranger had nothing in the Mannor until the wives death; therefore in that caſe, by neceſſary implication, the wife muſt have had both Demeſnes and Services during her life, notwithſtanding the explicit deviſe to her of the Rents and Services for Fifteen years, otherwiſe none ſhould have had the Rents and Services after the Fifteen years, during the wives life, which was not to be intended.

Ano-

15 El. Moore f. 123. n. 265

Another Caſe I ſhall make uſe of, is a Caſe Paſchæ 15 El. A man ſeis'd of a Meſſuage, and of divers Lands occupied with it, time out of mind, leaſed part of it to a ſtranger for years, and after made his laſt Will in theſe words, I will and bequeath to my wife my Meſſuage, with all the Lands thereto belonging in the occupation of the Leſſee, and after the deceaſe of my wife, I will that it, with all the reſt of my Lands, ſhall remain to my younger Son.

The Queſtion in that Caſe was, Whether the wife ſhould have the Land not leaſed by implication for her life, becauſe it was clear, the younger Son was to have no part, until the death of the wife. And the Lord Anderſon at firſt, grounding himſelf upon that Caſe in Brook (as it ſeems) of 29 H. 8. twice by Brook remembred in his Title Deviſe n. 28. and after n. 52. was of opinion, That the wife ſhould have the Land not leaſed by implication: But Mead was of a contrary opinion, for that it was expreſly devis'd, That the wife ſhould have the Land leas'd; and therefore no more ſhould be intended to be given her, but the Heir ſhould have the Land not in leaſe, during the wives life. To which Anderſon, mutata opinione, agreed. Hence perhaps many have collected, That a perſon ſhall not take Land by implication of a Will, if he takes ſome other Land expreſly by the ſame Will; but that is no warrantable difference.

For vary this Caſe but a little, as the former Caſe was varied, That the Land in leaſe was devis'd to the wife for life, and after the death of the wife, all the Deviſors land was devis'd to the youngeſt Son, as this Caſe was; and that after the death of the wife, and the youngeſt ſon, the Deviſors Heir ſhould have the Land both leas'd, and not leas'd: it had been clear that the Heir (exactly according to the Caſe of 13 H. 7.) ſhould have been excluded from all the Land leas'd, and not leas'd until after the death of the wife and the younger ſon. And therefore in ſuch caſe the wife, by neceſſary implication, ſhould have had the Land not leas'd, as ſhe had the Land leas'd by expreſs deviſe, and that notwithſtanding ſhe had the leas'd Land by expreſs deviſe, for elſe none could have the Land not leas'd during the wives life.

Horton. verſ. Horton. 2 Jac. Cr. f. 74. & 75.

Wadham made a Leaſe for years, upon conditon the Leſſee ſhould not alien to any beſides his Children. The Leſſee deviſeth the term to Humfrey his ſon, after the death of his wife, and made one Marſhall and another his Executors, and died: The Leſſor entred, as for breach of the Condition, ſuppoſing

poſing this a deviſe to the wife of the term by implication. The opinion of the Judges was, It was no deviſe by implication, but the Executors ſhould have the term until the wives death; but it was ſaid, If it had been devis'd to his Executors after the death of his wife, there the wife muſt have it by implication, or none could have had it. But Popham denied that Caſe, becauſe if the deviſe had been to the Executors after the wives death, the Executors ſhould, when the wife died, have had the term, as Legatees, but until her death they ſhould have it as Executors generally, which by all opinions fully confirms the difference taken, That a deviſe ſhall not be good by implication, when the implication is not neceſſary; and in this Caſe all agreed the Caſe in 13 H. 7. to be good Law, becauſe the implication there was neceſſary.

Edward Clatch being ſeis'd of two Meſſuages in Soccage tenure, and having Iſſue a Son and two Daughters by three ſeveral Venters; His Son being dead in his life time, and leaving two Daughters, who were Heirs at Law to the Father, devis'd one of the Meſſuages to Alice his Daughter, and her Heirs for ever; and the other to Thomazine his Daughter, and her Heirs for ever, with limitation, That if *Alice* died without Iſſue, living *Thomazine*, *Thomazine* ſhould then have *Alice's* part, to her and her Heirs; and if *Thomazine* died before the Age of Sixteen years, *Alice* ſhould have her part in Fee alſo. And if both his ſaid Daughters died without Iſſue of their bodies, then the Daughters of his Son ſhould have the Meſſuages. The youngeſt daughter of the Teſtator died without Iſſue, having paſt her Age of ſixteen years, It was reſolv'd That the words in the Will, If his two Daughters died without Iſſue of their Bodies, did not create, by implication croſs remainders in tayl to the Deviſors Daughters, whereby the eldeſt ſhould take the part of the youngeſt, but her part ſhould go to the Heirs at Law, according to the Limitation of the Will; and thoſe words were but a deſignation of the time when the Heirs at Law ſhould have the Meſſuages. Dyer 15 & 16 El. 4. 330. b.

Note, That one of the Daughters dying without Iſſue, the Heir at Law by the Will had her part without ſtaying untill the other Daughter died without Iſſue.

1. From theſe Caſes I firſt conclude, That only poſſible implication by a Will, ſhall not give the Land from the right Heir, but a neceſſary implication which excludes the right Heir, ſhall give it.

2. That

2. That the difference taken is not ſound, That one ſhall not take, by implication of a Will, any Land where the ſame perſon hath other Land or Goods expreſly devis'd by the ſame Will; for if the implication be neceſſary, the having of Land, or any other thing, by expreſs deviſe, will not hinder another taking alſo by implication, as appears in the three Caſes by me made uſe of, viz. 13 H. 7. 3 E. 6. 15 Eliz. cited out of Moor.

Ant. 263.

3. Whether any thing be given expreſly by Will, or not, a poſſible Implication only ſhall not diſinherit the Heir, where it may as well be intended that nothing was devis'd by implication, as that it was. But if any man think that be to material, in this Caſe the Daughters had reſpective Portions expreſly devis'd them, viz. Six hundred pounds to each of them, and therefore ſhall not have the Land alſo by implication only poſſible to diſinherit the right Heir.

For the ſecond point, Theſe words (My Will is, if it happen my Son *George*, *Mary* and *Katherine* my Daughters, to dye without Iſſue of their Bodies lawfully begotten, then all my Free-lands ſhall remain and be to my ſaid Nephew *William Roſe* and his Heirs for ever) are ſo far from importing a deviſe of the Land to the Son and Daughters for their lives, with reſpective Inheritances in tayl by any neceſſary implication, that both Grammatically, and to common intendment, they import only a deſignation and appointment of the time when the Land ſhall come to the Nephew, namely when George, Mary, and Katherine, happen to dye Iſſueleſs, and not before.

Queſt. 2 Ant. 263.

And where the words of a Will are of ambiguous and doubtful conſtruction, they ſhall not be interpreted to the diſinheriting of the right Heir, as is already ſhew'd.

This being clear, That there is no deviſe by this Will of the Land by implication in any kind to the Son and Daughters, it follows that Katherine, the ſurviving Daughter of the Teſtator, and Leſſor of the Plaintiff, had no Title to enter and make the Leaſe to the Plaintiff Gardner; and then as to the Caſe in queſtion before us, which is only, Whether the Defendants be culpable of Ejecting the Plaintiff? It will not be material whether,

Ant. 263.

The deviſe to the Nephew, Willam Roſe, be void or not; and if not void, how and when he ſhall take by the deviſe, which may come in queſtion perhaps hereafter.

4. But

But to that point ex abundante, and to make the Will not ineffectual in that point of the deviſe to the Nephew, if no Eſtate for lives, or other Eſtate, be created by this Will by implication to the Son and Daughters, it follows, That the Nephew can take nothing by way of Remainder, for the Remainder muſt depend upon ſome particular Eſtate, and be created the ſame time with the particular Eſtate. The Remainder is the reſidue of an Eſtate in Land depending upon a particular Eſtate, and created together with the ſame, and the Will creating no particular Eſtate, the conſequent muſt be, That the Land was left to deſcend in Fee-ſimple to the heir at law, without creating either particular Eſtate or Remainder upon it. Ant. 261. Cok. Litt. f. 49. a.

Sir Edward Coke hath a Caſe, but quotes no Authority for it; If Land be given to H. and his heirs, as long as B. hath heirs of his body, the Remainder over in Fee, the Remainder is void, being a Remainder after a Fee-ſimple, though that Fee-ſimple determines when no heirs are left of the body of B. Whether that caſe be law or not, I ſhall not now diſcuſs; in regard that when ſuch a baſe Fee determines for want of Iſſue of the body of B. the Land returns to the Grantor and his heirs, as a kind of Reverſion, and if there can be a Reverſion of ſuch Eſtate, I know not why a Remainder may not be granted of it, but for the former reaſon, this can be no Remainder, becauſe no particular Eſtate is upon which it depends; and if the Lord Coke's Caſe be law, it is the ſtronger, that no Remainder is in this Caſe. Cok. Litt. f. 18. a. 10 Co. 97. b. 98. a. Cok. Litt. f. 18. a. Sect. 11.

But without queſtion, a Remainder cannot depend upon an abſolute Fee-ſimple by neceſſary reaſon; For when all a man hath of Eſtate, or any thing elſe, is given, or gone away, nothing remains but an abſolute Fee-ſimple, being given or gone out of a man, that being all, no other or further Eſtate can remain to be given or diſpos'd, and therefore no Remainder can be of a pure Feeſimple.

To this purpoſe is the Caſe of Hearne and Allen in this Court. Richard Keen ſeis'd of a Meſſuage and Lands in Cheping-Norton, having Iſſue Thomas his Son, and Anne a Daughter by the ſame Venter, devis'd his Land to Thomas his Son, and his heirs for ever; and for want of heirs of Thomas, to Anne and her heirs, and died. 2 Car. 1. Cr. f. 57.

It became a Queſtion, Whether Thomas had an Eſtate in Fee or in Tayl by this Will, for he could not dye without heir if his Siſter outlived him, who was to take according to the intent of the Deviſor. Two Judges held it (and with reaſon) to be an Eſtate tayl in Thomas, and the Remainder to the Daughter, who might be his heir, ſhew'd, That the Deviſe to him and his heirs could be intended only to be to him and the heirs of his body; But three other Judges held it to be a deviſe in Fee, but all agreed, if the Remainder had been to a Stranger it had been void, for then Thomas (which is only to my purpoſe) had had an abſolute Eſtate in Fee, after which there could be no Remainder, which is undoubted law.

The Caſe out of Coke's Littleton, and this Caſe, is the ſame to this purpoſe, That a Remainder cannot depend upon a Fee-ſimple; yet in another reſpect they much differ: For in this laſt Caſe, after an Eſtate in Fee devis'd to Thomas, and if he died without heir, the Remainder to a Stranger or Siſter of the half blood, not only the Remainder was void as a Remainder, but no future deviſe could have been made of the land by the Deviſor; for if Thomas died without heir the land eſcheated, and the Lords Title would precede any future deviſe.

But in that Caſe of Sir Edward Coke, which he puts by way of Grant, if it be put by way of deviſe, That if land be deviſed to H. and his heirs as long as B. hath heirs of his body the Remainder over, ſuch later deviſe will be good, though not as a Remainder, yet as an Executory deviſe, becauſe ſomewhat remain'd to be devis'd when the Eſtate in Fee determin'd upon B. his having no Iſſue of his Body.

Ant. 263. And as an Executory Deviſe, and not as a Remainder, I conceive the Nephew ſhall well take in the preſent Caſe. And the intention of the Teſtator, by his Will, will runas if he had ſaid, I leave my land to deſcend to my Son and his Heirs, according to the Common Law, until he, and both my Daughters, ſhall happen to dye without Iſſue; And then I deviſe my Land to my Nephew *William Roſe*, and his Heirs. Or as if he had ſaid, my Son ſhall have all my Land, To have and to hold, to him and his Heirs, in Fee-ſimple, as long as any Heirs of the bodies of *A. B.* and *C.* ſhall be living, and for want of ſuch Heirs I deviſe my Land to my Nephew *William Roſe*, and his Heirs. The Nephew ſhall take as by a future and Executory Deviſe.

And

And there is no difference, whether ſuch deviſe be limited upon the contingent of three Strangers dying without Heirs of their bodies, or upon the contingent of three of the Deviſors own Children, dying without Heirs of their Bodies; for if a future deviſe may by upon any contingent, after a Fee-ſimple, it may as well be upon any other contingent, if it appear by the Will the Teſtator intended his Son and Heir ſhould have his Land in Fee-ſimple.

This way of Executory deviſe after a Fee-ſimple of any nature, was in former Ages unknown, as appears by a Caſe in the Lord Dyer, 29 H. 8. f. 33. concerning a Deviſe to the Prior of St. Bartholomew in Weſt-Smithfield, by the clear Opinion of Baldwin and Fitz-herbert, the greateſt Lawyers of the Age.

But now nothing more ordinary. The Caſes are for the moſt part remembred in Pell and Browns Caſe, that is, Dyer f. 124. Ed. Clatch his Caſe, f. 330. b. & 354. Wellock & Hamonds Caſe cited in Boraſtons Caſe, 3. Rep. Fulmerſton & Stewards Caſe, &c.

I ſhall inſtance two Caſes. The firſt is Haynſworths and Prettyes Caſe, Where a man ſeis'd of Land in Soccage, having Iſſue two Sons and a Daughter, devis'd to his youngeſt Son and Daughter Twenty pounds apiece, to be paid by his eldeſt Son, and devis'd his Lands to his eldeſt Son and his Heirs, upon Condition if he paid not thoſe Legacies, that his Land ſhould be to his ſecond Son and Daughter and their Heirs. The eldeſt Son fail'd of payment. After Argument upon a Special Verdict, It was reſolv'd by the Court clearly, That the ſecond Son and Daughter ſhould have the Land.

1. For that the deviſe to his Son and his Heir in Fee, being no other than what the Law gave him, was void. Hill. 41. El. Cr. 833. a.

2. That it was a future deviſe to the ſecond Son and Daughter, upon the contingent of the eldeſt Sons default of payment.

3. That it was no more in effect than if he had devis'd, That, if his eldeſt Son did not pay all Legacies, that his land ſhould be to the Legatories, and there was no doubt in that Caſe, but the land, in default of payment, ſhould veſt in them.

Which Caſe, in the reaſon of law, differs not from the preſent Caſe, where the land is devis'd by deviſe future and Executory to the Nephew, upon a contingent to happen by the Teſtators Son and Daughters having no iſſue.

18 Jac. Pell & Browns C. Cro. f. 59c.

The ſecond Caſe is that of Pell and Brown, the Father being ſeis'd of certain land, having Iſſue William his eldeſt Son, Thomas and Richard Brown, devis'd the land to Thomas and his Heirs for ever; and if Thomas died without Iſſue, living William, then William ſhould have the lands to him, his Heirs and Aſſigns.

1. This was adjudg'd an Eſtate in Fee-ſimple in Thomas.

2. That William by way of Executory deviſe, had an Eſtate in Fee-ſimple in poſſibility, if Thomas died without Iſſue before him.

And it being once clear, That the Eſtate of Thomas was a Fee-ſimple, determinable upon a contingent, and not an Eſtate tayl, and ſo in the preſent caſe it being clear'd that George, the Teſtators Son, had the land deſcended to him in Fee from the Teſtator, and took no Eſtate tayl expreſly, or by implication from the Will, it will not be material whether the Contingent which ſhall determine that Fee-ſimple proceeds from the perſon which hath ſuch determinable Fee, or from another, or partly from him, and partly from another, (as in Haynſworth's Caſe, the Son determined his Fee-ſimple by not paying the Legacies; in Pell and Brown's Caſe, Thomas his Fee-ſimple determined by his dying without Iſſue, living William,) the Fee-ſimple veſted in George the Son by deſcent, determines when he and his two Siſters dye without Iſſue; and upon ſuch determination in every of theſe Caſes, the future and executory deviſe muſt take effect.

But the great Objection is, That if this ſhould be an executory deviſe to the Nephew, upon the contingent of George the Son, and both his Siſters dying without Iſſue, It will be dangerous to introduce a new way of perpetuity; for if a man have ſeveral Children, and ſhall permit his Eſtate to deſcend, or by his Will deviſe it to his Heir, ſo as he may therein have an unqueſtionable Fee-ſimple (which is the ſame with permitting it to deſcend) he may then deviſe it futurely, when all his Children ſhall dye without Iſſue of their bodies to J. S. and his Heirs, as long as A. B and C. ſtrangers, ſhall have any Heirs of their bodies living, and then to a third perſon by like future deviſe: For if he ſhould deviſe it futurely to J. S. and his Heirs, as long as J. S. had any Heirs of his body, it were a clear Eſtate tayl in J. S. upon which no future deviſe could be, but it would be a Remainder to be docked.

This

This Objection was in ſome meaſure made by Doderige in Pell and Browns Caſe, and the Judges ſaid there was no danger, becauſe the Eſtate in Fee of Thomas did not determine by his dying without Heir of his body generally, but by dying without Iſſue, living William; for if the land had been given to Thomas and his Heirs for ever, and if he died without Heirs of his body, then to William and to his Heirs; Thomas his Eſtate had been judg'd an Eſtate tayl with the Remainder to William, and not a Fee, upon which no future or executory deviſe can be. So was it adjudg'd in Foy and Hinds Caſe 22 Jac. Cr. f. 695. & 6. and anciently 37 Aſſ. p. 18. 5 H. 5. f. 6. and to be within the reaſon of Mildmay and Corbets Caſe of Perpetuities. Vid. Stiles Rep. Gay & Gaps Caſe, 258, 275.

But in Pell and Browns Caſe the Judges ſaid it was more dangerous to deſtroy future deviſes, than to admit of ſuch Perpetuities as could follow from them any way by determinable Fee-ſimples, which is true; for a Fee-ſimple, determinable upon a contingent, is a Fee ſimple to all intents, but not ſo durable as abſolute Fee-ſimples. And all Fee-ſimples are unequally durable, for one will eſcheat ſooner than another by the failer of Heirs. An Eſtate of Fee-ſimple will determine in a Baſtard with his life, if he want Iſſue. An Eſtate to a man and his Heirs as long as John Stiles hath any Heir, which is no abſolute Fee-ſimple, is doubtleſs as durable as the Eſtate in Fee which John Stiles hath to him and his Hers, which is an abſolute Fee-ſimple. Nor do I know any Law ſimply againſt a Perpetuity, but againſt Intails of Perpetuity, for every Fee-ſimple is a Perpetuity, but in the accident of Alienation, and Alienation is as incident to a Fee-ſimple determinable upon a contingent, as to any more abſolute or more perdurable Fee-ſimple.

The Chief Juſtice, Juſtice *Archer*, and Juſtice *Wylde* for the Defendant. Juſtice *Tyrrell* for the Plaintiff.

Judgment for the Defendant.

Hill

Hill. 21 & 22 *Car.* II. *C. B.*

Craw verſus *Ramſey.*

2 Sid. 23.
1 Sid. 193.
Hard. 224.
Cart. 185.
2 Vent. 1.
2 Jones. 10.

Philip Craw is Plaintiff, and *John Ramſey* Defendant, In an Action of *Treſpaſs* and *Ejectment.*

THE Plaintiff declares, That Lionel Tolmach Baronet, and Humphrey Weld Eſquire, January the Twentieth, the Sixteenth of the King, demi'sd to the Plaintiff the Mannor of Kingſton, with the appurtenances, in the County of Surrey, one Meſſuage, two Barns, one Dove-houſe, two Gardens eighty Acres of Land, and ten Acres of Meadow, with the appurtenances in *Kingſton* aforeſaid, and other places, and alſo the Rectory of *Kingſton* aforeſaid, To have and to hold to the ſaid *Philip* and his Aſſigns, from the Feaſt of the Nativity laſt paſt, for five years next enſuing. By virtue whereof he entred into the Premiſſes, and was poſſeſſed, until the Defendant, the ſaid Twentieth of January in the Sixteenth year of the King, entred upon him, and Ejected him with force, to his Damage of Forty pounds.

To this the Defendant pleads he is not Culpable.

Upon a Special Verdict it appear'd, That

Robert Ramſey, Alien, Antenatus, had Iſſue { 1. Robert, 2. Nicholas, 3. John, 4 George } Antenatos.

Robert the ſon, had Iſſue { Margaret, Iſabel, Jane } Antenatas, living the Firſt of *Octob.* 14. *Car.* 1. and now have Iſſue at *Kingſton.*

John naturalized, 9 Maii, 1 Jac.

John, the third Son, by the name of Sir *John Ramſey*, was naturalized by Act of Parliament, holden at *Weſtminſter*, *May* the Ninth, 1 Jac. and after made Earl of *Holdernes.*

George

George Ramſey, the fourth Son, was naturalized in the fourth Seſſion of Parliament held at *Weſtminſter*, begun by Prorogation, 19 *Febr.* 17 *Jac.* and after had Iſſue *John* primogenitum filium, Quodque idem *Johannes* had Iſſue *John* the now Defendant, primogenitum ſuum filium, but finds not where either of theſe were born, nor the death of *George*. George naturalized, 7 Jac.

Nicholas the ſecond Son, had Iſſue *Patrick* his only Son, born at *Kingſton*, after the Union, 1 *Maii*, 1618. about 15 Jac. Nicholas had Iſſue Patrick a Native, 15 Jac.

John the third Son, Earl of *Holdernes*, ſeiz'd of the Mannors, Rectory, and Premiſſes in the Declaration mentioned, with other the Mannors of *Zouch* and *Taylboys*, and divers other Lands in the County of *Lincoln* in Fee, by Indenture Tripartite between him on the firſt part, Sir *William Cockayne* and *Martha* his Daughter of the ſecond part, &c. Dated the Firſt of *July*, 22 *Jac.* Covenanted to levy a Fine before the Feaſt of St. *Andrew* next enſuing, to Sir *Willam* of all his ſaid Lands, To the uſe of himſelf for life, then to the uſe of *Martha*, his intended Wife, for life, with remainder to the Heirs Males of his body begotten on her, Remainder to ſuch his Heirs Females, Remainder to his right Heirs. John covenanted to levy a Fine de Premiſſis, 1 Jul. 22 Jac.

The Marriage was ſolemnized the Seven and twentieth of *Sept.* 22 *Jac.* John married 29 Sept. 22 Jac.

The Fine accordingly levied in the Common Pleas *Octabis Michaelis*, 22 *Jac.* of all the Lands and Premiſſes among other in the Declaration mentioned. He levied the Fine Octab. Michael. 22 Jac.

The Earl, ſo ſeiz'd as aforeſaid, with the Remainder over at *Kingſton* aforeſaid, died the Four and twentieth of *January*, 1 *Car.* 1. John died 1 Car. 1 Jan. 24.

His Counteſs entred into the Premiſſes in the Declaration mentioned, and receiv'd the Profits during her life.

After the Earls death a Commiſſion iſſued, and an Inquiſition taken at *Southwark* in *Surry* the Nine and twentieth of *February*, 7 *Car.* 1. Inquiſition after his death capt. 29 Febr. 7 Car. 1.

By this Inquiſition it is found the Earl died ſeiz'd of the Mannor of *Zouch* and *Taylboys*, and divers Lands thereto belonging in Com. *Lincoln*, and of the Mannor of *Weſtdeerham*, and other Lands in Com. *Norfolk*, and of the Rectory of *Kingſton*, and of the Advowſon of the Vicaridge of *Kingſton* in Com. *Surrey*, but no other the Lands in the Declaration are found in that Office. And then the Tenures of thoſe Mannors are found, and that the Earl died without Heir. But it finds that the Earl ſo ſeiz'd levied a Fine of the Premiſſes to Sir *William Cockayne*, per nomina Manerio-rum de *Zouches* & *Taylboys*, & Rectoriæ de *Kingſton*, cum omnibus Decimis dictæ Rectoriæ pertinentibus, and finds the uſes ut ſupra, and ſo finds his dying without Heir, &c. It finds the Fine levied *in terminis*

terminis Michaelis, 22 *Jac.* but not in *Octabis Michaelis*, as the Special Verdict finds, but between the ſame perſons

The Iriſh Act to naturalize all Scots, 4 Jul. 10 Car. 1.

The general Act of Naturalizing the Scottiſh Antenati in the Kingdom of *Ireland*, was made in the Parliament there, begun at the Caſtle of *Dublin* the Fourth of *July*, 10 *Car.* 1.

Nicholas died 1 Sept. 10 Car. 1.

Nicholas died the Firſt of *September*, 10 *Car.* 1. Leaving Iſſue *Patrick.*

Murry's Pat. 25 Octob. 10 Car. 1.

King *Charles* the Firſt, by his Letters Patents dated the Five and twentieth of *October*, the Tenth of his Reign, under the Great Seal, granted to *William Murrey*, his Heirs and Aſſigns, in Fee-farm, All the ſaid Mannors, Lands, and Rectory, mentioned in the Declaration, with the Reverſion depending upon any life, lives, or years.

Patrick conveys to the Earl of Elkin 16 Feb. 1651.

Patrick and *Elizabeth* his wife, by Indenture dated the Sixteenth of *February* 1651. Covenant with the Earl of *Elkin* and Sir *Edward Sydenham* in conſideration of Eleven hundred pounds, and bargained and ſold the Premiſſes in the Declaration to them and their Heirs, and covenanted at the Earls charge to levy a Fine with proclamation, to the uſe of the Earl and his Heirs, of the Premiſſes, before the end of *Eaſter Term* next, and accordingly did levy it with warranty againſt them, and the Heirs of *Patrick*, by force whereof, and of the Statute of Uſes, the ſaid Earl and *Sydenham* were ſeiz'd, &c.

Patrick & Uxor. levy a Fine a die Paſchæ in fifteen days.

The Earl and Sydenham convey to the Counteſs Dowager, 10 Mar. 1652.

The Earl of *Elkin* and *Sydenham*, by Indenture of Leaſe, dated the tenth of *March*, 1652. and by Deed of Releaſe and Confirmation, convey the Premiſſes to *Amabel* Dowager of *Kent*, and the Lady *Jane Hart*, *viz.* the Eleventh of *March*, 1652. by way of Bargain and Sale to them and their Heirs, who entred by the Leaſe, and were in quiet poſſeſſion at the ſame time of the Releaſe.

The Dowager conveys to Pullayne and Neale.

The Dowager and Lady *Hart* by like Conveyance of Leaſe and Releaſe, bargained and ſold to *Pullayne* and *Simon Neale*, dated the Firſt and Second of *November*, 1655. who entred, and were in poſſeſſion as aforeſaid.

John Ramſey the now Defendant, entred in 15 *Car.* 2. and kept poſſeſſion.

Dat. 25 Sept. 1656 Pullayne and Neale convey to Talmuch and Weld by Bargain and Sale. 20 Jan. 16 Car. 2.

John Pullayne and *Symon Neale*, by Deed of Bargain and Sale, duly inrolled, convey'd the Premiſſes to *Lionel Talmuch* and *Humphrey* their Heirs and Aſſigns.

Lionel and *Humphrey* demis'd to *Philip.* the Plaintiff having entred, and being in poſſeſſion by Indenture, dated the Twentieth of *January*, 16 *Car.* 2. *John* then in poſſeſſion, and *John* reentred upon the Plaintiff, and Ejected him.

The

The Queſtions upon this Record will be three.

1. Whether a Naturalization in Ireland will naturalize the perſon in England? If it will not, all other Queſtions are out of the Caſe. Molly. 376. 377.

2. If it will, then whether by that Act for naturalizing the Antenati of Scotland, any his brothers, had title to inherit the Earl of Holderneſs in the lands in queſtion? By reaſon of the Clauſe in the Act of Naturalization, that nothing therein contained ſhould extend to avoid any Eſtate or Intereſt in any Lands or Hereditaments, which have already been found, and accrewed to his Majeſty, or to King *James*, for want of naturalization of any ſuch perſon, and which ſhall and doth appear by Office already found and return'd and remaining of Record, or by any other matter of Record.

An Office was found, as appears by the Verdict 7 Car. afore the Act, by which it is found he died ſeiſed of the Rectory of Kingſton in Reverſion, and of the Advowſon of the Vicaridge, and died without Heir, and that the ſame eſcheated to the King; and if all the lands in queſtion were held of the King, it being found he died without Heir, the proviſo will ſave all to the King.

3. Whether Nicholas Ramſey, under whom the Plaintiffs claim, be the perſon who had title to the lands in queſtion, if any had? Becauſe,

1. The death of Robert the elder Brother, is not ſufficiently found before the Act of Naturalization, for then he, and not Nicholas, was heir to John.

2. Becauſe if Robert the elder were dead before, yet he left Iſſue three Daughters, who were naturalized as well as Nicholas by the Act, and are the heirs to the Earl, being the Iſſue of his elder Brother.

If Robert had died after the Iriſh Act made, this Verdict had been as true as now it is: Therefore it is not ſufficient to find him dead before the Act.

Et Juratores ulterius dicunt quod prædictus *Robertus* filius primogenitus, & natu maximus prædicti *Roberti* patris poſtea obiit, tempore mortis ſuæ habens & relinquens tres filias de corpore ipſius *Roberti* filii legitime procreatas, viz. *Margaret. Iſabel.* & *Janam* Alienigenas natas in Regno *Scotiæ* ante acceſſionem prædict. Quæ quidem *Margaret. Iſabella*, & *Jana*, primo die *Octobris*, Anno Regni Domini *Caroli* nuper Regis *Angliæ* primi, quarto decimo, in plena vitâ fuerant, & habent exitus de earum corporibus exeuntes modo ſuperſtites, & in plena vita exiſtentes apud *Kingſton* ſuper *Thames* prædict.

As to the ſecond part, in the Caſe of Aliens, nothing interrupts the common courſe of Deſcents, but Defectus Nationis, as Bracton terms it. Therefore that being taken away by naturalization, they ſhall inherit as if it had not been, and then the eldeſt Brothers Iſſue had inherited before the ſecond Brother.

Carter 188. Poſt. 285. 1. It is admitted, and will eaſily appear, That one naturalized in Scotland ſince the Union, cannot inherit in England.

2. Ireland then differs from Scotland, in a common difference with Gernſey, Jerſey, Iſle of Man, Berwick, and all the Engliſh Plantations for that they are Dominions belonging to the Crown of England, which Scotland is not.

Poſt. 269.

3. If this difference, which was never diſcuſſed in Calvin's Caſe, alter not the Caſe from a naturalizing in Scotland, it remains, whether by Act of Parliament of England, though not extant, Ireland in this matter be not differenc'd from other Dominions belonging to England?

Poſt. 289.

1. He that is privileg'd by the law of England to inherit there, muſt be a Subject of the Kings.

2. He muſt be more than a local Subject, either in the Dominion of England, or out of the Dominon of England; for meer Aliens, when locally in England, or any other Dominions of the Kings, are local Subjects.

3. He muſt be otherwiſe a Subject than any Grant or Letters Patents of the King can make him; Therefore a Denizen of England by Letters Patents for life, in tayl, or in fee, whereby he becomes a Subject in regard of his perſon, will not enable him to inherit in England, but according to his Denization, will enable his Children born in England to inherit him, and much leſs will his Denization in any other Dominion.

7 Rep. Calvins C. f. 7. a. 36 H. 6. Tit. Deni 2. Br. 9.

Whence

Whence it follows, That no Laws made in any other Dominion acquired by Conqueſt, or new Plaintation, by the King's Lieutenants, Subſtitutes, Governours, or People there, by vertue of the King's Letters Patents, can make a man inherit in England, who could not otherwiſe inherit: For what the King cannot do by his Letters Patents, no delegated power under him can do by his Letters Patents.

It follows likewiſe upon the ſame reaſon, That no tenure of Land, by Homage, Fealty, or other Service in any other Dominion of the Kings, acquired by Conqueſt, or otherwiſe by any Grant or Letters Patents, can make a man inherit in England, who could not otherwiſe inherit, for that is not Homagium ligeum, but Feodale, as is rightly diſtinguiſhed. Calvins Caſe, f. 6. b.

4. A man born a Subject to one that is King of England, cannot therefore inherit in England, for then the Antenati in Scotland had inherited in England; they were born Subjects to King James, who was King of England; but not born when he was King of England.

5. A Subject born in any Dominion belonging to the Crown of England, is inheritable in England as well as native Engliſhmen. So the natural born Subjects of Ireland, Gernſey, Jerſey, Berwick, and all the Engliſh Plantations inherit; but the ſpecifique reaſon of their inheriting in England, is not becauſe they are born in Dominions belonging to the Crown of England, for if ſo, none could inherit who wanted that, and then the Poſtnati of Scotland ſhould not inherit; for Scotland is not a Dominion belonging to the Crown of England, but to the King of England. Ant. 268.

It remains then, according to the Reſolution and Reaſons of Calvin's Caſe, That the ſpecifique and adequate cauſe why the Kings Subjects of other his Dominions than England, do inherit in England, is, becauſe they are born his natural Subjects as the Engliſh are, he being actually King of England at the time of their birth, when their ſubjection begins; and ſo are born Liege-men to the ſame King. Poſt. 286. Cok. Rep. Calvins Caſe.

But then, ſince all Liegeance and Subjection are acts and obligations of Law (for a man owes no ligeance excluding all Civil Law) but a man is ſaid a natural Subject, becauſe his Subjection begins with his birth, that is, as ſoon as he can be ſubject, and a King is ſaid to be a mans natural Prince, becauſe his Protection begins as ſoon as the Subject can be protected, and in the ſame ſenſe, that a Country where a man is born, is his natural Country, or the Language he firſt ſpeaks, is his natu- Devant. 227.

ral Tongue; why ſhould not an Act of Law, making a man as if he had been born a Subject, work the ſame effect as his being born a Subject, which is an effect of law?

Poſt. 284. 1. The Reaſon is, That naturalization is but a fiction of Law, and can have effect but upon thoſe conſenting to that fiction: Therefore it hath the like effect as a mans Birth hath, where the Law makers have power, but not in other places where they have not. Naturalizing in Ireland gives the ſame effect in Ireland as being born there, ſo in Scotland as being born there, but not in England, which conſents not to the fiction of Ireland or Scotland, nor to any but her own.

Poſt. 283. 2. No fiction can make a natural Subject, for he is correlative to a natural Prince, and cannot have two natural Soveraigns (but may have one Soveraign, as a Queen Soveraign and her Husband in two perſons) no more than two natural Fathers, or two natural Mothers. But if a fiction could make a natural Subject, he hath two natural Princes, one where he was born, and the other where naturalized.

3. If one naturalized in Ireland ſhould in law make him naturally born there, then one naturalized in Scotland, after the Union, ſhould make him naturally born there, conſequently inheritable in England, which is not contended.

4. A naturalized perſon in a Dominion belonging to England, is both the King's Subject when he is King of England, and inheritable in that his Dominion, when naturaliz'd

So the Antenati of Scotland are the King of England's Subjects when he is King of England, and inheritable in that Dominion of his, yet cannot inherit in England; and being his Subjects before, doth not make them leſs his Subjects when King of England; Or if it did, Nicholas Ramſey, before he was naturalized in Ireland, and became there a Subject to the King of England, was a Subject in Scotland of the Kings.

There

There are four ways by which men born out of *England* may inherit in *England*, beſides by the Statute of *Edward* the Third, *De Natis ultra Mare.*

1. If they be born in any Dominion of the Kings when he is actually King of England.

2. If they be made inheritable by Act of Parliament in England, as by naturalization there.

3. If they be born Subjects to a Prince, holding his Kingdom or Territories as Homager and Liegeman to the King of England, during the time of his being Homager. So the Welch were inheritable in England before 12 Ed. 1. though Subjects to the Princes of Wales, who were Homagers to the King of England. So were the Scotch in Edward the firſt's time, during the King of Scotlands Homage to him, and to other Kings of England, as long as it continued. And that is the reaſon of the Caſe in 14 of Eliz. in the Lord Dyer, where a Scotch man being arraign'd for a Rape of a Girl under Seven years of Age, and praying his Tryal per medietatem Linguæ, becauſe he was a Scot born, it was denied him by the Opinion of the Judges of both Benches, for that, among other reaſons, a Scot was never accounted an Alien here, but rather a Subject (So are the words of the Book) But they did not conſider that the Homage was determined then, as it was conſidered after in Calvin's Caſe, when only the Poſtnati of Scotland were admitted inheritable in England. Upon the ſame ground one Magdulph, Subject to the King of Scots, appeal'd from his Judgment to Edward the Firſt, ut Superiori Domino Scotiæ.

Calvins Caſe, f. 21. b.

Dyer 14 Eliz. f. 304. pl. 51.

Pl. Parl. 12. E. 1. f. 152. & 157.

But this is to be underſtood where ſuch Prince is Homager, Subjectionis, and not only Infeodationis; for another King may hold of the King of England an Iſland, or other Territory, by Tenure, and not be his Subject.

4. If the King of England enter with his Army hoſtilly the Territories of another Prince, and any be born within the places poſſeſſed by the Kings Army, and conſequently within his Protection, ſuch perſon is a Subject born to the King of England, if from Parents Subjects, and not Hoſtile

So

5 Eliz. Dyer f. 224. Pl. 29. So was it reſolved by the Juſtices 5 Eliz. That one born in Tourney in France, and conquered by Henry the eighth, being a Baſtard between perſons that were of the King's liegeance, was enabled to purchaſe and implead within the Realm, and was the ſame as if a French man and French-woman ſhould come into England, and have a Son born there. The like law if he had been born of French Parents in Tourney, for it was part of the Dominions belonging to England pro tempore, as Calice was.

Thoſe under the King's Power, as King of England, in another Prince his Dominions, are under his Laws.

Fleta. l. 2. c. 3. 14 E. 1. King Edward the firſt being at Paris 14 E. 1. one Ingelram de Nogent ſtole ſilver Diſhes in the King's Houſe there, and after diſpute about his Tryal with the King of France and his Council, he was convicted before the Steward of the King of England's houſe, and executed, though the Felony was done in France, in Alieno Regno.

Fleta. l. 2. c. 3. 12 E. 1. So Edmund de Murdak brought an Appeal in Gaſcoigne, coram Seneſchallo Hoſpitii Regis Angliæ againſt one William de Leſnes of Robbery done to him, 12 E. 1. infra metas Hoſpitii Regis infra quas invenit ipſum. And the Defendant, non potuit appellum illud per exceptionem alterius Regni declinare.

Poſt. 284. 1. Regularly who once was an Alien to England, cannot be inheritable there, but by Act of Parliament, which is Common Experience.

But Ramſey was an Alien to England, being Antenatus of Scotland, and therefore cannot inherit here but by Act of Parliament.

If it be ſaid there is an Exception to that, viz. unleſs he be naturalized in Ireland; that Exception muſt be well prov'd, not ſuppos'd: For the Queſtion being, Whether one naturalized in Ireland do thereby become as a Native of England? muſt not be reſolv'd by ſaying, That he doth become as a Native of England, otherwiſe it is prov'd only by begging the Queſtion.

2. The being no Alien in England belongs not to any made the King of England's Subject by Act of Law, when he is King of England, but ſuch as are born ſo.

Natural

Natural legitimation reſpecteth actual Obedience to the Soveraign at the time of the birth, for the Antenati remain Aliens, becauſe they were born when there were ſeveral Kings of the ſeveral Kingdoms; not becauſe they are not by act of law afterwards become Subjects to the King of England by the Union of the Crowns: But he that is naturaliz'd in Scotland or Ireland, is not a Subject born to the King of England, but made by a ſubſequent Act in law. Calvins Caſe, f. 27.

3. And chiefly the manner of ſubjection of a Stranger naturaliz'd in Scotland or Ireland, doth exactly agree with that of the Antenatus, and not of the Poſtnatus. For,

1. The Antenatus was another Prince his Subject, before he was the King of Englands.

2. The Antenatus might have been an Enemy to England, by a war between the ſeveral Kings before the Union.

So a Stranger naturalized in Scotland or Ireland, was the natural Subject of ſome other Prince neceſſarily before he was naturaliz'd, and then might have been an Enemy to the King of England, by a war between his natural Soveraign and the King of England, before he was naturlized.

But the Poſtnatus was never ſubject to any before he was the King of Englands, nor ever in poſſibility of being an enemy to England, both which are the properties of ſubjection in the native Engliſh Subject, and is the reaſon why the Poſtnatus in England is as the Natives of England.

No fiction of Law can make a man Natural Subject that is not, for a Natural Subject and a Natural Prince are Relatives, and if an Act of Naturalization ſhould thereby make a man a natural Subject, the ſame Subject would have two natural Soveraigns, one when he was born, the other when naturalized, which he can never have more than two Natural Fathers, or two Natural Mothers, except the Soveraigns be ſubordinate, the Inferior holding his Kingdom as Liege Homager from the Superiour. Ant. 280.

And perhaps in the Caſe of Severing the Kingdoms, as Sir Edward Coke ſaith. Calvins Caſe 27.

Nor can an Act of Parliament in one place take away the natural ſubjection due to another Prince for want of power

And

And the Law of England being, That Antenatus ſhall not inherit, becauſe an Alien, without an Act of Parliament making him none: The fiction of an Act in another Kingdom, to which England never conſented, ſhall not alter the law here, becauſe he is made in Ireland as if born there.

Ant. 280.

If there were an Act of Parliament in England, That perſons naturalized in Ireland or Scotland, ſhould be no Aliens in England, no man thinks that thereby Scotland, or Ireland could naturalize a man in terminis in England. But a man naturalized there, would by conſequent be naturalized in England, becauſe the law of England did warrant that conſequent.

But to ſay, That a man naturalized in Ireland is not directly naturalized in England, but by conſequent, when the Queſtion is, Whether one naturalized in Ireland be thereby naturalized in England? is to beg for a proof that which is the queſtion.

Therefore it muſt be firſt proved, That there is a Law of England to warrant that conſequent.

Inconveniences.

The Law of England is, That no Alien can be naturalized but by Act of Parliament, with the aſſent of the whole Nation.

Ant. 282.

1. Now if this naturalization in Ireland ſhould be effectual for England, then a whole Nation ſhould become Natives in England, without Act of Parliament of what Country Religion, or Manners ſoever they be, by an Act of Ireland.

2. If the Parliament of England ſhould refuſe to naturalize a number of men, or Nation, as dangerous or incommodious to the Kingdom, yet they might be naturalized, whether the Houſes of Parliament would or not, by an Act of Ireland.

3. By this invention the King may naturalize in England without an Act of Parliament, as well as he may Denizen; for if the Parliament of Ireland enact, That the King, by Letters Patents, ſhall naturalize in *Ireland*, then they ſo naturalized in *Ireland* by Patent, will be naturalized in *England* by conſequent, ſo they may enact the Deputy or Council of *Ireland* to naturalize.

4. If an Alien hath Iſſue an Alien Son, and the Father be denizen'd in England, and after hath a Son born in England, the Law hath been taken, That the youngeſt Son ſhall inherit the Fathers Land. So is Sir Edward Coke Litt. f. 8.a. and other Books; yet if the elder be naturaliz'd in Ireland, the Eſtate which the youngeſt hath, by the Law of England, will be plucked from him. Co. Litt. f. 8. a. Doct. Stud. l. 1. Cr. 17 Jac. f. 539. Godfrey & Dixons C.

Having thus opened the Inconveniences conſequent to this Iriſh naturalization, the next is, That Judges muſt judge according as the Law is, not as it ought to be. But then the Premiſſes muſt be clear out of the eſtabliſhed Law, and the Concluſion well deduc'd before great Inconveniences be admitted for Law. But if Inconveniences neceſſarily follow out of the Law, only the Parliament can cure them. Ante. 37. 38. Devant. 38.

1. I ſhall begin with the admitted Doctrine of Calvin's Caſe. By that Caſe, He that is born a ſubject of the King of England in another Dominion than England, is no Alien in England. So the Scots, born when the King of Scots was King of England, are no Aliens; thoſe born before in Scotland are. Therefore Nicholas Ramſey, who is not born the Kings Subject of Ireland, muſt be an Alien in England, whoſe Law, by the Rule of that Caſe, makes only Subjects born, and not made of another Dominion, not to be Aliens in England.

2. It is agreed to my hand, That an Alien naturalized at this day in Scotland, remains an Alien in England notwithſtanding. Ant. 68.

3. By the Doctrine of Calvin's Caſe, a natural born Subject to the Kings perſon of a Forraign Dominion, is not priviledg'd in England from being an Alien, elſe the Antenati of Scotland were priviledg'd for they are natural born Subjects to the Kings perſon, as well as the Poſtnati.

4. It ſtands not with the Reſolution of that Caſe, That the natural born Subjects of the Dominions belonging to the Crown of England (qua ſuch) ſhould be no Aliens in England, which was the principal matter to have been diſcuſs'd, but was not, in Calvin's Caſe, and chiefly concerns the point in queſtion.

The Caſe relied on to juſtifie the Judgment in Calvins Caſe are ſeveral Authorities, That the King of England's Subjects formerly were never accounted Aliens in England, though they were all out of the Realm of England, and many within the Realm of France. But all theſe are admitted in that Caſe (as moſt of them were) Dominions belonging to the Crown of England, and if ſo,

Of { Normandy, Brittain, Aquitain, Anjou, Gaſcoigne, Guien, Calais, Jerſey and Gernſey, Iſle of Man, Berwick and other Parts of Scotland. Ireland, Tourney, &c.

What Inference could be made for the Reſolution of Calvin's Caſe? That becauſe the Kings natural Subjects of Dominions belonging to the Crown of England, as theſe did, were no Aliens in England: Therefore that Subjects of a Dominion not belonging to the Crown, as the Poſtnati of Scotland are, ſhould be no Aliens in England, Non ſequitur.

Therefore it is for other reaſon then, becauſe natural Subjects of Dominions belonging to the Crown of England, they were no Aliens by the meaning of that Reſolution. And the Adequate Reaſon being found out, why they are not Aliens, will determine the point in queſtion.

1. It was not becauſe they were natural Subjects to him that was King of England, for then the Antenati of Scotland would be no Aliens, they being natural Subjects to him that is King of England, as well as the Poſtnati.

2. It was not becauſe they were natural Subjects of Dominions belonging to the Crown of England; for then the Poſtnati would be Aliens in England, for they are not Subjects of a Dominion belonging to the Crown of England

3. It remains then, the Reaſon can be no other, but becauſe they were born under the ſame Liegance with the Subjects of England, which is the direct reaſon of that Reſolution in Calvins Caſe. The words are, The time of the birth is of the eſſence of a Subject born, for he cannot be a Subject to the King of *England* (that is, to be no Alien) unleſs at the time of his birth he was under the Liegance and Obedience of the King (that is) of *England*. And that is the reaſon that Antenati in *Scotland* (for that at the time of their birth they were not under the Liegance and Obedience of the King of *England*) are Aliens born, in reſpect of the time of their birth.

Ant. 279. Calvins Caſe, f. 18. b. a.

The

The time of his birth is chiefly to be conſidered, for he cannot be a Subject born of one Kingdom, that was born under the Liegeance of a King of another Kingdom, albeit afterwards one Kingdom deſcend to the King of the other.

Therefore Ramſey, being not under the Liegeance of the King of England at the time of his birth, muſt ſtill continue an Alien, though he were naturalized in Ireland.

Notwithſtanding all this, it may be urg'd,

A perſon naturalized in England is the ſame as if he had been born in England, and a perſon naturalized in Ireland is the ſame as if he had been born in Ireland.

But a perſon born in Ireland is the ſame as if he had been born, or naturalized in England. Obj. 1.

Therefore a perſon naturalized in Ireland, is the ſame as if he had been born or naturalized in England. This ſeems ſubtile and concluding.

For Anſwer, I ſay, That the ſame Syllogiſm may be made of a perſon naturalized in Scotland after the Union, viz. Anſw.

A perſon naturalized in England, is the ſame with a perſon born in England; and a perſon naturalized in Scotland, after the Union, is the ſame with a perſon born in Scotland after the Union.

But a perſon born in Scotland, after the Union, is the ſame with a perſon born or naturalized in England.

Therefore a perſon naturalized in Scotland, after the Union, is the ſame with a perſon born or naturalized in England.

Yet it is agreed, That a perſon naturalized in Scotland, ſince the Union, is no other than an Alien in England; Therefore the ſame Concluſion ſhould be made of one naturalized in Ireland.

To differ theſe two Caſes, it may be ſaid, That the naturalizing of a perſon in Scotland can never appear to England, becauſe we canot write to Scotland to certifie the Act of Naturalizing, as we may to Ireland, out of the Chancery, and as was done in the preſent Caſe in queſtion, as by the Record appears. Obj. 2.

This is a difference, but not to the purpoſe, and then it is the ſame as no difference; For I will ask by way of Suppoſition:

Admit an Act of Parliament were made in England for clearing all Queſtions of this kind,

That all perſons inheritable, in any Dominion whatſoever, whereof the King of England was King, whether naturalized, or Subjects born, ſhould be no Aliens in England, it were then evident by the Law, That a naturalized Subject of Scotland were no Alien in England; yet the ſame Queſtion would then remain as now doth, How he ſhould appear to be naturalized? becauſe the Chancery could not write to Scotland, as it can to Ireland, to certifie the Act of Naturalizing.

Anſw. 1. The fallacy of the Syllogiſm conſiſts in this. It is true, that a perſon naturalized in Ireland, is the ſame with a perſon born in Ireland, that is by the Law of Ireland. But when you aſſume, That a perſon born in Ireland is the ſame with a perſon born or naturalized in England, that is not by the Law of Ireland, but by the Law of England. And then the Syllogiſm will have four terms in it, and conclude nothing.

Anſw. 2.3. But to anſwer the difference taken, there are many things whereof the Kings Courts ſometimes ought to be certified, which cannot be certified by Certiorari, or any other ordinary Writ.

42E. 3.f. 2. b. An Act of Parliament of Scotland may be evidence as a Sentence of Divorce or Deprivation, and Forraign Laws for raiſing or abaſing Mony or Cuſtoms upon accompt between Merchants, but not as Records.

In the Caſe of the Lord Beaumond, 42 E. 3. a Queſtion grew, Whether one born in Roſs in Scotland were within the Kings Liegeance? becauſe part of Scotland then was, and part not, in his Liegeance, the Court knew not how to proceed until Thorpe gave this Rule; That doubtleſs the King had a Roll, what parts of Scotland were in his Liegeance, what not, upon the Treaty or Concluſion made, that therefore they muſt addreſs themſelves to the King to have that certified. The like may now happen of Virginia, Surenam, or other places, part of which are in the Kings Liegeance, part not. So the King hath, or may have, Rolls of all naturalized Subjects; and upon petition to him, where the occaſions require it, may cauſe the matter in his name to be certified. The like may happen upon emergent Queſtions upon Leagues or Treaties, to which there is no common acceſs, but by the Kings permiſſion.

5 El.c.4.f.957. For illuſtration, a feign'd Caſe is as good as a Caſe in fact. Suppoſe a Law in Ireland, like that of 5. of the Queen, That no man ſhould ſet up Shop in Dublin, unleſs he had ſerv'd as an Apprentice to the Trade for Seven years; and ſuppoſe a Law in England, That whoſoever had ſerved Seven years as an Apprentice in Dublin, might ſet up Shop in London. If by a particular Act of Parliament in Ireland J. S. be enabled to ſet up Shop in Dublin, as if he had ſerv'd an Apprentiſhip for Seven years, by this fiction he is enabled in Ireland to ſet up, but no

in

in London, unleſs he have really ſerved for Seven years, as the Law in England requires

Conſiderations.

That an Act of Parliament of Ireland ſhould ſo operate, as to effect a thing which could not, by the Laws of England, be done without an Act of Parliament in England regularly, ſeems ſo ſtrange, that it is ſuppos'd an Act of Parliament of England, did firſt impower the doing of it, though it be not extant by an Act of Parliament. Ant. 268.

The Argument then is,

1. A man is naturalized in Ireland, and thereby no Alien in England, which could not lawfully be done without an Act of Parliament in England to impower the doing it.

Which in effect is to ſay, a thing was done which could not lawfully be done without an Act of Parliament to warrant it, Ergo, it being done, there was an Act of Parliament to warrant it.

2. This Suppoſition ſeems rather true, becauſe other things relating to Ireland, and admitted to be Law, could not be but by Act of Parliament in England, yet no ſuch Act is extant; that is, that a Writ of Error lies in the Kings Bench to reverſe a Judgment given in the Kings Bench in Ireland.

3. That this muſt be by Act of Parliament, not by Common Law, becauſe ſuch a Writ did not lye in Wales or Calais at Common Law to reverſe an Error there. Poſt. 290.

Still the Argument is no better than before: Some things are of known Law, though many ſucceſſions of Ages, which could not commence without an Act of Parliament, which is not extant.

Therefore a thing wholly new, not warranted by any Teſtimony of former time, becauſe it cannot be lawful without an Act of Parliament, muſt be ſuppos'd, without other proof, to be lawful by an Act of Parliament.

If the lawfulneſs of any thing be in queſtion, ſuppoſe the Laws of Ireland were made the Laws of England by Act of Parliament here, only Two were material to this Queſtion, 1. That a Poſtnatus of a Foraign Dominion of the Kings ſhould be no Alien, the Law is ſo in Ireland. 2. That perſons naturaliſed in England are naturaliſed for all the Dominions belonging to England; if the Law were ſo in Ireland, it follows not, That one naturaliſed there muſt be naturaliſed in England thereby; for England is not a Dominion belonging to Ireland, but e contrario.

Fitz. Aſſiſe pla. 382. 18 E. 2. Poſt. 402.

A Writ of Error lies to reverſe a Judgment in any Dominions belonging to England; Breve Domini Regis non currit in Wallia, is not to be intended of a Writ of Error, but of ſuch Writs as related to Tryals by Juries; thoſe never did run in Forraign Dominions that moſt commonly were governed by different Laws. Error of a Judgment in Aſſize of Gower's Land, in B. R. 18 E. 2.

21 H. 7. f. 31. b.

A Writ of Non moleſtando iſſued out of the Chancery to the Mayor of Calais, retornable in the Kings Bench; and by the whole Court agreed, That there are divers Preſidents of Writs of Error to reverſe Judgments given in Calais; though it was Objected, They were governed by the Civil Law.

Ant. 289. Poſt. 402.

7 Rep. f. 20. a. Calvins Caſe. Carter. 188.

And Sir Edward Coke cites a Caſe of a Writ directed to the Mayor of Burdeaux, a Town Gaſcoigny, and takes the difference between Mandatory Writs, which iſſued to all the Dominions, and Writs of ordinary remedy, relating to Tryals in the Kingdom.

7 Rep. Calvins Caſe, f. 18. a.

And ſpeaking of Ireland among other things, he ſaith, That albeit no Reſervation were in King *John*'s Charter, yet by Judgment of Law a Writ of Error did lye in the *Kings Bench* of *England*, of an Erroneous Judgment in the *Kings Bench* in *Ireland*.

Poſt. 402.

A Writ of Error lies not therefore to reverſe a Judgment in Ireland by Special Act of Parliament, for it lies at Common Law to reverſe Judgments in any Inferiour Dominions; and if it did not, Inferior and Provincial Governments, as Ireland is, might make what Laws they pleas'd; for Judgments are Laws, when not to be revers'd.

Pla. Parl. 21 E. 1. f. 152, 157.

Magdulph appeal'd from the Court and Judgment of the King of Scots before King Edward the Firſt, ut Superiori Domino Scotiæ.

And

And by the Caſe in 2 R. 3. f. 12. all the Judges there agree, aſſembled in the Exchequer Chamber, That a Writ of Error lay to reverſe Judgments in Ireland, and that Ireland was ſubject as Calais, Gaſcoigne, and Guyen, who were therefore ſubject as Ireland: And therefore a Writ of Error would there lye as in Ireland. 2 R. 3. f. 12. Poſt. 401.

Another Objection, ſubtile enough, is, That if naturaliſing in Ireland, which makes a man as born there, ſhall not make him likewiſe as born (that is no Alien) in England, That then naturaliſing in England ſhould not make a man no Alien in Ireland (eſpecially without naming Ireland) and the ſame may be ſaid, That one denizen'd in England ſhould not be ſo in Ireland. Object. 3.

The Inference is not right in form, nor true. The Anſwer is, The people of England now do, and always did, conſiſt of Native Perſons, Naturaliz'd Perſons, and Denizen'd Perſons; and no people, of what conſiſtence ſoever they be, can be Aliens to that they have conquer'd by Arms, or otherwiſe ſubjected to themſelves, (for it is a contradiction to be a ſtranger to that which is a mans own, and againſt common reaſon and publique practice). Anſw.

Therefore neither Natives or Perſons Naturaliz'd or denizen'd of England, or their Succeſſors, can ever be Aliens in Ireland, which they conquer'd and ſubjected. And though this is De Jure Belli & Gentium, obſerve what is ſaid, and truly, by Sir Edward Coke in Calvin's Caſe, in purſuance of other things ſaid concerning Ireland.

In the Conqueſt of a Chriſtian Kingdom, as well thoſe that ſerved in Warr at the Conqueſt, as thoſe that remain'd at home for the Safety and Peace of their Country, and other the Kings Subjects, as well Antenati as Poſtnati, are capable of Lands in the Kingdom or Country conquer'd, and may maintain any real Action, and have the like Priviledges there as they may have in *England*. 7 Rep. Calvins C. f. 18. a.

Another Objection hath been, That if a perſon naturaliz'd in Ireland, and ſo the Kings natural Subject, ſhall be an Alien here, then if ſuch perſon commit Treaſon beyond the Seas, where no local Liegeance is to the King, he cannot be tryed here for Treaſon, contra ligeantiæ ſuæ debitum, by the Statute of 26 H. 8. or 35 H. 8. or any other Statute to that purpoſe. Object. 4.

26 H. 8 c. 13. 33 H. 8. c. 23. 35 H. 8. c. 2. 2 Vent. 314. Treaſon by an Iriſh man in Ireland or elſewhere, may be tryed in England by thoſe Statutes. 33 El. Anderſon Rep. f. 262. b. Orurks Caſe. Calvins Caſe, f. 23. a

I. To

1. To that I anſwer, That his Tryal muſt be as it would have been before thoſe Laws made, or as if thoſe ſtood now repeal'd

2. His Tryal ſhall be in ſuch caſe as the Tryal of a perſon naturalized in Scotland, after the Union, who is the Kings Subject, but an Alien in England.

Ireland.

Though Ireland have its own Parliament, yet is it not abſolute, & ſui juris, for if it were, England had no power over it, and it were as free after Conqueſt and Subjection by England, as before.

That it is a conquer'd Kingdom, is not doubted, but admitted in Calvin's Caſe ſeveral times: And by an Act of Parliament of Ireland, appears in expreſs words, Whereas in former times, after the Conqueſt of this Realm by his Majeſties moſt Royal Progenitors, Kings of England, &c.

Stat. Hib. 11. 12. & 13 Jac. c. 5.

What things the Parliament of Ireland cannot do.

1. It cannot Alien it ſelf, or any part of it ſelf, from being under the Dominion of England, nor change its Subjection.

2. It cannot make it ſelf not ſubject to the Laws of, and ſubordinate to, the Parliament of England.

3. It cannot change the Law of having Judgments there given, revers'd for Error in England, and others might be named.

4. It cannot diſpoſe the Crown of Ireland to the King of Englands ſecond Son, or any other, but to the King of England.

Laws

Laws made in the Parliament of *England* binding *Ireland.*

A Law concerning the Homage of Parceners, called Statutum Hiberniæ. 14 H. 3.

A Statute at Nottingham, called Ordinatio pro Statu Hiberniæ. 17 E. 1.

Laws for *Ireland* made by E. 3. per adviſamentum Concilii noſtri in ultimo Parliamento noſtro apud Weſtm. tento. Pat. Rol. 5 E. 3. pars 1. m. 29. pla. Parl. f. 586.

An Act that no Arcbiſhop, Biſhop, or Prior ſhould be choſen, who were Iriſh, nor come to Parliaments with Iriſh Attendants. 4 H. 5. c. 6.

The late Acts made in 17 Car. 1. and many others. 17 Car. 1.

The Reſolution of all the Judges in the Exchequer Chamber, That they were bound by, and ſubject to the Laws of England, as thoſe of Calais, Gaſcoign, and Guien, in the Caſe of the Merchants of Waterford, for ſhipping Staple Goods for Sluce in Flanders, to which they pleaded the Kings Licence and Diſpenſation, not pretending freedom from the Statute of 2 H. 6. c. 4. whereupon they were queſtioned. 25 H. 8. c. 20. 21.

Ireland receiv'd the Laws of *England* by the Charters and Commands of H. 2. King John, H. 3. &c.

I know no Opinion that Ireland, receiv'd the Laws of England by Act of Parliament of England, nor had it been to purpoſe, having alſo a Parliament of their own, that might change them.

Sir Edward Coke is of Opinion, That they received them by a Parliament of Ireland, in ſeveral Books, in the time of King John, and grounds his Opinion upon the words of ſeveral Patents of H. 3. which mention King John to have gone into Ireland, and carried with him diſcretos viros quorum communi Cok. Litt. f. 141. b. Part. 12 H. 3. Poſt. 298.

Concilio & ad inſtantiam Hibernienſium, he appointed the Laws of England to be there obſerved.

Pat. 18 H. 3. Another Patent of 18 H. 3. he there cites, wherein it is ſaid, That King John, de communi omnium de Hibernia conſenſu, ordained the Engliſh Laws to be there obſerved: And the like in effect in 30 H. 3.

Cok. 4. Inſt. f. 349. The ſame Charters he mentions, but not in the ſame words, eſpecially that of 12 H. 3. 1. and to the ſame purpoſe that King John, by a Paliament in Ireland, eſtabliſhed the Laws of England there, in his 4. Inſtitutes.

That wich occaſioned the miſtake were the words, De communi omnium aſſenſu, in the Patents, which he conceiv'd to be a Parliament.

But the Original Act and Command of King John to this purpoſe, and the Charter of 12 H. 3. at large (whereof Sir Edward Coke had only ſhort Notes) will clear how the Engliſh Law came into Ireland, and what that Communis aſſenſus meant; for they were not received by Act of Parliament in thoſe times.

Tempore Regis Johannis.

Pat. 6. Johan. m. 6. n. 17.

Rex dat. poteſtatem Juſtic. ſuis *Hiberniæ*, quod brevia ſua currant per totam terram noſtram, & poteſtatem noſtram *Hiberniæ* quæ ibidem nominantur.

Pat. 6. Johan.

Johannes Dei Gratia, &c. Juſticariis Baronibus, Militibus, & omnibus fidelibus ſuis *Hiberniæ* &c. Sciatis quod dedimus poteſtatem Juſtic. noſtr' *Hibern.* quod brevia ſua currant per totam terram noſtram, & poteſtatem noſtram *Hiberniæ*, ſcilicet breve de Recto de feodo dimidii Militis & infra & de morte anteceſſoris ſimiliter de feod. Domini Milit. & infra. Et erit terminus de morte anteceſſor. poſt transfretationem *H.* Regis patris noſtri de *Hibernia* in *Angl.* Et breve de Nova diſſ. cujus erit terminus poſt primam Coronationem apud *Cant.* Et breve de fugitivis & nativis in quo erit terminus poſt captionem *Dublin.* Et breve de

de diviſis faciend. inter duas villas exceptis Baron. Et ideo vobis mandamus, & firmiter præcipimus, quod hæc ita fieri & firmiter tener. per totam poteſtatem noſtram *Hiberniæ* faciatis. Teſte meipſo apud *Weſtmonaſterium* ſecundo die *Novembris.* 17.

Clauſ. 7. Johannis.

Rex M. filio *Henr.* Juſtitiar. *Hiberniæ*, &c. Sciatis quod *Deremunt* expoſuit nobis ex parte Regis *Connaciæ*, quod idem Rex exigit tenere de nobis tertiam partem terræ de *Connacia* per C. Marcas per Annum, ſibi & hæredibus ſuis nomine Baroniæ.

Pat. 6. Johan. m. 6. n. 17.

Rex, &c. Juſtic. Baronibus, Militibus, & omnibus fidelibus ſuis *Hibern.* &c. Sciatis quod dedimus poteſtatem Juſtic. noſtr' *Hiberniæ*, quod brevia ſua currant per totam rerram noſtram, & poteſtatem noſtram *Hiberniæ*, ſcilicet breve de Recto de feodo Dimidii Mil. & infra, & de morte Anteceſſor. & ſimiliter de feod. dimid. Mil. & infra. Et erit terminus de morte Anteceſſor. poſt transfretationem *Henr.* Regis patris noſtri de *Hibern.* in *Angl.* Et breve de Nova Diſſeiſina cujus erit terminus poſt primam Coronationem noſtram apud *Cant.* Et breve de Fugit. & Nativis, & ejus erit terminus poſt captionem *Dublin.* Et breve de diviſis faciend. inter duas villas, except. Baron. Et ideo vobis Mandamus & firmiter præcipimus quod hæc ita fier. & firmiter teneri per totam poteſtatem noſtram *Hiberniæ* faciatis. Teſte meipſo apud *Weſtmonaſt.* ji. die *Novembris.*

Clauſ. 12 H. 3. m. 8.

Rex dilecto & fideli ſuo *Richardo de Burgo* Juſtic. ſuo *Hibern.* ſalutem, Mandamus vobis firmiter præcipientes quatenus certo die & loco faciatis venir. coram vobis Archiepiſcopos, Epiſcopos, Abbates, Priores, Comites, & Barones, Milites & Libere tenentes & Ballivos ſingulorum Comitatuum, & coram eis publice legi faciatis *Chartam Domini J.* Regis patris noſtri cui Sigillum ſuum appenſum eſt, quam fieri fecit & jurari a Magnatibus *Hibern.* de Legibus & conſuetudinibus *Angl.* obſervandis in *Hibernia.* Et præcipiatis eis ex parte noſtra quod Leges illas & con-

De legibus & conſuetudinibus obſervandis in Hibernia.

Pat. 6. Joh. n. 17. Dat. apud Weſtm. 2 die Novemb.

coſuetudines in Charta præd. contentas de cetero firmiter teneant & obſervent. Et hoc idem per ſingulos comitatus *Hibern.* clamari faciatis & teneri prohibentes firmiter ex parte noſtra, & ſuper forisfacturam noſtram ne quis contra hoc mandatum noſtrum venire præſumat. Eo excepto quod nec de morte, nec de Catall. *Hibernienſium* occiſorum nihil ſtatuatur ex parte noſtra circa quindecim dies a die Sancti *Michaelis*, Anno Regni noſtri xij. ſuper quo reſpectum dedimus Magnatibus noſtris *Hiberniæ* uſque ad terminum præd. Teſte meipſo apud *Weſtmonaſt.* 8. die *Maii*, Anno xij.

Patentes 30 H. 3. m. 1.

Quia pro communi utilitate terræ *Hibern.* & unitate terrarum Regis, Rex vult & de communi Conſilio Regis proviſum eſt, quod omnes Leges & conſuetudines quæ in Regno *Angliæ* tenentur, in *Hibern.* teneantur & eadem terra eiſdem Legibus ſubjaceat, & per eaſdem regatur, ſicut Dominus *Johannes* Rex cum ultimo eſſet in *Hibernia* Statuit & fieri mandavit. Quia etiam Rex vult quod omnia brevia de Communi jure quæ currunt in *Angl.* ſimiliter currant *Hibernia* ſub novo Sigillo Regis.

Mandatum eſt Archiepiſcopis, &c. quod pro pace & tranquilitate ejuſdem terræ per eaſdem Leges eos regi, & deduci permittant, & eas in omnibus ſequantur. In cujus, &c. *T. R.* apud *Wadeſtocks* ix die *Septembris.*

Out of the Cloſe Rolls of King *Henry* the Third his Time.

Clauſe 1 H. 3. dorſo. 14.

The King's thanks to *G. de Mariſcis*, Juſtice of *Ireland.* The King ſignifies that himſelf, and other his Lieges of *Ireland*, ſhould enjoy the Liberties which he had granted to his Lieges of *England*, and that he will grant and confirm the ſame to them.

Clauſe

Clauſe 3. H. 3. m. 8. part 2.

The King writes ſingly to *Nicholas*, Son of *Leonard* Steward of *Meth*, and to *Nicholas* de *Verdenz*, and to *Walter Purcell* Steward of *Lagenia*, and to *Thomas* the ſon of *Adam*, and to the King of *Connage*, and to *Richard* de *Burgh*, and to *J. Saint John* Treaſurer, and to the other Barons of rhe *Exchequer* of *Dublin*, That they be intendant and anſwerable to *H.* Lord Arch-biſhop of *Dublin*, as to the Lord the King's Keeper and Bailif of the Kingo m of *Ireland*, as the King had writ concerning the ſame matter to *G. de Mariſcis*, Juſtice of *Ireland.*

Clauſe 5. H. 3. m. 14.

The King writes to his Juſtice of *Ireland*, That whereas there is but a ſingle Juſtice itinerant in *Ireland*, which is ſaid to be diſſonant from the more approved cuſtom in *England*, for Reaſons there ſpecified, two more Juſtices ſhould be aſſociated to him, the one a Knight, the other a Clerk, and to make their Circuits together, according to the Cuſtom of the Kingdom of *England.* Witneſs, &c.

The Cloſe Roll. 5 H. 3. m. 6. Dorſo.

The King makes a Recital, That though he had covenanted with *Geoffrey de Mariſcis*, That all Fines, and other Profits of *Ireland*, ſhould be paid unto the Treaſurer, and to other Bailiffs of the Kings *Exchequer* of *Dublin*, yet he receiv'd all in his own Chamber, and therefore is removed by the King from his Office: Whereupon the King, by adviſe of his Council of *England*, eſtabliſheth. that *H.* Arch-biſhop of *Ireland* be Keeper of that Land, till further order. And writes to *Thomas*, the ſon of *Anihony*, to be anſwerable and intendant to him. After the ſame manner it is written to ſundry Iriſh Kings and Nobles there ſpecially nominated.

Clauſe

Clauſe 7. H. 3. m. 9.

The King writes to the Arch-biſhop of *Dublin*, his Juſtice of *Ireland*, to reverſe a Judgment there given, in a Caſe concerning Lands in *Dalkera*, between *Geoffrey de Mariſcis*, and *Eve* his wife Plaintiffs, and *Reignald Talbot* Tenant By the Record of the ſame Plea returned into *England*, the Judgment is reverſed upon theſe two Errors. The firſt, becauſe upon *Reignald's* ſhewing the Charter of King *John*, the King's Father, concerning the ſame Land, in regard thereof deſiring peace, it was denyed him.

The ſecond, Becauſe the Seiſin was adjudged to the ſaid *Geoffrey* and *Eve*, becauſe *Reynald* calling us to warranty, had us not to warranty at the day ſet him by the Court, which was a thing impoſſible for either *Geoffrey*, or rhe Court themſelves to do, our Court not being above us to ſummon us, or compel us againſt our will. Therefore the King writes to the Juſtice of *Ireland* to re-ſeiſe *Reynald*, becauſe he was diſſeiſed by Erroneous Judgment.

Clauſe 28. H. 3. m. 7.

The King writes to *M. Donenald*, King of *Tirchonill*, to aid him againſt the King of *Scots*, Witneſs, &c. The like Letters to other Kings and Nobles of *Ireland*.

Clauſe 40. E. 3 m. 12 Dorſo.

The King takes notice of an illegal proceeding to Judgment in *Ireland*, Ordered to ſend the Record and Proceſs into *England*.

It was objected by one of my Brothers, That Ireland received not the Laws of England by Act of Parliament of England, but at the Common Law by King John's Charter. If his meaning be that the Fact was ſo, I agree it; but if he mean they could not receive them by Act of Parliament of England (as my Brother Maynard did conjecturally inferr for his purpoſe) then I deny my Brothers Aſſertion; for doubtleſs they might have received them by Act of Parliament, And I muſt clear my Brother Maynard from any mention of an Union, as was diſcourſed of England and Ireland: For was it at all to his purpoſe.

Ant. 293.

If

If any Union, other than that of a Provincial Government under England had been, Ireland had made no Laws more than Wales; but England had made them for Ireland, as it doth for Wales.

As for the Judgment.

One of my Brothers made a Queſtion, Whether George Ramſey, the younger Brother, inheriting John Earl of Holdernes, before the naturalization of Nicholas, Whether Nicholas, as elder Brother, being naturalized, ſhould have it from him? Doubtleſs he ſhould, if his Naturalizing were good. He ſaith the Plaintiff cannot have Judgment, becauſe a third perſon, by this Verdict, hath the Title. Obj.

If a Title appear for the King, the Court, ex Officio, ought to give Judgment for him, though no party. But if a man have a prior Poſſeſſion, and another enters upon him without Title, I conceive the priority of Poſſeſſion is a good Title againſt ſuch an Entry equally when a Title appears for a third, that is no party, as if no Title appear'd for a third. Anſw.

But who is this third party? For any thing appears in the Verdict, George Ramſey died before the Earl. 2. It appears not that his Son John, or the Defendant, his Grand-child, were born within the Kings Liegeance. Patient appears to be born at Kingſton, and ſo the Daughters of Robert by the Verdict.

The Acts of Ireland except all Land whereof Office was found before the Act to entitle the King, but that is in Ireland, for the Act extends not to England. If Nicholas have Title, it is by the Law of England, as a conſequent of Naturalization.

So it may be for the Act of 7 Jac. cap. 2. he that is Naturalized in England, ſince the Act, muſt receive the Sacrament; but if no Alien, by conſequent then he muſt no more receive the Sacrament than a Poſtnatus of Scotland.

Ireland is a diſtinct Kingdom from England, and therefore cannot make any Law Obligative to England. Obj.

That

Anſw. That is no adequate Reaſon, for by that Reaſon England being a diſtinct Kingdom, ſhould make no Law to bind Ireland, which is not ſo: England can naturalize, if it pleaſe, nominally a perſon in Ireland, and not in England. But he recover'd by ſaying, That Ireland was ſubordinate to England, and therefore could not make a Law Obligatory to England. True; for every Law, is coactive, and it is a contradiction that the Inferiour, which is civilly the leſſer power, ſhould compel the Superiour, which is a greater power.

Secondly, He ſaid England and Ireland were two diſtinct Kingdoms, and no otherways united than becauſe they had one Soveraign. Had this been ſaid of Scotland and England, it had been right, for they are both abſolute Kingdoms, and each of them Sui Juris.

But Ireland far otherwiſe; For it is a Dominion belonging to the Crown of England, and follows that it cannot be ſeparate from it, but by Act of Parliament of England, no more than Wales, Gernſey, Jerſey, Berwick, the Engliſh Plantations, all which are Dominions belonging to the Realm of England, though not within the Territorial Dominion or Realm of England, but follow it, and are a part of its Royalty.

Thirdly, That diſtinct Kingdoms cannot be united, but by mutual Acts of Parliament. True; if they be Kingdoms ſui Juris, and independent upon each other; as England and Scotland cannot be united but by reciprocal Acts of Parliament. So upon the Peace made after Edward the Third's war with France, Gaſcoign, Guien, Calais were united and annext to the Crown of England by the Parliaments of both Nations, which is a ſecret piece of Story, and miſtaken by Sir Edward Coke, who took it as a part of the Conqueſt of France, and by no other Title.

Poſt. 401.

But Wales, after the Conqueſt of it by Edward the Firſt, was annext to England, Jure Proprietatis, 12 Ed 1. by the Statute of Ruthland only, and after more really by 27 H. 8. & 34. but at firſt received Laws from England, as Ireland did; but not proceeded by Writs out of the Engliſh Chancery, but had a Chancery of his own, as Ireland hath; was not bound by the Laws

Laws of England, unnamed until 27 H. 8. no more than Ireland now is.

Ireland in nothing differs from it, but in having a Parliament, Gratia Regis, ſubject to the Parliament of England, it might have had ſo, if the King pleas'd; but it was annext to England. None doubts Ireland, as conquer'd, as it; and as much ſubject to the Parliament of England, if it pleaſe.

The Court was divided, viz. The Chief Juſtice and *Tyrrell* for the Plaintiff. *Wylde* and *Archer* for the Defendant.

Trin. 25 *Car.* II. *C. B. Rot.* 1488.

Thomas Hill and *Sarah* his Wife are Plaintiffs. *Thomas Good* Surrogat of Sir *Timothy Baldwyn* Knight, Doctor of Laws, and Official of the Reverend Father in God, *Herbert* Biſhop of *Hereford* is Defendant, *In a Prohibition.*

THE Plaintiffs, who proſecute as well for the King, as themſelves, ſet forth, That all Pleas and Civil Tranſactions, and the Expoſition and Conſtruction of all Statutes and all Penalties for the breach of them pertain only to the King and his Crown.

Then ſet forth the time of making the Act of 32 H. 8. c. 38. and the Act it ſelf at large, and that thereby it was enacted, That from the time limited by the Act, no Reſervation or Prohibition (Gods Law excepted) ſhould trouble or impeach any marriage without the Levitical Degrees. And that no perſon ſhall be admitted after the time limited by the Act, in any the Spirtual Courts within this Kingdom, to any Proceſs, Plea, or Allegation contrary to the Act.

They ſet forth, That after the making of the ſaid Act, and the time thereby limitted, the Plaintiffs being lawful perſons to contract marriage, and not prohibited by Gods Law, and being perſons without the Levitical Degrees, the Twentieth day of September, in the Four and twentieth year of the King, at Lemſter in the County of Hereford, contracted matrimony in the face of the Church, and the ſame conſummated and ſolemnized, with carnal knowledge and fruit of Children, at Lemſter aforeſaid.

Ant. 247.

That by reaſon thereof the ſaid Marriage is good and lawful, and ought not to be null'd in Court Chriſtian.

That

That notwithſtanding, the Defendant, præmiſſorum non ignarus, fraudulently intending to grieve and oppreſs the Plaintiffs, unduly draws them into queſtion before him in the Court Chriſtian for an unlawful marriage, as made within the Degrees prohibited by Gods Laws, and there falſo caute & ſubdole libelling, and ſuppoſing, that whereas by the Laws and Canons Eccleſiaſtical of this Kingdom, it is ordained, That none ſhould contract matrimony within the Degrees prohibited by Gods Law, and expreſſed in a cetain Table ſet forth by Publique Authority, Ant. 245. Anno 1563. and that all marriages, ſo contracted, ſhould be eſteemed inceſtuous and unlawful, and therefore ſhould be diſſolved, as void, from the beginning.

And alſo, That whereas by a certain Act of Parliament made and publiſhed in the Eight and twentieth year of King *Henry* the Eighth, It is enacted, That no perſon or perſons, ſubject or reſiding within the Realm of *England*, or within the Kings Dominions, ſhould marry within the Degrees recited in the ſaid Act, upon any pretence whatſoever: And

That whereas the ſaid Thomas Hill had taken to wife one Elizabeth Clark, and for ſeveral years cohabited with her, as man and wife, and had carnal knowledge of her,

He the ſaid Thomas, notwithſtanding, after the death of the ſaid Elizabeth, had married with, and took to wife the ſaid Sarah, being the natural and lawful Siſter of the ſaid Elizabeth, againſt the form of the ſaid laſt mentioned Statute, and them the ſaid Thomas and Sarah had caus'd unjuſtly to appear before him in Court Chriſtian, to Anſwer touching the Premiſſes, although the ſaid marriage be lawful, and according to Gods Law, and without the Levitical Degrees. And

That although the Plaintiffs have, for their diſcharge in the ſaid Court Chriſtian, pleaded the ſaid firſt recited Act, yet the Defendant refuſeth to admit the ſame, but proceeds againſt them, as for an inceſtuous marriage, againſt the form of the Statute.

And that notwithſtanding he was ſerved with the Kings Writ of Prohibition to deſiſt in that behalf, in contempt of the King, and to the Plaintiffs damage of One hundred pounds.

The Defendant denies any proſecution of the Plaintiffs, contrary to the Kings Writ of Prohibition, and thereupon Iſſue is joyn'd and demurrs upon the matter of the Declaration, and prays a Conſultation, and the Plaintiffs joyn in Demurrer.

Ant. 219. 220. In the Argument upon Harriſon's Caſe, I ſaid, and ſtill ſay, That if granting Prohibitions to the Spiritual Courts in Caſes of Matrimony, were res integra now, I ſaw no reaſon why we ſhould grant them in any Caſe. The matter being wholly of Eccleſiaſtick Conizance: My Reaſons were and are,

1. Becauſe in all times ſome marriages were lawful, and others prohibited by Divine and Eccleſiaſtick Laws or Canons, yet the Temporal Courts could not prohibit the impeaching of any marriage, how lawful ſoever, nor take notice of it.

2. If by Act of Parliament anciently, all marriages not pro-
Ant. 208. 213. hibited by Gods Law, or Canons of the Church, had been declared lawful, the Temporal Courts thereby had no power to prohibit the queſtioning of any marriage more than before, for it had ſaid no more than what the Law was, and did ſay before ſuch Act.

So had it been enacted, That all marriages ſhould be lawful, not prohibited by the Levitical Law, the Church had retain'd the judging which were againſt the Levitical Law, as they did when the unlawfulneſs was not confin'd only to the Levitical Law.

And the Queſtion now concerning what are the Levitical Degrees? (whereof we aſſume the Conizance) is but the ſame as the queſtion would be concerning what marriages were prohibited in the Eighteenth of Leviticus.

For though ſuch Acts of Parliament had been, yet they had
Ant. 214. given no new Juriſdiction or Conizance in matrimonial matters to the Temporal Courts, but had been only directory to the Courts which had the Conizance; and if any Judgment had been given amiſs in them, it was to be rectified by appeal, according to thoſe Statutes, or by Commiſſions of Delegacy.

2 Vent. 15 to 22. Ant. 220. But I then ſaid, That ſince 32 H. 8. many Prohibitions have been granted to the Spiritual Courts concerning marriages without the Levitical Degrees in ſeveral Ages. And that
Ant. 220. therefore in a Caſe concerning the Extent of the Spiritual and Temporal Juriſdiction, and after ſo many Parliaments wherein no complaint hath been made, or certainly no redreſs given, it cannot be expected we ſhould, againſt ſo many judicial Preſidents, take upon us to alter the Law ſo long practiz'd, ſpecially after Harriſon's Caſe, in which all the Judges were adviſed with.

There-

Therefore taking it for granted, That the Temporal Courts can prohibit the impeaching of marriages without the Levitical Degrees, by the Statute of 32 H. 8. (for before no Prohibition was ever granted in that kind:) The Queſtion is,

Whether the marriage of the Husband with his Wives Siſter, after the Wives death, be ſuch a marriage as by the Act of 32. the Temporal Courts may prohibit the impeaching or drawing it into queſtion in the Spiritual Courts, in order to a Divorce or ſeparation of the parties? And I conceive they cannot for theſe Reaſons,

1. I affirm this marriage to be expreſly prohibited within the Eighteenth of Leviticus, and then it muſt be within the Levitical Degrees.

2. If it were not ſo prohibited, yet it is not a marriage without the Levitical Degrees, but within them, and therefore no Prohibition will lye for impeaching it; for marriages not to be impeached muſt be without the Degrees, and for that ſome marriages within the Degrees may be lawful. Poſt. 219.

3. That if this marriage be without the Levitical Degrees, yet it is a marriage prohibited by Gods Law, and therefore to be impeached, notwithſtanding the Statute of 32. whoſe words are, No marriage (Gods Law excepted) ſhall be impeached without the Levitical Degrees. Poſt. 323.

As to the firſt,

1. When a Law is given to any people, it is neceſſary that it be conceiv'd and publiſh'd in words which may be underſtood, for without that the Law cannot be obey'd; and a Law that cannot be obey'd, is no Law. Devant. 228.

2. The meaning of words in any Law are to be known, either from their uſe and ſignification, according to common acceptation before the Law made, or from ſome Law or Inſtitution declaring their ſignification. Devant. 169.

3. The Interdicts of marriage and carnal knowledge in the Levitical Law were directed formally to the men, not to the women, who are interdicted but by conſequent; for marriage and carnal knowledge being a reciprocal Act, and impoſſible to be done by one party, it follows that the woman being interdicted to the man, the man muſt alſo conſequently be interdicted to the woman, for a man cannot marry a woman, and ſhe not marry him.

4. The

4. The Reaſons why the Interdict is ever formally to the man, are, 1. Becauſe in the prohibited Act of uncovering the nakedneſs, the man properly is the primary Agent, and the woman but patient and conſenting; for a woman can no more uncover the mans nakedneſs naturally, than ſhe can raviſh him. 2. The man, after marriage, hath the deduction of the woman, ad Domum & Thalamum, and all the civil power over her, and not ſhe over him; but the womans conſent to have her nakedneſs uncovered is forbid, and makes her conſenting act equal offence with the mans; for by the Twentieth of Leviticus the man and woman offending in that kind were to dye, which had not been but that both were Trangreſſors.

5. The firſt and moſt expreſs Law prohibiting the carnal knowledge of certain perſons in the Eighteenth Chapter of Le-
Verſ. 6. viticus, is,------None of you ſhall approach to any that is near of kin to him, to uncover their nakedneſs.

6. Near of kin are words of relation, and have no poſitive certainty, nor are intelligible, but relatively to remoter kin; all the poſterity of Adam being of kin in ſome degree.

A perſon of kin to a man within two Degrees, is nearer of kin than one within four Degrees; and one within four Degrees nearer than one within eight Degrees; and ſo interminately.

Whence it follows, That the Law before cited, --------Not to approach to any near of kin, to uncover their nakedneſs, had been uſeleſs, without knowing the perſons accepted and accounted to be the near of kin.

Thoſe perſons were known to the Jews to whom the Law was given by the Law it ſelf declaring them preciſely.

Lev. 21. 1, 2. The words are-------There ſhall none be defiled for the dead among his people, but for his kin that is near unto him; that is, for his mother, and for his father, and for his ſon, and for his daughter, and for his brother, and for his ſiſter. And without this declaring Law, it is evident that theſe perſons are a mans next of kin, in the aſcending and deſcending, and in the collateral line. And they which are next of kin to him muſt be a mans near kin neceſſarily, although others more remote may be alſo denominated a mans near kin by cuſtom of ſpeech.

Upon this foundation all the Prohibitions concerning inceſtuous marriages, are grounded by the Eighteenth Chapter of Leviticus.

The

The firſt and moſt general Levitical prohibition in that kind, is in the ſame words as this Law, prohibiting being defiled for the dead, but for a mans kin, that is near unto him.

None of you ſhall approach to any that is near of kin to him, to uncover their nakedneſs. And after Inſtances are given of the perſons comprehended under thoſe words, Near of kin, as is done in the other Law concerning the dead.

As in the father, the brother, the ſon whoſe nakedneſs appears to conſiſt and terminate in their Wives: For a man cannot otherwiſe uncover the nakedneſs of a man but in his wife, which is the mans nakedneſs, as appears in the Text; and thoſe are three of the perſons comprehended under the words near of kin.

The nakedneſs of thy father ſhalt thou not uncover, which is explained as before in the next verſe, ... The nakedneſs of thy Fathers Wife ſhalt thou not uncover: It is is thy Fathers nakedneſs. Lev. 18. v. 7. v. 8.

Thou ſhalt not uncover the nakedneſs of thy Daughter in law, ſhe is thy ſons Wife. v. 15.

The nakedneſs of thy Brothers Wife ſhalt thou not uncover; it is thy Brothers nakedneſs. v. 16.

Which is the ſame as to ſay, Thy Father, thy Brother, thy Son, are thy near of kin, therefore thou ſhalt not uncover their nakedneſs by uncovering the nakedneſs of their Wives.

Then as to the nakedneſs of the Females terminating in their own perſons.

The nakedneſs of thy Mother ſhalt thou not uncover, ſhe is thy Mother. -------- The nakeneſs of thy Siſter, the Daughter of thy Father, or the Daughter of thy Mother, thou ſhall not uncover: which is to ſay, Thy Mother and Siſter are thy near of kin, therefore ſhalt thou not uncover their nakedneſs. So expreſs Inſtances are made in five of the ſix ſorts of perſons declared to be near of kin. v. 7. v. 9.

But no Inſtance is made in the Daughter, though ſhe be as immediately as the Son near of kin to the Father, and eminently comprehended under that Law of not approaching to a mans near of kin, and by all both reaſon and expoſition within it; which made Sir Edward Coke, by miſtake in his Table of Prohibited Marriages in his Comment upon the Statute of 32 H.8. to ſet down the Daughter as nominally prohibited by the Eighteenth of Leviticus, and then in the Margent to ſay, thoſe Degrees are truly Poſt. 323. Cok. Inſt. 2. f. 683.

truly ſet down in the Statutes of 25 & 28 H. 8. whereas the Daughter is mentioned in neither of them, nor in the Eighteenth of Leviticus.

The uſe I make of this, is to ſhew, That the extent of the prohibiting Law is not to be meaſured from the perſons inſtanced in Leviticus; for ſhould it be ſo eſtimated, the Law would be narrower than it ſelf, the Inſtances comprehending only five prohibited perſons: But the Clauſe of not approaching to a mans near of kin comprehending ſix, and ſo the Law would be inconſiſtent with it ſelf

The ſecond General Law.

Beſides thoſe ſix Degrees of perſons before mentioned, who are paſt queſtion a mans next of kin, and conſequently his near of kin, and declared by the Levitical Law ſo to be, there are other degrees of kin prohibited, which are alſo undoubtedly a mans next of kin after the former ſix kinds, and are denoted alſo in Leviticus as a mans near kin; and who are inſtanc'd in as, and indeed are, the next, and ſo the near of kin to a mans near of kin, as before, and prohibited for that reaſon, beyond which kindred no prohibition is found in Leviticus.

Whence a ſecond general Law is deduced from Leviticus the Eighteenth, That no man ſhall diſcover their nakedneſs who are the near of kin to his near of kin, or of them who are propinqui propinquis ſuis, which they draw from theſe words,

Lev. 18. v. 12. Thou ſhalt not uncover the nakedneſs of thy Fathers Siſter, ſhe is thy Fathers near kinſwoman. Nor of thy Mothers Siſter, for
v. 13. ſhe is thy Mothers near kinſwoman. Nor of thy Fathers Brother,
v. 14. which muſt be for the ſame reaſon, he being his Fathers near kinſ-
v. 10. man. Nor of thy Sons Daughter, or of thy Daughters Daughter, for the like reaſon, they being near of kin to his Son and Daughter, as his Son and Daughter are to him.

All which are inſtanced in, in Leviticus, as prohibited for that reaſon, and many others are of the ſame relation not inſtanced in, as a mans Mothers brother, his fathers father, his mothers father, his fathers mother, his mothers mother, his brothers daughter, his Siſters daughter, and others who are equally near of kin to his near of kin, as his immediate near of kin are to himſelf, and were never doubted to be prohibited within the Levitical Degrees by any.

Whence

Whence alſo it appears, That the Inſtances given in this ſecond Rule drawn out of Leviticus, are not the Law it ſelf, nor comprehend the extent of it, but are examples only of another, or ſecond degree of kindred, comprehended under the general Law of not approaching to thoſe near of kin, and which are particularly ſpecified by the Karait Rabbies.

That all perſons near of kin ſtrictly, to any the ſix perſons firſt interdicted, are likewiſe interdicted by that Law: None ſhall approach to any near of kin to him to uncover their nakedneſs, within the meaning of the words, near of kin, is further proved by theſe Reaſons.

1. When the Law hath denominated the Relations to be accounted near of kin; (as is done in this caſe) none comprized under that denomination can be more or leſs near of kin than others ſo denominated. As when the Law denominates a man an Attorney, Serjeant, or the like, no Attorney is more or leſs an Attorney, and no Serjeant more or leſs a Serjeant, than any other Attorney or Serjeant. And ſo is it in all orders of men of the ſame denomination.

Therefore it appearing by the Law to be the reaſon of interdicting a perſon, becauſe near of kin to a mans father or mother, and none of thoſe ſix Relations being more or leſs near of kin than the other, the nearneſs of kin to any of them is as much reaſon of interdicting, as the nearneſs of kin to the Father or Mother, or any other of them inſtanced in.

Another reaſon is, becauſe the Law forbidding the approach to any near of kin, forbids in that expreſſion the near of kin to any of the ſix perſons ſtrictly denominated near of kin, as well as thoſe ſix perſons themſelves: For in Leviticus a man is interdicted his wives daughter, and his wives ſons daughter, and her daughters daughter, becauſe they are his wives near kinſwomen, whereas her daughter only is the near kinſwoman to the wife in the ſtricteſt ſenſe, and the other but near of kin to her near of kin, that is, to her daughter; yet all of them are ſaid to be the wives near kinſwomen. So, Thou ſhalt not uncover the nakedneſs of thy mothers or fathers ſiſter, for he unconvereth his near kin: before they were ſaid to be the near kin to the mother and father, and here to be the ſons near kin. Lev. 20. 19.

The third General Law.

The third prohibiting Rule drawn out of Leviticus, is, A man is prohibited to take a wife, and any other near of kin to her,
Lev. 18. 17. which is grounded upon theſe words, Thou ſhalt not uncover the nakedneſs of a woman and her daughter; neither ſhalt thou take her ſons daughter, or her daughters daughter, to uncover their nakedneſs, for they are her near kinſwomen.

None of the wives near kinſwomen are here clearly inſtanced in but her daughter, not her mother, not her ſiſter, who are equally her near kinſwomen, and compriſed in this prohibition, and in the reaſon of it, as well as the daughter: For the reaſon of prohibiting theſe perſons inſtanced in, being, 1. Becauſe they are the wives near kinſwomen, it is evident that the wives mother and the wives ſiſter are by the ſame reaſon prohibited, for they are her near kinſwomen in the ſtricteſt ſenſe of nearneſs.

His wives daughter is literally forbidden the husband, and ſo is (but not ſo obviouſly) his wives mother. For example,

If he marry the mother, the words forbid him her daughter, and if he marry the daughter, he is prohibited the mother, elſe he would marry a woman and her daughter, which the words forbid, and accordingly by the Karaits Doctrine, grounded upon clear expoſition, as I conceive of the Levitical prohibitions, the husband is forbidden, as near of kin to his wife.

Her mother,
Her daughter,
Her ſiſter.

And as the mother and daughter of his wife are expreſly forbidden him in that Seventeenth verſe, ſo is his wives ſiſter in the next following Verſe; Neither ſhalt thou take a wife to her ſiſter to vex her, during her life. They add alſo, as prohibited the husband by this Rule,

His wives fathers wife,
Her brothers wife,
Her ſons wife.

From

From the ſame Verſe they deduce a fourth Rule, That the Husband is prohibited the near of kin to his wives near of kin, as before in the prohibitions of conſanguinity; for he is literally prohibited the daughter of his wives ſon, and her daughters daughter, and by neceſſary inference alſo his wives grand mother by father and mother, who are the near of kin to his wives daughter and her mother, who are his wives near of kin, which they thus ſtrongly prove. For theſe Rules vid. Seldens ux. Ebraica, c. 4, §.

A man is forbidden to take a woman and her ſons daughter or her daughters daughter.

Therefore if a man marry his wives grand-mother, he hath taken a woman and her ſons daughter, or her daughters daughter, which is expreſly forbid.

And in theſe are expreſs inſtances given of prohibiting the near of kin to his wives near of kin, and are alſo termed his wives near kinſwomen as well as thoſe which ſtrictly are ſo.

By the ſame reaſon all others near of kin to his wives father, brother or ſiſter, are prohibited the husband, as well as thoſe near of kin to her mother, her daughter, or ſon, and are equally in terminis within the words, his wives near kinſwomen, of which ſort they number Sixteen, the ſame with thoſe prohibited in the ſecond Rule for Conſanguinity.

And it is obſervable, That the Parochial Matrimonial Table, in uſe in England, agrees in its prohibitions of marriages, which are Thirty in number, for Conſanguinity and Affinity, with the Levitical Prohibitions, according to the Doctrine of the Karait Rabbins in the four former Rules. Ant. 245. Poſt. 318.

But the Karaits prohibit Eleven Degrees of Affinity (much of the ſame nature) more than the Table doth in their two laſt Rules; that is, Poſt. 316. 317. 318.

The wives fathers wife,
Her brothers wife,
Her ſons wife,
Her Grand-fathers wife by the father,
Her Grand-fathers wife by the mother,
Her fathers brothers wife,
Her mothers brothers wife,
Her brothers ſons wife,
Her ſiſters ſons wife,
Her ſons ſons wife,
Her daughters ſons wife.

And they have Seven other Prohibitions by a fifth Rule, whereof our Table receives none

And this harmony between our Matrimonial Table and the Karaits expoſition of the Levitical Degrees, is more perhaps than hath been obſerved, to juſtifie the perſons prohibited by the Table, for as many as they are, to be the ſame levitically prohibited.

To this may be added, That by our Vulgar Tranſlation, and also by the Septuagint (as I conceive) the words, Neither ſhalt thou take a wife to her ſiſter to vex her, to uncover her nakedneſs, beſides the other, during her life, may be underſtood to prohibit the husband his wives ſiſter abſolutely, as well as to prohibit her during his wives life; For the words (during her life) may relate either to the words, Thou ſhalt not take a wife to her ſiſter, viz. during her life, and in that ſenſe the meaning will be, That a man is not prohibited to marry his wives ſiſter abſolutely, but only until his wives death, and is conſonant to the expoſition of that place in Leviticus, by the Scribes and Talmudical Rabbies.

Lev. 18. 18.

Ant. 241.

Seld. de Jure naturali & Gentium, l. 5. a. 10. f. 591.

Or the words may be read thus, Thou ſhalt not take a wife to her ſiſter to vex her, during her life, or as long as ſhe lives, that is, to cauſe jealouſie and vexation to thy wife, during the whole time of her life; which ſenſe and reading ſquares with the Doctrine of the Karaits upon Leviticus: and I think may well be defended by the Septuagint Tranſlation.

The next thing I ſhall inſiſt on, is, The Authority of the Canons of the Apoſtles ſo ſtiled; Whether they were re vera the Apoſtles, or not, doubtleſs they are of great, both Antiquity and Authority.

Of thoſe Canons the Eighteenth hath theſe words, as they are publiſhed in the Canon Law.

Can. Apoſt. 18. ☞ Qui duas ſorores duxit aut conſobrinam clericus eſſe non poteſt.

1. This Canon cannot be underſtood of having two Siſters for wives at the ſame time, for the Chriſtians never admitted two wives, or more, at one time; and therefore interdicting of two ſiſters, qua ſiſters, at a time, was to no purpoſe,

2. The other part of the Canon, which is aut conſobrinam, that is, his brother or ſiſters daughter taken to wife, ſhews the Canon reſpected only the nearneſs of Relation.

That

That clear'd, I reaſon thus, either marrying the wives ſiſter, after the wives death, was lawful when the Canon was made, or unlawful, for it relates to an offence done qui duxit, not to a new made offence. If lawful, why then was any puniſhment (namely excluſion from the Clergy) inflicted for a lawful Act? If it were unlawful in the Apoſtles time, how is it become now lawful?

It is true, as the Learned Grotius obſerves on this Subject, A marriage may be unlawful in many reſpects, and yet the marriage ſtand good, and the vinculum matrimonii not diſſolv'd, but puniſhable ſome other ways, if made unlawful by Human Authority. Grot. de Jure Belli. l. 2. c. 5. Sect. 14.

But this Precept of the Apoſtles cannot be ſaid of Human Authority only, nor a new Inſtitution, as is already noted; nor was there any Divorce for Inceſt among the Jews, as is noted after, but was always among the Chriſtians in Chriſtian States.

2. In that time the Apoſtles and Primitive Chriſtian Church had no Juriſdiction or Power of Legal Divorce, Separation, and Baſtarding the Iſſue, how inceſtuous ſoever the marriage were, for thoſe were Acts of Juriſdiction and Coercion, and could not be done but by the power of Laws, to which the parties were locally ſubject. But the Apoſtles and Church power was only to forbid them communion with the reſt of their brethren Chriſtians, and to deny the Offenders ſuch things as were in their power, namely, to be of the Clergy, as was done by this Canon.

This appears by St. Paul, 1 Cor. 5. It is reported there is fornication among you, and ſuch fornication as is not ſo much as named among the Gentiles, That one ſhould have his Fathers wife; which was an Inceſt of the higheſt degree, although denoted by the word πορνεία. 1 Cor. 5. 1.

Yet St. Paul could do no more but direct the Corinthians from Communion with that man, and to put away from among them that wicked perſon: He could neither null his marriage, nor illegitimate his Iſſue, if he had any, nor put the Offender to death, according to the Moſaical Law, for theſe are effects of the Civil Power; and among the Hebrews no Divorce was for Inceſt, but the marriage was void, and the Inceſt puniſht, as in perſons unmarried. Seld. Ux. Ebraica, l. 1. c. 12. f. 87. 89.

The

The next thing observable from this Canon, is, That the Makers were of opinion that the marriage with the Consobrina or Brother or Sisters Daughter, was equally unlawful as marriage with two Sisters, and the punishment by the Canon is equal.

Whence it follows, That the Makers of the Canon, Apostles or others, did in those two Cases follow the exposition of the Karaits, and not of the Talmudists: The Karaits holding both marriages unlawful, but the Talmudists holding neither unlawful by Moses's Law.

But by what Law Divine the primitive and succeeding Christian Churches conceived themselves obliged (as generally they did, and do) in the matter of marriage, to observe the Levitical prohibitions strictly and indispensably, is a question of great difficulty. But surely they took their measure of those Prohibitions from the Doctrine of the Karaits, more than from the Scribes and Pharisees, though the last were of more Authority in the Hebrews Commonwealth, as appears by that of Matthew cap. 23. v. 2, 3. The Scribes and Pharisees sit in *Moses* his Seat, all therefore they bid you observe, that observe and do. Nor was it without reason done, for such of those degrees which are not particularly specified in the Eighteenth of Leviticus (for in those the Scribes and Karaits agree) but are deduc'd by Argument to be prohibited. The Karaits conclude in their Prohibitions of Marriage from the Scripture it self, but the Scribes in theirs from the Tradition and Sanctions of the Elders, which Traditions the Christians often heeded not, as introduced frequently against Gods Law, as appears in the Tradition of Corban against Gods Precept of honouring the Father and Mother, most signally.

Seld. Uxor Ebraica, l. 1. c. 3, 4.
Uxor Ebraica, l. 1. c. 1, 2.
Mark. 7. 11.
Mat. 15. 3, 4, 5, 6.

Nor is it strange that the Opinions of private men prevail above the publick in process of time. So happened it in Luther, Calvin, and others, in the beginning of the Reformation, whose Opinions in time grew more authentique, both in Doctrine and Discipline here, and in many other States, than the Doctrine of the Church of Rome, which was the publique before in both kinds: Many like Examples might be given, ancient and modern, which I purposely omit.

By

By a Canon of another very ancient Provincial Council, called Concilium Eliberinum, under Pope Silveſter, Three hundred and fourteen years after Chriſt, and before the Council of Nice, by the Sixteenth Canon of that Council---- --Si quis poſt obitum Uxoris ſuæ ſororem ejus duxerit per quinquennium a communione abſtineat. Grot. l. 2. c. 5. p. 256. Sect. 14.

By this ſo ancient Council, marrying the wives ſiſter was accompted unlawful, but for the ſame reaſons as before; they could puniſh it no otherwiſe than by ways in the power of the Church, which was to hinder the Offender from Communion for five years.

And in this Council they followed the expoſition of the Karaits alſo concerning marriages, and not of the Talmudiſts; nor is it rational to conceive, that Canons then forbidding any ſort of marriage, proceeded from an Arbitrary power, aſſumed by thoſe who made them, as Law-makers, to which they could no way pretend, but becauſe it was unlawful by the Principles and Perſuaſion of all Chriſtian Believers.

Vide for theſe Rules Selden's Uxor Ebraica, l. 1. cap. 4, 5.

By the firſt *Rule* is interdicted to *a man* his *near of Kin*	By the *Matrimonial Table* of *England* interdicted	
The fathers wife	The fathers wife or Step-mother	f. 11
The mother	The mother	f. 10
The brothers wife	The brothers wife	f. 18
The ſiſter	The ſiſter	f. 16
The ſons wife	The ſons wife	f. 15
The daughter	The daughter	f. 13

By

By the ſecond *Rule* is interdicted to a man the *near of kin* to his *near of kin.*

The Grand-fathers wife by the father	The Grand fathers wife by the father f. 2
The Grand-fathers wife by the Mother	The Grand-fathers wife by the mother f. 2
The Grand-mother by the Father	The Grand-mother by the father f. 1
The Grand-mother by the mother	The Grand-mother by the mother f. 1
The fathers brothers wife	The fathers brothers wife f. 6
The fathers ſiſter	The fathers ſiſter f. 4
The mothers brothers wife	The mother brothers wife f. 7
The mothers ſiſter	The mothers ſiſter f. 5
The brothers ſons wife	The brothers ſons wife f. 27
The brothers daughter	The brothers daughter f. 25
The ſiſters ſons wife	The ſiſters ſons wife f. 28
The ſiſters daughter	The ſiſters daughter f. 26
The ſons ſons wife	The ſons ſons wife f. 21
The ſons daughter	The ſons daughter f. 19
The daughters ſons wife	The daughters ſons wife f. 22
The daughters daughter	The daughters daughter f. 20

By the third *Rule* is interdicted to the husband his *wives near of kin.*

From a woman and her fathers wife	Omitted.
From a woman and her mother	From a woman and her mother f. 12
From a woman and her Brothers wife	Omitted.
From a woman and her ſiſter	A woman and her ſiſter f. 17
From a woman and her ſons wife	Omitted.
From a woman and her daughter	A woman and her daughter f. 14

By

By the fourth *Rule* is interdicted to a man the *near of Kin* to his *wives near of Kin*

A woman and her grand-mother by the mother	A woman and her grand-mother by the mother f. 3
A woman and her grand-mother by the father	A woman and her grand-mother by the father f. 3
A woman and her fathers brothers wife	O. A woman and her fathers brothers wife f. 6
A woman and her mothers brothers wife	O. A woman and her mothers brothers wife
A woman and her brothers ſons wife	Omitted.
A woman and her brothers daughter	A woman and her brothers daughter f. 29
A woman and her ſiſters daughter	A woman and her ſiſters daughter f. 30
A woman and her ſiſters ſons wife	Omitted.
A woman and her ſons ſons wife	Omitted.
A woman and her ſons daughter	A woman and her ſons daughter f. 23
A woman and her daughters ſons wife	Omitted.
A woman and her daughters daughter	A woman and her daughters daughter f. 24
A woman and her fathers ſiſter	A woman and her fathers ſiſter
A woman and her mothers ſiſter	A woman and her mothers ſiſter
A woman and her grand-fathers wife by the father	Omitted.
A woman and her grand-fathers wife by the mother	Omitted.

These laſt four Degrees are not mentioned under the fourth Rule by Mr. Selden, but referred to by the words, & reliquis quæ ſuperſunt ex iis quæ in regula ſecunda propinquorum ſunt propinquæ; but the two firſt of theſe laſt four are forbid in our Matrimonial Table, not the two laſt, as ſeveral others of the

ſame kind; for the husband is not forbid by the Table the wives of his wives Grand-fathers, nor her Fathers, nor Brothers wife, nor ſons wife, nor her fathers brothers, nor mothers brothers wife, nor her brothers ſons wife, nor ſiſters ſons wife, nor her ſons ſons wife, nor her daughters ſons wife.

By the fifth *Rule* is interdicted that *two near of Kin* marry *two other near of Kin.*

A man and his father from a woman and her daughter	O.
A man and his father from a woman and her ſons wife	O.
A man and his father from a woman and her brothers wife	O.
A man and his father from a woman and her ſiſter	O.
A man and his brother from a woman and her brothers wife	O.
A man and his brother from a man and her daughter	O.
A man and his brother from a woman and her ſons wife	O.

None of thoſe compriſed in this fifth Rule are prohibited by the Matrimonial Table, but all the perſons interdicted by the Doctrine of the Karaits or Scripture Rabbies, are alſo interdicted by the Matrimonial Table of England, excepting eleven perſons before mentioned, not interdicted to the wives husband by the Table, who are interdicted by the Karaits enumeration, but in this paper are marked with Ciphers, as to the Matrmonial Table, in the firſt four Rules of the Karaits Doctrine. So as all the perſons prohibited in thoſe firſt four Rules of the Karaits, being in number Four and forty, are alſo prohibited by the Matrimonial Table, which, together with Eleven perſons ciphered in the Table, as excepted, make up the like number of Four and forty, from which if you deduct Eleven as excepted, there will remain Three and thirty, wherein the Table and the Karaits agree.

And whereas the enumeration of the prohibited marriages to a man are in the Table but Thirty, and by conſequence ſo many to the woman; for where the man is prohibited to marry the woman, the woman muſt reciprocally be prohibited to marry the man; the reaſon is, becauſe in the number of degrees in

Ant. 311.

the

the Table, the Grand-fathers wife, the Grand-mother, and the wives Grandmother, make but three degrees; But in the enumeration of the Karaits, the Grandfathers wife by the father, the Grand-fathers wife by the mother, the Grand-mother by the father, and the Grand-mother by the mother, the wives Grandmother by the father, and the wives Grand-mother by the mother, are ſeverally enumerated, and ſo make Six perſons, Three more than are enumerated in the Table, and ſo the Numbers agree.

The ſecond Aſſertion.

And as to the ſecond Aſſertion, That admitting this marriage is not within the Levitical Prohibitions, yet the Temporal Courts cannot prohibit the impeaching or drawing it into queſtion by the Spiritual Court. Ant. 305.

There is a great difference between marriage within the Levitical prohibitions, and marriage within the Levitical degrees, which commonly are taken to be the ſame. For marriage within the Levitical prohibitions was always unlawful to the Hebrews by Gods Law, that is, the Moſaick Law: But marriage within the Levitical degrees was not always unlawful; for marriage between perſons of the ſame nearneſs in Affinity or Conſanguinity, which only makes the degree, was in ſome caſe and circumſtance unlawful, in others lawful: So a marriage unlawful, and a marriage lawful as the Circumſtance varied in the ſame degree, that is, the ſame nearneſs of Relation.

The Levitical degrees, qua ſuch, are ſet forth by no Act of Parliament; but marriages which fall within ſome of thoſe degrees, are ſaid to be marriages within the degrees prohibited by Gods Law, by 28 H. 8. c. 7. & 28. H. 8. c. 16.

Nor is it ſaid in any Act of Parliament, That all marriages within the Levitical degrees are prohibited by Gods Law,

Sir Edward Coke in the firſt Edition, but not in the reſt, of his Littleton, hath, I confeſs, theſe words; By the Statute of 32 H. 8. it is declared, That all perſons be lawful, that is, may lawfully marry, that are not prohibited by Gods Law to marry, that is to ſay, that be not prohibited by the Levitical degrees. Cok. Litt. f. 235. a. Edit. 1.

By which he makes all Gods Law, by which any marriage is prohibited to be the Levitical degrees, which is not ſo; nor doth he conſtare ſibi, for in his Comment upon the Statute of 32 H. 8. he ſaith expreſly,

That marriage made with a perſon pre-contracted, or with a perſon naturally impotent, could not have been impeached in order to a Divorce, by reaſon of the Statute of 32 H. 8. but becauſe ſuch marriages are againſt Gods Law. Yet they are not marriages within the Levitical degrees.

This marriage in queſtion therefore, though by way of Admiſſion not within the Levitical prohibitions, if it be within the Levitical degrees at all, and whether unlawful or lawful within them, and by what Law ſoever ſo unlawful or lawful, cannot be prohibited to be impeached by the Spiritual Courts, by the Statute of 32 H. 8.

For that Act prohibits the impeaching of marriages only which are abſolutely without the Levitical degrees, leaving all other to the Spiriual Juriſdiction as before the Act of 32. Now

The Levitical degrees are to be reckon'd by the perſons whoſe carnal knowledge is forbidden a man in reſpect of Conſanguinity or Affinity by the Law of Moſes. As the carnal knowledge of the mother, the fathers wife, the ſons wife, &c. in reſpect of Conſanguinity of the wives daughter, her daughters daughter, her mother, &c. in reſpect of Affinity. And it is plain, the wives ſiſter is prohibited in ſome reſpect of Affinity, by the words, Neither ſhalt thou take a wife to her ſiſter, to vex her: Therefore her marriage with her ſiſters husband is a marriage within the Levitical degrees.

And agreed on all ſides to be unlawful within the degrees, if during the wives life; but doubted if unlawful after her death.

Next, it is certain the wives husband was reſtrained from taking his wives ſiſter as he might take another woman, that is, either during his wives life, or after: Therefore his marriage with her was within the Levitical degrees.

But it muſt be clearly without thoſe degrees, if the impeachment of it may be prohibited by the Act of 32 H. 8.

This marriage permitted Lawful by the Canon Law, where uſed. Decret. Greg. l. 4. Tit. de Divortiis, c. 9.

If a man marry his brothers wife, none will deny that marriage to be within the Levitical degrees; yet in ſome caſe that marriage was lawful by the Moſaick Law, that is, if the deceaſed brother died iſſueleſs. But that will not hinder the impeachment of ſuch a marriage by the Statute of 32 H. 8.

So

So if a man marry his fathers brothers wife, it is a marriage within the Levitical degrees. Yet if the fathers brother were by the half blood only of the mothers ſide, the Rabbies and Scribes held ſuch marriage not unlawful by the Levitical Law, but by the Sanctions of the Elders. Many ſuch caſes may be found to prove a marriage may be lawful, though it be a marriage within the Levitical degrees: But none of thoſe can therefore be prohibited to be impeached, for they are not marriages without the Levitical degrees, as the Statute requires. Seld. Uxor Ebraica, l. 1. c. 2. f. 8.

Accordingly Sir Edward Coke commenting upon the Statute, of 32 H. 8. in his ſecond Inſtitutes, ſets forth a Scheme of the Levitical degrees, as neceſſary to the expoſition of that Statute, and therein enumerates the marriage of the wives husband with her ſiſter to be both within the Levitical degrees, and prohibited by the Eighteenth Chapter of Leviticus. Cok. Inſt. 2. f. 683.

One Man was ſued before the High Commiſſioners, 33 Eliz. for marrying his wives ſiſters daughter, and a Prohibition was granted, as Moore Reports the Caſe, becauſe the marriage was not prohibited by the Levitical Law, which was no Reaſon. Mans Caſe. Moore's Rep. f. 907. a. Ant. 247.

Crook reports the ſame Caſe, and that a prohibition was granted, but that a Conſultation was after granted, and that a ſentence of Divorce was given. Crook. 33 Eliz. f. 228. Mans Caſe.

In reporting this Caſe of Mans, Juſtice Crook's words are, A Conſultation was granted, becauſe the Prohibition is not to be, if the marriage be not within the Levitical degrees.

Which is a great miſtake; for if the marriage be within the Levitical degrees, no prohibition ought to iſſue; for it ought not to be but when the marriage is without the Levitical degrees.

Then he adds, But here the prohibition was general, and therefore not good; which is not intelligble, whatever he intended by it.

For by the Libel it muſt neceſſarily appear to the Court, That the marriage in queſtion was either without the Levitical degrees, or within them.

If it were without the degrees, the Court did moſt unjuſtly to grant the Conſultation, for it ought not to have been granted.

If the marriage were within the Levitical degrees, it had been unjuſt not to grant a Conſultation.

But a Conſultation was granted, therefore the Court conceived the marriage of the husband with his wives ſiſters daughter to be a marriage within the Levitical degrees, and not without them, though it be not ſpecified in the Eighteenth of Leviticus to be prohibited.

Cok. Litt. Edit. 1. f. 235. a. Peirſons Caſe not Parſons. Ant. 248.

Sir Edward Coke, in the firſt Edition of his Littleton, ſaith, That one Peirſon was ſued in the Eccleſiaſtical Court for marrying his firſt wives ſiſters daughter againſt the Canons of the Church; and that the Court of Common Pleas upon conſideration taken of the Statute of 32 H. 8. granted a prohibition, becauſe the marriage was not prohibited by the Levitical degrees. And theſe two Caſes have been principally inſiſted on to prove no marriage is within the Levitical degrees, if the degree be not particularly mentioned in the Eighteenth of Leviticus. But upon occaſion of Harriſon's Caſe, lately adjudg'd in this Court, I made ſearch for the Records of thoſe two Caſes, but no Record could be found of Man's Caſe; but by Crook a Conſultation was granted in it.

Trin. 2 Jac. Rot. 1032.

By the Record of Pierſon's Caſe, which was in Trinity 2 Jac. it appears that in Hillary Term following a Conſultation was granted, which Sir Edward Coke mentions not in his Littleton. And in the Second Edition of his Littleton, and all the ſubſequent Editions, that Caſe is omitted.

Hob. f. 181. a. Howard verſ. Bartlet. Rennington's Caſe. Ant. 249.

I find likewiſe in the Lord Hobarts Reports, That one Rennington was queſtioned by the High Commiſſioners for marrying his wives Neece, and was ſentenced to Penance, and bound to abſtain from her Company, but they were not divorced a vinculo Matrimonii, though there was cauſe, ſaith the Book, and therefore the wife had her Dower, nor was there any prohibition in the Caſe.

So as by all theſe Caſes the marriage of the husband with his wives ſiſters daughter, is a marriage prohibited within the Levitical degrees, for nearneſs of kindred to the wife; Then of neceſſity the wives ſiſters marriage (who is nearer to the wife) with the wives husband muſt be prohibited a fortiori; So I conceive theſe three Caſes full againſt the Plaintiff.

It is not ſtrange, That at firſt Prohibitions were granted upon the Statute of 32. in Caſes which were not ſpecifically mentioned in the Eighteenth of Leviticus, but after diſcuſſions of the Levitical Degrees upon Conſultations pray'd, It was manifeſtly found, That divers marriages muſt be prohibited within the Levitical degrees, not nominally expreſſed in the Eighteenth of Le-

Leviticus: As the marriage of the father with his own daughter, Of the Grandſon with his Grand-mother or Grand-fathers wife, Of the Son with his Mothers brothers wife, Of the Uncle with his brothers or ſiſters daughter, which ſince appears by Sir Edward Coke to be a prohibited marriage, and others upon like reaſon. Cok. Inſt. 2. f. 683, 684.

And was reſolved in Archbiſhop Laud's time, in the Caſe of Sir Giles Alington, who was deeply fined, and a Sentence of Divorce given for marrying his brother or ſiſters daughter, which I heard at Lambeth Houſe.

And no prohibition was granted, though moved for, as was very probable, and commonly reported; but we find no Record of Prohibitions denied, for there is no Entry made of Motions not granted, but of Prohibitions granted there is, which makes the granting of a Prohibition of no great Authority, unleſs upon Action brought a Conſultation be denied upon Demurrer.

So of the husband with his wives ſiſters daughter.

The third Aſſertion.

As to the third Aſſertion, That admitting this marriage be without the Levitical Degrees, yet it is prohibited by Gods Law, and therefore to be impeached notwithſtanding the Statute of 32 H. 8. whoſe words are, No marriage, Gods Law excepted, ſhall be impeached without the Levitical degrees. Ant. 305.

When an Act of Parliament declares a marriage to be againſt Gods Law, it muſt be admitted in all Courts and Proceedings of this Kingdom to be ſo.

By an Act, 25 H. 8. c. 22. intituled, An Act declaring the Eſtabliſhment of the Succeſſion of the Kings moſt Royal Majeſty in the Imperial Crown of this Realm.

Among ſundry marriages declared by that Act to be marriages within the degrees of marriage prohibited by Gods Law, the marriage of a man with his wives ſiſter is expreſly declared to be prohibited by Gods Law, and that a Divorce ſhould be of ſuch marriage, if any ſuch were.

But this Act is expreſly repeal'd by an Act in 28 H. 8. c. 7. intituled, An Act for the Eſtabliſhment of the Imperial Crown of this Realm.

By

By that Act of 28 H. 8. it is declared in theſe words, And furthermore, ſince many Inconveniences have fallen, as well in this Realm as others, by reaſon of the marrying within the degrees of marriage prohibited by Gods Law, That is to ſay, The Son to marry the Mother or the Step-mother, carnally known by his Father, The Brother the Siſter, The Father his Sons daughter, or his Daughters daughter, Or the Son to marry the Daughter of his Father, procreate and born by his Step mother, Or the Son to marry his Aunt, being his Fathers or Mothers ſiſter, Or to marry his Uncles wife, carnally known by his Uncle, Or the father to marry his Sons wife, carnally known by his Son, Or the Brother to marry his Brothers wife, carnally known by his Brother, Or any man married, and carnally knowing his wife, to marry his Wives daughter, or his Wives ſons daughter, Or his Wives daughters daughter, Or his Wives ſiſter.

Then it declares, Thoſe marriages to be indiſpenſable, becauſe againſt Gods Law, and that there ſhould be a ſeparation of ſuch marriages, if any were, and the Children procreate in them to be illegitimate.

But this Clauſe alſo of this Act of 28 H. 8. as ſome conceive, is repeal'd by 1 & 2 Phil. & Mar. c. 8. in theſe words, And alſo all that part of the Act made in the ſaid 28 H. 8. intituled, An Act for the Eſtabliſhment of the Succeſſion of the Imperial Crown of the Realm, that concerneth a Prohibition to marry within the degrees expreſſed in the ſaid Act, ſhall henceforth be repeal'd, made fruſtrate, void, and of none effect.

By the Act of 1 & 2 Phil. & Mar. two other Laws are likewiſe repeal'd, which concern the queſtion before us, viz. An Act in 28 H. 8. c. 16. intituled, An Act for the releaſe of ſuch as have obtained pretended Licences and Diſpenſations from the See of *Rome*: And the Act of 32 H. 8. c. 38. which hath been often mentioned.

But theſe two laſt Acts are revived by the Act of 1 Eliz. c. 1. and in force; but neither the Act of 25 H. 8. nor 28 H. 8. c. 7. are revived in expreſs terms: And not only ſo, but the Act of 1 El. c. 1. hath this Negative Clauſe, That all other Laws and Statutes, and the Branches and Clauſes of any Act or Statute repeal'd by the ſaid Act of Repeal made in the time of the ſaid late King *Philip* and Queen *Mary*, and not in this preſent Act ſpecially mentioned and reviv'd, ſhall ſtand, remain, and be repeal'd and void in ſuch like manner and form as they were before the making of this Act.

Whence

Whence it follows, That this marriage is not now proved be to againſt Gods Law, by either of theſe repeal'd Statutes of 25 H. 8. or 28 H. 8. c. 7. unleſs it be made out, that one of them at leaſt remains at this day in force. And as for that,

The Act of 28 H. 8. c. 16 which makes void all Diſpenſations from the See of Rome, and expreſly revived by 1 Eliz. and all Branches, Words, and Sentences thereof, hath theſe words, As a Grace of the Kings to divers of his Subjects, who had married by Diſpenſation, notwithſtanding that Act made all Diſpeſations from Rome void.

All marriages had from the Third of *November*, 26 H. 8. for which no Divorce or Separation is had, and which marriages be not prohibited by Gods Laws, limited and declared in the Act made this preſent Parliament for Eſtabliſhing the Kings Succeſſion, or otherwiſe, by Holy Scriptures, ſhall be good. By which words I conceive the Clauſe of 28 H. 8. c. 7. repeal'd in Queen Maries time, is again reviv'd.

It may be objected, The Clauſe of 28 H. 8. c. 7. concerning marriages prohibited by Gods Law, continues ſtill repeal'd, becauſe it is not ſpecially mentioned to be reviv'd by the Act of 1 Eliz. And therefore no Act is in force declaring the husbands marriage with his wives ſiſter to be prohibited by Gods Law. Obj.

An Act repeal'd is of no effect more than if it had been never made. Anſw.

By the Act of 28 H. 8. c. 7. All marriages prohibited by Gods Law, limited and declared by the Clauſe of that Act, were unlawful, notwithſtanding any Diſpenſation had before the Repeal of that Clauſe.

By the Reviver in 1 Eliz. of 28 H. 8. c. 16 and of every Clauſe in it, All marriages prohibited by Gods Law, limited and declared by 28 H. 8. c. 7. were again unlawful, as before the Repeal, notwithſtanding any Diſpenſation.

Therefore the Statute of 28 H. 8. c. 7 was revived by the Reviver of the Statute of 28 H. 8. c 16. in 1 Eliz. and made as effectual as before it was repeal'd, and ſo it continues.

If it had been enacted by Parliament after the Repeal of the Clauſe in 28 H. 8. c. 7. That all marriages prohibited by Gods Law, limited and declared by 28. H. 8. c. 7. ſhould be unlawful, notwithſtanding any Diſpenſation that enacting had revived the Clauſe in 28 H. 8. c. 7.

Therefore the ſame thing being enacted by revival of 28 H. 8. c. 16. muſt have the ſame effect of reviving that Clauſe in 28 H. 8. c. 7.

I will put it, for more clearneſs by way of a Caſe; A man before the Third of November, 26 H. 8. by Diſpenſation from Rome, had married his wives ſiſters daughter, which marriage was prohibited by the Canons of the Church, and no Divorce had been attempted in the Caſe until after 1 Eliz. and the Reviver of the Statute of 28 H. 8. c. 16. which made void all Diſpenſations from Rome.

It is plain, That this marriage being not prohibited by Gods Law, limitted and declared in the Act of 28 H. 8. c. 7. was by the expreſs words of the revivd Act of 28 H. 8. c. 16. a marriage to continue good without ſeparation notwithſtanding all Diſpenſations from Rome were null'd; becauſe it was no marriage excepted out of the Grace intended and given by that Act to the Kings ſubjects married by Diſpenſation before November the third, 26 H. 8 and not then ſeparated.

But if a marriage before the Third of November, 26 H. 8. had been by Diſpenſation between the brother and ſiſter, or as this Caſe is between the husband and his wives ſiſter, and no Separation attempted until after 1 Eliz. and the Reviver of the Act of 28 H. 8. c. 16. Theſe marriages were not to continue good, and without Separation by 28 H. 8. c. 16. becauſe they were marriages particularly excepted out of the Grace granted by that Act, as being prohibited by Gods Law, limited and declared in the Act of 28 H. 8. c. 7. which proves 28 H. 8. c. 7. to be in force by the Reviver of 28 H. 8. c. 16 and conſequently the marriage in queſtion to be clearly againſt Gods Law, which is the thing to be proved.

In the Statute of 28 H. 8. c. 7. there are two Clauſes concerning marriages, The firſt declaring certain marriages there recited, to be within the degrees prohibited by Gods Law, which Clauſe concerns the preſent queſtion, and is before cited.

The ſecond Clauſe, in theſe words, Be it therefore enacted That no perſons or perſon, Subjects or Reſiants of this Realm, or in any your Dominions of what eſtate, degree, or degrees ſoever they be, ſhall from henceforth marry within the degrees afore rehearſed, what pretence ſoever ſhall be made to the contrary thereof. Then it proceeds,

That

That if there were any Divorce or Separation made of any ſuch marriages by the Arch-biſhops or Miniſters of the Church of *England*, ſuch Separation ſhould remain good, and not be revokable by any Authority; and the Children procreated under ſuch unlawful marriage, ſhould be illegitimate.

And if any ſuch marriages were in any the Kings Dominions without Separation, that there ſhould be a ſeparation from the Bonds of ſuch unlawful marriage.

Now we muſt obſerve, the Act of 1 & 2 Phil. & Mar. c. 8. doth not repeal this Act entirely of 28 H. 8. c. 7. but repeals only one Clauſe of it; the words of which Clauſe of Repeal are before cited, and manifeſt this ſecond Clauſe of the Act of 28 H. 8. and not the firſt to be the Clauſe intended to be repeal'd.

For there was no reaſon to repeal the Clauſe declaratory of marriages prohibited by Gods Law, which the Church of Rome always acknowledged; nor do the words of Repeal import any thing concerning marriages within degrees prohibited by Gods Law.

But (as the time then was) there was reaſon to repeal a Clauſe enacting all Separations of ſuch marriages with which the Pope had diſpens'd, ſhould remain good againſt his Authority and that ſuch marriages with which he had diſpens'd, not yet ſeparated, ſhould be ſeparate.

And the words of the Clauſe of Repeal manifeſt the ſecond Clauſe to be intended, viz. All that Part of the Act made in the ſaid Eight and twentieth year of King *Henry* the Eighth, which concerneth a prohibition to marry within the degrees expreſſed in the ſaid Act, ſhall be repeal'd, &c.

As it is true, That if a marriage be declared by Act of Parliament to be againſt Gods Law, we muſt admit it to be ſo; for by a Law (that is, by an Act of Parliament) it is ſo declared.

By the ſame reaſon, if by a lawful Canon, a marriage be declared to be againſt Gods Law, we muſt admit it to be ſo; for a lawful Canon is the Law of the Kingdom, as well as an Act of Parliament: And whatever is the Law of the Kingdom, is as much the Law as any thing elſe that is ſo; for what is Law doth not ſuſcipere magis aut minus. Canon-Law. What Canon good 2 Ventris, 222. & 44 2 Levinz

But by a lawful Canon of this Kingdom, which is enough, and not only ſo, but by a Canon warranted by Act of Parliament, the marriage in queſtion is declared to be prohibited by Gods Law, therefore we muſt admit it to be ſo.

In a Synod or Covocation holden at London in the year 1603. for the Province of Canterbury, by the Kings Writ, and with the Kings Licence under the Great Seal of England, to treat, conſult, and agree of ſuch Canons and Conſtitutions Eccleſiaſtick as ſhould be there thought fit. Several Canons were concluded and agreed.

To which King James gave his Royal Aſſent and Approbation, and by his Letters Patents ratified and confirmed them, according to the form of the Statute made in 25 H. 8. c. 19. and commanded the due obſervance of them. Among which the Ninety-ninth Canon is,

No perſon ſhall marry within the degrees prohibited by Gods Law, and expreſſed in a Table ſet forth by Authority in the year of our Lord 1563: And all marriages ſo made and contracted, ſhall be adjudged inceſtuous and unlawful; and the aforeſaid Table ſhall be in every Church publickly ſet up and fixed at the charge of the Pariſh.

Ant. 245. Which is the ſame as--------No perſon ſhall marry within the degrees prohibited by Gods Law, and which degrees are expreſſed in the Table, &c.

For to the Queſtion, What is expreſſed in the Table? there can be no Anſwer, but the degrees prohibited by Gods Law.

But by this Table, this marriage in queſtion is expreſſed to be in a degree prohibited by Gods Law, therefore it muſt be admitted to be ſo.

Another conſequent is this, That by this Canon, and conſequently by the Law of this Kingdom, All marriages prohibited, by that Table, are declared to be within the degrees prohibited by Gods Law.

Note, That any marriage unlawful by holy Scripture, is declared here to be againſt Gods Law Judicially, no otherwiſe, than becauſe by the Law of the Land the Scripture it ſelf is declared and approved to be the Law of God; for the Scripture cannot judge it ſelf to be Scripture without ſome Judicature. ------ Therefore by the ſixth Canon, tempore Ed. 6. at a Convo-

Can. 1552. cation in London, Anno 1552. the Authority of the Old Teſtament was declared. At a Convocation of both Provinces in Lon-

Can. 1563. don, Anno 1562. the Canonical and Apocryphal Books of the Old Teſtament were particularly enumerated, and the Books of the New declared Canonical, as Receiv'd. By the ſeventh Canon the Authority of the Old Teſtament Declared.

By

By the Act it is ſaid, That the Clergy of this Kingdom, nor any of them, ſhall henceforth enact, promulgate, or execute any Canons, Conſtitutions, or Ordinances Provincial, by whatſoever name or names they may be called, in their Convocations, in time coming, which ſhall always be aſſembled by Authority of the Kings Writ, unleſs the ſame Clergy may have the Kings moſt Royal Aſſent and Licence to make, promulge, and execute ſuch Canons, Conſtitutions, and Ordinances Provincial, &c.

The Chief Juſtice delivered the Reſolution of the Court; And accordingly a Conſultation was granted.

In

In Camera Scaccarii.

Edward Thomas Plaintiff.
Thomas Sorrell Defendant.

1 Levinz. 217. 3 Keble 223.

THE Plantiff by Information in the Kings Bench, tam pro Domino Rege quam pro ſeipſo, demands of the Defendant Four hundred and fifty pounds for ſelling Wine in the Pariſh of Stepney, in the County of Middlex, by Retail, Ninety ſeveral times, between the Tenth day of June, the Seventeenth of the King, and the Two and twentieth day of May, the Eighteenth of the King, to ſeveral perſons, without licence, contrary to the Statute of 12 Car. 2. whereby he forfeited Five pounds for every ſeveral offence, which amounts to Four hundred and fifty pounds.

The Defendant pleads, Nil debet, and therefore puts himſelf upon the Country. The Jury find,

That as to all the Debt, except Fifty pounds, the Defendant owes nothing. And as to the Fifty pounds, they find the Statute of 7 E. 6. c. 5. concerning retailing of Wines, prout in the Statute.

They find Letters Patents under the Great Seal, dated 2 *Feb.* 9 *Jac.* prout in the Letters Patents, whereby King *James* incorporated the Company of *Vintners* in the City of *London*, by the Name of Maſter, Warden, Freemen, and Commonalty of the Myſtery of *Vintners* in the ſaid City, and thereby among other things granted, for him, his Heirs and Succeſſors, to the ſaid Maſter, Warden, and Freemen of the ſaid Company, and their Succeſſors, that they might always after, within the ſaid City and Suburbs of the ſame, and within 3. Miles from the Walls or Gates thereof, and in all and every other City and Sea-ports, called Port-towns, within the Kingdom of *England*, and in all other Cities and Towns, known by the name of Thorough fare-towns, where Poſts were ſet and laid between *Dover* and *London*, and between *London* and *Berwick*, where any of the Freemen of the ſaid Myſtery did, or ſhould happen to dwell and keep a Wine Tavern, and by themſelves or ſervants, ſell Wine by retail or in groſs to their beſt advantage, in their houſes, or elſewhere, Non obſtante the Statute of 7 E. 6.

They

They find the Act of 12 Car. 2. c. 25. and the confirmation of it concerning the giving Licences to retail Wine, and the Proviſo therein prout.

Provided alſo, That this Act, or any thing therein contained, ſhall not extend, or be prejudicial to the Maſter, Wardens, Freemen, and Commonalty of the Myſtery of *Vintners* of the City of *London*, or to any other City or Town Corporate, but that they may uſe and enjoy ſuch Liberties and priviledges, as heretofore they have lawfully uſed and enjoyed.

They find. That the Maſter, Wardens, Freemen, and Commonalty of the Myſtery of *Vintners* in the City *London*, was an ancient Corporation of the ſaid City of *London*, at the time of the Act of 12 Car. 2. and incorporated by the Name of Maſter, Wardens, Freemen, and Commonalty of the Myſtery of *Vintners* of the City of *London*.

They find, That the Defendant, three years before, and during all the time in the Information, uſed the Trade of retailng of Wine, and kept a Tavern in the Pariſh of *Stepney* in the County of *Middleſex*, was an Inhabitant there, and that the Defendants houſe, in which the ſaid Wine was ſold, is within two miles of the City of *London*.

They find, That the Defendant, within the time in the Information mentioned, did ſell Ten pints of Sack, as in the Information mentioned, to be drunk and ſpent in his ſaid dwelling houſe, being a Tavern, in the ſaid Pariſh of *Stepney*.

They find, That at the time of the ſale of the ſaid Wine, and three years before, the Defendant was a natural born Subject of the King, and a Freeman of the City of *London* of the ſaid Company of *Vintners*.

Si pro quer. quoad 50 l. pro quer.
Si pro Def. pro Def. 1 s.

Upon this Special Verdict three Queſtions **have been raiſed.**

1. **Whether the Patent of** 9 Jac. **was not void in its Creation?**

2. **Admitting it was not void in its Creation, Whether it became void by the death of** King James?

3. It

3. If it were a good Patent in the Creation, or was void by the death of King James, Whether the Proviſo in the Act of 12 Car. 2. Saving all the Right of the Maſter, Wardens, Freemen and Commonalty of *Vintners* in the City of *London*, hath preſerved all that Right which they had by the Patent of 9 Jac. againſt the Act of 12 Car. 2.?

1. I conceive, That if the Patent, 9 Jac. were not void in the Creation, it remained good after the death of King James.

2. If it were not void in the Creation, or by the death of King James, all Right that the Maſter, Wardens, Freemen and Commonalty of *Vintners* had by it, is ſtill preſerved by the Proviſo in the Act of 12 Car. 2. But if the Patent of 9 Jac. was void in its Creation, or by the death of King James, then the Proviſo in the Act of 12 Car. 2. aids them not at all.

So as now it is only inſiſted on, That the Patent of 9 Jac. was void in its Creation for two Reaſons.

1. For that the Law of 7 E. 6. was ſuch a Law pro bono publico, as the King could not dipenſe againſt it, more than with ſome other penal Laws pro bono publico.

Poſt 346. 2. If he could to particular perſons, he could not to the Corporation of Vintners, and their Succeſſors, whoſe number or perſons the King could never know; and that it ſtood not with the truſt repoſed in him by the Law, to diſpenſe ſo generally without any proſpect of number or perſons.

The Books have been plentifully urg'd at the Barr, and by my Brothers, who argued before me, therefore I ſhall not Actum agere to repeat them.

But I obſerved not that any ſteddy Rule hath been drawn from the Caſes cited to guid a mans Judgment, where the King may, or may not diſpenſe in penal Laws, excepting that old Rule taken from the Caſe of 11 H. 7.

11 H. 7. f. 11, 12. That with *Malum Prohibitum* by Stat. the King may diſpenſe, but not with *Malum per ſe.*

But I think that Rule hath more confounded mens Judgments on that ſubject, than rectified them.

Yet I conceive that Caſe, and the Inſtances given in it, rightly underſtood, to be the beſt key affoarded by our Books, to open this dark Learning (as it ſeems to me) of Diſpenſations to which therefore I ſhall only or principally apply my ſelf.

Be-

Before I enter upon it, I muſt previouſly aſſent, That every act a man is naturally enabled to do, is in it ſelf equally good, as any other act he is ſo enabled to do. And ſo all the Schoolmen agree, That Actus qua actus non eſt malus. And that mens acts are good or bad only as they are precepted or prohibited by a Law, according to that Truth, Where there is no law there is no tranſgreſſion. Whence it follows, That every Malum is in truth a Malum prohibitum by ſome Law. Rom. 4. 15. Seld. de Jur. Nat. 45 Still. Eccl. Can. 35.

In the next place, I mean be the word (Diſpenſation) when I uſe it, another thing than ſome of my Brothers defined it to be, namely, That it was Liberatio a pœna; or as others, That it is provida relaxatio Juris, which is defining an ignotum per ignotius; but liberare a pœna, is the proper effect of a pardon, not of a diſpenſation; For a diſpenſation obtained doth *jus dare*, and makes the thing prohibited lawful to be done by him who hath it, upon which depends the true reaſon of many Caſes which admit not of diſpenſation; but a pardon frees from the puniſhment due for a thing unlawfully done. Yet freedom from puniſhment is a conſequent of a diſpenſation, though not its effect. But ſo it is alſo a conſequent of repealing the Law, and a conſequent of an exception at the making of the Law of ſome particular perſon or perſons from being bound by the Law. Poſt. 349.

I come now to the Caſe it ſelf of 11 H. 7. wherein I agree, That with Malum prohibitum by Stat. indefinitely underſtood the King may diſpenſe.

But I deny that the King can diſpenſe with every Malum prohibitum by Statute, though prohibited by Statute only.

1. The King may pardon Nuſances that are tranſient, and not continuing, as a Nuſance in the High way, which ſtill continues, and is not ended, until removed, cannot be pardon'd: So of a Water-courſe diverted, or a Bridge broken down, they cannot be pardon'd ſo as to acquit the Nuſance maker for committing them; but the fine or puniſhment impos'd for the doing may be pardon'd. Cok. Pla. Coron. f. 237.

But breaking the Aſſiſe of Bread and Ale, foreſtalling the Markets, ingroſſing, regrating, or the like, which continue not, but which are over aſſoon as done, until done de novo again, may be pardon'd, like other offences: So as the Offender ſhall not be impleaded for them, otherwiſe than by perſons who have receiv'd particular damage, which the King cannot remit; this difference holds in offences by penal Laws. Poſt. 335. Inſt. 202.

22 Car. 2. c. 8. So a Mayor or Bayliff of a Town, or other Toll-taker, who is penally bound to provide true Market meaſures, and doth not, cannot be pardon'd by the King, becauſe the fault ſtill continues; but the puniſhment inflicted the King may pardon. But by a Law all theſe offences may be pardon'd.

So it is generally true, that malum per ſe cannot be diſpenſed with; but thence to infer (as many do) that every malum which the King cannot diſpenſe with is malum per ſe, is not true.

Nor is there in that Caſe any ſufficient deſignation of what is malum per ſe, and why to prevent error in diſquiſition concerning it, though ſome inſtances thereof, mala per ſe, be very right.

I ſhall therefore endeavour to inſtance in ſeveral kinds of mala per ſe, which cannot be diſpens'd with, and ſome mala prohibita by Acts of Parliament, and otherwiſe, which the King alſo cannot diſpenſe with; and to give the reaſon why he cannot in both, thereby to make the concluſion I drive at leſs confuſed, which is to differ penal Law diſpenſable from thoſe which are not.

Murther, Adultery, Stealing, Inceſt, Sacriledge, Extortion, Perjury, Treſpaſs, and many other of the like kind, all men will agree to be mala per ſe, and indiſpenſable: All which are prohibited, and by Statutes. Nor is it much to ſay, thoſe are alſo prohibited by the Common Law, and therefore cannot be diſpens'd with, if that were the reaſon, nothing prohibited at the Common Law could be diſpens'd with, which is not ſo.

2. Where the Suit is only the Kings for breach of a Law, which is not to the particular damage of any third perſon, the King may diſpenſe; but where the Suit is only the Kings, but for the benefit and ſafety of a third perſon, and the King is intitled to the Suit by the proſecution and complaint of ſuch third perſon, the King cannot relaſe, diſcharge, or diſpenſe with the Suit, but by conſent and agreement of the party concern'd As where, upon complaint of any perſon, a man hath entred into Recognizance to keep the Peace againſt ſuch perſon, the King cannot diſcharge ſuch Recognizance before it be forfeited, but the party whoſe ſafety is concerned may, though the King only can ſue the Recognizance. Some more ſuch Caſes may be.

Poſt 342.

Poſt 343.

As the Laws of Nuſances are pro bono publico, ſo are all general penal Laws; and if a Nuſance cannot be diſpens'd with for that reaſon, it follows, no penal Law, for the ſame reaſon, can be diſpens'd with. Poſt 341.

Therefore the reaſon is, becauſe the parties particularly damaged by a Nuſance, have their Actions on the Caſe for their damage, whereof the King cannot deprive them by his diſpenſation: And by the ſame reaſon, other penal Laws, the breach of which are to mens particular damage, cannot be diſpens'd with. Poſt 341.

3. Nuſances and Ills prohibited by penal Acts of Parliament, are of the ſame nature as to the publique, although (as the Law is now received) the mala or nocumenta prohibited by Acts of Parliament, are not preſentable in Leets, or the Sheriffs Torn, as Nuſances at Common Law are, of which ſome queſtionleſs canot be diſpens'd with; As obſtructing the High way, diverting a Water-courſe, breaking down a Bridge, breaking the Aſſiſe of Bread and Ale: for as to theſe, the parties particularly damaged by them have their Actions, which the King cannot diſcharge. 4 E. f. 31. 22 E. 4. f. 22. 3 H. 7. f. 1. Br. Leet. n. 2. 19, 25, 26, 30. Ant 133.

4. Other ancient Nuſances are by which no man hath a particular damage or Action for it, as if a man buy proviſion coming to the Market by the way (which is a Nuſance by foreſtalling the Market) and ſells it not in the Market foreſtall'd, no Action lies for a particular damage to any man, more than to every man; but the King may puniſh it.

So if a man buy Corn growing in the field, contrary to the Statute of 5 E. 6. c. 14. he is an Ingroſſer: So ſelling Corn in the Sheaf is againſt the Common Law by Robert Hadam's Caſe, cited in Coke's Pleas of the Crown, and puniſhable by the King, but no particular perſon can have an Action for ſuch ingroſſing more than every man; yet theſe are Nuſanſes by the Common Law, but ſo made by prohibiting Laws beyond memory: As by a Law of King Athelſtan's, Ne quis extra oppidum quid emat, foreſtalling was prohibited. And by ſeveral Laws of William the Firſt, Ne venditio & emptio fiat niſi coram teſtibus & in civitatibus. Item nullum mercatum vel forum ſit, nec fieri permittatur, niſi in civitatibus regni noſtri. And no way differ from publique evils now prohibited by Parliament, and may, by it, be permitted; for the Statute of 15 Car. 2. c. 5 gives leave to ingroſs without foreſtalling, when Corn exceeds not certain Rates. Nor ſee I any reaſon why the King may not diſpenſe with thoſe Nuſances by which no man hath right to a particular Action, as Cok. f. 197. c. 89. Hill. 25 E. 3. coram Rege. Sax. Laws f. 49. c. 12. Will. the firſts Laws. f. 171. c. 60, 61. Cok. Pleas Coron. 197. Poſt 339. 358. 15 Car. 2. c. 5.

well as he may with any other offence againſt a penal Law, by which no third perſon hath cauſe of Action,

Whence it follows, That if an Act of Parliament call an offence a Nuſance, from which no particular damage can ariſe to a particular perſon, to have his Action, the King may diſpenſe with ſuch a nominal Nuſance as with an offence againſt a penal Law, for which a man can have no Action for his particular damage.

5. The Regiſter hath no Writ of Ad quod damnum, upon any Licence to be granted, but for alienation of Capite Land, or in Mortmain, or for diverting or obſtructing a Water-courſe, or High way, in which Caſes the Writ is directed to the certain Sheriff or Eſcheator of the County, where the Land-way or Water-courſe lye; but for Licences for other things, as Exportation or Importation of prohibited Commodities, a Writ of Ad quod Damnum, cannot be directed to any certain Sheriff, or other Officer, to enquire.

Nor is it enough to mak a thing malum per ſe, becauſe prohibited at Common Law: But the reaſon is,

The word Murther (ex vi termini, in the Language it is us'd in) ſignifies unlawful killing a man. The word Adultery, unlawful Copulation; Stealing, unlawful taking from another; Perjury, unlawful ſwearing; and Treſpaſs, ex vi termini, an unlawful impriſonment, or unlawful entry, or the like, upon anothers Houſe or Lands, and ſo do the other mala inſtanced.

If theſe mala might be diſpens'd with, in regard a diſpenſation, as I ſaid, makes the thing to be done lawful to him who is diſpens'd with, it follows, that the diſpenſation would make unlawful killing, which the word Murther imports, vi termini, to be lawful; unlawful taking from another, which the word Stealing imports, to be lawful; unlawful Swearing, which Perjury imports, to be lawful; an unlawful Entry upon a mans Houſe or Land, which the word Treſpas imports, to be lawful, and ſo of the reſt.

So the ſame thing, at the ſame time, would be both lawful and unlawful, which is impoſſible.

For the ſame reaſon, a Law making Murther, Stealing, Perjury, Treſpaſs, or any the reſt of the mala inſtanc'd in lawful, would be a void Law in it ſelf.

For a Law which a man cannot obey, nor act according to it, is void, and no Law: And it is impoſſible to obey contradictions, or act according to them.

Therefore I may conclude thoſe things to be mala in ſe, which can never be made lawful.

The inſtances in that Book of 11 H. 7. are none of theſe, but near them: the words are, But malum in ſe, the King nor any other can diſpenſe. And inſtanceth,

Si come, ſi le Roy, voyloit pardon de occider un homme ou de fair nuiſance in le haut chemin, ceo eſt void.

Where by the way, pardon is miſ-printed for poiar done, for the King may pardon killing a man; but if the King will give power to kill a man, or to make a nuſance in the High-way, it is void.

And upon the ſame reaſon, a licence to impriſon a man, to take his Land, his Horſe, or any thing that is his, from him, is void.

For in life, liberty, and eſtate, every man who hath not forfeited them, hath a property and right which the Law allows him to defend; and if it be violated, it gives an Action to redreſs the wrong, and to puniſh the wrong-doer.

Therefore a diſpenſation, that is to make lawful the taking from a man any thing which he may lawfully defend from being taken, or lawfully puniſh if it be, muſt be void.

For it is a contradiction to make it lawful, to take what may be lawfully hindred from being taken, or lawfully puniſhed, if it be.

And that were to make two men have ſeveral plenary rights in the ſame thing at the ſame time, which no Law can effect: Therefore to do a thing which no Law can make lawful, muſt be malum in ſe. Ant. 189. 192

But theſe inſtances differ from the former; for killing a man, or taking from him his Lands or Goods, do not import, ex vi termini, that which is unlawful, as Murther and Stealing do; for in many Caſes killing a man, or taking his liberty or goods from him, is lawful, and where it is not, may by a Law be made ſo, which the other can never be.

As every new capital puniſhment ordained by Law, makes killing a man lawful, where it was not before; every new aid granted out of mens eſtate, makes a taking from men lawful that was not before.

But

But this is becauſe a Law can alter, change, or transfer a mans property in life, liberty, eſtate, or any intereſt, as it will, which cannot be done without a Law, and thereby nothing unlawful is made lawful: But the property which a man had, and was the ſubject matter of the unlawful doing or taking before, is alter'd or transferred to another, either in toto or in tanto.

So as to violate mens properties is never lawful, but a malum per ſe, as that Book is of 11 H. 7. and according to that of Bracton;

Bract. l. 3. f. 132. Rex non poterit gratiam facere cum injuria & damno aliorum, quod autem alienum eſt dare non poteſt per ſuam gratiam.

But to alter or transfer mens properties to others, is no malum per ſe, it is daily done by the owners expreſs conſent, and by a Law without their expreſs conſent.

And as the Law is, the Lord of a Villain may transfer his Villains property, in Lands or Goods, to himſelf, by entry or ſeiſure: And it is the ſignal difference between a Freeman and Villain, that it cannot be done to a Freeman, nor yet to a Villain to the uſe of any but his Lord.

The Learned and Judicious Grotius, in his excellent Work de Jure belli ac pacis, is moſt appoſit upon this ſubject:

Grot. de Jure belli ac pacis, l. 1. c. 1. Sect. 5, 6. Sicut ergo ut bis duo non ſint quatuor, ne a Deo quidem poteſt effici, ita ne hoc quidem, ut quod intrinſeca ratione malum eſt, malum non ſit. And then follows, after ſome further explanation of his notion, Ita, ſi quem Deus occidi præcipiat, aut res alicujus auferri; non licitum fiet Homicidium aut furtum (quæ voces vitium involvunt) ſed non erit Homicidium aut furtum; quod vitæ & rerum ſupremo Domino auctore fit. And it is the ſame to ſay.

Si quem Lex occidi præcipiat aut res alicujus auferri, non licitum fiet homicidium aut furtum (quæ voces vitium involvunt) ſed non erit homicidium aut furtum quod a lege vitæ & rerum poteſtatem habente, auctore fit.

If any need further ſatisfaction concerning what hath been ſaid on this occaſion, he may reſort with ſucceſs to the place quoted of that great Lawyer.

But it is to be obſerved, That altering or changing property is no ſubject matter for a diſpenſation. A man is not diſpens'd with to do an act which he cannot do, but to do an act which ſimply he can do, but the Law prohibits his doing it, penally.

Poſt 351.

But altering or changing property is an act ſimply out of his power to do, which ſhould be diſpens'd with in that behalf.

And

And thus we ſee violation of property is a malum per ſe by that Book of 11 H. 7. and the reaſon why it is ſo, and cannot be diſpens'd with.

A third kind of malum per ſe by that Caſe of 11 H. 7. is that which the Law of the Land admits to be ſpecially prohibited, Jure Divino, Et iſſint le Roy, ne nul Eveſque ou Presbiter poit doner licence a un de faire Lechery, Quia eſt malum in ſe, ſaith the Book, that is Coition without wedlock, which offence, when by mutual conſent, injures no property, having two husbands or two wives at the ſame time; but that is alſo againſt the property of the firſt husband or wife, marriage within the Levitical degrees. All which are admitted by the Law of the Land to be prohibited, Jure Divino, and cannot be diſpens'd with; For no Human authority can make lawful what Divine authority hath made unlawful, without Gods leave, and then it is by his authority. 11 H. 7. 32 H. 8. c. 38.

Many more particulars fall under this head, which I ſhall not now mention. Hence I infer mala in ſe to be only ſuch as imply a contradiction to be made lawful, and conſequently what may be made lawful by Human Law to be no malum in ſe, as not differing from other things which may be permitted or prohibited occaſionally, at the pleaſure of the Law maker. Poſt 359.

The King cannot diſpeſne with a Nuſance to the High ways by 11 H. 7. and conſequently, as ſome think, with no other publique Nuſance, by Sir Edward Coke. For all common Nuſances, as not repairing Bridges, High-ways, &c. the Suit is the Kings, but he cannot pardon or diſcharge the Nuſance or the Suit for the ſame, the High-ways being neceſſary to ſupport ſuch of his Subjects as are occaſioned to travel them: Of this more hereafter. Cok. Pleas of the Crown, f. 237, c. 105.

The ſpecifical offences, which are publique Nuſances, I do not reckon to be mala in ſe, as ſome do, becauſe though it be admitted none of them can be diſpens'd with, yet a Law may make them lawful; and if ſo, they are not mala in ſe, as before.

But either a diſpenſation, or a Law to commit Nuſances (in thoſe terms) I conceive to be void, becauſe the word Nuſance imports a thing, vi termini, that is unlawful, as Treſpaſs doth; and therefore it is a contradiction to make it lawful by a diſpenſation or Law. Ant. 336.

But by a Law, a Baker or Victualler may ſell Bread or Ale of ſuch weight or meaſure as he pleaſeth, and as they did before the Aſſiſe was made. By a Law a Water-courſe may be diverted; Corn growing in the field, or Proviſion going to a Market may be bought up by the way, which are Nuſances in Specie, Poſt 358. Ant. 335.

ſo

ſo of the reſt; and therefore not mala in ſe, as ſome have thought, but mala politica, as they are prohibited.

But obſtructing a High-way, diverting a water-courſe, breaking down a Bridge, breaking the Aſſiſe of Bread and Ale, cannot be diſpens'd with, though they are only puniſhable by the King, becauſe ſuch a Diſpenſation would take away the Action of thoſe who had particular damage by the offence done.

But a Diſpenſation to buy the ſtanding Corn of ſuch a particular man, or field, or a certain proviſion going to ſuch a Market, ſuch a Market-day, may be good, for no man can declare upon a particular damage to himſelf thereby, for if any man could, every man could; but a general diſpenſation in either kind, were an abrogation of the Laws which prohibit them, which cannot be.

Next, ſome Nuſances are permanent, and continue ſtill, untill removed, as Ditches, Hedges, or other obſtructions to the High-ways, diverting Water-courſes, decay of Bridges; theſe cannot be pardon'd nor the Suit for them, until removed; but breaking the Aſſiſe of Bread and Ale, buying proviſion in the way to Market, ingroſſing a certain quantity of Corn, theſe are tranſient Nuſances, as I conceive, which continue not, but ceaſe, until done de novo, and ſuch may be pardon'd, and the Suit for them (as I conceive).

And note, if a man have particular damage by a foundrous way, he is generally without remedy, though the Nuſance is to be puniſht by the King. The reaſon is,

Becauſe a foundrous way, a decay'd Bridge, or the like, are commonly to be repaired by ſome Townſhip, Vill, Hamlet, or a County who are not corporate, and therefore no action lyes againſt them for a particular damage, but their neglects are to be preſented, and they puniſh'd by fine to the King.

But if a particular perſon, or Body Corporate, by to repair a certain High-way, or portion of it, or a Bridge, and a man is endamaged particularly by the foundrouſneſs of the way, or decay of the Bridge, he may have his Action againſt the perſon or Body Corporate, who ought to repair for his damage, becauſe he can bring his Action againſt them; but where there is no perſon againſt whom to bring his Action, it is as if a man be damaged by one that cannot be known.

11 H. 4. f. 83. a. Rolls Actions ſur Caſe, f. 104. l. 2.

Though

Though no perſon, Natural or Corporate, can have an Action for a publik Nuſance, or puniſh it, but the King, upon preſentment or indictment, as appears 3 E. 2. Where the Mayor and Commonalty of London brought an Action upon the Statute for foreſtalling the Markets, and after ſelling at double the rate, becauſe no particular damage was alledg'd, without which the Suit was only the Kings, the Plaintiffs had nothing by their Action. Fitz. Action ſur le Stat. 3 E. 2. n. 26. which ſhews it muſt be the Stat. de Piſtoribus in 31 E. 1.

For if by any publique Nuſance a man have a particular damage, he may have his Action on the Caſe againſt the Nuſance-maker. 27 H. 8. 26, 27. Cok. Litt. f. 56. a. Cok. pl. Coron. tit. Pardon.

And the reaſon why the King cannot diſpenſe in ſuch Caſes, is, not only as Nuſances are contra bonum publicum, but becauſe if a Diſpenſation might make it lawful to do a Nuſance, which differs from a Licence, to continue a Nuſance in the reaſon of it, the perſon damaged by it would be deprived of his Action, for an Action cannot lye for doing that which was lawfully done; and it is the ſame to alter or change property, by making what is mine to be lawfully another mans, as to licence another to damage me, and I ſhall have no Action or remedy for it: And no offence againſt a penal Law could be diſpens'd with, if the reaſon of not diſpenſing were becauſe the offence is contra bonum publicum, for all offences by penal Laws are ſuch. Ant 335. Ant 335.

And it is obſervable, That if upon the Return of an Ad quod dampnum it appear to be ad dampnum vel prejudicium of no man, the King may then licence the ſtopping up of an ancient High-way, or diverting a Water-courſe, or part of it, for the concern is then wholly his own, but without his licence it can never be done, though a better way be ſet out, and ſo return'd upon an ad quod damnum. Cro. 8 Car. 1. f. 266, 267. The King verſ. Ward.

Offences againſt penal Laws to be diſpens'd with.

1. There are many penal Laws, by tranſgreſſing which the Subject can have no particular damage, and therefore no particular Action; for the Law gives not particular Actions regularly but for particular damage.

2. If any man might have an Action when he had no more damage than every other man had, thouſands ſhould equally have their ſeveral Actions, which the Law permits not.

11 H. 7. f. 12. 1 H. 7. f. 3. As if Tranſportation of Wooll, Mony, Corn, Horſes, Bell-metal, Beer, or the like, be penally prohibited by Acts of Parliament, no Subject can derive a particular damage to himſelf for having an Action againſt the Offender.

Secondly, If one might have an Action for ſuch offences, every man might have the like, therefore ſuch offences are only to the King's damage in his publique Capacity of Supreme Governour, and wronging none but himſelf, he may (as every man elſe may) diſpenſe with his own wrong, when it is abſque damno & injuria aliorum. Still. Eccl. Com. 41.

And though ſuch Laws are pro bono publico in ſome ſenſe, they are not Laws pro bono ſingulorum populi, but pro bono populi complicati, as the King in his diſcretion ſhall think fit to order them for the good of the whole.

In this notion the eſtate of every Pater familias may be ſaid to be pro bono Communi of his Family, which yet is but at his diſcretion and management of it; and they have no intereſt in it, but have benefit by it.

Offences not to be diſpens'd with.

Ant. 334. There are other penal Laws by Acts of Parliament, and puniſhable at the Kings Suit by Indictment or Preſentment; the tranſgreſſing of which is to the immediate wrong of particular perſons, and for which the Law gives them ſpecial Actions, with which the King cannot diſpenſe: As he cannot licence a man to commit maintenance, to make a forcible entry, to carry diſtreſſes out of the Hundred, contrary to the Statute, which yet are no Mala in ſe; for it is no Malum in ſe to maintain in a juſt cauſe, to enter forcibly where the entry is lawful, to carry a diſtreſs farther or nearer; but are mala when prohibita, and non when permiſſa, as they would be were the Laws repeal'd, and were before they were made: From whence it is clear, there are mala prohibita by Acts of Parliament with which the King cannot diſpenſe: And next, it follows not, that a Malum with which the King cannot diſpenſe, is a Malum in ſe, which are the exceptions I took to the receiv'd Rule, out of the Caſe of 11 H. 7. 8 H. 6. c. 9. Stat. 1 & 2 P. & M. c. 12.

No

No non obſtante can diſpenſe in theſe Caſes, and many the like, for that were to grant that a man ſhould not have lawful Actions brought againſt him, or be impleaded at leaſt in certain Actions, which the King cannot grant. 8 H. 6. f. 19. The Chancellor of *Oxfords* Caſe. Br. Pat. n. 15.

For the ſame reaſon the King cannot licence a Baker, Brewer, or Victuallar, to break the Aſſiſe of Bread or Ale, nor a Miller to take more Toll than the Law appoints, nor a Taverner to break the Aſſiſe of Wine, nor a Butcher to ſell meaſled Swines fleſh or Murrain fleſh, nor any man to foreſtall the Market by a non obſtante of the Statute de Piſtoribus, which prohibits all theſe under ſevere penalties. Stat. de Piſtoribus c. 7. 31 E. 1.

Nor can he licence Butchers, Fiſhmongers, Poultrers, or other ſellers of Victuals, nor Hoſtlers to ſell Hay and Oats at what price they pleaſe, by a non obſtante of the Statute of 23 E. 3. c. 6. and 13 R. 2. c. 8. which require that the prices be moderate. And it was ſo reſolved and decreed in the Star-Chamber by opinion of all the Judges, 9 Car. 1. and that the Juſtices of the Peace, in the reſpective Counties, were to aſcertain the prices of Hay and Oats. Stat. 23 E. 3. c. 6. 13 R. 2. c. 8. 9 Car. 1. Cam. Stell.

He cannot licence a Labourer to take more wages, nor any Officers to take more Fees than the Law allows, nor to diſtrain a mans Plough-Beaſts, where there is other diſtreſs; for in theſe, and multitudes of like caſes the damaged perſon hath his Action equally as for a Nuſance, to his particular hurt. Regiſt. f. 190. a. tit. de Servientibus. In the Table of the Regiſter the Title is de Laboratiis.

And even in the Caſe of a Common Informer, who cannot ſue but in the Kings Name, as well as his own, when he is once intitled to Action, which he never is but by commencing Suit, for then the Action popular is become his proper Action, the King can neither pardon, releaſe, or otherwiſe diſcharge his right in the Suit, as is fully reſolved 1 H. 7. and in many other Books, much leſs can he diſcharge or prevent the Action of any other man. Ant. 334. 1 H. 7. f. 3.

The Statute of 12 Car. 2. c. 25. upon which this Caſe ariſeth, hath examples of penal Laws in both theſe kinds. 12 Car. 2. c. 25

1. Every man is prohibited to ſell Wine by retail, contrary to the Act, upon forfeiture of Five pounds for every offence; from which offence no third man can poſſibly derive a particular damage to himſelf, for which he can have an Action upon his Caſe.

2. If any man ſhould have an Action becauſe another ſold a pint of Wine without licence, every man ſhould have the like Action, which the Law permits not.

Whence it follows, That the offence wrongs none but the King, and therefore he may, as in like Caſes, diſpenſe with it.

By a ſecond Clauſe in that Act, the mingling of Wine with ſeveral Ingredients therein mentioned, is penally prohibited; as by another Clauſe the ſale of Wine at greater prizes than the Act limits.

He that ſhall offend, either by unlawful mixtures, or by ſelling dearer than the Law admits, doth a particular wrong to the buyer, for which he may have his Action; and therefore the King cannot diſpenſe with either of thoſe Offences.

Diſpenſations void againſt Acts of Parliament for maintaining Native Artificers.

The Caſe of Monopolies, the eleventh Report.

If Forreign Manufactures, or Forreign Corn, as by the Acts of 3 E. 4. c. 4. & 3 E. 4. c. 3. be prohibited for ſupport of thoſe Artificers, and the Husbandmen within the Kingdom, a Licence to one or more to bring them in, if general, is void by the Caſe of Monopolies, notwithſtanding a Non obſtante.

1. All penal Laws, when made, and in force, are equally neceſſary, and in things neceſſary there is no gradation of more or leſs neceſſary.

2. If any penal Laws were poſſibly leſs diſpenſable than others (but upon the differences already given) thoſe captially penal were leſs diſpenſable than thoſe leſs penal; but it is not ſo, for coyning mony of right Alloy in imitation of the Kings Coyn, is capitally penal. without licence, but it may be licenced.

11 H. 7. f. 11.

1 H. 7. f. 3.

If tranſporting Wool were Felony, yet the King may licence it.

Cok. plac. Coronæ, f. 74. c. 20.

It is capital to multiply Gold or Silver by the Statute of 5 H. 4. c. 4. but may be licenc'd; as was done to John Faceby, tempore H. 6. the Diſpenſation with a non obſtante of that Statute may be ſeen, Coke's placita Coronæ, f. 74. c. 20.

If

If an Ad quod damnum iſſue to enquire ad quod damnum vel præjudicium, a licence for a Mortmain will be: One Inquiry is----- Si patria per donationem illam magis ſolito non oneretur, &c. Though the Return be, that by ſuch licence patria magis ſolito oneretur, yet the Licence, if granted, will be good, which ſhews that Clauſe is for Information of the King, that he may not licence what he would not, and not for Reſtraint, to hinder him to licence what he would. For by Fitz-herbert the uſual licence now is with -----Et hoc abſque aliquo brevi de Ad quod damnum. And when the King can licence without any Writ of Ad quod damnum, he may, if he will, licence whatever the Return of the Writ be. Though it be ſaid in the Caſe of Monopolies, That in the Kings Grant it is always a Condition expreſſed or implyed, Quod patria plus ſolito non oneretur, but that ſeems but gratis dictum. Fitz. Nat. Br. Ad quod damnum, f. 222. b. Letter D.

So if the King will, ex ſpeciali gratia, licence a Mortmain, the Chancellor need not iſſue any Ad quod damnum, for the King, without words of Non obſtante, is ſufficiently appris'd by asking his licence to do a thing, which at Common Law might be done without it, that now it cannot be done without it. And that is all the uſe of a Non obſtante. Dyer 9, 10 El. f. 269. a. Poſt 356.

But whether in ſuch Caſes licences limited to certain quantities of the Commodities to be imported be good (as ſome collect from that Caſe, as it is reported, which appears not by the Judgment) nor in what Caſes licences may be general, or ought to be limited, is not now properly before us.

1. If Exportation, Importation of a Commodity, or the exercise of a Trade be prohibited generally by Parliament, and no cauſe expreſſed of the Prohibition, a licence may be granted to one or more without limitation to Export or Import, or to exercise the Trade: For by ſuch general Reſtraint the end of the Law is conceived to be no more than to limit the over-numerous Exporters, Importers, or Traders in that kind, by putting them to the difficulty of procuring licences, and not otherwiſe, and therefore ſuch general licences ſhall not be accounted Monopolies.

2. In ſuch Caſes the Law implies the King may licence as well as if the prohibitory Law had been that no ſuch Importation, Exportation, or Trading ſhould be without the King's expreſs licence, in which Caſe the licence requires no limitation to a certain quantity.

3. It

3. It is apparent, That if the exercise of a Trade be generally prohibited, the Kings Licence must be without any Limitation to him that hath it, to exercise his Trade, as before it was prohibited, else it is no licence at all.

4. Where the King may dispense generally he is not bound to it, but may limit his Dispensation if he think fit.

5. If to avoid a Monopoly his Dispensation upon all prohibitory Laws generally must by Law be limited; his limited Dispensation may be for greater quantities than were Imported or Exported before the Restraint, because the quantity in the Dispensation is left indefinite, and may be any quantity certain, and consequently the end of the Restraint equally frustrated, and the Monopoly as effectuall as if the Licence had been general, though it be limited.

6. If a Commodity be prohibited to be Exported or imported, because too great quantities of it is carried out, or brought in, the Licences ought to be limited to answer the end of the Act.

7. If Importation of a Commodity be prohibited, to maintain the Native Artificers of that Commodity in the Kingdom with livelyhood, and so of Exportation, no Licence, either with stint or limitation, or without it, seems good by way of Merchandise; for both of them may equally frustrate the end of the Act in the support of the Native Artificers for the former reason, but such a Licence may be good to Import for a mans private use, though in the Case of Monopolies it is said, Such a Licence (without any Limitation) is a Monopoly, which is as much perhaps by implication, as to say that such a Licence with a Limitation is no Monopoly, quod non credo.

Sid. 6. As to the second Question; Admitting King James might have dispens'd with particular persons for selling Wine by Retail, as the constant course hath been since the Statute of 7 E. 6.

Ant. 332. Whether he could dispense with a Corporation, or with this Corporation of Vintners, and their Successors, as he hath done, having no possible knowledge of the persons themselves, or of their nuber, to whom he granted his Dispensation? which is the reason insisted on why his Grant is not good. As to that,

1. First,

1. Firſt, that the nature of the offence is ſuch as may be diſpens'd with, ſeems clear in reaſon of Law, and by conſtant practice of licencing particular perſons.

2. Where the King can diſpenſe with particular perſons, he is not confined to number or place, but may licence as many, and in ſuch places, as he thinks fit.

An Act of Parliament, which generally prohibits a thing upon penalty which is popular, or only given to the King, may be inconvenient to divers particular perſons, in reſpect of perſon, place, time, &c. For this cauſe the Law hath given power to the King to diſpenſe with particular perſons.

But that Caſe touches not upon any inconvenience from the largeneſs of the Kings diſpenſation, in reſpect of perſons, place or time, which the Law leaves indefinite to the pleaſure of the King, as the remedy of inconveniences to perſons and places by the penal Laws, ſome of which may be very inconvenient to many particular perſons, and to many trading Towns, others but to few perſons or places, and the remedy by Diſpenſation accordingly muſt ſometimes be to great number of perſons and places, and ſometimes to fewer.

If the wiſdom of the Parliament hath made an Act to reſtrain pro bono publico, the Importation of Foreign Manufactures, that the Subjects of the Realm may apply themſelves to the making of the ſaid Manufactures for their ſupport and livehood, to grant to one or more the Importation of ſuch Manufacture (without any limitation) non obſtante, the ſaid Act is a Monopoly, and void.

3. It is admitted a Corporation is capable of a Diſpenſation; as where the King hath an Inheritance in the thing concerning which the Diſpenſation is (ſo it was expreſs'd) and therefore he may diſpenſe with a Corporation of Merchants, or with a Town Corporate, not to pay Cuſtom for ſome Commodity, as he may with particular perſons

This ſeems to end the Queſtion; For if the offence in its nature may be diſpens'd with, and a Corporation be capable of a Diſpenſation, the King's not knowing the perſons or numbers (which is the pretended reaſon) will not avoid the Diſpenſation in the preſent Caſe of the Vintners.

For

For by the ſame reaſon diſpenſations to Corporations, and their Succeſſors, would be void in all Caſes, as well as in this; for their perſons and numbers muſt be equally unknown to the King, in every Caſe, as in the preſent Caſe.

That a diſpenſation may be granted to a Body Corporate or Aggregate, as well as to private perſons, Suarez de Legibus, which Mr. Attorney cited in this Caſe, and is in truth a moſt learned Work, is very expreſs.

Suarez de Legibus l. 6. c. 12. f. 416. Diſpenſatio autem per ſe primo verſari poteſt circa perſonam privatam, quia ſolum eſt particularis exceptio a Communi Lege; poteſt etiam ferri circa communitatem aliquam quæ ſit pars majoris communitatis, ſicut uni Religioni, Eccleſiæ aut Civitati conceditur privilegium, per quod excipitur a Lege Communi. Poteſt etiam concedi toti communitati pro uno Actu, vel pro certo tempore per modum ſuſpenſionis. This laſt muſt be underſtood where the Diſpenſator is the intire Law-maker.

And accordingly Diſpenſations are as frequently granted by the Pope, from whom the uſe of Diſpenſations was principally derived to us, to Bodies Corporate, that is, to religious Orders, as to private perſons, as is apparent in the Bullaries, if any will conſult them; but I forbear citing them, becauſe they are Foreign Authorities.

Laertius Cherubinus his Bullarium.

2 R. 3. f. 11, 12. 1 H. 7. f. 2, 3. Poſt 357. E. 3. licens'd the Citizens of Waterford in Ireland, their Heirs and Succeſſors, to carry their Staple Merchandiſe to what parts they pleaſed beyond the Seas, being bound under great penalties by Act of Parliament, to bring them to the Staple. And the Judges twice aſſembled 2 R. 3. & 1 H. 7. made no queſtion of the King's Diſpenſation, but the Queſtion was becauſe later Laws of Henry the Sixth's time had enacted the bringing of Iriſh Merchandiſe to the Staple at Calice.

Regiſt. ad quod damnum, f. 252. b. The King may licence an Aggregate Body Corporate, and their Succeſſors, to dam up an ancient Current of the Sea through their Land for carriage by water to a Mill, and that ſuch paſſage and carriage ſhall be by a new Current, as commodious, as appears by a Writ of Ad quod damnum in the Regiſter, in the Caſe of the Prior and Covent of Chriſt-Church in Canterbury, which is a Body Corporate.

Regiſt. f. 254. b. The like licence may be to ſuch Body Corporate, and their Succeſſors, to bring the Water-courſe of a Well for the uſe of that Community, as by like Writ of Ad quod damnum appears in the Caſe of the Prior and Convent of K. for diverting ſuch a Water-courſe for the uſe of their Houſe.

And

And by another like Writ, in the Caſe of the Fraternity of Fryars Minors, for diverting of a Water-courſe, or part of it, to ſerve the Houſe of the Fraternity. Regiſt. f. 255. a.

And ſo a Licenſe may be to a Corporation to ſtop up a High-way through their Land, a more commodious being by them ſet out in place of it, as is common in the Caſes of particular perſons.

And in all theſe Caſes, the benefit of the Licence is to every particlar perſon of the Corporation, more than to the Body Politique.

And theſe are not Licences where the King hath an Inheritance, unleſs all High-ways and Water-courſes be accounted the Kings inheritance.

The like Diſpenſation or Exemption the King may grant to a Corporation that they ſhall be Toll-free, which extends to every man, and not to the Corporation only in their Corporate Capacity.

And a Diſpenſation and Exemption differ in ſound only; for a Diſpenſation is properly to licence a perſon to do a thing which he can do, but is by a Law penally prohibited from doing it. Ant. 333.

An Exemption is properly to licence a man, or men, not to do a thing which they are penally by a Law precepted to do.

Edward the Third granted to the Bailiffs, Mayor, and Burgeſſes of Oxford, that none of them ſhould be ſworn in Juries with Forreigners that were not of the Town. 4 H. 6. f. 6.

The like Grant was made to the Commonalty and Citizens of Norwich by Edward the Fourth, that they ſhould not be put in Juries out of the Town of Norfolk. Theſe are Diſpenſations or Exemptions to a Corporation, and their Succeſſors, that none of them ſhould ſerve in Juries but within their Corporation, which otherwiſe by the Law they muſt have done: And the like we meet with daily to other Towns in the Circuits. 21 E. 4. f. 56

Now if it ſhall be ſaid, That High-ways, the Water-ſtreams, Tolls of Markets, Fines of Jurors, and the like, are the Kings Inheritance as well as his Cuſtoms are; and therefore the King, as to them, may diſpenſe with Corporations, Then.

It is clear, That penal Laws (the breach of which enables no man to an Action for his damage thereby) and the forfeiture and puniſhment for breaking them are much more the Kings Inheritance.

Therefore, ex conceſſo, the King may diſpenſe with Corporations as to them.

Pl. Com. f. 487. Nicholls C. 2. The King cannot diſpenſe in any Caſe, but with his own Right, and not with the Right of any other. And every Right of the Crown is its Inheritance or Intereſt: Therefore where the King can diſpenſe at all, he hath an Inheritance or Intereſt, and conſequently where he can diſpenſe at all, he may diſpenſe to a Corporation.

If the Laws of 7 E. 6. and 12 Car. 2. had been penn'd thus, Every man that ſells Wine contrary to this Act, ſhall pay the King Two pence for every pint ſo ſold; this Two pence had been a Duty and inheritance to the King, as his Cuſtoms are, without difference; and as the Duty of Six pence lately was upon every quart of French Wine retail'd; Why then, the greater or leſs the Duty be, alters not the nature of the Kings inheritance in the Duty.

Therefore if the Acts had been, That every ſeller of Wine, contrary to the Act, ſhould pay the King Five pounds for every pint ſold, there Five pounds had equally been the King's Duty and Inheritance, as the Two pence before; and there had been no reſtraint to ſell, but what was made by payment of ſo great a Duty to the King.

Secondly, The Acts ſo penn'd had equally hindred the ſelling of Wine, as now they do by words, prohibiting ſale upon forfeiture of Five pounds; for in both Caſes the payment of Five pounds, whether by Forfeiture or Duty, is that which only prevents the ſelling.

Therefore the Laws were the ſame in effect, either way penn'd, and conſequently the Forfeiture of Five pounds given, as the Acts ſtand penn'd, is equally the King's Inheritane, as if it had been given by way of Duty.

Sid. 6.

In the next place I will ſhew what Diſpenſations or Licences are, as I conceive, unqueſtionably good to Corporations, and their Succeſſors.

1. A Licence to purchaſe in Mortmain, which none can have but a Corporation or ſingle Body Politique.

2. A Licence to make a Park, Chaſe, or Warren in their own Ground, which the Law prohibits to be done without licence.

3. A Licence to convert ſome quantity of their ancient Arable Land into Paſture, which was prohibited by the Acts of 4 H. 7. 5 Eliz. and divers other Laws, moſt of which were repeal'd in 21 Jac. which is not material, as to the Queſtion in hand. And that is an Offence alſo at the Common Law, and I remember it proceeded againſt as ſuch, tempore Car. 1. in the Star Chamber, after the Repeal of moſt of the Statutes prohibiting it. 4 H. 7. c. 19.

4. A Licence to convert part of their Wood-land into Arable, contrary to the Statute of 35 H. 8. and contrary alſo to the Common Law. 35 H. 8. c. 17.

I have a Note of a Charter of King John to an Abbot and his Convent, by which they had Licence, Nemora ſua pertinentia Domui ſuæ redigere in culturam.

5. Licence to erect ſome Cottages upon their Waſte, or other Lands, contrary to the Statute of 31 Eliz. c. 7. 31 El. c. 7.

6. A Licence to erect a Fair or Market.

7. A Licence to an Abbot and his Convent, to appropriate a Rectory. Pl. Com. Grendons C.

In all theſe Caſes the King hath no knowledge of the perſons themſelves, or of their number, to whom he grants his Licence or Diſpenſation; Therefore that can be no reaſon to avoid the Charter of the Corporation of Vintners.

A Diſpenſation or Licence properly paſſeth no Intereſt, nor alters or transfers Property in any thing, but only makes an Action lawful, which without it had been unlawful. As a Licence to go beyond the Seas, to hunt in a mans Park, to come into his Houſe, are only Actions, which without Licence, had been unlawful.

But a Licence to hunt in a mans Park, and carry away the Deer kill'd to his own uſe; to cut down a Tree in a mans Ground, and to carry it away the next day after to his own uſe, are Licences as to the Acts of Hunting and cutting down the Tree; but as to the carrying away of the Deer kill'd, and Tree cut down, they are Grants.

So to licence a man to eat my meat, or to fire the wood in my Chimney to warm him by, as to the actions of eating, firing my wood and warming him, they are Licences; but it is conſequent neceſſarily to thoſe Actions that my Property be deſtroyed in the meat eaten, and in the wood burnt, ſo as in ſome Caſes by conſequent and not directly, and as its effect, a Diſpenſation or Licence may deſtroy and alter Property. Ant. 338.

Trin. 2 Jac.

To the Preſidents of Wright verſus Horton, & alios.

Of Norris verſus Maſon, Trin. 2 Jac. Both which were the ſame Caſes with the preſent, upon the Letters Patents of Queen Elizabeth, the Ninth of her Reign, to the Vintners of London

Of Young verſus Wright, Mich 12 Car. 2.

No Anſwer hath been given, but that which is none, viz. That the two firſt Judgments were without Argument, which is not eſſential to a Judgment; and Judgments are frequently given when the Cauſe is conceiv'd clear (as it ſeems theſe were conceiv'd) if there were no Argument, which is but a Non liquet.

The Anſwer to the laſt Preſident is, That the Judgment upon the Roll is torn off. That ſome of the Judges are living who gave the Judgment, and many more who know it to have been given.

Other Preſidents of Licences to Corporations.

6 H. 8. 1.

A Special Licence to the Fraternity of *Corviſors*, *London*, to exerciſe their Callings, notwithſtanding a penal Statute to the contrary, 1 R. 3.

1 E. 6. 4.

Inhabitantibus in Com. *Norf.* & Civitat. *Norwic.* authorizat. barganizare pro Lanis, non obſtante Statuto 37 H. 8.

2 E. 6. 3.

Mercatoribus de *Venice* Licenc. Special. emere in aliquo Com. hujus regni *Angl.* 500 Saccas Lanarum, ac illas operare, & ſic operat. in partes exteras, & tranſmarinas carriare abſque impedimento, non obſtante Statut. 4 H. 7.

7 E. 6. 6.

Mercatoribus tranſeuntibus Licen. aſportâre pecun. contra formam Statuti.

1 E.

1 E. 6. 7.

Johanni Gale Mil Licenc. pro omnibus ſuis ſervis ſagittare in vibrell. non obſtante Act. Parliament. Conſ. *Tho.* Com. *South.*

2 R. 3. 1.

A Proclamation diſpenſing with a penal Statute touching Cloth-making, 1 R. 3.

9 Eliz. 3.

Henr. Campion & al. Braſiator. de *Lond.* & *Weſtm.* licenc. retinere alienos in ſervitiis ſuis.

27 H. 8. 2.

Major. Civitat. *Heref.* Licenc. perquirere terram ad Annuum valorem 40 Marcarum, non obſtante Statuto.

36 Eliz. 3.

Ballivis, &c. de *Yarmouth*, magna Licenc. tranſportare 40000 quarter. frument. & gran. infra 10 Ann.

26 Eliz. 7.

Preſident. &c. Mercatorum *Hiſpaniæ* & Portugal. infra Civitat. *Ceſtr.* Licenc. tranſportare 10000 Dickers of Leather per 12 Ann.

1 M. 2.

Mercatoribus de le *Stillyard*, Licencene for three years to Export any manner of Woollen Cloth, at 6 l. and under, unrowed, unbarbed, and unſhorn, without forfeiture.

1 M. 11.

Mercatoribus periclitan. a Licence to tranſport all manner of Woollen Cloth, non obſtante Stat.

Roberto Heming & alios, Licence to ſell Faggots within *London* and *Weſtminſter*, non obſtante Stat.

2 Jac. 22.

A Licence to the Gun-makers of *London* to tranſport Guns.

4 Eliz. 3.

A Licence to the Mayor, &c. of *Briſtol*, that they may lade and unlade their Ships, &c. of their Goods, and lay the ſame on Land, and from Land to tranſport them, Non obſtante Statut.

6 Eliz.

6 Eliz. 11.

Mercatoribus Periclitan. Licence to tranſport their Merchandiſes in ſtrange Ships, Non obſtante Sratut.

5 Car. 1.

Mercatoribus de le *Eaſt-Indies*, Licence to tranſport 10000 l. in Engliſh Gold.

Objections againſt the Patent 9 *Jac.*

Obj. 1. That by this Patent every Freeman of London, and of the Corporation of Vintners, which freedom the City and Corporation gives to whom they pleaſe, is diſpens'd with. So in effect the City of London and Corporation of Vintners give Diſpenſation to ſell Wine, which by Law none but the King can grant, as is reſolved in the Seventh Report.

The caſe of penal Laws, Seventh Rep.

Anſw. 1. The King Incorporates a Town by name of Mayor and Burgeſſes, with power to the Burgeſſes annually to chooſe a New Mayor, and grants that every Mayor, at the end of his Majoralty, ſhall be a Juſtice of the Peace in that Corporation: It is no Inference, becauſe the Burgeſſes elect the Mayors, that therefore they make Juſtices of Peace, for they are made ſo by the King's Great Seal, and not by them. The Caſe is in Brook, Title Commiſſion, N. 5.

Brook Commiſſion, n. 5.

For is that Caſe of penal Laws ſo generally true perhaps, if not underſtood where the King governs in perſon, and not by his Lieutenant, as in Ireland, or by Governours, as in the Plantations of the Weſtern Iſlands.

The City of London grants Diſpenſations in this Caſe, no more than the Burgeſſes make Juſtices of the Peace in the other.

Obj. 2. Another Objection made, is, That the King cannot diſpenſe with a man to buy an Office contrary to the penal Statute of 5 E. 6. nor with one Simoniacally preſented to hold the Living, nor with any of the Houſe of Commons not to take the Oath of Allegiance, according to the Statute 7 Jac. c. 6. nor to Sue in the Admiralty for a Contract on the Land, contrary to the Statute 2 H. 4.

Poſt 355. Co. Litt. 120. 234.

Firſt,

First, It is againſt the known practice ſince the Statute of 7 E. 6. That the King cannot diſpenſe for ſelling of Wine, for that Objection reaches to Diſpenſations with ſingle Perſons as well as Corporations. Anſw. 1.

2. The reaſon why the King cannot diſpenſe in the Caſes of buying Offices and Simoniacal Preſentations, is becauſe the perſons were made incapable to hold them; and a perſon incapable is as a dead perſon, and no perſon at all as to that wherein he is incapable: For perſons entred in Religion, and dead in Law, were not to all purpoſes dead, but to ſuch wherein they were incapable to take or give. Anſw. 2. Ant. 354. Hob. 75.

3. A Member of the Houſe of Commons is by 7 Jac. perſona inhabilis, and not to be permitted to enter the Houſe before the Oath taken. A particular Action is given by 2 H. 4. for ſuch Suit in the Admiralty, and ſuch Licence gives the Admiralty a Juriſdiction againſt Law, 4 & 5 P. M. Dyer 159. Domingo Belatta's Caſe. Anſw. 3.

A third Objection was, That this general Diſpenſation anſwers not the end and intention of the Act of 7 E. 6. but ſeems to fruſtrate and null that Law wholly: And though the King can diſpenſe with penal Laws, yet not in ſuch manner, as to annihilate and make them void. Obj. 3.

If this Objection held good in fact, it is a material one; but the Act of 7 E. 6. intended not that no Wine ſhould be ſold, nor that it ſhould be with great reſtraint ſold, but not ſo looſly as every man might ſell it. And ſince it is addmitted that the Act of 7 E. 6. reſtrains not the King's power to licence ſelling Wine (which perhaps was more a Queſtion than this in hand) it is clear the King may licence, as if the Act had abſolutely prohibited ſelling Wine, and left it to the King to licence as he thought fit, not abrogating the Law. And if ſo, Anſw. 1.

The end of the Act being only that every man ſhould not ſell Wine that would, as they might when the Act was made, and not to reſtrain convenient numbers to ſell for the Kingdoms uſe, Anſw. 2.

The King could not better anſwer the end of the Act, than to reſtrain the ſellers to Freemen of London,

To the Corporation of Vintners, men bred up in the Trade, and ſerving Apprentiſhips in it. Anſw. 3.

And

And that ſuch ſhould be licenc'd without reſtraint, is alſo agreeable to the Laws of the Kingdom, which permits not perſons, who had ſerved Seven years to have a way of livelyhood, to be hindred from exerciſing their Trades in any Town or part of the Kingdom, as was reſolved in the Taylors of Ipſwich Caſe, in the Eleventh Report. And therefore the King had well complyed with the ends of the Law, had he licenced ſuch to ſell in any part of the Kingdom, which he did not, but confined them to Towns.

Taylors of Ipſwich C. Report. 11.

Obj. 4. It hath been ſaid to the Caſe of Licences to Corporations for purchaſing in Mortmain,

That the Laws againſt Mortmain are not penal, becauſe they may be diſpens'd without a Non obſtante, and ſo cannot penal Laws be.

Anſw. 1. It is durus ſermo that thoſe Laws are not penal which give the forfeiture of the Land.

2. By the Statute of 1 H. 4. c. 6. and 4 H. 4. c. 4. the King is reſtrained in ſome Caſes from granting as he might at the Common Law.

Therefore without a Non obſtante of thoſe Laws, it cannot appear that the King would have granted it if he had been appris'd of thoſe reſtraining Laws: Therefore a Non obſtante in ſuch Caſes is requiſite. But when a man might, by the Common Law, purchaſe without licence, as in the Caſe of Mortmain, before the prohibiting Statutes, or might Export or Import a prohibited Commodity before reſtraint by Statute, a Licence ex ſpeciali gratia is ſufficient without a Non obſtante: For by petitioning for a Licence, the King is ſufficiently informed the Law permits not the thing without a Licence (which is all the uſe of a Non obſtante). This enough appears by the Caſe in Dyer 269. where a Licence, ex ſpeciali gratia, is good without iſſuing any Ad quod damnum in the Caſe of Mortmain.

Ant. 345.

3. The Writ of Ad quod damnum in that Caſe, which regularly iſſues, informs the King better than a Non obſtante would do.

Obj. 5. Next, it hath been ſaid in the Caſe of Mortmain, the King diſpenſeth only with his own Right, and concludes not the mean Lords.

It is true, for the King in no caſe can diſpenſe but with his own Right, and not with anothers.

An-

Anſwer hath been offered to the Preſident of Waterford, by which the King diſpens'd with the Offence of not bringing the Staple Merchandiſe from Ireland to Calais, being ſo penal, which was an Offence by 10 H. 6. c. and 14 H. 6. c. to the univerſal hurt of the Kingdom, and therefore much greater than ſelling of Wine contrary to the Statute of 7 E. 6. c. but that was as hath been ſaid, Obj. 6. Ant. 348.

Becauſe thoſe Merchants were to pay Cuſtom to the King, which was his Inheritance, and with which he could diſpenſe.

This put together ſounds thus, The Merchants of Waterford were to pay Cuſtoms to the King for their Staple Merchandiſe, for which he might diſpenſe if he would, but never did, for any thing appears: The Merchants of Waterford were, upon penalties, to bring their Staple Merchandiſe to Calais, with which the King could not diſpenſe, had no Cuſtoms been due from them, yet he did diſpenſe, with them for that which he could not, viz. bringing their Goods to Calais, becauſe he did not diſpenſe with them for that which he could, viz. their Cuſtoms; there is no Inference nor Coherence in this Anſwer. Anſw.

But it alſo appears by the Statute 27 E. 3. c. 11. of the Staple for the reaſon therein given, that the Merchants of Ireland were to pay their Cuſtoms in Ireland, and to bring their Cockets of their payments there to the Staple, leſt otherwiſe they might be doubly charg'd.

Therefore the Cuſtoms which were paid in Ireland before the Goods brought to the Staple, was no cauſe for diſpenſing with the Corporation of Waterford for not bringing their Merchandiſe to the Staple, according to the penal Laws for that purpoſe. The Licence of Edward the Third, pleaded by the men of Waterford, was perhaps after the Statute of 27 E. 3. when they were not to pay their Cuſtoms at the Staple, but however, the Licences by them pleaded, 1 H. 7. by Henry the Sixth, and Edward the Fourth, were long after they were to pay their Cuſtoms in Ireland, and not at the Staple.

I muſt ſay as my Brother Atkins obſerved before, That in this Caſe the Plaintiffs Council argue againſt the Kings Prerogative, for the extent of his Prerogative is the extent of his Power, and the extent of his Power is to do what he hath will to do, according to that, ut ſummæ poteſtatis Regis eſt poſſe quantum velit, ſic magnitudinis eſt velle quantum poteſt; if therefore the King have a will to diſpenſe with a Corporation, as it ſeems K. James had in this

Caſe, when the Patent was granted, but by Law cannot, his Power, and conſequently his Prerogative, is leſs than if he could.

1. Malum prohibitum is that which is prohibited per le Statute: Per le Statute is not intended only an Act of Parliament, but any obliging Law or Conſtitution, as appears by the Caſe: For it is ſaid, The King may diſpenſe with a Baſtard to take Holy Orders, or with a Clerk to have two Benefices, with cure; which were mala prohibita by the Canon Law, and by the Council of Lateran, not by Act of Parliament.

Ant. 163, Spelm. Law Terms 99. Brady Intr. 48.

2. Many things are ſaid to be prohibited by the Common Law, and indeed moſt things ſo prohibited were primarily prohibited by Parliament, or by a Power equivalent to it in making Laws, which is the ſame, but are ſaid to be prohibited by the Common Law, becauſe the Original of the Conſtitution or prohibiting Law is not to be found of Record, but is beyond memory, and the Law known only from practical proceeding and uſage in Courts of Juſtice, as may appear by many Laws made in the time of the Saxon Kings, of William the Firſt, and Henry the Firſt, yet extant in Hiſtory, which are now received as Common Law. So if by accident the Records of all Acts of Parliament now extant, none of which is elder than 9 H. 3. (but new Laws were as frequent before as ſince) ſhould be deſtroyed by fire, or other caſualty, the memorials of proceeding upon them found by the Records in Judicial proceeding, would upon like reaſon be accounted Common Law by Poſterity.

3. Publique Nuſances are not mala in ſe, but mala politica & introducta, though in ſome paſſages of Cokes Poſthuma's they are termed mala in ſe, becauſe prohibited at Common Law, which holds not for the reaſons before given: For liberty of High-ways ſtrangers have not in Foreign Territories, but by permiſſion, therefore not eſſential to Dominion, becauſe it may be lawfully prohibited. 2. Liberty of the High-ways is prohibited with us in the night, by the Statute of Wincheſter, in ſome ſeaſons of the year, and in times of warr, and for apprehenſion of Thiefs in time of Peace, &c. The Aſſiſe of Bread and Ale is conſtituted by Statute, and may be taken away. Foreſtalling the Market and ingroſſing hath like inſtitution; the firſt was prohibited by Athelſtan's Laws and William the Firſt's, and may be permitted by a Law; the ſecond is

Ant. 339. 335.

allowed

allowed by the late Laws when Corn is at a certain low price, quære the Law tempore Car. 2. the pulling down of Bridges wholly, or placing them in other places, may be done by a Law; and what may be, or not be, by a Law, is no malum in ſe, more than any other prohibitum by a Law is. Ant. 335. Ant. 339. 1 Levinz. 217.

Judgment was given by the Advice of the Judges in the *Kings Bench*, *Quod Querens nil Capiat*.

Mich. 25 *Car.* II. *C. B. Rot.* 253.

In a formedon in the Reverter.

John Bole Eſquire, and *Elizabeth* his wife, and *John Ely* Gent. and *Sarah* his wife, Demandants, againſt *Anne Horton* Widow, Tenant of

The Writ.

ONe Meſſuage, Thirty Acres of Land, Fifteen Acres of Meadow, Twenty Acres of Paſture, and of the third part of One Meſſuage, One hundred and forty Acres of Land, Four and forty Acres of Meadow, Eighty three Acres of Paſture with the Appurtenances in Tickhill and Wellingly, which William Veſcy Gent. Grand-father of the ſaid Elizabeth and Sarah, whoſe Coheirs they are, gave to John Veſcy, during the life of the ſaid John, and after the deceaſe of the ſaid John, to the heirs males of the body of the ſaid John begotten, and for default of ſuch iſſue to Robert Veſcy, and the heirs males of his body begotten, and for default of ſuch iſſue to William Veſcy, ſon of the ſaid William the Grandfather, and to the heirs males of his body begotten, and for default of ſuch iſſue to Matthew Veſcy, and the heirs males of his body begotten: And which, after the death of the ſaid John, Robert, William the Son, and Matthew, to the ſaid Elizabeth and Sarah, Coſins and Coheirs of the ſaid William the Grand-father, that is to ſay Daughters and Coheirs of the ſaid John, Son and Heir of the ſaid William the Grand-father, ought to revert by form of the ſaid gift, for that the ſaid John, Robert, William the Son, and Matthew, are dead, without heirs males of their bodies lawfully begotten: Then counts that

The Count.

William the Grandfather was ſeis'd of the Premiſſes in demand in his Demeſne, as of Fee, and held the ſame in Soccage of the late King Charles, as of his Honour of Tickhill in the ſaid County, in free Soccage by fealty only, and ſo ſeis'd the Eight and twentieth day of November, 1628. at Tickhill aforeſaid, made his laſt Will in writing, and thereby deviſed the ſaid Lands to the ſaid John Veſcy for life, and after to the heirs males of his body begotten: And for default of ſuch iſſue, to Robert Veſcy, and the heirs males of his body; and for default

of

of ſuch iſſue, to William Veſcy the Son, and the heirs males of his body; and for default of ſuch iſſue, to Matthew Veſcy, and the heirs males of his body; and after the Six and twentieth of December, 1628. at Tickhill aforeſaid, died ſo ſeis'd. And the ſaid John, after his death entred, and was ſeis'd by force of the ſaid gift, and died ſo ſeis'd without heir male of his body.

After the death of John, Robert entred by vertue of his ſaid Remainder, and was ſeis'd accordingly, and ſo ſeis'd, died without heir male of his body, after whoſe death William entred by vertue of his ſaid Remainder, and was ſeis'd accordingly; and he being ſo ſeis'd, Matthew died without heir male of his body, and after the ſaid William died ſeis'd of the premiſſes without heir male of his body: After the death of which William the Son, for that he died without heir male of his body begotten, the right of the Premiſſes reverts to the ſaid Elizabeth and Sarah, who, together with their ſaid Husbands, demand as Coſens and Coheirs of the ſaid William the Grandfather, that is to ſay, Daughters and Coheirs of the ſaid John, Son and Heir of the ſaid William the Grandfather, and which after the death of the ſaid John, Robert, William, and Matthew, for that they died without any heir male of their bodies, ought to revert to them.

The Tenant Anne for Plea ſaith, That the ſaid William, whoſe Coſens and Coheirs the ſaid Elizabeth and Sarah are, by his Deed dated the Seventh of November, 1655. in conſideration of a marriage to be ſolemnized between him and Anne the now Tenant, then by the name of Anne Hewett, and of 1200 l. marriage Portion, and for a Joynture for the ſaid Anne, and in ſatisfaction of all Dower, ſhe might claim out of his Lands; And for ſettling the ſaid Lands upon the iſſue and heirs of the ſaid William, to be begotten of her the ſaid Anne, The Barr

Infeoffed James Lane and John Lane Gentlemen, of the ſaid Premiſſes, Habendum to them, their heirs and aſſigns for ever, To the uſe of the ſaid William Veſcy the Feoffor and his aſſigns, for term of his life, without impeachment of Waſte, and after to the uſe of the ſaid Anne the Tenant (if the Marriage ſucceeded between them) for term of her life for her Joynture, and after her deceaſe to the uſe of the heirs males of his body on her body begotten for ever; and for want of ſuch iſſue, to the uſe of the heirs females of him the ſaid William Veſcy upon her body begotten; and for want of ſuch iſſue, to the uſe of the

right

right heirs of him the ſaid William Veſcy; And bound him and his heirs to warrant the premiſſes as aforeſaid, to the ſaid Feoffees and their Heirs, to the uſes aforeſaid.

By vertue whereof, and of the Statute of Uſes, the ſaid William was ſeis'd for term of his life, with the Remainder over as aforeſaid: And after the ſaid marriage was had and ſolemnized between him and the Tenant Anne.

That William died ſo ſeis'd without any iſſue of his body, and Anne ſurviv'd him, and entred, and by vertue of the ſaid Feoffment and the Statute of Uſes, is ſeis'd in her Demeſne as of Freehold for term of her life.

And that the ſaid warranty of the ſaid William deſcended from him to the ſaid Elizabeth and Sarah, as Coſins and Coheirs of him the ſaid William the Son, that is to ſay, Daughters and Coheirs of John Veſcy, Brother and Heir of the ſaid William the Son, and demands Judgment if againſt the ſaid Warranty the Demandants ſhall be received to demand, and avers her ſelf, and Anne Hewet named in the Feoffment, to be the ſame perſon.

The Replication. The Demandants reply, and confeſs the Feoffment to uſes of William, as is pleaded in Barr to Lane and Lane, and their heirs, with warranty: But further ſay, That the ſaid William Veſcy the Son, after, that is the Four and twentieth of December, 14 Car. 2. at Tickhill aforeſaid, died without any iſſue of his body, which they are ready to aver, and demand Judgment if they ſhall be barred of their Action againſt the ſaid Anne by the ſaid Feoffment and warranty.

The Rejoynder. Anne the Tenant rejoyns that the Replication is inſufficient, and demurs thereupon.

The matter of the Replication is all ſet forth in the Defendants Plea in Barr, but only the time of William Veſcy's death, which was not material, upon which the Demandants ought to have demur'd, and not to have replyed impertinently.

The

The Caſe upon the Pleading.

William Veſcy ſeis'd of the Land in queſtion in his Demeſne. as of Fee, held of King Charles the Firſt, in free Soccage, as of his Honour of Tickhill, by his laſt Will and Teſtament devis'd the ſame to John Veſcy his eldeſt Son, and the heirs males of his body; and for default of ſuch to Robert Veſcy, and the heirs males of his body; and for default of ſuch to William Veſcy his Son, and the heirs males of his body; and for default of ſuch to Matthew Veſcy, and the heirs males of his body, and died. Then John entred, and died ſeis'd without iſſue male, leaving two daughters, Elizabeth and Sarah, now Demandants, together with their Husbands.

After his death Robert entred, and died ſeis'd, without iſſue male.

Then William entred, and was ſeis'd, and Matthew, in the life of William, died without iſſue male.

William, by his Deed Indented in Conſideration of an intended marriage with Anne the now Tenant, and for other Conſiderations, infeoffed James Lane and John Lane, Habendum to them and their Heirs, to the uſe of William the Feoffor, for term of his life, and after to the uſe of Anne Hewet, now the Tenant, for her life; then to the uſe of the heirs males of his body upon her begotten; and for default of ſuch, to the uſe of the heirs females of his body on her begotten; and for default of ſuch, to the uſe of his right Heirs: And bound him and his Heirs to warrant to the ſaid Feoffees and their Heirs.

William, by vertue of the ſaid Feoffment, and of the Statute of Uſes, was poſſeſſed, and after he married the now Tenant, and died ſeis'd, as of his Freehold, without any iſſue of his body.

After his death, Anne his wife, now Tenant, by vertue of the ſaid Feoffment, and Statute of Uſes, entred and was poſſeſſed.

Againſt whom, Elizabeth and Sarah, Daughters and Coheirs of John Veſcy, and Coſins and Coheirs of William the Deviſor, bring their Formedon in the Reverter

Anne

Anne, the Tenant in possession, would rebutt and barr them by the said warranty of William Vescy the Son, whose Cosins and Coheirs they are (videlicet) the Daughters and Coheirs of John, eldest Brother of the said William.

And whether the said Anne Tenant by the said Feoffment and Statute of Uses, can rebutt them by the said warranty, is the general Question.

For Resolution of which I must make these previous Questions.

The first is, If before the Statute of 27 H. 8. to Uses, Tenant in tayl had made a Feoffment in Fee to uses with warranty to the Feoffees and their Heirs, such Feoffees, in a Formedon in the Reverter, brought against them by the Heirs of the Donor, could have rebutted and barr'd them by the warranty of the Tenant in tayl? Post 365.

For if the Feoffees to use in such case could not have barr'd the Heirs of the Donor before the Statute by the warranty, it is evident the Cestuy que use, since the Statute, cannot barr them; for he can have no more power since the Statute, than the Feoffees to use had before the Statute by the warranty.

I put the Case before the Statute, for clearnes sake only; for though since the Statute there are Feoffees to use as before, yet no question can be made upon their rebutter by a warranty, because the Estate is out of them by the Statute as soon as it is in them.

And as to this, the Case in effect is no more than, Whether the warranty of Tenant in Tayl (which must be admitted to be a Collateral warranty) descending upon the Donor, or his Heirs, will barr him or them of the Reversion.

The second Question I make, admitting the Heirs of the Donor to be barr'd by the warranty of Tenant in Tayl, descending upon them, is, Whether after the Statute of Uses, the Cestuy que use can have any benefit of the warranty granted to the Feoffees to use, either by way of Voucher or Rebutter? Because the Cestuy que use is not in possession in the per by the Feoffees, but by the Statute of Uses. Post 384. Mod. 192.

The third Question is, admitting generally that the Cestuy que use shall have benefit of the warranty made to the Feoffees to use, Whether yet in this Case, Anne the Tenant being a Cestuy que use, shall have benefit of the warranty made to the Feoffees? Because neither William, the first Cestuy que use, nor his Heir, the last Cestuy que use, in the Case could, nor can have any benefit of this warranty, because William, the first Cestuy

Ceſtuy que uſe, nor his Heir, could not, nor can warrant to himſelf; but as to William and his Heirs, the warranty is clearly extinct.

The Argument.

And as to the firſt Queſtion, I conceive the Law to be that the warranty of William, the Tenant in tayl, deſcending upon Elizabeth and Sarah the Demandants, his Heirs at Law, is no barr in the Formedon in Reverter brought by them, as Heirs to William their Grandfather, the Donor, though it be a Collateral warranty. Ant. 364.

I know it is the perſwaſion of many profeſſing the Law, That by the Statute of Weſtminſter the ſecond, De donis conditionalibus, the Lineal warranty of Tenant in tayl ſhall be no barr in a Formedon in the Deſcender, but that the Collateral warranty of Tenant in tayl is at large, as at the Common Law unreſtrain'd by that Statute.

Sir Edward Coke, in his Comment upon Section 712. of Littleton, A lineal warranty doth not bind the right of an Eſtate tayl, for that it is reſtrain'd by the Statute de donis Conditionalibus: And immediately follows, A lineal warranty and aſſets is a barr of the right in tayl, and is not reſtrain'd. Sect. 712. Co. Litt. 374

But the reaſon why the warranty of Tenant in tayl, with Aſſets, binds the right of the Eſtate tayl, is in no reſpect from the Statute de donis, but is by the Equity of the Statute of Gloceſter, by which the warranty of Tenant by the Courteſie barrs not the Heir, for the Lands of his Mother, if the Father leave not Aſſets to deſcend in recompence.

And therefore it was conceived, after the Statute de donis was made, That if Tenant in tayl left Aſſets to deſcend in Feeſimple, his warranty ſhould bind the right of the Iſſue in tayl by the equity of that preceding Statute of Gloceſter.

Whereas if the Statute of Gloceſter had not been, the Lineal warranty of Tenant in tayl had no more bound the right of the Eſtate tayl by the Statute de donis, with Aſſets deſcending, than it doth without Aſſets.

For the better clearing therefore of the Law in the Caſe in queſtion, I ſhall preparatorily aſſert ſome few things, and clear what I ſo aſſert, without which the truth of the Concluſion I hold, will not appear ſo naked to the Hearers as it ſhould.

Aſſ. 1. The firſt is, That at the Common Law the diſtinction of a lineal and collateral warranty was uſeleſs and unknown: For though what we now call a Collateral and a lineal warranty might be in ſpeculation and notionable at the Common Law, as at this day a Male warranty, or a Female warranty may be, yet as to any effect in Law, there was no difference between a Lineal warranty and a Collateral; but the warranty of the Anceſtor deſcending upon the Heir, be it the one or the other, did equally bind. And this, as it is evident in it ſelf, ſo is it by Littleton, whoſe words are,

Litt. Sect. 697. Before the Statute of *Gloceſter*, all warranties which deſcended to them, who are Heirs to thoſe who made the warranties, were barrs to the ſame Heirs to demand any Lands or Tenements againſt the warranties, except the warranties which commence by diſſeiſin.

Therefore, if a Queſtion had been at the Common Law only, Whether in ſome particular Caſe the Anceſtors warranty had bound the Heir? It had been a ſenſleſs Anſwer to ſay it did, or did not, becauſe the warranty was Lineal or Collateral, for thoſe warranties were not defined at the Common Law, nor of uſe to be defined: But the proper Anſwer had been, That the warranty did bind the Heir, becauſe it commenc'd not by diſſeiſin; for every warranty of the Anceſtor, but ſuch deſcending upon the Heir did bind him.

So if after the Statute of Gloceſter, Tenant by the Courteſie had alienedwith warranty, had it been demanded, if the Heir were barr'd by that warranty, it had been an abſurd Anſwer, That he was not, becauſe it was a Collateral warranty of his Father, without Aſſets: For all Collateral warranties of the Father were not reſtrained, but his warranty in that Caſe (which could be no other than Collateral) was reſtrained by the Statute. Therefore

The adequate Anſwer had been, That the Fathers warranty bound not in that Caſe, without Aſſets, becauſe the Statute of Gloceſter had ſo reſtrained it.

By ſecond Aſſertion is, That the Statute de Donis reſtrains not the warranty of Tenant in tayl from barring him in the Remainder in tayl by his warranty deſcending upon him. Aſſ. 2. Poſt 377.

1. For that the miſchief complained of, and remedied by the Statute, is, That in omnibus prædictis caſibus therein recited, poſt prolem ſuſcitatam habuerunt illi quibus Tenementum ſic conditionaliter datum fuit hucuſque poteſtatem alienandi Tenementum ſic datum, & exhæredandi exitum eorum contra voluntatem Donatoris. But the warranty of the Donee in tayl deſcending upon him in the Remainder, who regularly claims by purchaſe from the Donor, and not by deſcent from the Donee in tayl, could be no diſinheriting of the Iſſue of the Donee, claiming by deſcent from him, againſt which diſinheriting only the Statute provides, which is evident by the Writ of Formedon in the Deſcender, framed by the Statute in behalf of ſuch Iſſue of the Donee, whom the Statute intends.

2. The Statute did not provide againſt Inconveniences or Miſchiefs which were not at the time of making the Statute, but againſt thoſe which were. But at the making of it there could be no Remainder in tayl, becauſe all Eſtates, which are Eſtates tayl ſince the Statute, were Fee-ſimples Conditional before the Statute, upon which a Remainder could not be limited. Poſt 369.

So is Sir Edward Coke in his Comment upon the Statute de Donis, The Formedon in Reverter did lye at Common Law, but not a Formedon in Remainder upon an Eſtate tayl, becauſe it was a Fee-ſimple Conditional, whereupon no Remainder could be limited at Common Law, but after the Statute it may be limited upon an Eſtate tayl, in reſpect of the Diviſion of the Eſtates. Cok. part. 2. f. 336.

3. The Statute formed a Writ of Formedon in the Deſcender for the new Eſtate tayl created by the Statute, and mentions a Formedon in the Reverter, as already known in the Chancery, for the Donor, for whom the Statute likewiſe intended to provide, but formed or mentioned none for the Remainder in tayl.

And the Caſes are common in Littleton, and in many other Books, that the warranty of Donee in tayl, is Collateral to him in the Remainder in tayl, and binds as at the Common Law. Litt. Sect. 716. 718, 719.

But thence to conclude, That therefore the warranty of the Donee in tayl ſhall barr the Donor of his Reverſion, becauſe it is a Collateral warranty alſo, is a groſs Non ſequitur; for the Donees warranty doth not therefore barr the Remainder, becauſe it is a Collateral warranty, but becauſe the Statute de donis doth not reſtrain his warranty, from barring him in the Remainder, as hath been clear'd, but leaves it as at Common Law, but it doth reſtrain his warranty from barring him in the Reverſion, as ſhall appear.

There is one Caſe in Littleton remarkable for many Reaſons, where the warranty of Tenant in tayl is lineal, and not collateral, to the perſon in Remainder, and therefore binds not if the Caſe be Law (as may be juſtly doubted) as Littleton is commonly underſtood.

Poſt 369.

Litt. Sect. 719. Land is given to a man, and the heirs males of his body, the Remainder to the heirs females of his body; and the Donee in tayl makes a Feoffment in Fee with warranty, and hath Iſſue a Son and a Daughter, and dieth, this warranty is but a lineal warranty to the Son to demand by a Writ of formedon in the Deſcender; and alſo it is but lineal to the Daughter to demand the ſame Land by a Writ of Formedon in the Remainder, unleſs the Brother dieth without Iſſue male, becauſe ſhe claimeth as Heir female of the body of her Father engendred. But if her Brother releaſe to the Diſcontinuee with warranty, and after dye without Iſſue, this is a collateral warranty to the daughter, becauſe ſhe cannot conveigh the right which ſhe hath to the Remainder, by any means of deſcent by her brother.

1. Here the warranty of the Father, Donee in tayl, is but lineal to the Daughter in Remainder in tayl; But ſhe claims, ſaith the Book, her Remainder as heir female of the body of the Donee in tayl, which differs the Caſe from other perſons in Remainder of an Eſtate tayl: But of this more hereafter.

2. And by the way, in this Caſe Sir Edward Coke, though he hath commented upon it, hath committed an over-ſight of ſome moment, by uſing a Copy that wanted a critical emendation: For where it is ſaid, That the warranty of the Father is but lineal to the Daughter, to demand the Land by a Formedon in the Remainder, unleſs the Brother dye without Iſſue male, becauſe ſhe claims as Heir female of the body of her Father. By which reading and contert the ſenſe muſt be, That if the Son dye without Iſſue male of his body, then the warranty of the Father is not lineal to the Daughter, cujus contrarium eſt verum, for ſhe can claim her Remainder as heir female of the body of her Father,

ther, and thereby make the Fathers warranty lineal to her, but only becauſe her Brother died without Iſſue male.

That which deceived Sir Edward Coke to admit this Caſe as he hath printed it, was a depraved French Copy thus, Si non frere devyaſt ſans Iſſue male, which truly read, ſhould be, Si ſon frere devyaſt; and the Tranſlation ſhould be, Not unleſs the Brother dye without Iſſue male, but, If her Brother dye without Iſſue male.

Another reaſon is that his French Copy was depravd, Becauſe the French of it is, Si non frere devyaſt ſans Iſſue male, which is no Language, for that rendred in Engliſh, is, Unleſs Brother dye: For it cannot be rendred as he hath done it, unleſs the Brother dye, without the French had been, Si non le frere devyaſt, and not Si non frere devyaſt.

Sir Edward Coke's firſt Edition of his Littleton, and all the following Editions, are alike falſe in this Section. I have an Edition of Littleton in 1604. ſo depravd which was long before Sir Edward Coke publiſht his; but I have a right Edition in 1581. which it ſeems Sir Edward Coke ſaw not, where the Reading is right, Si ſon frere devyaſt ſans Iſſue male: Therefore you may mend all your Littletons, if you pleaſe, and in peruſing the Caſe, you will find the groſſneſs of the falſe Copies more clearly than you can by this my Diſcourſe of it.

And after all, I much doubt whether this Caſe, as Littleton is commonly underſtood, that is, That this lineal warranty doth not bind the Daughter without Aſſets deſcending, be Law; my reaſon is, for that no Iſſue in tayl is defended from the warranty of the Donee, or Tenant in tayl, but ſuch as are inheritable to the Eſtates intended within that Statute, and no Eſtates are ſo intended but ſuch as have been Fee-ſimple Conditional at the Common Law. Ant. 368.

And no Eſtate in Remainder of an Eſtate tayl, that is of a Fee Conditional, could be at Common Law. Ant. 367.

All Iſſues in tayl, within that Statute, are to claim by the Writ there purpoſely formed for them, which is a Formedon in the Deſcender, not in Remainder.

3. A third thing to be cleared, is, That the Statute de Donis did not intend to preſerve the Eſtate tayl for the Iſſue, or the Reverſion for the Donor abſolutely againſt all warranties that might barr them, but only againſt the Alienation, with, or without warranty of the Donee and Tenant in tayl only; for if it had

had intended otherwiſe, it had reſtrain'd all Collateral warranties of any other Anceſtor, from binding the Iſſue in tayl, which it neither did, nor intended, though well it might, ſuch warranters having no title.

4. The Statute de Donis did not intend to reſtrain the Alienation of any Eſtates, but Eſtates of Inheritance upon Condition expreſſed or implyed, ſuch as were Fee-ſimples Conditional at Common-Law; And therefore if Tenant for life aliened with warranty which deſcended upon the Reverſioner, ſuch Alienation or Warranty were not reſtrained by this Statute, but left at Common Law;

1. Becauſe the Eſtate aliened was not of Inheritance upon Condition within that Statute.

2. He in the Reverſion had his remedy by entring for the forfeiture upon the Alienation, if he pleas'd, which the Donors of Fee-ſimples Conditional could not do.

Theſe things cleared, I think it will be moſt manifeſt by the Statute de donis, and all ancient Authority, That the warranty of Tenant in tayl, though it be a Collateral warranty, will not barr the Donor, or his Heir, of the Reverſion.

After the Inconvenience before recited, That the Donees diſinherited their Iſſue againſt the form of the Gift; then follows,

Et præterea cum deficienti exitu de hujuſmodi Feoffatis, Tenementum ſic datum ad donatorem vel ad ejus hæredes reverti debuit per formam in Charta de dono hujuſmodi expreſſam, licet exitus, ſi quis fuerit obiiſſet per factum tamen, & Feoffamentum eorum quibus Tenementum ſic datum fuit ſub conditione excluſi fuerunt hucuſque de Reverſione eorundem Tenementorum quod manifeſte fuit contra formam doni.

Hitherto the Inconveniences and Miſchiefs which followed the Iſſue of the Donees, and to the Donor, when they fail'd by the Donees power of Alienation, are only recited in the Statute, without a word of reſtraint or remedy.

Then follows the remedy and reſtraint in theſe words only, and no other.

Propter quod Dominus Rex perpendens quod neceſſarium, & utile eſt in prædictis caſibus (which comprehends both Inconveniences) apponere remedium, Statuit quod voluntas donatoris ſecundum formam in Charta Doni ſui manifeſte expreſſam de cætero obſervetur, ita quod non habeant illi quibus Tenementum ſic datum fuit ſub conditione poteſtatem alienandi Tenementum ſic datum, quo minus ad exitum illorum quibus Tenementum ſic fuerit datum, remaneat

remaneat poſt eorum obitum, vel ad donatorem, vel ad ejus hæredes, ſi exitus deficiat, revertatur. Per hoc quod nullus ſit exitus omnino, vel ſi aliquis exitus fuerit, & per mortem deficiet, hærede de corpore hujuſmodi exitus deficiente.

1. By theſe words the Donee or Tenant in Tayl is reſtrained from all power of alienation, whereby the Lands intail'd may not deſcend to the Heir in tayl after his death.

Therefore,

By theſe words he is reſtrained from alienation with warranty, which doubtleſs would hinder the Land ſo to deſcend, if it were not reſtrained by the words of the Statute.

2. By the ſame words the Donee in tayl is reſtrained from all power of alienation, whereby the Land intail'd may not revert to the Donor for want of Iſſue in tayl.

Therefore,

By thoſe words he is reſtrained from ſuch alienation with warranty, whereby the Lands may not revert to the Donor, or his Heirs, for want of Iſſue in tayl.

For the ſame words of the Statute muſt be of equal power and extent to reſtrain the Donees alienation from damaging the Donor, as from damaging the Iſſue in tayl. Otherwiſe,

3. Words in an Act of Parliament, That A. ſhould have no power to hurt the right of B. nor the right of C. muſt ſignifie that A. ſhall have no power to hurt the right of B. but ſhall have ſome to hurt the right of C. which is that A. by his warranty ſhall not harm B. but may by his warranty harm C.

4. If it be ſaid, The Statute reſtraining not the alienation by warranty as to the Iſſue in tayl, the Iſſue would have no benefit by the Statute; For it is as eaſie for the Donee or Tenant in tayl to alien with warranty (and ſo to deprive the Iſſue of all benefit of the Statute) as to alien without warranty.

But his warranty can ſeldom deſcend upon the Donor, and therefore cannot be ſo hurtful to him as to the Iſſue in tayl. How doth this ſatisfie the equal reſtraint of the Statute from harming the Donor or the Iſſue in tayl? For, Poſt 373.

This Logick and Reaſoning is the ſame as to ſay, A. by expreſs words is reſtrained from beating B. or beating C. but A. hath more frequent opportunities of beating B. than of beating C. Therefore the ſame words reſtrain A. from beating B. at all.

But

But not from beating C. when opportunity is offered.

5. In the next place, admit the words of reſtraint in the Statute de donis had been, Rex Statuit quod voluntas donatoris in Charta doni ſui expreſſa de cætero obſervetur, ita quod non habeant illi quibus Tenementum ſic fuit datum ſub Conditione poteſtatem alienandi Tenementum ſic datum per Warrantiam, vel aliter, quo minus ad exitum eorum remaneat vel ad donatorem revertatur.

It had then been clear to every underſtanding, That the warranty of the Donee or Tenant in tayl, by the expreſs words of the Statute, did neither barr the Donor, nor the Iſſue in tayl (for words more expreſs were not inventable to reſtrain the Donees warranty from barring them) and then obſerve what conſequents had been rightly deduc'd from ſuch reſtraint made by the Statute.

The Statute expreſly reſtrains the warranty of Tenant in tayl from barring his Iſſue, whence it follows, That by the Statute the Iſſue in tayl is not barr'd by the Lineal warranty of Tenant in tayl, becauſe his warranty upon the Iſſue in tayl cannot poſſibly be any other than a Lineal warranty.

It might be ſaid in like manner, the Statute de donis reſtrains the warranty of Tenant in tayl from barring the Donor, or his Heir of the Reverſion, the conſequent thence deducible had been, That the Statute had reſtrained the Collateral warranty of Tenant in tayl from barring the Donor, or his Heirs; becauſe his warranty falling upon the Donor, or his Heir, could be no other than a Collateral warranty.

Now it is true, the word (warranty) is not in ſyllables within the reſtraint of the Statute, but is neceſſarily implied in it, elſe the Iſſue in tayl would be barr'd by the warranty of Tenant in tayl, without Aſſets, contrary to all the Current of our Books from the making of the Statute.

But thoſe general words of the Statute reſtraining the Donees power of alienation in expreſs terms, equally & pari paſſu for the benefit of the Donor, as for the benefit of the Iſſue in tayl, can never be underſtood to reſtrain the warranty of Tenant in tayl only for the benefit of the Iſſue in tayl, but not at all for the benefit of the Donor, but the Statute muſt neceſſarily reſtrain his warranty indefinitely from hurting either, and by conſequent his Lineal warranty is reſtrained from hurting the Iſſue, and his Collateral warranty from hurting the Donor,

Donor, to whom his warranty can never be but Collateral, as it can never be but Lineal to the Iſſue in tayl.

And if it be neceſſarily underſtood and implyed in the Statute, the operation muſt be the ſame as if it had been ſyllabically inſerted in the Statute.

Then to ſay by the reſtraint of the Statute, the Donees have not power to alien the Land intayl'd, quo minus ad exitum illorum remaneat poſt eorum mortem; but they have power to alien quo minus ad donatorem revertatur deficiente exitu, is to make the Statute contradictory to it ſelf; which ſaith,

Non habeant de cætero poteſtatem alienandi quo minus ad exitum illorum remaneat vel ad donatorem, vel ejus hæredes revertatur deficiente exitu.

6. Again, if the Statute had provided only for indempnity of the Iſſue in tayl, omitting the Donor and his Heirs, by the words, Non habeant de cætero poteſtatem alienandi quo minus Tenementum ſic datum ad exitum illorum remaneat poſt obitum eorum. The Donees warranty had been reſtrain'd (as it is) to barr the Iſſue.

And if it had only provided for the Indempnity of the Donor and his Heirs, omitting the Iſſue, by the words, Non habeant poteſtatem alienandi quo minus Tenementum ſic datum ad Donatorem vel ad ejus hæredes revertatur deficiente exitu, muſt not his warranty have been reſtrain'd from barring the Donor and his Heirs in like manner?

Why then the reſtraint reaching to both (Iſſue and Donor) muſt not both have like benefit of it?

And for further Anſwer to that thin Objection, That the Statute did not provide againſt the Donees warranty, falling on the Donor or his Heirs, becauſe it can fall on them but ſeldom, and that Laws provide againſt ills quæ frequentius accidunt. Ant. 371.

It is true, when the words of a Law extend not to an inconvenience rarely happening, and do to thoſe which often happen, it is good reaſon not to ſtrain the words further than they reach, by ſaying it is caſus omiſſus, and that the Law intended quæ frequentius accidunt.

But it is no reaſon, when the words of a Law do enough extend to an inconvenience ſeldom happening, that they ſhould not extend to it as well as if it happened more frequently, becauſe it happens but ſeldom. For,

By that Reaſon, if Lands be given to a man, and the Heirs of his body, his warranty ſhould not barr the Iſſue in tayl within the meaning of the Statute, becauſe there his warranty muſt always fall upon the Iſſue in tayl; but if given to him, and the Heirs females of his body, it ſhould barr, becauſe it falls leſs frequently upon ſuch Heir female, which is abſurd.

7. The Statute further commands, That the Donors Will be obſerved, according to the form of his Gift expreſſed in his Charter, which was that if the Donee died without Iſſue, the Land ſhould return to the Donor or his Heirs. Therefore ſuch alienation is forbid which hinders the return of it according to the Charter, and conſequently alienation with warranty is forbid.

I add, That the makers of the Statute well underſtood the uſe of reſtraining the Donees warranty from hurting the Donor, or the Iſſue in tayl, but not poſſibly the uſe of reſtraining his Lineal or Collateral warranty, which were terms then uſeleſs and unknown, and therefore not in their proſpect at all.

I ſhall now a little reſume my former reaſoning, for more clearing of this point.

If immediately after the Statute de Donis, Tenant in tayl had made a Feoffment in Fee with warranty, which deſcended upon the Iſſue in tayl, if it had been demanded, Whether that warranty barr'd the Iſſue in a Formedon in the Deſcender, it had been an unintelligible Anſwer to have ſaid in that Age, That it did not barr the Iſſue in tayl, becauſe it was a Lineal warranty; for that had been to anſwer an Ignotum per multo ignotius, than which nothing is more irrational.

But the clean Anſwer had been, That the Donees power of Alienation was reſtrained in general by the Statute de Donis, and therefore his Alienation by warranty, and conſequently his warranty, could not barr the Iſſue in tayl.

In like manner if Tenant in tayl had been with the Remainder over, ſoon after the Statute (as then it might be) and he had made a Feoffment in Fee with warranty, and dyed, and the warranty had deſcended upon him in the Remainder;

If it had been demanded then, Whether that warranty did barr him in the Remainder? It had been an Anſwer not to be underſtood to have ſaid, That it did barr him, becauſe it was a Collateral warranty.

But the right Answer had been, That it was the warranty of the Ancestor, descending upon the Heir, and was not restrained within the Statute de Donis, and therefore must bind him in the Remainder of Common Course.

So as the Doctrine of the binding of Lineal and Collateral warranties, or their not binding, is an Extraction out of mens brains, and Speculations, many scores of years after the Statute de Donis.

And if Littleton (whose memory I much honour) had taken that plain way in resolving his many excellent Cases in his Chapter of warranty, of saying the warranty of the Ancestor doth not bind in this Case, because it is restrained by the Statute of Gloucester, or the Staute de Donis, and it doth bind in this Case, as at the Common Law, because not restrain'd by either Statute (for when he wrote there were no other Statutes restraining warranties, there is now a third 11 H. 7.) his Doctrine of warranties had been more clear and satisfactory than now it is, being intricated under the terms of Lineal and Collateral; for that in truth is the genuine Resolution of most, if not of all his Cases: For no mans warranty doth bind, or not, directly, and a priori, because it is Lineal or Collateral; for no Statute restrains any warranty under those terms; from binding, nor no Law institutes any warranty in those terms, but those are restraints by consequent only from the restraints of warranties made by Statutes. Post 377.

Objections.

On the other side was urg'd Sir Edward Coke's Opinion upon Sect. 712 of Littleton, and his Comment upon the Statute de Donis (which is but the quoting of his Littleton) where his words are,

The warranty of the Donee in tayl, which is Collateral to the Donor or him in Remainder being heir to him, doth bind them without any Assets: For though the Alienation of the Donee, after Issue, doth not barr the Donor (which was the Mischief provided for by the Act) yet the warranty being Collateral, doth barr both of them, because the Act restrains not that warranty, but it remaineth at Common Law. Cok. Litt. Sect. 712.

Theſe words may have a double meaning, though the alienation of the Donee doth not barr the Donor (which was the Miſchief provided for by the Act) yet the warranty being Collateral doth barr.

If the meaning be, That the warranty is a thing Collateral to the Alienation againſt which proviſion was made, and therefore the warranty was not reſtrained, but the Alienation was.

By the ſame reaſon, and in the ſame words, it may be ſaid, The Alienation of the Donee doth not barr the Iſſue in tayl (which was the Miſchief provided for by the Act) yet his warranty, which is a thing Collateral to the Alienation, doth barr, becauſe it remains at Common Law.

So as this Reaſon concludes equally, That the Lineal warranty of Donee in tayl ſhould barr his iſſue, as that his Collateral warranty ſhould barr the Donor.

Another meaning of his words may be, having firſt aſſerted that the Collateral warranty of the Donee doth barr the Donor deſcending upon him, and giving the reaſon of it, he gives no other but this, For though the Alienation of Donee in tayl doth not barr him, yet the warranty, being a Collateral warranty, doth barr him; which is idem per idem, and the ſame as if he ſaid, The Collateral warranty of Donee in tayl doth barr the Donor and him in Remainder; for the warranty being Collateral doth barr both of them; which is no reaſon of his Aſſertion, but the ſame Aſſertion over again. And where it follows, For the Act reſtraineth not that warranty, viz. the Collateral, no more doth the Act reſtrain the Lineal warranty in expreſs terms, or by any Periphraſis, more than it doth the Collateral, but reſtrains all power of Alienation in prejudice of the Iſſue or Donor, and conſequently the power of Aliening with warranty to the hurt of either.

2. The ſecond thing objected was Littleton's own Authority in the ſame Sect. 712. his words are,

He that demandeth Fee-tayl by Writ of Formedon in Deſcender, ſhall not be barr'd by Lineal warranty, unleſs he hath Aſſets by deſcent in Fee ſimple by the ſame Anceſtor that made the warranty. But ſaith not he that demandeth Fee-tayl by Formedon in Remainder, ſhall not be barr'd, quod nota as to the Caſe, Sect. 719. But Collateral warranty is a barr to him that demandeth Fee, and alſo to him that demandeth Fee-tayl, without any other deſcent of Fee-ſimple. Whence it was concluded, That the

the Collateral warranty muſt barr the Donor without Aſſets, who demands a Fee-ſimple. But

Littleton's words end not there, but immediately follow, Except in Caſes which are reſtrain'd by the Statutes, in the plural number; which words taken in, as Littleton's Caſe is, make his Authority direcly for me.

For when Littleton wrote, there were but two Statutes which reſtrain'd any warranty from binding, as at Common Law, namely the Statute of Gloceſter, and Weſtminſter the ſecond, de Donis; now there is a third, 11 H. 7. c. 20. Ant. 375.

So as thoſe words of Littleton are the ſame as if he had ſaid, Except in Caſes reſtrain'd by the Statutes of Gloceſter and Weſtminſter the ſecond, de Donis.

Whence it follows; That by Littleton both Statutes did reſtrain ſome Collateral warranties, but the Statute de Donis reſtrains no other than the Collateral warranty of the Donee deſcending upon the Donor, it leaving all other Collateral warranties as at the Common Law. Ergo it doth reſtrain that, which is the ſolution of the Queſtion, and according to Littleton.

I have examined ſeveral Editions of Littleton, and the words are the ſame in all, Si non in Caſes reſtrained per les Eſtatutes.

No man will ſay, that by thoſe words, Except in Caſes reſtrained by the Statutes, Littleton meant Statutes that were not then made, nor perhaps never would be.

For that were to make him ſay in inſtructing his Son (for, and to whom he writ his Books) what the Law was.

But a Collateral warranty doth bind both for Fee and Fee-tayl, except in Caſes reſtrain'd by Statutes, yet to be made, and which perhaps never will be made: Beſides the words reſtrain'd per les Eſtatutes by the Statutes, always denote Statutes which ſignally are, and not which are not.

3. The third Objection was from Littleton, Sect. 716. where it is ſhewed the Collateral warranty of Tenant in tayl doth bind him in Remainder in tayl, which is agreed; for the Statute de Donis reſtrains not the warranty of Donee in tayl deſcending upon him in Remainder, as hath been cleared. Poſt 381. Ant. 367.

4 The fourth Objection was the Caſe of 41 Ed. 3. Fitz. tit. Garranty pl. 16. whence it was urg'd as Juſtice Herles Opinion, and by him ſpoken.

1. That

1. That he was at the making of the Statute de Donis.

2. That the makers of the Statute intended that the Donees warranty ſhould not barr a Donor ſtranger in blood to the Donee, but ſhould barr a Donor of kindred to the Donee.

This Caſe is of no Credit in ſeveral reſpects. For,

1. The Statute makes no ſuch difference of a Donor ſtranger, and a Donor privy in blood to the Donee as is urg'd in that Caſe.

2. The Statute is, That the Donors Will was to be obſerv'd, expreſſed in his Charter of Gift; and if a Donor were privy in blood, yet his will in his Charter might be the ſame as that of a ſtranger Donor, and was equally by the Statute to be obſerved.

3. The warranty of Donee in tayl could never deſcend upon a ſtranger Donor, for ſuch could never be his Heir, nor needed any help of the Statute againſt his warranty.

4. The Donor in Frank-marriage, who might be Coſen to either party married, and muſt be of kindred to one or both Donees, is expreſly named as a Donor, wronged by the Donees alienation in the Statute: Therefore a Donor of the Donees blood was within the remedy of the Statute.

5. Nor could this be Herle's Opinion in 41 E. 3. but in the Contexte of the Report Finchden ſaith, Il eſt dit in terms Comment Herle que fuit un Juſtic. dit que il fuit al feſanc del Stat. & dit as before.

And for that the name of Herle is written in the Report in large Letters, as the Judges Names uſe to be, it was miſtaken at the Barr, as if the Contexte had begun, Herle que fuit un Juſtic dit, which could not then be an Opinion of Herles. For if he were at the making of the Statute de Donis, 13 E. 1. he could not then be leſs than Four and twenty, or Five and twenty years old, and muſt have liv'd after until 41 E. 3. above Eighty years. But the truth is, he died in, or ſoon after, 7 E. 3.

So it is not Herle's Opinion, but Finchden ſaith, It is ſaid in Terms, that is of the Year Books, how Herle, who was a Juſtice, ſaid, he was at the making of the Statute which was made to redreſs the Miſchief to the Donor, who was a ſtranger; And therefore he ſaid that the Donor in the Caſe being no ſtranger, he ſaw no reaſon why he ſhould not be barr'd, being out of the

the miſchief of the Statute, but gave no Rule, but the Debate was adjourn'd.

Another Reaſon proving this, is, That it is ſaid, Herle que fuit un Juſtic, which no Reporter ever ſaid of a Juſtice at preſent, and reporting his Opinion.

What Finchden ſaid is grounded upon what he had heard was ſaid by Herle in former terms. But no ſuch Opinion of Herle's appears any where, but the contrary clearly in ſeveral places.

The Reporter, at the end of the Caſe, hath vid. 5 E.3. Opinion Herle que le warranty le Ten. in tayl, n'eſt pas barr al donor pour ceo que le ſtatut reherſe le miſchief quod Donatores fuerunt excluſi deReverſionibus hucuſque, & les heires diſherit, iſſint a reſtrainer tiel point fuit le ſtat. de Donis Conditionalibus fait quod voluntas donatoris obſervetur. Here is Herle's own Opinion expreſly contrary to what Finchden by hearſay only ſaid it was. 7 E.3.f. 34. Fitz. Garranty p. 44.

In another Caſe upon queſtion, Whether the warranty of Tenant in tayl barr'd him in Remainder? Herle ſaith, Le ſtatute voet que ceux as queux les Tenements ſont done, ne eient power de alienation quo minus il deſcendra al Iſſue, ou retorn al Donor, & in ceo point le ſtatute voet que le volunt del donor in omnibus obſervetur, mes le ſtatute ne parle riens de ceſtuy in le Remainder, and ſo rul'd. Fitz. 7 E. 3. f. 48. p. 46.

Here is the Opinion of Herle in another Caſe, That the warranty of the Donee in tayl barr'd not the Iſſue in tayl, nor the Donor, by the Statute, but barr'd him in Remainder, as not aided by the Statute.

In a queſtion, Whether the King were barr'd by the warranty of Tenant in tayl, his Anceſtor for a Reverſion deſcended to him, with Aſſets? Herle gives his Opinion as known Law then, Vous ſaves bien que de ley ceſtuy que demand per Formedon in Reverter, ne ſerra barr per le garranty, ceſtuy a que les Tenements fuerunt done in tayl, ſil ne eyt per deſcent, tout ſoit il heire a luy, & le quel Roy ad per deſcent ou non, ne poiomus enquire. And on this Caſe Sir Edward Coke makes an Obſervation, That the King was not bound by a Collateral warranty for the Reverſion of an Eſtate in tayl, no more is any other Donor, by that Caſe. Fitz. p. 61. Garranty. 6 E. 3. f. 56.

So

So as Sir William Herle's Judgment, who was then Chief Juſtice of the Common Pleas in three ſeveral years, and ſeveral Cales, was directly contrary to what Finchden, 41 E. 3. ſaid it was upon Report.

Beſides the contrary of what my Brother Ellis urg'd from this Cale, may be thus inferr'd out of it: This Cale admits that the Statute reſtrains the warranty of the Donee from barring ſome Donor, viz. a Donor ſtranger in blood, as was ſaid; for it reſtrains Alienation without warranty againſt all Donors, but the Statute did not reſtrain the Donees warranty from barring ſuch a Donor, for his warranty could never deſcend upon a ſtranger, and the Statute did not reſtrain a thing which could not be: Therefore, ex conceſſo, the Statute reſtrained the Donees warranty from barring the Donor of blood to the Donee.

7 E. 3. 34. p. 44. 5. The fifth Objection was a Cale 7 E. 3. that Tenant in tayl made a Feoffment in Fee, and died iſſuleſs, and the Feoffee rebutted the Donor by the warranty.

This Cale rightly underſtood is not to the purpoſe, for the Donor was not rebutted by the warranty of Tenant in tayl (which is the preſent queſtion) but by the Donors own warranty.

The Cale was, That A. gave Land to W. and E. his wife, Habendum prædictis *W.* & *E.* & hæredibus inter ſe legitime procreatis, and warranted thoſe Tenements to the ſaid W. & E. & hæredibus eorum ſeu aſſignatis. The Heir in tayl made a Feoffment in Fee, and died, leaving no Iſſue inheritable, and the Donor was rebutted in his Formedon in Reverter by his own warranty, having warranted to the Donee, his Heirs and Aſſigns, and the Feoffee claimed as Aſſignee. And it was adjudg'd againſt the Donor after in the ſame year, as appears 46 E. 3. f. 4. b. and there admitted good Law.

46 E. f. 4. b.

But Sir Edward Coke denies this Cale to be Law now, ſaying, That the warranty determined with the Eſtate tayl, to which it was firſt annexed; and doubtleſs it did ſo as to Voucher, but whether as to Rebutter of the Donor, the party rebutting having the Land, though another Eſtate in it, and deriving the warranty to himſelf, as Aſſignee, is not clear.

6. A ſixth Objection was made from a Caſe 27 E. 3. f. 83. of a Formedon in Reverter brought, and the Deed of Tenant in tayl, Anceſtor to the Demandant, ſhewed forth, but the Book mentions no warranty; but it is like it was a Deed with warranty, and the Plaintiff durſt not demurr, but traverſed the Deed, as any would avoid demurring upon the validity of an Anceſtor's Deed, when he was ſecure, there was no ſuch Deed of the Anceſtor. 27 E. 3. f. 83. pl. 42.

7. The laſt Objection was a Caſe 4 E. 3. f. 56. p. 58. where Tenant in tayl made a Feoffment with warranty, and the warranty deſcended upon him in the Remainder in tayl, which barr'd him, which is a Caſe agreed, as before: For the Statute of Weſtminſter the ſecond, provides not at all for him in Remainder; but as to him, Tenant in tayls warranty is left as at Common Law. 4 E. 3. f. 56. pl. 58. Ant. 377.

In 4 E. 3. a Formedon in the Deſcender was brought by the Iſſue in tayl, and the Releaſe of his elder Brother, with warranty, was pleaded by the Tenant Stoner, who gave the Rule in the Caſe: Le ſtatute reſtraynes le power del Iſſue in tayl, to alien in prejudice of him in the Reverſion, by expreſs words, and a Fortiori, the power of the Iſſue in tayl is reſtrain'd to alien in prejudice of the Iſſue in tayl. 4 E. 3. f. 28. pl. 57.

Whereupon the Tenant was rul'd to anſwer, and pleaded Aſſets deſcended.

Here it was admitted, the Iſſue in tayl could not alien with warranty in prejudice of the Reverſioner: And in 10 E 3. ſoon after a Formedon in Reverter being brought, and the warranty of Tenant in tayl pleaded in barr, Scot alledg'd the reſtraint of the Statute as well for the Reverſioner as for thoſe claiming by deſcent in tayl. The ſame Stoner demanding if the Anceſtor's Deed was acknowledge'd, and anſwered it was; His Rule was, That the Judgment muſt be the ſame for the Reverſioner as for the Iſſue, in theſe words, Ore eſt tout ſur un Judgment, which can have no other meaning, conſidering Scot's words immediately before, that the Law was the ſame for the Reverſioner, as for the Iſſue in tayl, and Stoner's Opinion in the Caſe before to the ſame effect, 4 E. 3. 10 E. 3. f. 14. pl. 53.

Objections from Modern Reports.

Moor f. 96. pl. 239.

In Moor's Reports this Caſe is, A man ſeis'd of Land, having Iſſue two Sons, devis'd it to his youngeſt Son in tayl; and the eldeſt Son died, leaving Iſſue a Son; the youngeſt alienes in Fee with warranty, and died without Iſſue, the Son of the eldeſt being within age: If this Collateral warranty ſhall bind the Son within age, without Aſſets, notwithſtanding the Statute of Weſtminſter the ſecond, was the queſtion?

And the Opinions of Plowden, Bromley Solicitor, Manwood and Lovelace, Serjeants, and of the Lord Dyer and Catlin Chief Juſtice, were Clear, That it is a Collateral warranty, and without Aſſets did barr, notwithſtanding his Nonage, for that his Entry was taken away. And this was the Caſe of one Evans, 12 & 13 of the Queen, as it was reported to me.

This Opinion makes againſt me, I confeſs, but I give it this Anſwer.

1. This Caſe is not reported by Sir Francis Moor, but reported to him, non conſtat in what manner, nor by whom.

2. It was no Judicial Opinion, for Plowden, Bromley Solicitor, two Serjeants, Manwood and Lovelace are named for it, as well as Dyer and Catlin, who were then Chief Juſtices of the ſeveral Courts, which proves the Opinion not only extra-judicial, but not given in any Court.

3. The motive of their Opinion was becauſe the warranty was Collateral, which is no true reaſon of the binding, or not, of any warranty.

4. An extra-judicial Opinion given in, or out of Court, is no more than the Prolatum or ſaying of him who gives it, nor can be taken for his Opinion, unleſs every thing ſpoken at pleaſure, muſt paſs as the ſpeakers Opinion.

Waſhingtons Eccleſ. Jur. 4. Show. Rep. 9.

5. An Opinion given in Court, if not neceſſary to the Judgment given of Record, but that it might have been as well given if no ſuch, or a contrary, Opinion had been broach'd, is no Judicial Opinion, nor more than a gratis dictum.

But an Opinion, though Erroneous, concluding to the Judgment, is a Judicial Opinion, becauſe delivered under the Sanction of the Judges Oath, upon deliberation, which aſſures it is, or was, when delivered, the Opinion of the Deliverer.

Yet if a Court give Judgment judicially, another Court is not bound to give like Judgment, unleſs it think that Judgment firſt given was according to Law. Hobbs Leviath. 144.

For any Court may err, elſe Errors in Judgment would not be admitted, nor a Reverſal of them.

Therefore, if a Judge conceives a Judgment given in another Court to be erroneous, he being ſworn to judge according to Law, that is, in his own conſcience ought not to give the like Judgment, for that were to wrong every man having a like cauſe, becauſe another was wrong'd before, much leſs to follow extra-judicial Opinions, unleſs he believes thoſe Opinions are right.

The other Caſe is in Croke, 5 Car. Salvin verſus Clerk, in Ejectment upon a ſpecial Verdict; Alexander Sidenham Tenant in tayl to him and the Heirs males of his body, the Reverſion to John his eldeſt Brother, made a Leaſe for three Lives, warranted by the Statute of 32 H. 8. c. 28. with warranty; And after 16 Eliz. levies a Fine with warranty and proclamations to Taylor, and dies without Iſſue male, leaving Iſſue Elizabeth his Daughter, Mother to the Plaintiffs Leſſor. In 18 Eliz. the Leaſe for Lives exptr'd. In 30 Eliz. John the elder Brother died without Iſſue, the ſaid Elizabeth being his Neece and Heir. The Defendant entred, claiming by a Leaſe from Taylor, and Points entred upon him as Heir to Elizabeth. Cro. Car. 156. 1 Jones 208.

A queſtion was mov'd upon a ſuppos'd Caſe, and not in fact within the Caſe, Whether if the Fine had not been with proclamation (as it was) and no Non-claim had been in the Caſe (as there was) this warranty ſhould make a diſcontinuance in Fee, and barr Elizabeth, it not deſcending upon John after Alexander's death, but upon Elizabeth, who is now alſo John's Heir, or determined by Alexander's death.

The Judges were of opinion, as the Reporter ſaith, That the warranty did barr Elizabeth, and conſequently her Heir, becauſe the Reverſion was diſcontinued by the Eſtate for Lives, and a new Fee thereby gain'd, and the Reverſion diſplac'd thereby, and the warranty was anner'd to that new Fee. But this Caſe is all falſe, and miſ-reported.

1. For that it ſaith the Leaſe for Lives was a diſcontinuance of the Reverſion, & thereby a new Fee gain'd to Tenant in tayl, which he paſſed away by the Fine with warranty, which could not be; for in the Caſe it appears the Leaſe was warranted by the Stat. of 32 H. 8. and then it could make no diſcontinuance, nor no new Fee of a Reverſion could be gain'd, and then no Eſtate to which the warranty was anner'd, and ſo was it reſolv'd 40 El. Keen & Copes Caſe. Con. Cro. Car. 156. 1 Jones. 208, 209. 40 Eliz. Keen & Copes C. 602. pl. 13.

2. That Opinion was extra-judicial, it being concerning a point not in the Caſe, but ſuppos'd.

3. That Caſe was reſolv'd upon the point of Non-claim, and not upon this of the warranty, which was not a point in the Caſe.

4. Some of the Judges therefore ſpoke not to that point, as appears in the Caſe.

As to the ſecond Queſtion, Admitting the warranty of Tenant in tayl doth bind the Donor and his Heirs, yet in regard the Defendant, Tenant in poſſeſſion, cannot derive the warranty to her ſelf, from the Feoffees, as Aſſignee, or otherwiſe, whether ſhe may rebutt the Demandants, or not, by her poſſeſſion only? is the queſtion; and I conceive ſhe may not, as this Caſe is.

Ant. 364.

I ſhall begin with thoſe Authorities that make, and are moſt preſs'd againſt me, which is the Authority of Sir Edward Coke in Lincoln Colledge Caſe, in the third Report, and from thence brought over to his Littleton, f. 385. a.

His words in Lincoln Colledge Caſe, f. 63. a. are, He which hath the poſſeſſion of the Land ſhall rebutt the Demandant himſelf, without ſhewing how he came to the poſſeſſion of it; for it ſufficeth him to defend his poſſeſſion, and barr the Demandant, and the Demandant cannot recover the Land againſt his own warranty, And there he cites ſeveral Caſes, as making good this his Aſſertion.

In the ſame place he ſaith it is adjudg'd, 38 E. 3. f. 26. That an Aſſignee ſhall rebut by force of a warranty made to one and his Heirs only.

This Doctrine is transferred to his Littleton, in theſe words, If the warranty be made to a man and his heirs without this word Aſſigns, yet the Aſſignee or any Tenant of the Land may rebutt. And albeit no man ſhall vouch, or have a Warrantia Chartæ, either as party Heir or Aſſignee, but in privity of Eſtate, yet any one that is in of another Eſtate, be it by diſſeiſin, abatement, intruſion, uſurpation, or otherwiſe, ſhall rebutt by force of the warranty, as a thing annex'd to the Land: which ſometimes was doubted in our Books, when as in the Caſes aforeſaid, he that rebutteth claimeth under, and not above the warranty.

Mod. 192.

I ſhall clearly agree, no man ſhall vouch, or have a warrantia Chartæ who is not in privity of Eſtate, that is, who hath not the ſame Eſtate, as well as the ſame Land, to which the warranty was annexed: And the reaſon is evident, becauſe the Tenant muſt recover if the Land be not defended to him by the

the Warranter, ſuch Eſtate as was firſt warranted, and no other, unleſs a Fee be granted with warranty only for the life of the Grantee or Grantor, in which Caſe the Grantee, upon voucher, recovers a Fee, though the warranty were but for life.

I ſhall likewiſe agree the Law to be as Sir Edward Coke ſaith in both places, if his meaning be that the Tenant in poſſeſſion, when he is impleaded, may rebutt the Demandant, without ſhewing how he came to the poſſeſſion which he then hath, when impleaded, be it by diſſeiſin, abatement, intruſion, Poſt 386. or any other tortious way: And for the reaſon given in Lincoln Colledge Caſe, That it ſufficeth that the Tenant defend his poſſeſſion: But if his meaning be, that the Tenant in poſſeſſion need not ſhew that the warranty ever extended to him, or that he hath any right to it, then I muſt deny his Doctrine in Lincoln Colledge Caſe, or in Littleton, which is but the former there repeated to be Law.

For as it is not reaſonable a man ſhould recover that Land which he hath once warranted to me, from me, what title ſoever I have in it at the time when he impleads me:

So on the other ſide, it is againſt reaſon I ſhould warrant Land to one who never had any right in my warranty. And the ſame reaſon is if a man will be warranted by Rebutter, he ſhould make it appear how the warranty extends to him, as if he will be warranted by Voucher; for the difference is no other, than that in the caſe of Voucher a ſtranger impleads him, in caſe of Rebutter, the Warranter himſelf impleads him, and in a Voucher he muſt make his title appear to be warranted, Ergo in a Rebutter. But he needs not have like Eſtate in the Land upon a Rebutter as upon Voucher, which is the reaſon given of recovering in value.

And the only reaſon why the perſon, who is to warrant, impleading the Tenant of the Land, ſhall not recover, but be rebutted by the warranty, is becauſe if he ſhould recover the Land, the Tenant, who is intitled to the warranty, muſt recover in value from him again, and therefore to avoid Circuit of Action, he ſhall not recover, but be rebutted and barr'd, as is moſt reaſonable.

I ſhall therefore firſt make it appear by all ancient Authorities, That the Tenant in poſſeſſion ſhall not rebutt the Demandant by the warranty, without he firſt make it appear that the warranty did extend to him as Heir or Aſſignee.

To

To prove this are full in the point,

Hill. 8 E. 3. f. 10. tit garranty pl. 48. New Edit. f. 283. b. num. 28.

The Book of 8 E. 3. f. 10. of the Old Edition Hillary Term, tit. Garranty, pl. 48. where upon a great Debate it was rul'd, That the Tenant muſt ſhew how he was entitled to the warranty, and how it extended to him, and accordingly did ſo before his Plea was admitted by way of Rebutter.

10 E. 3. 42. b. New Edit. f. 391. b. num 42.

Another Book full in the point, is 10 E. 3. f. 42. b. of the Old Edition, where in like manner the Tenant was forc'd to ſhew how the warranty extended to him upon Debate: and it is remarkable in that Caſe, That his ſhewing the Deed of warranty to him, whoſe Aſſignee he was, and the Deed of Aſſignment to himſelf was not enough, but he was compell'd to plead orally, as the manner then was, That William, who had the warranty aſſign'd to him by his Deed there ſhew'd forth, and the reaſon given was that the Deed of Aſſignment could not ſpeak and make his Plea, and was but Evidence of the truth of his Plea.

But in that very Caſe, when it was replyed, That he was not Tenant by the Aſſignment of William, but by diſſeiſin of the Plaintiff, it was not permitted without traverſing the Aſſignment of William: For if he were once intitled to the warranty, what Eſtate ſoever he had when impleaded, he might rebutt, though he could not vouch. Which Caſe proves fully both my Poſitions, That a man cannot rebutt without ſhewing how the warranty extends to him.

Ant. 385.

2. That ſo doing, he may, whatever Seiſin he hath at that time, be it by Diſſeiſin, or Abatement, &c. or otherwiſe.

Ant. 385.

22 Aſſ. pl. 88.

A third Caſe is, when the Tenant being impleaded, pleaded the warranty of the Demandants Father to one A. and bound him and his Heirs to warrant to A. his Heirs and Aſſigns, and that he was Aſſignee of A. and demanded Judgment. In that Caſe, becauſe he did not plead that he was Aſſignee of A. by Deed, the Plea was diſallow'd (which ſince hath been thought not neceſſary) but a fortiori if he had pleaded no Aſſignment at all from A. by Deed, or without Deed, to intitle him to the warranty, his Plea had been neceſſarily diſallowed.

My next Assertion is, That the Tenant in possession setting forth how the warranty extends to him, needs not set forth by what Estate or Title he is in possession.

To this I shall cite three Books full in the point.

6 E. 3. f. 7. old Edit. new Edit. 6 E. 3. f. 187. Num. 16.
10 E. 3. f. 42. cited before old Book.
45 E. 3.
45 E. 3. f. 18.

But in all these Cases it is to be noted, That the Tenant rebutting, though he was in possession of another Estate than that to which the warranty was annex'd; yet constantly shew'd how the warranty was deriv'd to him, which Sir Edward Coke observ'd not, either in Lincoln Colledge Case, or his Littleton, but cites in Lincoln Colledge Case the Case of 45 E. 3. and some others I shall mention after, to shew a man may rebutt, being in of another Estate than that which was warranted, which is true, but not without intitling himself to the warranty.

That the Law of rebutting stands upon the difference I have taken, besides the Authorities urg'd, will be evident for these Reasons.

As a warranty may be created, so may it be determin'd or extinguish'd various ways.

1. It may be releas'd, as Littleton himself is Sect. 748.

2. It may be defeasanc'd, as Sir Edward Coke upon that Sect. 748.

3. It may be lost by Attainder, Sect. 745.

4. It may be extinguish'd by Re-feoffment of the warranter or his Heirs, by the Garrantee or his Heir.

In all these Cases, if the warranty be destroy'd, it cannot be rebutted; for there cannot be an accident to a thing which is not, and rebutting is an accident incident to a warranty: And therefore if the warranty have no being, there can be no rebutter.

Why then admit A. warrants Land to B. and his Assigns, during the life of B. after B. releases this warranty to A. and then Assigns to C. C. is impleaded by A. and pleads generally that A. warranted to B. for his life, and that B. is still living, if C. could rebutt A. by this manner of pleading, without shewing when B. assigned to him, so to derive the benefit of the warranty to himself, A. could never have benefit of the Release of the warranty, because it could not appear whether the warranty were releas'd before or after the Assignment; if before, then the warranty is gone, and cannot be rebuted, but if after, it may.

So

So if A. binds him and his Heirs to warrant to B. his Heirs and Assigns, B. dyes, his Heir releases the warranty, and dies, and then the Heir of the Heir assigns: The Tenant is impleaded by A.

If he may rebutt by his bare possession without shewing how the warranty extended to him, A. can have no benefit of his Release before any assignment was made; for the Demandant cannot be suppos'd to know the time of the assignment, and consequently cannot know how to plead the Release, until the time of the assignment appear, which is most consonant in reason with the Authorities before urg'd

Another reason is, That constantly, in elder times, when the Tenant pleaded a warranty to rebutt, he concluded his Plea, that if he were impleaded by a stranger, the Demandant was to warrant him, which could not be without shewing how the warranty extended to him; for he was not to warrant him, if impleaded by a stranger, because he had possession of the Land only.

Sir Edward Coke in Lincoln Colledge Case, cites the Book of 38 E. 3. f. 26. as adjudg'd, to prove that the bare possession of the Land is sufficient for the Tenant to rebutt, for that the Assignee may rebutt a warranty made only to a man and his Heirs: If that were so, it were to his purpose; but there is no such Case in 38 E. 3. f. 26. but the Case intended is 38 E. 3. f. 21. and he quotes the folio truly in his Littleton.

But the Case is not, That an Assignee may rebutt, or have benefit of a warranty made to a man and his Heirs only, but that a warranty being made to a man, his Heirs and Assigns, the Assignee of the Heir, or the Assignee of the Assignee, though neither be Assignee of the first Grantee of the warranty, shall have like benefit of the warranty, as if he were Assignee of the first Grantee, which hath been often resolv'd in the old Books.

To the same purpose he cites a Case out of 7 E. 3. f. 34. & 46 E. 3. f. 4. which doth but remember that of 7. as adjudg'd, That the Assignee of Tenant in tayl might rebutt the Donor; whence he infers, as before, that the Tenant in possession might rebutt without any right to the warranty: But the Inference holds not from that Case.

The

The Caſe of 7 E. 3. was, That Land was given in tayl, and the Donor warranted the Land generally to the Donee, his Heirs and Aſſigns, the Donee made a Feoffment in Fee, and died without Iſſue; and the Donor impleading the Feoffee was rebutted, becauſe he had warranted the Land to the Donee, his Heirs and Aſſigns, and the Feoffee claimed as Aſſignee of the Donee, and therefore rebutted, not becauſe he had a bare poſſeſſion. But this Judgment of 7 E. 3. Sir Edward Coke denies (and perhaps juſtly) to be Law now, becauſe the Eſtate tayl being determin'd to which the warranty was firſt annex'd, the whole warranty determin'd with it.

But however, the Caſe no way proves what it is alledg'd for in Licoln Colledge Caſe, That a man may rebutt without ever ſhewing the warranty, extended to him, for the Feoffee did in that Caſe ſhew it: So in the Caſe 45 E. 3. f. 18. the Feme, who rebutted, ſhew'd ſhe was Grantee of the warranty.

To this may be added, That what is delivered, as before, in Lincoln Colledge Caſe, is neither conducing to the Judgment given in that Caſe, nor is it any Opinion of the Judges, but is Sir Edward Coke's ſingle Opinion, emergently given, as appears moſt clearly in the Caſe. Mod. 192.

To conclude,

When the Feoffees were ſeis'd to the uſe of William Veſcy for his life, and after to the uſe of the Defendant, his wife, for her life, and after to the uſe of the right Heirs of William Veſcy:

And when by Operation of the Statute of 27 H. 8. the poſſeſſion is brought to theſe uſes, the warranty made by William Veſcy to the Feoffees and their Heirs, is wholly deſtroy'd. Mod. 182.

For if before the Statute the Feoffees had executed an Eſtate to William for life, the Remainder to his wife for life, the Remainder to his right Heirs;

The warranty had been extinguiſh'd by ſuch Execution of Eſtate, and releas'd in Law, for it could be in none but in William and his Heirs, who could not warrant to himſelf, or themſelves, by Littleton Sect. 743. for his Heirs, in ſuch Caſe, take not by Purchaſe, but Limitation, becauſe the Freehold was in him with a Remainder over to his right Heirs, and ſo hath as great an Eſtate in the Land as the Feoffees had, and then the warranty is gone by Littleton. Litt. Sect. 744.

And now the Statute executes the poſſeſſion in the ſame manner, and the warranty is in none, for the time preſent or future, but extinct: If the warranty had been to the Feoffees, their Heirs and Aſſigns, it might have been more colourably queſtion'd Whether the mean Remainder were not an Aſſignee of the Feoffees, and ſo to have benefit of the warranty; but the warranty being to the Feoffees and their Heirs only, no Eſtate remaining in them, no Aſſignee can pretend to the warranty.

2. William Veſcy could by no poſſibility ever warrant this Eſtate to the Defendant during his life, and where the warranty cannot poſſibly attach the Anceſtor, it ſhall never attach the Heir, as by Littleton's Caſe: If a man deviſeth Lands in Fee to another with warranty, for him and his Heirs, his Heirs ſhall not be bound to the warranty, becauſe himſelf could never be.

And though in that Caſe the Eſtate to be warranted, commenc'd after the death of the Warranter, and here the Remainder to the wife is in being before his death, yet the reaſon differs not; for himſelf could no more warrant this by any poſſibility than that, and his Heir might as equally warrant the Eſtate deviſ'd, as this.

Mod. 192. Next Juſtice Jones in Spirt and Bences Caſe, cites a Caſe 7 Eliz. the ſame with this Reſolution, reſolved in the Common Pleas, That the mediate Remainder could not be warranted.

In this Caſe, if the Feoffees before the Statute had either voluntarily, or by coercion of the Chancery, after the death of the firſt Ceſtuy que uſe for life executed the Eſtate of the mean Remainder, ſuch perſon in Remainder could have no benefit of the warranty, being but an Aſſignee of the Feoffees, becauſe the warranty was only to them and their Heirs.

No more can the perſon in Remainder here, whoſe Eſtate is executed by the Statute, be warranted more than if ſuch Eſtate had been executed by the Common Law.

There are another ſort of perſons who may rebutt, and perhaps vouch, who are neither Heirs nor formally Aſſignees to the Garrantee, but have the Eſtate warranted, diſpoſitione & inſtitutione Legis, which I conceive not to differ materially, whether they have ſuch Eſtate warranted by the Common Law, or by Act of Parliament.

The

The firſt of this kind I ſhall name, is Tenant by the Courteſie, who, as was adjudg'd 35 Aſſ. might rebutt the warranty made to his wives Anceſtor; yet was neither Heir nor formal Aſſignee to any to whom the warranty was granted; nothing is ſaid in the Book concerning his vouching, but certainly the wives Heir may be receiv'd to defend his Eſtate, if impleaded by a ſtranger, who may vouch according to the warranty, or may rebutt, as the Caſe of 45 E. 3. f. 18. is. Aſſ. p. 9. 35.

But this difference is obſervable alſo, where ſuch a Tenant rebutts, it appears what claim he makes to the warranty, and ſo the Inconveniences avoided which follow a Rebutter made upon no other reaſon than becauſe he who rebutts is in poſſeſſion of the Land warranted.

A ſecond Tenant of this kind is the Lord of a Villain, and therefore the Caſe is 22 Aſſ. That Tenant in Dower made a Leaſe for life to a Villain (which in truth was a forfeiture for making a greater Eſtate of Freehold than ſhe had power to make) and bound her and her Heirs to warranty; the Lord of the Villain entred upon the Land in her life time, and before the warranty attach'd the Heir, who had right to enter for the forfeiture, the Mother died, and the Heir entred upon the L. of the Villain, who reentred, and the Heir brought an Aſſiſe. The L. of the Villain pleaded the warranty, and that the Heir, if a ſtranger had impleaded him, was bound to warrant the Eſtate, and therefore demanded Judgment if the Heir himſelf ſhould implead him. Mod. 193. 22 Aſſ. p. 37.

1. It is there agreed, if the warranty had attach'd the Heir before the Lords entry, the Heir had been bound: but quære.

2. By that Book it ſeems the Lord, impleaded by a Stranger, might have vouch'd the Heir, if the warranty had attach'd him before the Lords entry.

But in this Caſe it appears, the Lord was no formal Aſſignee of the Villains, for this warranty muſt be as to an Aſſignee (for the Eſtate warranted was but for life) and the Lords Eſtate was only by order of the Law.

A third Caſe of this nature is, Where the Anceſtor granted Lands to a Baſtard, with warranty; but how far the warranty extended, as to the Heirs, or Heirs and Aſſigns of the Baſtard, appears not in the Caſe: the Baſtard died without Iſſue, and conſequently without Heir, the L. by Eſcheat entred, upon whom the Heir entred, the warranty of his Anceſtor having not attach'd him before the Baſtards death (for it ſeems this was in a Caſe where the Heir might have entred in his Anceſtors life time, & ſo avoided his warranty, as in the former caſe of the L. of a Villain) by the Book

Mod. 193. the warranty having not attach'd him during the Baſtards life, the Lord by Eſcheat could have no benefit of it, but if it had attach'd him, he might, ut videtur.

In this Caſe, if the warranty were to the Baſtard and his heirs only, it determined, he dying without Iſſue, and then there could be no Rebutter or Voucher by the Lord by Eſcheat, if the warranty had attach'd the Heir, but if it were to him, his Heirs and Aſſigns, then the Lord, whoſe title is by the Act and Diſpoſition of the Law, and not as Aſſignee in the per had, notwithſtanding the benefit of this warranty; quod nota.

Theſe Caſes are mentioned in Lincoln Colledge Caſe, and in Spirt and Bences Caſe in Cro. 1. and in both places admitted for Law.

Nor ſeems this very unreaſonabe; That the warranty being an incident to the Eſtate warranted, ſhould accompany it where the Law diſpos'd the Eſtate and Land warranted to all intents

2. In many Caſes the Law diſpoſing the Eſtate, if the warranty attended it not, the diſpoſition made by the Law were in vain, for without the warranty the Eſtate may be neceſſarily avoided.

Such perſons who come to the Eſtate, diſpoſitione Legis, are not properly in, in the poſt, but they modally have the Eſtate by conſent, both of the Warranter and Garrantee, becauſe they have it by the Act of Law, Statute or Common, to whoſe diſpoſe every man is as much conſenting, and more ſolemnly than he is to his own private Deed.

And after this way, if the two laſt Caſes be Law, the Ceſtuy que uſe having his Eſtate by operation and appointment of the
Mod. 193. Statute of Uſes of 27 H. 8. may have the benefit of the warranty attending the Eſtate, though he be no formal Aſſignee or Heir to the Feoffees to uſe.

Many other Eſtates are of this kind; as Tenant in Dower, if endowed of all the Land warranted. An Occupant, Tenants by the Statute of 6 R. 2. c. 6. where the Feme conſents to the Raviſher. Tenant by 4 & 5 P. & M. becauſe the ward conſented to her taking away without the Guardians conſent. Lands warranted, which after become forfeited to the King, or other Lords, &c.

Quære in the Caſes of 22 Aſſ. p. 37. & 29 Aſſ. p. 34. Whether, notwithſtanding the warranty had deſcended upon the Heir, while the Lands were in the poſſeſſion of the Villain in the firſt Caſe, and of the Baſtard in the ſecond Caſe, before any entry

try made by either Lord, the Lords could have rebutted or vouched by reaſon of thoſe warranties, being in truth ſtrangers to the warranty, and not able to derive it to themſelves any way.

But if after the warranty deſcended upon the Villain or Baſtard, the Villain or Baſtard had been impleaded by the Heir, and had pleaded the warranty againſt the Heir, and had Judgment thereupon by way of Rebutter, then the Lords might have pleaded this Judgment as concluſive, and making the Villains Title, or Baſtard, good againſt the Heir, and the Heir ſhould never have recover'd againſt the Lords. And this ſeems the meaning of the Book 22 Aſſ. p. 37. if well conſider'd. Though in Spirt and Bences Caſe no ſuch difference is obſerv'd.

Cætera deſiderantur.

The Court was in this Caſe divided, *viz.* The Chief Juſtice and Juſtice *Archer* for the Demandant, and Juſtice *Wylde* and Juſtice *Atkins* for the Tenant.

CONCERNING

PROCESS

Out of the

COURTS at WESTMINSTER

INTO

WALES

Of late times, and how anciently.

2 Saund. 193. 2 Modern. 10. 3 Keb. 170.

Memorandum, These Notes following were all wrote with the proper hand of the Chief Juſtice Sir *John Vaughan*, *and* intended to be methodiſed by him, in order to be delivered in Court.

A Man taken upon a *Latitat* in *England*, puts in two Welch men for his Bayl, Judgment paſſing againſt him, it was a Queſtion, **Whether after a** Capias ad Satisfaciendum **iſſued againſt the Principal, who was not to be found, Proceſs** might iſſue **into** Wales, **which muſt be by** Scire facias, **firſt** againſt the Bayl; **whereupon** Mann **the Secondary of the** Kings Bench **informed the** Court **that it had been ſo done in like Caſes many times.**

10 Jac. Bolſtrode part 2. f. 54, 55. Hall and Rotherams Caſe.

But the Court **was likewiſe informed, that** Brownloe, Chief Pronotary **of the** Common Pleas, **affirmed they did not then uſe to ſend ſuch** Proceſs **into** Wales, **but only** Proceſs **of** Outlawry. Poſt 397, 414.

But

But Mann affirming that their Courſe was otherwiſe in the Kings Bench, the Court awarded Proceſs into Wales againſt the Bayl, and ſaid, If the parties were grieved, they might bring their Writ of Error.

1. This Award of the Kings Bench hath no other Foundation to juſtifie it, than Mann's the Secondaries Information, That the like had been often done, which was his own doing poſſibly, and never fell under the Conſideration of the Court.

2. The Court weighed it no more than to ſay, The parties grieved might have a Writ of Error, which by the way muſt be into the Parliament for it concerned the Juriſdiction of the Court, which the Act of 27 Eliz. for Errors in the Exchequer Chamber excepts; and upon that ground any injuſtice might be done, becauſe the party wronged may have a Writ of Error.

3. Brownloe the Chief Pronotary of the Common Pleas, and a moſt knowing man, affirm'd no ſuch Proceſs iſſued thence into Wales, and but only Proceſs of Outlawry.

So as this awarding of Proceſs into Wales, upon the uſage of that Court, affirmed by Mann, is counter'd by the contrary uſage of the Common Pleas, affirmed by Brownloe: Therefore that Book and Authority is of no moment to juſtifie the iſſuing of a Scire facias into Wales.

11 Jac. Bolſtrode part 2. f. 156, 157. Bedo v. Piper.

The next Caſe in time is 11 Jac. in Debt upon a Bond; the Action was laid in the County of Hereford, upon Nil debet pleaded, the Plaintiff had Judgment and Execution, and a Writ to the Sheriff of the County of Radnor, to levy Execution, who did not, but made his Return, That breve Domini Regis non currit there.

Qu. How an Action of Debt could be laid in *Hereford*, which muſt be by Original, unleſs the party were in *Cuſtodia Mariſcal.* and declared upon a Bond in the County of *Hereford.*

Coke, the Chief Juſtice, ſaid before the Statute of 27 H. 8. c. 26. which annexed Wales and England, doubt might have been in that Caſe; but ſince the Statute 27 H. 8. it was clear, and grounded himſelf upon a Caſe in 13 E. 3. of which more anon: In this Caſe the Court did agree, That the Writ of Execution did well go into Wales, and amerced the Sheriff 10 l. for his bad Return.

In this Caſe Dodrige agreed with Coke, and ſaid, If the Law ſhould be otherwiſe, all the Executions in England would be defeated.

This was a Reſolution upon ſome Debate among the Judges of the Court, but upon no Argument at Barr for any thing appearing.

Per

Per Doderige, If Debt be brought againſt one in London, and after the Defendant removes, and inhabits in Wales, a Capias ad ſatisfaciendum may be awarded againſt him into Wales, or into any County Palatine, and this was his Opinion exactly in the former Caſe. 16 Jac. B. R. Croke 484.

But as the courſe of the Common Pleas was alledged to be contrary to what Mann ſaid was uſed in the King's Bench, in the Caſe of Hall & Rotheram, 10 Jac. before cited, ſo

It was in the ſame year 11 Jac. wherein the Kings Bench reſolved, That Execution did well iſſue to the Sheriff of the County of Radnor of a Recovery in Debt in the Kings Bench, and fin'd the Sheriff for his Retorn, that breve Domini Regis non currit in Wallia.

Reſolved otherwiſe in the Common Pleas, and that by the whole Court, That a Fieri facias, Capias ad Satisfaciendum, or other Judicial Proceſs did not run into Wales, but that a Capias utlagatum did go into Wales; and as Brownloe, Prothonotary, then ſaid, that an Extent hath gone into Wales. 11 Jac. Godbolt f. 214. 2 Saund. 193. Ant. 395. Poſt 414.

And it is undoubtedly true, as to the Capias utlagatum and Extent, but as to all other Judicial Proceſs into Wales, upon Judgments obtained here between party and party, hitherto there is nothing to turn the Scale: The Judgment of the Court of Common Pleas being directly contrary to that of the Kings Bench in the ſame age and time.

Upon occaſion of a Procedendo moved for to the Council of the Marches, who had made a Decree, That ſome perſons living in the Engliſh Counties, where they at leaſt exerciſed Juriſdiction, ſhould pay monies recovered againſt him at a great Seſſions in Wales, he having neither Lands or Goods, nor inhabiting in Wales, having obtained a Prohibition to the Council of the Marches, the Court of the Kings Bench was againſt the Procedendo. And Juſtice Jones cited a Caſe where Judgment was given in the great Seſſions of Cardigan, againſt a Citizen of London, who then inhabited there, and after removed his Goods and Perſon thence, that upon great deliberation it was reſolved, A Certiorari ſhould iſſue out of the Chancery to remove the Record out of Wales, and that then it ſhould be ſent by Mittimus into the Kings Bench, and ſo Execution ſhould be awarded in England of the Judgment had in Wales. If this were ſo, for which there is no other Authority but that Juſtice Jones cited ſuch a Caſe, not mentioning the time, I agree it would ſeem ſtrange, that a Judgment obtained in Wales ſhould by Law be executed in England, and that a Judgment obtained in England, could not be executed in Wales. Bendloes Rep. 2 Car. 1. Term. Mich. f. 192. Beatons Caſe.

No time is mentioned when this Reſolution, cited by *Jones*, was, ſo as it probably preceded the Reſolutions of the Judges in *Crooke*.

Cro. 2 Car. 1. f. 346.

But in the ſame year, in Eaſter Term before, at an Aſſembly of all the Juſtices and Barons, it was reſolved, where Judgment was given in Debt at the great Seſſions in Wales againſt a Defendant inhabiting there, and the Defendant dying inteſtate, one who inhabited in London taking Adminiſtration, that Execution could not be in Wales, becauſe the Adminiſtrator inhabited not there, nor a Certiorari granted out of the Chancery to remove the Record, that ſo by Mittimus it might be ſent to the Kings Bench or Common Pleas, to take forth a Scire facias upon it, to have Lands out of Wales or Goods in the Adminiſtrators hands liable to it there.

This Caſe is in the point, for a *Scire facias* to have Lands in *Wales* muſt be againſt the Heir inhabiting in *England*, but having Lands in *Wales*.

This was the Reſolution of all the Juſtices and Barons for theſe Reaſons: Firſt, by this way all Judgments given in London, or other inferior Juriſdictions, would be removed, and executed at large, which would be of great inconvenience to make Lands or Goods liable to Execution, in other manner than they were at the time of the Judgment given, which was but within the Juriſdiction.

Secondly, It would extend the Execution of Judgments given in pivate and limited Juriſdictions, as amply as of Judgments given at the Kings Courts at Weſtminſter.

By this Reſolution a Judgment given in Wales ſhall not be executed in England, out of their Juriſdiction of Wales, and a pari, a Judgment given in England, ought not to be executed in Wales, which is out of the Juriſdiction of the Engliſh Courts, more than a Judgment given in the Kings Bench or Common Pleas, ought to be executed in Ireland, or the Iſlands which are out of their Juriſdiction, equally and upon the ſame grounds, for any thing deducible from theſe Caſes, which was never pretended that it could be done.

And by that Caſe of Coke, Lands, Perſons, or Goods ought not to be lyable to Judgments in other manner than they were at the time of the Judgment given, which was where the Court had Juriſdiction which gave the Judgment.

Nor is it material to ſay, the Judgments then given are of no effect, no more than to ſay, Judgments given in the Kings Courts, are of no effect againſt an Iriſh-man, Dutch-man, or Scotchman, that hath no Lands or Goods in England liable to Execution by that Judgment.

For the Plaintiff commencing his Suit, ought to be conſtant what benefit he might have from it.

Nor

Nor are Preſidents of Fact, which paſs ſub ſilentio in the Court of Kings Bench or Common Pleas, in ſuch Caſes to be regarded. Stat. Tract. 240.

For Proceſſes iſſue out of the Offices regularly to the Sheriffs of the County, whereupon the Teſtator, the Perſon, Goods, or Lands, are ſaid to be without diſtinction of places within or without the Juriſdiction of the Court, if the name of the County be familiar to them, as thoſe of Wales are, but not thoſe of Ireland.

We muſt then look higher, and ſearch for ſurer Premiſſes than thoſe late Awards of the Courts at Weſtminſter, to determine this Queſtion.

And firſt it muſt be agreed, That when Wales was a Kingdom, or Territory governed by its own Laws, and the people ſubject to a Prince peculiar to themſelves immediately, and not to the Crown of England, no Proceſs, of any nature, could iſſue thither from the Courts of England, more than to any other Forreign Dominion that is not of the Dominion of England.

In which Aſſertion I neither do, nor need affirm any thing, Whether Wales were held from the Crown of England by Feodal Right, or not? and what ſort of Liegeance the Princes of Wales, and from what time, did owe to the King of England? For whatever that was, yet Wales was governed by its own Laws, and not bound by any Law made in England to bind them more than Scotland was, when yet the King of Scotland did Homage to the King of England for that very Kingdom of Scotland.

I begin then with the time that Wales came to be of the Dominion of the Crown of England, and was obliged to ſuch Laws as the Parliament of England would enact purpoſely to bind it.

This was not before the entire ſubmiſſion of Wales (de alto & baſſo) as the words of the Statute of Rutland are to King E. 1. which a little in time preceded the making of thoſe Laws for Wales, called the Statute of Rutland.

Whether it was really a Statute by Parliament, or conceſſion of the King by his Charter, for the future Government of Wales is not material (for ſo at leaſt it appears to be)

But by what tranſaction ſoever, either of voluntary ſubmiſſion, or partly by force of Arms it was effected, it is evident, that from that time Wales became abſolutely of the Dominion of the Kingdom of England, and not only of the Empire of the King of England, as it might poſſibly have been, for now Scotland is.

The words of the Statute of Rutland are, Divina Providentia quæ in ſui diſpoſitione non fallitur, inter alia ſuæ diſpenſationis munera quibus Nos, & Regnum Noſtrum *Angliæ* decorari dignata eſt, terram *Walliæ* cum incolis ſuis prius nobis jure feodali ſubjectam, jam ſui gratia in proprietatis noſtræ Domin. obſtaculis quibuſcunque ceſſantibus, totaliter & cum integritate convertit, & coronæ regni præd. tanquam partem coporis ejuſdem annexit & univit.

So as from this time it being of the Dominions of the Engliſh, the Parliaments of England might make Courts to bind it; but it was not immediately neceſſary it ſhould, but its former Laws (excepting in point of Soveraignity) might ſtill obtain, or ſuch other as E. 1. ſhould conſtitute, to whom they had ſubmitted; and accordingly their Laws, after their Submiſſion, were partly their Old Laws, and partly New, ordained by him.

Preamble Stat. Walliæ. Leges & conſuetudines partium illarum hactenus uſitatas coram nobis & proceribus Regni noſtri fecimus recitari; quibus diligenter auditis & plenius intellectis, quaſdam illarum de conſilio procerum prædictorum delevimus, quaſdam permiſimus, & quaſdam correximus, & etiam quaſdam alias adjiciendas & faciendas decrevimus, & eas de cætero in terris Noſtris, in partibus illis perpetua firmitate teneri, & Obſervari volumus in forma ſubſcripta.

Then follow the Ordinances appointing Writs Original and Judicial, in many things varying from thoſe of England, and a particular manner of proceeding, and a particular Juſticiar to adminiſter Juſtice, and particular Chancery, out of which the Writs for thoſe parts were to iſſue.

So as though Wales became of the Dominion of England from that time, yet the Courts of England had nothing to do with Adminiſtration of Juſtice there, in other manner than now they have with the Weſtern Iſlands, Barbadoes, St. Chriſtophers, Mevis, New England, which are of the Dominions of England, and ſo is Ireland, the Iſles of Garnſey and Jerſey at preſent, all which may be bound by Laws, made reſpectively for them by an Engliſh Parliament: but all, or moſt of them, at preſent

preſent by Laws appointed and made by the King's Letters Patents, and the King's Writs Original or Judicial from the Courts of Weſtminſter go not there; ſo anciently were Gaſcoign, Guyen, Calais of the Dominions of England, but governed by the Cuſtoms and Laws uſed there, and out of the Juriſdiction of the Kings Courts.

And it is obſervable, That theſe Territories of France were not held by the Crown of England by that right it had to all France (as is much miſtaken) and particularly by Sir Edward Coke in Calvin's Caſe: For thoſe Territories, by an Act and Concluſion of Peace made by E. 3. with the French, which was ratified by the Parliaments of both Kingdoms, thoſe Territorries were then annexed thereby to the Dominion of the Crown of England; whereof I had a fair and ancient Copy from Mr. Selden, but loſt it by the fire. Ant 300. Ant 300.

And that Gaſcoign, Guyen, and Calais were of the Dominions of England and Ireland, appears by the Book 2 R. 3. f. 12. 2 R. 3. f. 12. Ant 291.

But to all Dominions of Acquiſition to the Crown of England, ſome Writs out of the King's Chancery have conſtantly run.

Sir Edward Coke, in Calvin's Caſe, calleth them Brevia mandatoria & non remedialia, diſtinguiſhing Writs into Brevia mandatoria & remedialia, & Brevia mandatoria non remedialia: The firſt ſort, he ſaith, never iſſue into Dominions belonging to England, but not parts of it; the other do. Calvin's Caſe 7 Rep. f. 20.

More intelligible it may be ſaid, That Writs in order to the particular Rights and Properties of the Subject (which he calls Brevia mandatoria remedialia) for this Writ is a Mandate, iſſue not to Dominions that are no part of England, but belonging to it: For ſurely, as they have their particular Laws, ſo conſequently they muſt have their particular Mandates or Writs in order to them.

And though their Laws ſhould by accident be the ſame with thoſe of England, as hath happned to Ireland ſome times, and now to Wales, yet the Adminiſtration of them is not neceſſarily by and under the Juriſdiction of the Courts of England.

Brevia mandatoria, & non remedialia, are Writs that concern not the particular Rights or Properties of the Subjects, but the Government and Superintendency of the King, Ne quid Reſpublica capiat detrimenti, ſuch are Writs for ſafe Conduct, and protection, Writs for Apprehenſion of perſons in his Dominions of England, and withdrawing to avoid the Law into other of his

his Dominions, as he inſtances in ſuch Writs to the Dominions of Gaſcoign, viz. to the Major of Bourdeaux, there to certifie concerning a perſon Outlaw'd in England, if he were in Servitio Regis there; of like nature are the Writs of Ne Exeat Regnum, de Leproſo amovendo, de Apoſtata Capiendo, ad quod damnum, and Writs to call perſons thence (as hath been done before they had Burgeſſes to the Parliament of England).

And Writs of Error into all Dominions belonging to England, lye upon the ultimate Judgments there given into the Kings Courts of England, to reverſe Judgments, or affirm, which is the only Writ which concerns Right and Property between the Subjects that lies. Ant. 290.

† The Reaſons are, Firſt for that without ſuch Writ, the Law appointed or permitted to ſuch inferiour Dominion, might be inſenſibly changed within it ſelf, without the aſſent of the Dominion Superiour.

Secondly, Judgments might be then given to the diſadvantage or leſſening of the Superiority, which cannot be reaſonable; or to make the Superiority to be only of the King, not of the Crown of England (as King James once would have it in the Caſe of *Ireland*, *ex relatione J. Selden mihi*, whom King *James* conſulted in this Queſtion).

The practice hath always been accordingly, as is familiarly known by reverſal or affirmance of Judgments given in the Kings Bench in Ireland, in the Kings Bench here, which is enough alone to prove the Law to be ſo to other ſubordinate Dominions.

And it is as clear, That Writs of Error did lye in the Kings Bench to reverſe Judgments in Calais (and the reaſon is alike) per Curiam, for which were divers Preſidents. 21 H. 7. f. 3. Ant. 290.

This being the ſtate of Wales, when it firſt became an Acceſſion to the Dominion of England under E. 1. and when it was far from the Juriſdiction of the Courts of Juſtice in England, as before it was added to the Dominion of the Crown of England. And as other Dominions added to it were 7 H. 4. f. 14. it was queſtioned only, Whether a Protection, quia moratur in obſequio noſtro in *Wallia*, were good? becauſe, ſaith the Book, it is within the Realm of England: It may be as in the Caſe of Baſtardy, the Husband being infra quatuor maria, which doubtleſs was the Iſle of Brittain, ſo the Primacy of Biſhops in Scotland and Wales was that of England. Qu. about this, but that gives no Juriſdiction to the Courts.

There

There were two ways by which alteration might be wrought: The firſt by Act of Parliament in England, making Laws to change either the Laws or Juriſdictions of Wales, or both.

The ſecond, by Alterations made in the Laws formerly by him eſtabliſhed by E. 1. himſelf, and perhaps by his Succeſſors, Kings of England, without Parliament, by a Clauſe contained in the Cloſe of that Statute or Ordinance, called Statutum Walliæ, in theſe words:

Et ideo vobis Mandamus quod præmiſſa de cætero in omnibus obſervetis, ita tantum quod quotiescunque, & quandocunque, & ubicunque nobis placuerit poſſimus prædicta Statuta, & eorum partes ſingulas declarare, interpretari, addere ſive diminuere pro noſtræ libito voluntatis, prout ſecuritati noſtræ & terræ noſtræ prædictæ viderimus expediri. This ſeems to extend but to the perſon of E. 1. and not to his Succeſſors; and however, no ſuch change was made by him or his Succeſſors. Poſt 409.

But the firſt remarkable Alteration made, ſeems to have been by Act of Parliament, and probably in the time of E. 1. who reigned long after the Statute of Wales, but the Act it ſelf is no where extant, that I could learn. But great Evidence that ſuch there was, which in ſome meaſure gave a Juriſdiction to the Kings Courts of England in Wales, not generally, but over the Lordſhips Marchers there.

This appears clearly by a Caſe, not much noted nor cited by any that I know, to this purpoſe, being out of the printed Year-Books, but printed by Fitz-herbert out of the Reports he had of E. 2. as he had of E. 1. and H. 3. all which we want wholly, though ſome Copies are extant of E. 2. which Caſe is the only light that I know to clear the Queſtion in hand. Fitz. Aſſ. 18 E. 2. pl. 382.

An Aſſiſe of Novel Diſſeiſin was brought againſt C. de libero tenemento in Gowre, and the Writ was directed to the Sheriff of Gloceſter, and the Plaint was made of two Commots, which is miſ-printed Commons, and comprehends all Gouers-land, now part of the County of Glamorgan, by 27 H. 8. but was not ſo then, the Aſſiſe paſt againſt the Tenant, before the Juſtice aſſigned to take Aſſiſes in the Marches of Wales.

The Tenant brought his Writ of Error and Aſſigns for Error.

1. That the Writ was directed to the Sheriff of Gloceſter, and the Land put in view was in Wales.

2. That

(2) That the Land was out of the Power and Bayliwick of the Sheriff of Gloceſter.

(3) That the Aſſiſe ought to be taken in the County where the Land lies, and that Goures-land was in no County.

(4) That the Writ was de libero tenemento in villa, ſive Hamletto de Gouerſe, and Gouer was no Village or Hamlet, but an entire Country conſiſting of two Commots.

To theſe Errors aſſigned Scroope, then Chief Juſtice, made Anſwer,

1. That Gower is a great Barony in the Marches of Wales, and That every Barony of the Marches hath a Chancellor, and its own Writs, whereby one Tenant wronged by another may be righted: But when the Lord is outed of his intire Barony, he can have no remedy by his own Writ, for he is outed of all his Juriſdicton.

And it is repugant to demand Juſtice of him whoſe Juriſdiction is queſtioned, that is, to give it, ut mihi videtur.

That therefore it was ordained by Parliament, when the Baron or Marcher is outed of his Barony in the Marches of *Wales*, he ought to go to the King for Remedy, and have a Writ in the Kings Chancery directed to the Sheriff of the next Engliſh County, and the Sheriff of *Gloceſter* ſerved the Writ, as being the next Engliſh Sheriff. This being the moſt material, the other Errors were alſo anſwered, and the Judgment was affirmed.

From this Caſe we may learn, and from no other, as I believe, at leaſt with ſo much clearneſs, That the Summons of Inhabitants in Wales, and the tryal of an Iſſue there ariſing, ſhould be by the Sheriff of, and in the next adjoyning Engliſh County, was firſt ordained by Parliament, though the Act be not extant now; nor is it conceived how it ſhould be otherwiſe, it being an empty Opinion that it was by the Common Law, as is touched
Poſt 407, 408. in ſeveral Books, who knew the practice, but were ſtrangers to the reaſons of it.

For if the Law had been, that an Iſſue ariſing out of the Juriſdiction of the Courts of England, ſhould be tryed in that County of England next to the place where the Iſſue did ariſe, not only any Iſſue ariſing in any the Dominions of England out of the Realm, might be tryed in England by that rule, but any Iſſue ariſing in any Forreiegn parts, as France, Holland, Scotland, or elſewhere, that were not of the Dominions of England, might,
Poſt 408. pari ratione, be tryed in the County next adjoyning, whereof there is no Veſtigium for the one or the other, nor ſorts it any way with the rule of the Law.

2. This

2. This Ordinance of Parliament extended not to all Wales, but only to the Lordſhips Marchers there, nor any way comprehended the ancient Shires of Wales, or Body of the Principality to which the Ordinance of the Statute of Rutland only extended: For Lordſhips Marchers were out of the Shires, as appears by Statute 27 H. 8.

3. It appears by the Caſe, that Gower was not within any County at that time.

Another Caſe to the ſame purpoſe is in Fitz-herbert, Title Juriſdiction, and not in any other Reports, 13 E. 3. in a Writ of Coſenage, the Demand was of Caſtle of K. and Commot of J. the Defendant pleaded the Caſtle and Commot were in Wales, where the King's Writ runs not; and it was ſaid that the word was not intelligible in the Courts of England, and Judgment was prayed if the Court would take Cognizance. Fitz. Juriſdiction, 13 E. 3. pl. 23.

To give the Court Juriſdiction, it was urged preſſingly,

1. That they had given the Court Juriſdiction, by alledging the Court knew not what was meant by Commot, which the Court was to determine whether it did or not: Therefore Juriſdiction was admitted therein.

2. Parning preſſed they had demanded the view, which gave the Court Juriſdiction.

3. For that the Original was directed to the Sheriff of Hereford, who by his Return had teſtified the Summons, and the Tenant had appeared, and ſo affirmed the Summons.

4. For that the view was had: Notwithſtanding all which, to give the Court Juriſdiction, it was ſaid to Parning, He muſt ſay more before the Court would have Juriſdiction. Which evidently proves that the Court had no Juriſdiction generally of Land in Wales, as I obſerved from the former Caſe. And no act of the party gives Juriſdiction to the Court, by elapſing his time to plead to the Juriſdiction, if it appear by the Record the Court hath no Juriſdiction, as in this Caſe it did. 2 Mod. 197, 273. 1 Mod. 81. Keil. 55. a. 1 Vent. 236, 369.

Then Woodſtock ſaid, Though the Caſtle and Commot were in Wales the Court ought not to be outed of Juriſdiction, for by Commot a great Signiory was demanded, conſiſting of Lands, Rents and Services, and that the Caſtle and Commot were held in Capite of the King, as of his Crown, and ſaid, thoſe ſo held were to be impleaded here, and not elſewhere, ſo is 7 H. 6. f. 36. b. 7 H. 6. f. 36. b.

And ſaid, the King by his Charter had granted the Caſtle and Commot to the Tenant in tayl, and thereupon pray'd aid of the King, and it was granted hereupon.

But before this was ſhew'd, and that it was a great Signiory, and held of the King in Capite, by which it was no part of the Principality, nor held under it, the Court would own no Juriſdiction; but when that appeared the Caſe was the ſame with the former in 18 E. 2. and the Defendant had no remedy but in the Kings Courts.

This Caſe was cited by Sir Edward Coke, in the Caſe before cited 11 Jacobi, concerning the Sheriff of Radnor, but the difference not obſerv'd of its being a Lordſhip in Wales, held immediately of the King in Capite, nor that the Court owned no Juriſdictions generally concerning Lands in Wales by the Summons and view of the next adjoyning Sheriff.

William de Coſington and Elizabeth his Wife, brought a Writ of Dower, of the third part of the Land in Gower, againſt the Earl of Warwick, as Tenant; and the Writ was, Quod reddat ei rationabilem dotem de libero tenemento quod fuit *Jo. Moubray* quondam viri ſui in terra de *Gowre* in *Wallia*.

It apears not in the Caſe to what Sheriff the Writ was directed, though this Caſe be in the Book at large; but it appears that thoſe of the Chancery, and the Judges of the Kings Bench had been conſulted with concerning the Writ (in bringing it for Dower in terra de Gower in Wallia) therefore it muſt iſſue from the High Court of Chancery, and muſt be directed conſequently to the Sheriff of Gloceſter, as the Aſſiſe was in 18 E. 2.

Bro. abridging this Caſe, ſaith, The Action was againſt the Earl of Warwick, as being Lord of the intire Signiory of Gower, and then he was to be impleaded by Writ out of the Chancery here equally, and upon the ſame reaſon for a third part of the Signiory, as for the whole, according to the Caſe of 18 E. 2. firſt cited; for the Lord could no more make a Precipe to ſummon himſelf to his own Miniſter, or to make Execution againſt himſelf for a third part of the Royalty than for the whole: And therefore the Ordinance of Parlament then mentioned, equally extended to this Caſe as to that of 18. E. 2.

This

This is not ſtrange that Acts of Parliament are loſt ſometimes; the Act of 3 E. 1. by which old Cuſtoms were granted, not extant, but clear proofs of it remain. Note Ante 161.

Theſe three laſt Caſes therefore, wherein the Tenants were impleaded in the Courts here for Land in Wales, and Summons and Execution made by the Sheriff of the next adjoyning County, are well warranted by an Act of Parliament not extant, being for either the Lordſhips Marchers themſelves, or ſome part of them, and againſt the Lord himſelf, as that Caſe of 18 E. 2. expreſly reſolves.

All theſe were real Actions: The firſt an Aſſiſe of Novel Diſſeiſin; the ſecond a Writ of Coſenage; the third a Writ of Dower.

The like Caſe is cited 19 H. 6. That when the Mannor of Abergavenny was demanded, the Writ was directed to the Sheriff of Hereford, as Newton urged, for this was a Lordſhip Marcher, and held of the King in Capite, as appears by Moor's Reports in Cornwals Caſe, in that the Barony of Abergavenny was held by the Lord Haſtings of the King in Capite, to defend it at his charge, ad utilitatem Domini Regis. 19H.6.f.12.A.

Exactly agreeing with this Doctrine is the Book of 21 H. 7. f. 33. b. if a Signiory in Wales be to be tryed, it ſhall be tryed here by the Courſe of the Common Law; but if Lands be held of a Signiory in Wales, it ſhall be tryed within the Mannor, and not elſewhere. 21H.7.f.33.B.

As for that expreſſion, by the Courſe of the Common Law, it is alſo in the Book 19 H. 6. that Deeds and all other things alledged in Wales, ſhall be tryed in the adjoyning Counties at the Common Law, otherwiſe there would be a failer of Right: and of this opinion ſeemed moſt of the Juſtices, arguendo obiter, the Caſe before them not concerning Wales, but the County Palatine of Lancaſter. 19H.6.f.12.A. Ant. 404. Poſt 408.

Of Churches in Wales a Quare Impedit ſhall be brought in England, yet the Land, and other things in Wales, ſhall be determined before the Stewards of the Lords of Wales, if it be not of Lands between the Lords themſelves. 30 H. f.6. B.

There is an ancient Book remarkable to the ſame purpoſe, ſpeaking of the Common Pleas: This Court hath more Conuzance of Pleas of the Welch Shires, than it hath of Pleas of the County of Cheſter; for the Pleas of Quare Impedits, and of Lands and Tenements held of the King in Chief in Wales, ſhall be pleaded here, and they ſhall not be ſo of the County of Cheſter. 8 E. 3. Term. Mich. 59. Poſt 409.

Fitz. Juriſdiction. p. 34. 6 H. 5. Land in Wales immediately held of the King, is pleadable in England, per Hankford, 6 H. 5. no ſuch Book at large.

The Law, and doubtleſs the Ordinance made by Parliament, mentioned in 18 E. 2. concerning Lordſhips Marchers, was the ſame concerning Land held in chief of the King, and are mentioned in the Books as ſynonimous, and were ſo, for all Lordſhips Marchers were held from the Crown in chief, nor could the King probably have other Lands in chief in Wales, beſide the Lordſhips Marchers, for all was either of Lordſhips Marchers, or Lands belonging to the Principality, and held from it, and not from the Crown in chief: To this purpoſe there is an ancient Statute 28 E. 3. very convincing.

28 E. 3. c. 2. All the Lords of the Marches of *Wales* ſhall be perpetually Attendants, and annexed to the Crown of *England*, as they and their Anceſtors have been at all times before this, in whoſe hands ſoever the ſame Principality be, or ſhall come.

And they being no part of the Principality, and conſequently not under the Statute and Ordinance of Wales, 12 E. 1. It was provided by a Law, That they ſhould be impleaded in *England*, and the Summons and Tryal to be by the Sheriff of and in the next adjoyning County.

Accordingly you find the practice was by many ancient Caſes remembred, but the Year-Books of E. 2. being never printed, wherein only that Statute is mentioned otherwiſe than in Fitz-herbert's Abridgment, and the Statute it ſelf not extant, gave occaſion to men obiter in the time of H. 6. & H. 7. long after, to ſay that ſuch impleading for matters ariſing in Wales in the Courts of England, and the Tryals to be in the adjacent Counties, becauſe they knew not it came to paſs by Act of Parliament, was by the Common Law, on which had they reflected with ſeriouſneſs, they had found it impoſſible. Ant. 404.

For that Tryals concerning Lands in Wales, quatenus particularly Wales, after it became of the Dominion of England, ſhould by the Common Law be differing from other Tryals in England, and in the adjacent Counties, could not poſſibly be, for Wales was made of the Dominion of England, within time of memory, viz. 12 E. 1. and whatſoever Tryal was at Common Law, muſt be beyond all memory: Therefore no ſuch Tryal for Land in Wales particularly could be by the Common Law.

It remains then, That if ſuch were at Common Law, it muſt be for Lands in all Dominions of the Acquiſition of England conſequently for Ireland, Garnſey, and Jerſey, Gaſcoign, Guyen, Calais, Tournay, as well as Wales, but it was never in practice Ant. 404.

practice or pretence that any ſuch Tryals ſhould be for any Land in theſe places.

Therefore it is evident, That it was, and it could be no otherwiſe than by Act of Parliament, that Wales differed from the other Dominions, belonging to England, in theſe Tryals.

Nor was it by any new Law made by E. 1. or any his Succeſſors, by the Clauſe in the end of the Statute of Rutland, which hath never been pretended: For by that Clauſe power was given to change Laws ſimply for Wales, but this way of Tryals changes the Law of England, in order to Tryals for Land in Wales, which that Clauſe neither doth, nor could warrant. Ant 403.

Beſides this new way of Tryals concerning Lordſhips Marchers held in chief from the King, the Books are full, that in Quare Impedits for diſturbance to Churches in Wales, the Summons and Tryal muſt be by the Sheriff of, and in the adjacent Counties, which is often affirmed and agitated in the Books, but with as much confuſion, and as little clearneſs as the other concerning Land.

To this purpoſe is the Caſe before 8 E. 3. the Pleas of Quare Impedits and of Lands and Tenements held in chief of the King in Wales, ſhall be pleaded there. 8 E. 3. 59. Ant 407.

A Quare Impedit brought by the King againſt an Abbot, exception taken that the Church was in Wales, where the Kings Writ runs not, & non allocatur, for the King was party by the Book, as a reaſon. 15 E. 3. Fitz. Juriſdiction, p. 24.

A Quare impedit cannot be brought in Wales becauſe a Writ to the Biſhop cannot be awarded, for they will not obey it, and ſo was the Opinion in that Caſe of Danby, Morton, and Newton, that Quare Impedits for Churches in Wales muſt be brought only in the Kings Courts, and the Opinion is there, that the Prince could not direct a VVrit to the Biſhops in VVales, upon Quare Impedits there brought. 11 H. 6. f. 3. A, B.

So is the Book of 30 H. 6 of Churches in VVales, a Quare Impedit ſhall be brought in England; the Caſe was cited before concerning Tryals of Lands in VVales. 30 H. 6. f. 6. B.

A Quare Impedit was brought in the County of Hereford of a diſturbance in VVales to preſent to a Church, exception was taken by Littleton only to this, that the Plaintiff did not ſhew in his Count or VVrit, that Hereford was the next adjoyning County, but by the Book it was well enough, for if Hereford were not the next adjoyning County, the Defendant might ſhew it, but no exception was taken to the bringing of the VVrit into the County of Hereford, if it were the next County. 35 H. 6. f. 30. A. B.

Quare

36 H. 6. f. 33. A, B. Quare Impedits ſhall be brought here of Churches in Wales, and ſhall be ſued in the Counties adjoyning, for that the Juſtices, (read it) Biſhops, will not obey any man there.

If a Quare Impedit be brought here of a Church in Wales, it ſhall be tryed in the County adjoyning: The reaſon there given is the ſame as in many other Books, Car nous avomus power ad eſcrier al Eveſque, mes ils voylont & purront ceo diſobeyer.

It is manifeſtly miſ-printed, Car nous navomus power ad eſcrier al Eveſque, mes ils voylont & purront ceo diſobeyer, which is not ſenſe.

By theſe Books, and many other, it is clear, Quare Impedits were formerly brought in England for Churches in Wales, as real VVrits were for Land, and the Tryal was in the next adjoyning Engliſh County.

But as thoſe Tryals for Land were only for Lordſhips Marchers held of the King in Chief, or part of them, and that by ſpecial Act of Parliament, as hath been opened.

So the Quare Impedits brought in England, and Tryals there had upon them, were not for all Churches in VVales, but for Churches only within the Lordſhips Marchers, whether of the Kings Patronage, or others; for there it is certain, according to the reaſon given in the Books, that the Stewards of the Lordſhips Marchers, to whomſoever they belonged, could not write to the Biſhops. And Newton was right, 19 H. 6. That if Action of Dower once brought in the Court of any Signiory real (it ſhould be Royal) in VVales, and there iſſue ſhould be upon unque accouple in loyal Matrimony, which muſt be tryed by the Biſhop, but the Court had no power to write to the Biſhop, but therefore ſaith he, The King ſhall write to the Marſhal to remove the Record hither, and then we ſhall make Proceſs to the Biſhop. But this is againſt the Reſolution of all the Judges in Cro. 2 Car. 1. f. 34.

So as either of Neceſſity this was a proviſion in the ſame Act, That as well Quare Impedits ſhould be brought in England of Churches in the Lordſhips Marchers of VVales, as that VVrits ſhould be brought in England of Lordſhips Marchers, or any part of them in queſtion, becauſe Juſtice could not be had in VVales, either concerning ſuch Lordſhips or Churches, or elſe Churches within Lordſhips Marchers, being in the ſame Caſe for a failer of Juſtice they were comprehended, and ought to be ſo within the equity of that Act of Parliament for Juſtice to be had touching the Lordſhips themſelves, and that the Law was ſuch, appears

1. That

1. That only Quare Impedits for Churches in Lordſhips Marchers in VVales, and not for Churches in the ancient Shires, or of the Principality of VVales, whereof ſubmiſſion and render was made to E. 1. were to be brought and tryed in England.

2. That Tryals and VVrits in England for Land in Wales were only for Lordſhips Marchers, and not for any Land in VVales, which was of the ancient Principality; for the Lordſhips Marchers were, or moſt of them, of the Dominion of England, and held of the King in chief, as appears by the Statute 28 E. 3. c. 2. and by the Title of the Earl of March before the rendition of the Principality to E. 1.

That the Law was ſo for the Quare Impedits appears in the firſt place by the Book before cited, 11 H. 6. f. 3. where Danby, Martin, and Newton were of Opinion (argued about a Church in Garnſey, for the Caſe before them was not of a Church in Wales) That Quare Impedits for Churches in Wales were to be brought in England, which was true; but not for Churches which were not in any Lordſhips Marchers. Strange affirms poſitively in the ſame Caſe, in theſe words, Sid. 92.

It is frequent to have *Quare Impedits* in *Wales*, and the Biſhops there do ſerve the VVrits directed to them, which, I my ſelf have often ſeen. And what he ſaid was moſt true for Churches within the Principality, as what the other Judges ſaid was alſo true concerning Churches within the Lordſhips Marchers, for thoſe Courts had no power to write to the Biſhops. Per Strange, 11 H. 6. f. 3.

But this is moſt manifeſt by the Statute of VVales 12 E. 1. That the Kings Juſticiar there had power within the County where he was Juſticiar to write to the Biſhops, which the Lords Marchers could not do. Sid. 92.

The words of the Law are upon demand of Dower in Wales before the Kings Juſticiar. Stat. Walliæ, f. 17.

Si forte objiciat, quare non debet dotem habere, eo quod nunquam fuit tali quem ipſa vocat virum legitimo matrimonio copulata, tunc mandabitur Epiſcopo quod ſuper hoc inquirat veritatem, & inquiſita veritate certificet Juſtitiarios *Walliæ*, & ſecundum certificationem Epiſcopi procedatur ad Judicium.

It is clear alſo, That the Biſhops of VVales, were originally of the Foundation of the Princes of VVales, as is the Book of 10 H. 4. and their Courts did write to their own Biſhops as the Courts in England did to the Kings Biſhops. 10 H. 4. f. 1

And

And when the Dominion of Wales was lawfully veſted in the King of England, his Juſtices there muſt have the ſame power, as to the Biſhops, that the Juſtices of the Courts of the Prince of Wales had before. How the ſame ſtands in this point, ſince the Statute of 27 of the Union of Wales with England, ſhall be ſhewed after.

Beſides what hath been already ſhewed, That the Writs out of the Chancery in England iſſued not into Wales for Tryals of Land, other than the Land of Lordſhips Marchers, and by a ſpecial Law that was provided, but neither for other Lands nor for other Iſſues ariſing in Wales, Tryals were not to be in the Engliſh Counties.

11 H. 6. f. 3. A. B. In 11 H. 6. Danby ſaith, That if a Church in Wales, which is out of the Juriſdiction of the Common Law, and a Franchiſe of the Prince, cannot award a Writ to the Biſhop, and for this cauſe it muſt be brought here: But other Actions are not maintainable here of a thing done in Wales, which was true of a thing done within the Principality, and of a Church within the Principality alſo, a Quare Impedit was not to be brought in England.

19 H. 6. f. 12. A. In 19 H. 6. Forteſcue takes a difference between Wales, which was only once a Kingdom of it ſelf, and the Counties Palatine, which were parcels of England, and therefore ſaith, The King may ſend a Record to be tryed in the Counties Palatine, becauſe he might do ſo at Common Law, but could not into Wales, becauſe he could not at Common Law.

And then he ſaith, That is the cauſe that the Statute will's, that of things pleaded there (as of a Releaſe bearing date there) it ſhall be tryed in the next adjoyning County. What this Statute ſhould be, he means, unleſs it be the ſame mentioned in the Caſe 18 E. 2. is not intelligible; for the Statute of 9 E. 3. which ſpeaks of Releaſes pleaded in Franchiſes within the Realm, That they ſhould be tryed in the County where the Action was brought, he cannot intend, for that Wales was no Franches nor Franchis of the Realm, and Tryals where the Action is brought is not a Tryal in the next adjoyning County to the place where the Iſſue ariſes. And by Aſcue expreſly in that Caſe, that Statute proves in it ſelf it doth not extend to a Deed bearing date in Wales, but all ſuch Deeds, and all other things alledged in VVales, ſhall be tryed in the County next adjoyning by the Common Law, for ſo he adds, which could not be.

Poſt 418.

So

So as an Action brought upon a Bond or Deed made in Wales, Ireland, Normandy, & Dutchland, or upon a matter there alledged, cannot poſſibly be for want of Tryal; but a Plea in Barr to an Action brought ariſing there, ſome queſtion hath been, Whether ſuch a Plea ſhall not be tryed where the Action is brought? and in ſuch a Caſe, if the Plea in Barr ariſe wholly out of the Realm of England, the better Opinion is that ſuch Plea wants a Tryal: See for this 32 H. 6. 25. B. 8 Aſſ. pl. 27. d. Dowdales Caſe, Co. l. 6.

Thus bringing Actions in England and trying them in Counties adjoyning to Wales, without knowing the true reaſon of it; alſo bringing Quare Impedits in like manner for Churches in Wales, without diſtinguiſhing they were for Lands of Lordſhips Marchers held of the King, and for Churches within ſuch Lordſhips Marchers, hath occaſioned that great diverſity and contrariety of Opinions in our Books; and at length that common Error, That matters in *Wales*, of what nature ſoever, are impleadable in *England*, and to be tryed in the next adjoyning County.

When no ſuch Law was ever pretended to be concerning other the Kings Dominions out of the Realm, belonging to the Engliſh Crown, of the ſame nature with Wales, as Ireland, the Iſles of Garnſey and Jerſey, Calais, Gaſcoign, Guyen anciently.

Nor could it be pretended of Scotland if it ſhould become a Dominion of the Crown of England, it being at preſent but of the King of England, though it was otherwiſe when the King came to the Crown.

And to ſay that Dominions contiguous with the Realm of England, as Wales was, and Scotland would be, is a thing ſo ſimple to make a difference, as it is not worth the anſwering; for no ſuch difference, was aſſignable before Wales became of the Dominions of England, and ſince, the Common Law cannot make the difference, as is obſerved before,

It remains to examine what other Alterations have been by Act of Parliament, whereby Juriſdiction hath been given to the Courts of England in Wales, without which it ſeems clear they could have none.

1. And firſt by Parliament 26 H. 8. power was given to the Kings Preſident and Council in the Marchers of Wales in ſeveral Caſes.

2. Power was given to indict, outlaw, and proceed againſt Traytors, Clippers of Mony, Murtherers, and other Felons within the Lordſhips Marchers of Wales, ſo indicted in the adjoyning Counties by the ſame Statute, but not againſt ſuch Offenders within the Principality of Wales, which was not Lordſhips Marchers.

3. Some other Laws are of this nature about the ſame time, to puniſh the perjury of Jurors in Wales, generally before the Council of the Marchers.

1 E. 6. c. 10. & 31 Eliz. c. 3. That Proclamtions upon Exigents ſhould iſſue into Wales, was ordained by the Statute of 1. E. 6. for by a Statute before in 6 H. 8. c. 4. ſuch Proclamations went but to the adjoyning Counties, but the Capias utlagatum went always, as I take it, being a Mandatory Writ for the King; but by 1 E. 6. c. 10. That if any perſons dwelling in Wales ſhall, after the time limited by the Act, be outlawed, that then Writs of ſpecial Capias utlagatum, ſingle Capias utlagatum, Non moleſtando, and all other Proceſs for againſt any perſon outlawed, ſhall iſſue to the Sheriffs of Wales, as immediate Officers of the King's Bench and Common Pleas.

Raſtall Exigent. Ant. 397.

Ant. 395.

Capias Utlagatum. So as the iſſuing of a Capias utlagatum into Wales, is clear by Parliament.

34 H. 8. Ant. 397. Perſons having Lands in Wales and bound in Statute Staples or Recognizances in England, Proceſs to be made againſt them out of the Chancery in England to the Sheriffs of Wales, and for Recognizances acknowleged before either of the Chief Juſtices by them, Proceſs to be immediately purſued from the ſaid Juſtices.

34 H. 8, c. 26. All Proceſs for urgent Cauſes to be directed into Wales by command of the Chancellor of England, or any of the King's Council, as hath been uſed.

The next is the Alteration made by the Statute of 27 H. 8. which was very great, and by which it is commonly taken, that Wales was to all purpoſes united with England, and that ſince all Proceſs may iſſue out of the Courts here to Wales.

It is ſaid that the Dominion and Principality of Wales is, and always hath been, incorporated to the Realm of England, that is, ut per Stat. Walliæ 12 E. 1. jure feodali, non proprietatis, and ſo it is expounded in Calvin's Caſe.

Cal. C. 7 Rep. f. 21. B. But there it is ſaid by 12 E. 1. which is there taken for an Act of Parliament, Wales was united and incorporated unto England, and made parcel of England in poſſeſſion, and the Caſe of 7 H. 4. f. 14. there cited; but this is clearly otherwiſe, for unleſs that Stat. Walliæ were an Act of Parliament, it could not make VVales part of England, which is much queſtioned; for no ſuch Parliament is found ſummoned, nor Law made in it, nor is it likely at that time a Parliament of England ſhould be ſummoned there, for Rutland is doubtleſs in Wales, which had

it

it been part of England then made, all Laws made, or to be made in England, without naming Wales, had extended to it, which they did not before 27 H. 8.

The Incorporation of Wales with England by that Act, conſiſts in theſe particulars generally.

1. That all perſons in Wales ſhould enjoy all Liberties, Priviledges, and Laws in England, as the natural born Subjects of England.

2. That all perſons inheritable to Land, ſhould inherit the ſame according to the Laws of England, thereby inheriting in Gavelkind was abrogated.

3. That Laws, and Statutes of England, and no other, ſhould for ever be practiſed and executed in Wales, as they have been, and ſhall be in England.

And as by this Act hereafter ſhall be further ordained: By this Clauſe not only all the preſent Laws of England were induced into Wales, but all future Statutes of England to be made, were alſo for the future in like manner induced into Wales, which was more than ever was done in Ireland; though Ireland before and by Parning's Act, had the preſent Laws then, and Statutes of England introduced into Ireland, but not the future Laws and Statutes to be made, as in this Caſe was for Wales.

But this gave no Juriſdiction in general to the Courts of England over Wales more than before; nor otherwiſe than if a Law were made in England, That the Laws and Statutes of England now, and for the future always to be made, ſhould be Laws in Ireland, the Courts in England would not thereby have other Juriſdiction in Ireland than they already have in any reſpect.

The Uniting of Wales to England, and Incorporating, doth not thereby make the Laws uſed in England to extend to Wales, without more expreſs words, Pl. Com. 129. B. 130. A. Note.

By this Act it appears, That the Lordſhips Marchers in the Dominions of Wales, did lye between the Shires of England and the Shires of Wales, and were not in any Shire; moſt of which Lordſhips were then in the King's poſſeſſion, and ſome in the poſſeſſion of other Lords: And that divers of them are by the Act united and joyned to the County of Gloceſter, others to the County of Hereford, and others to the County of Salop; others reſpectively to the Shires of Glamorgan, Carmarthen, Pembrook, and Merioneth. Sid. 92.

The reſidue of the ſaid Lordſhips Marchers were thereby framed and divided into five particular Counties, erected and created by the Act, namely, the County of 1 Monmouth, 2 of Brecnock, 3 of Montgomery, 4 of Radnor, of Denbigh.

The reſpective Lordſhips Marchers annexed to the reſpective Engliſh Counties of Salop, Hereford, and Gloceſter, are now to all intents under the Juriſdiction of the Courts at Weſtminſter, in like manner as the Counties to which they were annexed formerly were, and yet are.

So is one of the new erected Counties framed out of the ſaid Lordſhips Marchers, namely, the County of Monmouth, which by the ſaid Act is to all purpoſes under the Juriſdiction of the Kings Courts at Weſtminſter, as any Engliſh County is.

All the Lordſhips Marchers annexed to the ancient Shires of VVales, are now, ſince the Statute, under the ſame Juriſdiction for Adminiſtration of Juſtice, as thoſe ancient Shires were before the Statute of the 27. and yet are, ſo as the Lordſhips Marchers annexed to thoſe ancient Shires of Wales, are now ſuch parts of them as the Lordſhips Marchers annexed to the Engliſh Shires are parts of them.

And the four new Shires in Wales, excluding Monmouth-ſhire, are by the ſaid Act under the ſame Adminiſtration of Juſtice, by the King's Juſtices, to that purpoſe there Commiſſioned, as the other ancient Shires of Wales formerly were, and are, and conſequently wholly out of the Juriſdiction of the King's Courts at VVeſtminſter.

And the reaſon appears in the Statute, forasmuch as the Counties or Shires of Brecknok, Radnor, Montgomery, and Denbigh be far diſtant from the City of London, and the Inhabitans of the ſaid Shires not of ſubſtance to travel out of their Counties to have the Adminiſtration of Juſtice.

It is therefore enacted, that there ſhall be reſpective Chanceries and Exchequers in theſe Counties, and that the Sheriffs of thoſe Counties ſhall make their Accompts before the Chamberlain and Barons there appointed.

And that Juſtice ſhall be uſed and miniſtred in the ſaid new Shires, according to the Laws and Statutes of England, by ſuch Juſticiar or Juſticiars as ſhall be thereto appointed by the King, and after ſuch form and faſhion as Juſtice is uſed and miniſtred to the King's Subjects within the three Shires of North-wales, which is according to the ancient Adminiſtration of Juſtice by the Statute of VVales, 12 E. 1.

So

So as ſince this Statute the Courts of Weſtminſter have leſs Juriſdiction in VVales than before; for before they had ſome in all their Lordſhips Marchers, which were in no County, as by this Act, and ſince, they being all reduced into Counties, either of England or VVales, their Juriſdiction is abſolute over ſuch of them, as are annexed to Engliſh Counties, but none over the reſt.

And accordingly it hath been ſtill practiſed ſince the Statute, for before, Lordſhips Marchers and Quare Impedits of Churches within them were impleadable in the Kings Courts by Originals out of the Chancery, directed to the adjoyning Sheriffs, and the Iſſue tryed in the Counties adjoyning.

But ſince no ſuch Original hath iſſued for real Actions, nor any ſuch Tryal been.

And what hath been in perſonal Actions of that kind, began upon miſtake, becauſe they found ſome Originals iſſued into ſome part of VVales, and knew not the true reaſon of it, that it was by Act of Parliament, they then concluded Originals might iſſue for any cauſe ariſing into any part of VVales, and the Tryals to be in the adjacent Counties of England generally.

And though that practice hath been deſerted ſince the Statute of 27 H. 8. as to real Actions, becauſe the ſubject matter of the Lordſhips Marchers was taken away, which in ſome ſenſe was lawful (as is opened) before the Statute, yet they have retained it ſtill in perſonal Actions, which was never lawful, nor found in any Caſe anciently practiſed, as real Actions were, as appears in the Caſe of Stradling and Morgan in the Commentaries; yet that was upon a Quo minus out of the Exchequer, which I do not ſee how it can change the Law.

If Judgments be obtained in the King's Courts againſt perſons inhabiting in Wales, and that Proceſs of Execution cannot be awarded thither, the Judgments will be ineffectual. Obj. 1.

The ſame may be ſaid of Judgments obtained againſt a French-man, Scotch-man or Dutch-man whoſe uſual Reſidence, Lands, and Goods are in thoſe Territories; he that ſues ought to foreſee what benefit he ſhall have by it, and muſt not expect it, but where the Courts have Juriſdiction. Anſw. 1.

The ſame may be ſaid of Judgments obtained here againſt Iriſh-men, Garnſey or Jerſey Inhabitants, or formerly againſt thoſe of Calais, Gaſcoign, Guien, which were equally and ſome are ſtill, of the Dominions of England, as Wales is ſubject to the Parliament of England, but not under the Juriſdiction of the Courts at Weſtminſter, though ſubject to Mandatory VVrits of the King. 2.

That

Object. 2. That of Judgments obtained in the King's Courts Execution is had in Franchiſes, and alſo in Counties Palatine, where the King's Writ runneth not, and by the ſame reaſon ought to be had in Wales, though the King's Writ runneth not there.

Anſw. 1. Franchiſes inferiour are deriv'd out of Counties by the Kings' Grant, where the King's Writ did run, and ſo were Counties Palatine part of the Realm anciently, where the Subjects of the Realm had right to have Execution of the Lands and Goods of thoſe againſt whom they recovered in the King's Courts, whereof they are no more to be deprived than of their Actions by the King's Grant, for he may make what Counties he pleaſes Counties Palatine; but in Dominions out of the Realm, the Subject had no ſuch Right; in the other they have it, becauſe they had it at Common Law, but in others not, becauſe they had it not at Common Law.

2. When the Queſtion is of the Juriſdiction in a Dominion or Territory belonging to England, the way to determine it is by examining the Law in Dominions, the ſame in Specie with that concerning which the Queſtion is, and not to examine the Law in Franchiſes or Dominions of another kind: Therefore to determine what Juriſdiction the King's Courts have in Wales ought to be by examining their Juriſdiction in Ireland, the Iſlands of Garnſey, Jerſey, Calais, Gaſcoign, Guyen, in former times, ſome part of Scotland, and the Weſtern Iſlands, and many others might be named which are Dominions in ſpecie the ſame with Wales, and belonging to England, where the King's Writ runneth not; and not this power in Franchiſes within the Realm, part of Engliſh Counties, before they were Franchiſes, and continuing ſo after, or in entire Counties Palatine, which ſometimes were under the Juriſdiction of the King's Courts, and in which the Subjects had a right of their Tryals upon Pleas pleaded, and of Execution, and which cannot be taken from them where the King's Writ runneth not.

The Caſes are full in this point in 19 H. 6. f. 12. & 32 H. 6. f. 25, and many more Books.

Object. 3. That by the Statute of 9 E. 3. Pleas of Releaſes or Deeds, dated in Franchiſes within the Realm, ſhall be tryed where the Action is brought.
Ant. 412.

Wales

Wales is no Franchiſe, or if it were, not within the Realm; for the queſtions concerning a Deed pleaded, bearing date there, but of Original Proceſs for Cauſes ariſing, and Tryals of them in the next County adjoyning, and not in the County where the Action of a Deed dated in a Franchiſe of the Realm, which do toto cœlo differ, and concerning Executions and Judgments here to be made in another Dominion. Anſw.

The ſame may be ſaid concerning the Statute of 12 E. 2. when Witneſſes to Deeds in Foreign Franchiſes are to be ſummoned with the Jury, and the Tryal, notwithſtanding their abſence, to proceed when the VVrit is brought.

Preſidents of Proceſs iſſued to the Sheriffs of Wales, without a Judicial deciſion upon Argument, are of no moment: Many things may be done ſeveral ways (as Bonds) though they have regularly one common form, yet they may be in other forms as well. Preſidents are uſeful to decide queſtions, but in ſuch Cales as theſe which depend upon Fundamental Principles, from which Demonſtrations may be drawn, millions of Preſidents are to no purpoſe: Beſides, it is known, that Officers grant ſuch Proceſs to one Sheriff or County, as they uſe to another, nor is it in them to diſtinguiſh between the power of the Court over a Sheriff in Wales from a Sheriff in England, eſpecially when they find ſome VVrits of Execution going which are warranted by Acts of Parliament, which they know not, though they do know Proceſs of Execution in fact runs thither, as Capias utlagatum, Extents upon Statute, which are by Acts of Parliament, And that other Mandatory VVrits iſſue thither as well at Common Law, as by a particular Clauſe concerning the Chancellor in the Act of 34 H. 8. c. 26. Obj. 4. Stat. Tract 1, Part, 240.

By the Regiſter upon a Judgment had in the Common Pleas againſt a Clerk, who was after made Archbiſhop of Dublin in Ireland, upon a Fieri Facias iſſued to execute the Judgment to the Sheriff of Middleſex, and his Return that he had no Lands or Goods in his Bayliwick, but was Archibiſhop in Ireland, upon a Teſtatum of it in the Common Pleas, that he had Lands and Goods in Ireland, a Fieri Facias iſſued in the King's name, Juſticiario ſuo Hiberniæ, to make Execution; but it appears not whether this VVrit iſſued from the Common Pleas, or eſpecially by the King's Direction out of the Chancery, which poſſibly may be as a ſpecial Mandatory VVrit of the King's locum tenens there, which varies in ſtile at the Kings pleaſure; anciently Juſticiario ſuo Hiberniæ, at other timemes Locum tenenti noſtro, at other times Deputat. or Capitaneo generali noſtro, which ſtiles Régiſt. f. 43 B. Brevium Judicialium.

are

are not regularly known to the Officers of the Courts at Weſtminſter.

And perhaps by ſpecial VVrits to the chief Officer of the King, Execution may be made of Judgments given at Weſtminſter in any of his Dominions, which would be enquired of.

FINIS.

An Exact and Perfect

TABLE

TO THE

REPORTS and ARGUMENTS

OF

Sir *JOHN VAUGHAN*, Lord Chief Juſtice of the Court of *Common Pleas*.

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(20) 32 H. 8. c. 32 concerning *Executors*.

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(21) 7 E. 6. cap. 5. *Selling of Wines.*

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(23) 13 *Eliz. cap.* 10. *Concerning Leaſes to be made by Eccleſiaſtical perſons.*

1. That all Leaſes by Spiritual perſons of Tythe, &c. parcel of tehir Spiritual Promotions, other than for One and twenty years, or three Lives, reſerving the accuſtomed yearly Rent, ſhall be void.

2. This Statute intended that Leaſes in ſome ſenſe might be made of Tythes for One and twenty years, or three Lives, and an ancient Rent Reſerved, but of a bare Tythe only a Rent could not be reſerved, for neither Diſtreſs nor Aſſiſe can be of ſuch a Rent 203, 204

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(24) 7 Jac. cap. 5. 21 Jac. cap. 12. For Officers to be ſued in the proper County.

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2. Or if they are impleaded for any thing done by pretence of their Offices, and which is not ſtrictly done by reaſon of their Office, but is a miſ-feazance, Whether they may have the like benefit?

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(26) 12 Car. 2. cap. 24. To enable the Father to deviſe the Guardianſhip of his Son.

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2. To the Corporation of *Vintners*, men bred up in that Trade, and ſerving Apprenticeſhips to it, 355
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