The Ninth PART of the

REPORTS

OF

Sir *Edward Coke* Kt.

Chief Juſtice of the COMMON PLEAS.

OF

Divers Reſolutions and Judgments given upon ſolemn Arguments, and with great Deliberation and Conference of the Reverend Judges and Sages of the Law, of Caſes in Law, which were never reſolved or adjudged before: And the Reaſons and Cauſes of the ſaid Reſolutions and Judgments: Publiſhed in the tenth Year of the moſt High and moſt Illuſtrious *JAMES* King of *England*, *France* and *Ireland*, and of *Scotland* the 46. the Fountain of all PIETY and JUSTICE, and the LIFE of the LAW.

With REFERENCES to all the BOOKS of the *COMMON LAW*, as well Antient as Modern: And the PLEADINGS in *ENGLISH*, carefully Reviſed and Corrected.

Proviſum eſt, concordatum & conceſſum, quod tam majores, quam minores juſtitiam habeant & recipiant in Curia Domini Regis. Marlb. Anno 52 H. III. Cap. 1.

Summa charitas eſt unicuique facere juſtitiam omni tempore cum opus fuerit. Weſtm. 1. Anno 3 Ed. I. Cap. 50.

In the SAVOY:

Printed by E. and R. NUTT, and R. GOSLING, (Aſſigns of *Edward Sayer* Eſq;) for R. Gosling, W. Pears, W. Innys and R. Manby, T. Woodward, F. Clay, A. Ward, J. and P. Knapton, T. Wotton, T. Longman, D. Browne, T. Osborne, H. Lintot, and T. Waller. M.DCC.XXXVIII.

Deo; Patriæ, Tibi.

CUM tantillum hoc meum, in præfatione octavi mei operis, ex hiſtoriarum conſenſu, apud ſcientes Lectores (dum monumentis Judicialibus haud dubio quadrat) optatos adeo produxit effectus, adjicere nonnulla viſum eſt, quibus ſuadeor & ſatisfactioni & ſolamini addatur eorum, qui ſoli natalis Leges municipales (id quod omnes oportet) colunt pariter ac amant.

Multum antiquus & non minus elaboratus penes me eſt tractatus de Legibus & Conſuetudinibus hujus regni, quibus res hujus noſtræ gentis publicæ 1100. *ab hinc retroactis annis agebantur. Titulum ſimul & hujus libri materiam dicat ipſe author, his verbis:* Quel ſumme jeo appelloi Mirror aux Juſtices, ſo-

SEeing the light Touch I gave in my Preface to my eighth Work out of Conſent of Hiſtory, hath with the judicious Reader (finding it conſonant to judicial Record) wrought ſo good Effect, I will add ſomewhat thereunto, which I am perſuaded will add to their Satisfaction and Solace therein, who do reverence and love (as all Men ought) the national Laws of their native Country.

I have a very ancient and learned Treatiſe of the Laws and Uſages of this Kingdom, whereby this Realm was governed about 1100. *Years paſt, of the Title and Subject of which Book the Author ſhall tell you himſelf in theſe Words.* Which Summary I have intitled, the Mirror of Juſtices, according to the

In Proœmio. The Book called the Mirror of Juſtices.

Virtues and Subſtances *imbellies* which I have obſerved, and which have been uſed by holy Cuſtoms ſince the Time of King *Arthur*, &c.

Cap. 1. Sect. 1. The Laws warranted by holy Scripture. Why they be called the Common Law Councils general or Parliaments.

And ſoon after. The Law whereof this Summary is made, is of ancient Uſages warranted by holy Scripture; and becauſe it is generally given to all, it is therefore called Common. And for that there is no other Law but this, this alone of Antiquities, it is by general Councils or Parliaments permitted to be uſed by holy Uſages, *&c.*

In this Book in Effect appeareth the whole Frame of the antient Common Laws of this Realm, as by theſe few Particulars ſhall appear: As the Diverſity and Diſtinction of the Courts of Juſtice (which are officinæ legis.) *And*

The High Court of Parliament. Cro. Arg. 54.

firſt of the High Court of Parliament, which Court is mentioned before by the Name of Council general or Parliament, and cap. 1. ſect. 3. King *Alfred* ordaineth for a Uſuage perpetual, that twice in the Year, or oftner if Need be, they ſhall aſſemble themſelves at *London* to treat in Parliament of the Government of the

lonque ceo que jeo trova les vertues & les ſubſtances imbellies, & puis le temps le Roy *Arthur* uſes per ſaint Uſages, &c.

Et paulo poſt. *La Ley dont ceſt ſumme eſt fait, eſt eſcrie des auncient uſages garrant de ſaint Eſcripture; & pur ceo que eſt generalment done a touts, eſt appelle Commune. Et pur ceo que nul auter Ley eſt forſque cela, ele un dantiquities in Councells generalls ou Parliaments eſt ſuffer deſtre uſe per ſaints Uſages, &c.*

Totum fere antiquiorum hujus regni Legum Communium contextum habet hic liber, (ut hiſce particularibus ſatis liquebit): cujuſmodi ſunt Diverſitas & Diſtinctio Curiarum juſticiæ (quæ ipſius ſane Legis ſunt officinæ). Primum itaque de ſuprema Curia parliamentaria, quæ cum ante memorata ſit appellatione Concilii generalis ſive Parliamenti, tum *cap. 1. ſect. 3. Le Roy* Alfred *ordeigna pur uſage perpetuell, que a duex foits per lan, ou pluis ſovent pur miſtier, in temps de peace ſe aſſembler' a Londres pur parliamenter ſur le guide-*

ment

ment del people de Dieu, coment gents ſoy garderent de pecher, viverent en quiet, receiverent droit per certain uſages & ſaints Judgements, &c.

People of God, how they ſhould keep themſelves from Sin, ſhould live in Quiet, and ſhould receive Right, by certain Laws and holy Judgments, &c.

2. De Curia Cancellariæ. *Ordeign fuit que cheſcun eyt del Chauncery le Roy briefe remedial a ſa plaint ſans nul difficultie*, &c. *i. e.* without Fine or Fee, &c.

2. In the Court of Chancery. It was ordained, that every one, upon Complaint, ſhould have out of the King's Chancery, a Writ remedial, without any Difficulty, &c.

Cap. 1. Sect. 3. The Court of Chancery. Cap. 5. Sect. 1.

In temps le Roy Alfred *neſtoit nul briefe de Grace, eins fueront touts briefs remedials, grantables come de Det per vertue de ſerement*, &c.

In the Time of King *Alfred* there was no Writ of Grace, but all Writs were remedial, grantable (as of Duty, *) by Virtue of an Oath, &c.

* i. e. without Fine, &c. So Mag. Char. Nulli vendemus, &c. Cap. 4. De Juriſdictione.

3. De Banco Regis. *Chief Juſtices teignants les plees le Roy.* Et deinde, *Al office de chiefe Juſtices appent les tortonious Judgements, & les torts & les errours dauters Juſtices redreſſer & punier per briefe, nequidant de faire vener devaunt le Roy les parties & le Record oveſque le briefe original; Et per devant tiels Juſtices ſont touts briefes pledables, retournables & terminables, ou mention eſt fait devant le Roy meſme*, &c. *Et cy appent a lour office d'oyer & terminer touts plaints faits de perſonal torts faits a* 12 *lieus dentour le Roy: Et les Goales deliverer des*

3. The King's Bench. Chief Juſtices holding Pleas of the King. And ſoon after, To the Office of the Chief Juſtices belongeth to redreſs and puniſh by Writ the wrongful Judgments, Wrongs, and Errors of other Juſtices, And to cauſe to come before the King the Parties and the Record with the original Writ. And before theſe Juſtices are all Writs pleadable, returnable, and determinable where it is mentioned, before the King himſelf, &c. It belongeth alſo to their Office, to hear and determine all Plaints of perſonal

The King's Bench.

Wrongs, done within 12 Miles of the King: And to deliver the Gaol of Priſoners deliverable: And to determine all that is determinable by Juſtices in Eire, and more or leſs according to the Nature of their Commiſſion.

Cap. 4. Sect. eodem. The Court of Common Pleas

4. The Court of Common Pleas. To the Juſtices of the Bench Power is given to take Fines, to hear and determine grand Aſſiſes, Common Pleas, &c.

Cap. eodem, Sect. eodem. The Court of Exchequer.

5. The Court of Exchequer. Moreover the Barons of the Exchequer have Juriſdiction over the King's Receivers and Bailiffs, and of the Alienation of the Fiefs (or Fees) and Rights belonging to the King, and to the Rights of his Crown, &c.

Cap 1. Sect. 3. The Office of Juſtices in Eire.

6. *Juſticiarii itinerantes*, or Juſtices in Eyre. The Kings do Right to all Men by their Juſtices, Commiſſioners itinerant, aſſigned to have Conuſance of all Pleas. In Aid of ſuch Eires, the Sheriff's Turns, and Views of Franc-pledges are neceſſary. And all thoſe whom the good Men of ſuch Enqueſts did indict of a capital Offence, the Kings were wont to deſtroy

priſoners deliverable: et terminer quant que eſt terminable per Juſtices errants, & pluis ou meins ſolonque le nature de lour Commiſſion.

4. De Curia placitorum Communium. *Et aux Juſtices del Banke a queux poyer eſt done de prendre fines, de oyer and terminer les grands aſſiſes, Common Plees*, &c.

5. De Curia Scaccarii. *Ouſter ceo ount les Barons del Eſchequer juriſdiction ſur les Receivors & les Baylifes le Roy, & ſur Alienation des Fiefts & droits appendants al Roy & al droyt de ſa Corone*, &c.

6. De Juſticiariis itinerantibus. *Les Royes ſont droit a touts per lour Juſtices Commiſſaries errants, aſſignes a touts Plees. En ayd de tiels Eires ſont Tornes del Viſcounts neceſſaries, & Views de Frankpledges. Et quant que bones gents a tiels Enqueſts enditerent de peche mortel, ſoloyent les Royes deſtruere ſans reſpons, les queux uſages durant uncore en Alermaigne; mes per garrant*

garrant de pitie & de mercie (& pur ceo que la frailtie de home ne ſe poit tener de pecher ſi abſtinence ne ſoit de la grace de Dieu) Accord eſt quel nul Appellee ne Inditee ſoit deſtroy ſans reſpons.

without any *Anſwer*; which Uſages are yet in Practice in *Almaigne*: But by Warrant of Pity and Mercy, (becauſe the Frailty of Man cannot refrain from Sin, unleſs God of his Grace give him Abſtinence,) It is accorded, that no Appellee or Indictee ſhall be deſtroyed without Anſwer.

7. De Curia Vicecomitis (quam Turnum vocamus) de qua ſupra dicitur. *Les Viſconts dauncient ordinance tenont aſſemblies generalls deux foits per lan en cheſcun Hundred, ou touts les fieftenants deins le Hundred ſont obliges de vener per le ſervage de lour fiefs, ceſtaſcavoir, un foits apres le S. Michael, & autrefoits apres la Paſche. Et pur ceo que les Viſcounts a ceo faire font lour Tornes de Hundred, ſont tiels venues appels Tornes des Viſcounts: Ou aux Viſcounts appent denquirer de touts peches perſonels, & de touts circumſtances de peches faits en ceux Hundreds, & de torts des Miniſters le Roy & la Roigne, & de torts faits au Roy & al Comminalty del people ſolonq; les points avantdits en les diviſions de peches.*

7. The Sheriff's Torn, whereof Mention is made before. The Sheriffs of antient Ordinance do hold general Aſſemblies twice a Year in every Hundred, whither all the Freeholders within the Hundred are bound to come by the Service of their Fiefs (or Fees) that is to ſay, once after *Michaelmas*, and another Time after *Eaſter*. And becauſe the Sheriffs for the doing hereof make their Turns (or Courſes) thro' the Hundred, ſuch Aſſemblies are called, the Sheriff's Turns. Where, it belongeth to the Sheriffs, to enquire of all Offences Perſonal, and of all the Circumſtances of Offences, done in thoſe Hundreds; and of Wrongs done by the Kings and Queens Miniſters; and of Wrongs done to the King and to the Commonalty, according

Cap. 1. Sect. 16. De Turnis.

Note.

according to the Articles aforeſaid in the Diviſions of Offences.

Cap. 1. Sect. 17. De Viſu Franciplegii.

8. Leets ou Courts des Views de Frankpledge. Concerning theſe Aſſemblies, firſt, it is thus ordained, That every Hundredor ſhall aſſemble once a Year, and not only Freeholders, but all of the Hundred, as well Strangers as Denizens, from 12 Years upwards (except Archbiſhops, Biſhops, Abbots, Priors, and all religious People and Clerks, Earls, Barons, and Kts. married Women, Perſons dumb and deaf, diſeaſed, Baſtards, and Lepers, and thoſe that are Deciners elſewhere) to inquire of the Points aforeſaid, and of the Articles following; and that, not by Bondmen or Women, but by the Oaths of 12 Freemen at the leaſt, for a Bondman cannot indict a Freeman, nor no other that is not receivable to do Suit in the ſame Courts. And, becauſe it was anciently ordained, That none ſhould abide in the Realm, if he were not in ſome Dezeine (or Tithing) and undertaken for by Freemen, the Hundredors are once a Year to View the Frankpledges and the

8. Leets ou Courts des Views de Frankpledge. *De celles aſſemblies primiers eſtoit ainſi ordeigne, que cheſcun Hundredor fait common aſſemblie un foits per an, & nemy ſolement de fieſtenants, mes de touts del Hundred eſtrangers & denizens de* 12. *ans enſuis, forſpriſe Archieveſques, Eveſques, Abbes, Priors, & touts gents de religion & touts Clerks, Counties, Barons, & Chevaliers, femes eſpouſes, ſurds & Mutes, Malades, fols-naiſtres, & meſeaux, & ceux que ſont ailors en dezein, pur enquir' des points avantdits & des articles ſuivants, & nemy per ſerfs ne per femmes, mes per les ſerements de* 12 *frankhommes al meins, car ſerf ne poit nul frankhomme inditer, ne nul auter que neſt receivable a ſute faire en meſmes les Courts. Et pur ceo que ordeigne fuit ancientment, que nul ne demurraſt en le Roialme ſil ne fuit en dezeine & plevy de frankhommes, appent aux Hundredors de Viewer un foits per lan les frankpledges & les plevies; & pur ceo ſont tiels Views*

appells

appells Views de Frankpledges.

9. De Curia Comitatus. *Un court teignont les viſconts de mois en mois, ou de cinq ſemaigns en cinq ſolon lour greindure & largeſſe de pais: & celles courts ſont appelles Counties, ou les Judgments ſe font per les ſutors ſi breve ne y ſoit: Et ceo eſt garrant de Juriſdiction ordinary.*

10. De Curiis Dominicalibus, & Hundredorum. *Lautres mean courts ſont les courts de cheſcun Seignior del fief*, &c.

11. De Curia pedis pulverizati. *Et que de jour en jour ſoi haſtaſt droit de eſtrangers en faires & markets, come de poudrons ſolonque le ley Merchand.*

12. Court de Admiraltie. *Le Roy eit ſoveraigne juriſdict' ſur la mer.*

13. De Curiis Foreſtæ. *Les miniſters le Roy de ſes foreſts ont power per authority de lour office, a mitter gents al ſerem't ſans breve le Roy pur le ſalvac' de la pees & pur le droit le Roy, & pur le common prou*, &c.

Sureties: And therefore are ſuch Views called Views of Frankpledge.

9. The County Court. The Sheriffs hold a Court from Month to Month, or from five Weeks to five Weeks, according to the Greatneſs and Largeneſs of the Country: And theſe Courts are called Counties, where the Judgments are given by the Suitors, if there be no Writ: And this is warranted by ordinary Juriſdiction. Cap. 1. Sect. 15. The County Court.

10. Court-Barons and Hundred-Courts. The other mean Courts, are the Courts of every Lord of the Fee, *&c.* Cap. 1. Sect. 15. Court-Baron and Hundred-Court.

11. Courts of Pipowders. And that from Day to Day ſpeedy Juſtice be done to Strangers in Fairs and Markets, as of Pipowders, according to the Law of Merchants. Court of Pipowders. Cap. 1. Sect. 3. and Sect. 15. Of mean Courts.

12. Court of Admiralty. The King hath *ſoveraign* (abſolute) Juriſdiction upon the Sea. (*Not ſo on the Land.*) Cap. 1. Sect. 3. Court of Admiralty.

13. Courts of the Foreſt. The King's Miniſters of his Foreſt have Power by Authority of their Office, to ſwear Men without the King's Writ, for the Safeguard of the Peace, and for the King's Right and the common Good, *&c.* Cap. 1. Sect. 13. Courts of the Foreſt.

He

Cap. 2. Sect. 5. of Countors.

He alſo treateth of the Profeſſors of the Law, as of the Countors, that is of the Serjeants and other Pleaders. There are many that cannot proſecute nor defend their own Cauſes in Judgment, and many which may not: And therefore are Countors neceſſary, that that which the Plaintiffs and Actors may not or cannot do by themſelves, they may do by their Serjeants, Proctors, or Friends. Countors are Serjeants skilful in the Law of the Realm, which ſerve the common People to proſecute and defend their Actions in Judgment (when need is) for their Fee.

Addit etiam de legis Profeſſoribus, nempe de hiis quos Countors dicimus, id eſt, Servientibus, & de aliis cauſarum actoribus. *Pluſors ſont que ne ſcavent lour cauſes pronounce ne defendre en judgment, & pluſors que ne poyent; & pur ceo ſont Countors neceſſaires, cy que ceo que plaintifes & actors ne poyent ou ne ſcavent per eux meſmes, facent per lour Serjeants, ou procurators, ou amies. Countors ſont Serjeants ſachants la Ley del Royalme, que ſervent al common del people a pronouncier & defendre les actions en jugement, pur ceux que miſtier ount pur lour loier.*

Note.

And alſo of Attornies, where amongſt other Things it is ſaid, None may be an Attorney, which may not be a Countor, *&c.*

Item de Atturnatis, ubi inter alia dicitur, *Nul poet eſtre Atturney que ne purr' eſtre Countor,* &c.

Cap. 1. Sect. 3.

Of the Miniſters of Juſtice, as Viſcounts, Coroners, Eſcheators, Bailiffs of Hundreds, &c. Alſo by the ancient Kings, Coroners were ordained in every County; and Sheriffs to keep the Peace when the Earls were abſent from their Charges, and Bailiffs in lieu of Hundredors, *&c.*

De Miniſtris Juſtitiæ, ſicuti de Vicecomitibus, Coronatoribus, Eſchaetoribus, Ballivis Hundredorum, *&c. Auxy ordeignes fueront per viels Royes Coroners en cheſcun Countie, & Viſcounts a garder la peace quant les Countees ſoy demiſterent des gards, & Baliſes en lieu de Centeiners,* &c.

Cap. 1. Sect. 3.

Of the Prerogatives of

De Regis Prærogativis:

vis: *Sicome Deodands, Alienation as Aliens, Treſour trove, Wrecke, Eſtray, Chattels des Felons & Futifs, Counties, Honours, Hundreds, Soknes, Gaoles, Foreſts, chiefe Cities, chiefe Ports de la Mer, graunas Manors: Ceux droits retiendront les primer Royes, & de remnant de la Terre feofferont les Countees, Barons, Chivalers, Serjeants, & auters, a tener de les Royes pur les ſervices purvieus & ordeignes al defence del Realme. Ordeigne fuit que fee de Chivaler deviendroit al eigne fits per ſucceſſion de heritage, & que ſocage fee fuit partible parenter males enfants. Et que les mariages fuiſſent al liege Seigniours.*

the *King*: As of Deodands, Alienation to Aliens, Treaſure found, Wreck, Waif, Eſtray, Chattels of Felons and Fugitives, Counties, Honours, Hundreds, Sokes, Gaols, Foreſts, chief Cities, chief Ports of the Sea, great Manors. Theſe held the firſt Kings as their Right, and of the Reſidue of the Land did enfeoff the Earls, Barons, Knights, Serjeants, and others, to hold of the Kings, by Services provided and ordained for Defence of the Realm. It was ordained, that the Knight's Fee ſhould come to the eldeſt by Succeſſion of Heritage; and that Socage-Fee ſhould be partible between the Male Children; and that the Liege Lords ſhould have the Marriage. Note.

Capite primo agitur de Criminibus, eorumque diviſionibus; De crimine læſæ Majeſtatis, de Falſificationibus, de Proditione, de incendiis, de homicidio, de felonia, de burglaria, de raptu, &c. Secundo, de Actionibus, de Judicibus, de Actoribus, &c. Tertio, de Exceptionibus dilatoriis & peremptoriis, hoc eſt, placitis ad breve & (ut lo-

He treateth in the firſt Chapter of Crimes and their Diviſions; of the Crime of Majeſty, of Fauſonnery, of Treaſon, of Burning, of Homicide, of Felony, of Burglary, of Rape, &c. In the ſecond of Actions, of Judges, of Actors, &c. In the third of Exceptions dilatory and peremptory, that is Pleas to the Writ and in Bar, &c. Of Trials by Juries and by Battail,

of

of Attaints, of Challenges, of Fines, &c. *In the fourth of Judgments, and therein of Juriſdiction, of Proceſs in criminal Cauſes, and in Actions real, perſonal, and mixt. So as in this* Mirror *you may perfectly and truly diſcern the whole Body of the Common Laws of* England. *In Mr.* Plowden's *Commentaries, fol.* 8. *in* Fogaſſe's *Caſe,* Bradſhaw *Attorney General citeth this Book by the Name of* Mirror des Juſtices, le quel (*ſaith he*) fuit fait devant le conqueſt. *The Meaning of* Bradſhaw *was, not that the Book was made before the Conqueſt, but that the Text of Law which he citeth out of that Book was the Law of this Realm before the Conqueſt.*

But here, though ſumma ſequar faſtigia rerum, *yet I will ſtay my Foot and fix my Staff a while, for this grave and learned Author will ſhew us in this* Mirror *the great Antiquity of the ſaid Courts of the Common Law, and particularly of the High Court of* Par-

quimur) in barram, &c. De explorationibus cauſarum juramento 12 virorum, & Duello: De attincturis, de Calumniis, de Finibus, *&c.* Quarto, de Sententiis judicialiter latis; & has dum tractat agit de juriſdictione, de Proceſſu in cauſis criminalibus, & in actionibus realibus, perſonalibus, & mixtis. Adeo ut in hoc ſpeculo totum Legum Angliæ municipalium corpus perſpicue imo veriſſime videre eſt. Apud Magiſtri *Plowden* Commentaria, in caſu *Fogaſſei*, fol. 8. *Bradſhaw* Atturnatus generalis hunc librum citando, ei nomen dedit Speculum Juſticiariorum, *le quel* (inquit) *fuit fait devant le Conqueſt:* Non interim intendens conditum fuiſſe gente hac nondum ſubacta, textum vero Legis, quem ex illo excerpſerat, Legem fuiſſe hujus regni ante devictam hanc Nationem.

At (licet *ſumma ſequor faſtigia rerum*) componam greſſus, & baculum hic pauliſper figam, interea dum gravis noſter multumque literatus author, in hoc ſuo ſpeculo, immenſam illam Curiarum Legis Communis nos edoceat antiquitatem, eamque

amque ſigillatim de ſuprema parliamenti Curia, uſque a temporibus Regis *Arthuri*, qui an' a Chriſto nato 516. plus minus regnavit: Non quod forum iſtud cæterave eo temporis inſtituebantur, ſed quod tractatu ille ſuo nullas ſibi propoſuit ſuperiorum ætatum Leges ac Conſuetudines hujus regni deſcripſiſſe, ſed has ſolummodo quæ regno ejuſdem regis & exinde inſenuerant. In medium (ut audiviſtis) profert ſtatutum a Rege *Alfredo* ſancitum, tam de Curia hac parliamentaria bis in anno convocanda Londini, quam ut ternum hujus magni honorandique Magnatum Conventus indicaret inſtitutum; 1. ad ſubditos a delinquendo detinendos, hoc eſt, ut delicta, tum bonis cautiſque legibus, tum debita earundem executione anticiparentur; 2. Ut tuta tranquillaque ſit vita hominum; 3. Ut fixis quibuſdam Sanctionibus, ſanctiſque Judiciis jus unicuique fieret, eatenus nimirum ut rectius juſtitia miniſtraretur, ut quæſtiones & in Lege ambiguitates altiſſima hac Curia parliamenti enodarentur, in certitudinem redigerentur, & dijudicarentur.

liament *ever ſince the Time of King* Arthur, *who reigned about the Year of our Lord* 516. *not that this Court and the Reſt were inſtituted then, but that the Reach of his Treatiſe extendeth no higher than to write of the Laws and Uſages of this Realm continued ſince the Reign of that King. He citeth (as you have heard) a Statute of King* Alfred, *as well concerning the holding of this Court of Parliament twice every Year at the City of* London, *as to manifeſt the threefold End of this great and honourable Aſſembly of Eſtates: Firſt, that the Subject might be kept from offending, that is, that Offences might be prevented both by good and provident Laws and the due Execution thereof: Secondly, That Men might live ſafely in Quiet: And Thirdly, That all Men might receive Juſtice by certain Laws and holy Judgments, that is, to the End that Juſtice might be the better adminiſtred, that Queſtions and Defects in Laws might be by this High Court of* Parliament *explained, reduced to Certainty, and adjudged.*

Parliaments before K. Arthur.

This Court, being the moſt ſupreme Court of this Realm, is a Part of the Frame of the Common Laws, and in ſome Caſes doth proceed legally according to the ordinary Courſe of the Common Law, as it appeareth in 39 Ed. 3. *fol. To be ſhort, of this Court it is truly ſaid,* Si vetuſtatem ſpecte eſt antiquiſſima, ſi dig itatem eſt honoratiſſima, ſi juriſdictionem eſt capaciſſima.

Hoc, cum ſit forum in hoc regno plane ſupremum, pars eſt ſtructuræ jurium municipalium, & nonnunque ſecundum frequentem illum & uſitatum in Lege Communi ordinem, legali modo habet proceſſus, ut in 39 *Ed.* 3. *fol.* liquet manifeſte. Et, ut verbo dicam, merito de hac Curia, *Si vetuſtatem ſpectes eſt antiquiſſima, ſi dignitatem eſt honoratiſſima, ſi juriſdictionem eſt capaciſſima.*

An. Dom. 712. *And here Queſtion hath been made whether this Court of Parliament continued during the Heptarchy, let the Records themſelves make anſwer. King* Ina *began his Parliament thus, as hath been anciently tranſlated into* Latin (*which Tranſlation I have*): Ego *Ina* Dei gratia Weſt-Saxonum Rex, exhortatione & doctrina *Cenredes* patris mei, & *Heddes* Epiſcopi mei, & *Erkenwaldes* Epiſcopi mei, & omnium Aldremannorum meorum & ſeniorum Sapientum regni mei, multaque congregatione ſervorum Dei ſollicitus de ſalute animarum noſtrarum & ſtatu regni mei, Conſtitui rectum Conjugium*, & juſta judicia, pro ſtabilitate & confirmatione

Queſtionem quod attinet, utrum Curia hæc parliamenti in uſu fuerat durante illa Heptarchia, reſpondeant ſacra ipſa ſcrinia. Inchoatio ſui parliamenti, a Rege Ina, hujuſmodi fuit, uti antiquitus in Linguam Latinam convertitur (quæ apud me eſt traductio): *Ego* Ina *Dei gratia Weſt-Saxonum Rex, exhortatione & doctrina* Cenredes *patris mei, &* Heddes *Epiſcopi mei, &* Erkenwaldes *Epiſcopi mei, & omnium Aldremannorum meorum & ſeniorum Sapientum regni mei, multaque congregatione ſervorum Dei ſollicitus de ſalute animarum noſtrarum & ſtatu regni mei, Conſtitui rectum Conjugium, & juſta judicia, pro ſtabilitate & confirmatione*

* Al. Recta Fœdera.

ne populi mei, benigna ſedulitate celebrari: Et nullo Aldremanno vel alicui de toto regimine noſtro conſcripta liceat abolere judicia.

Ejuſmodi fuit & Offæ Regis Merciorum parliamentum, ejuſmodi *Etherberti* Regis Kanciæ, & ejuſmodi reliquorum e ſeptem regibus. Exacta jam tum Heptarchia (ut inſtar multorum ſint pauca) Rex *Edwardus*, filius Regis *Alfredi*, (de quo ſupra fit mentio) ante expugnationem illam hujus Nationis primus, convenire fecit ad parliamentum Exoniæ, omnes Sapientes ſuos: *Edwardus Rex admonuit omnes Sapientes ſuos qui fuerint Exoniæ, ut inveſtigarent ſimul & quærerent quomodo pax eorum melior eſſe poſſit quam ante fuit, &c.* Quin & facile conſtabit hunc Sapientum Coventum Optimates atque Communitatem ad parliamentum ſimul incluſiſſe.

Rex *Ethelſtanus* apud Great-ænley, ubi omnes regni Nobiles pariter ac Sapientes conveniebant: Erat hic *Conventus omnium Nobilium & Sapientum.* Imperante rege eodem alia ejuſdem edicta parliamentaria inſcribuntur, &

populi mei, benigna ſedulitate celebrari: Et nullo Aldremanno vel alicui de toto regimine noſtro conſcripta liceat abolere judicia.

The like Parliament was holden by Offa *King of the* Mercians, *and by* Etherbert, *King of* Kent, *and the Reſt of the ſeven Kings. After the Heptarchy, taking ſome few Precedents for many, King* Edward, *Son of the aforenamed King* Alfred, *before the Conqueſt the Firſt, held a Parliament at* Exeter, *and called thither all his Wiſemen:* Edwardus Rex admonuit omnes ſapientes ſuos qui fuerint Exoniæ ut inveſtigarent ſimul & quærerent quomodo pax eorum melior eſſe poſſit quam ante fuit, &c. *And it ſhall evidently appear hereafter, that this* conventus Sapientum *included the Lords and Commons of the Parliament.*

King Ethelſtan apud Great-ænly * *where all the Noblemen and Wiſemen of the Realm where gathered together; here was* Conventus omnium nobilium & ſapientium. *In the Reign of the ſame King other of his Acts of Parliament are*

* This ſeems Heanly or Henly on Thames.

are ſtiled and ancientlytranſlated thus : Hæc ſunt judicia Exoniæ quæ ſapientes conſilio Ethelſtani Regis inſtituerunt, & iterum apud Frefreſham*, & tertia vice apud ubi hæc definita ſimul & confirmata ſunt.

* Feverſham in Kent.

King Edgar, *Surnamed* Pacificus, *at ſeveral Places enacted many Laws by the Counſel of his wiſe Men : Here was* Concilium Sapientum, *whoſe Acts of Parliament, being ancientlytranſlated into* Latin, *were intitled thus*, Hæc ſunt inſtituta quæ Edgarus Rex conſilio ſapientum ſuorum inſtituit, &c.

King Etheldred *at* Woodſtock ; *and there Laws were ordained by him and his wiſe Men :* Hoc eſt concilium qd' Etheldredus Rex & omnes ſapientes ſui condixer' ad emendation' pacis omnis populi apud Woodſtock. *And another Parliament by him and his Wiſemen, both Spiritual and Lay : Here was* Concilium ſpiritualium & laicorum : *And ſtiled another thus :* Hæc ſunt verba pacis & prolocutionis quæ Etheldred' Rex & omnes ſapientes ejus cum exercitu firmaverunt qui cum Anulano, a temporibus antiquis traduntur, *Hæc ſunt judicia Exoniæ quæ Sapientes conſilio* Ethelſtani *Regis inſtituerunt, & iterum apud Frefreſham, & tertia vice apud ubi hæc definita ſimul & confirmata ſunt*.

Rex *Edgarus*, cognomento Pacificus, locis prorſus disjunctis plurimas ſancivit Leges conſilio Sapientum : Erat hic *Concilium Sapientum* ; quorum Parliamenti actorum Latine priſcius redditorum titulus eſt, *Hæc ſunt inſtituta quæ* Edgarus *Rex conſilio Sapientum ſuorum inſtituit, &c.*

Rex *Etheldredus* apud Woodſtock, ibique ab illo & ſuis ſapientibus leges ſtabiliuntur : *Hoc eſt Concilium quod* Etheldredus *Rex & omnes Sapientes ſui condixerunt, ad emendationem pacis omnis populi apud Woodſtock :* Alioque parliamento, ab eo & ſapientibus ſuis tum ſpiritualibus tum Laicis : Hic erat *Concilium ſpiritualium & laicorum.* Et alterius titulum fecit, *Hæc ſunt verba pacis & prolocutionis quæ* Etheldredus *Rex & omnes Sapientes ejus cum exercitu firmaverunt, qui cum* Anulano,

ano, Juſtino, & Guthmundo, Stigtani *filio venit.* Item & aliud habuit parliamentum apud Habam, *Hæc inſtituerunt* Etheldredus *Rex & Sapientes ejus apud Habam.*

Juſtino & Guthmundo Stigtani filio venit. *And held another Parliament at* Habam: Hæc inſtituerunt Etheldredus Rex & ſapientes ejus apud Habam.

Vide Wilkins Sax. LL. pa. 102, 104, &c.

Rex *Edmundus* Londini, quo ſummonuit & Spirituales & Temporales ſub nomine uno generali Sapientum: Hic obſerves *Conventum Sapientum Spiritualium & Temporalium.* Interpretem vero ipſum antiquum audire operæ pretium eſt, *Edmundus Rex congregavit magnam Synodum divini ordinis & ſeculi apud Londoniæ civitatem in Sancto Paſchæ ſolenni, &c.* Initium alterius parliamentorum ejuſdem ita ſe habet, *Hæ ſunt inſtitutiones, quas* Edmundus *Rex & Epiſcopi ſui cum Sapientibus ſuis inſtituerunt apud Culinconam, &c.* Et paulo poſt, *Ego* Edmundus *Rex mando & præcipio omni populo ſeniorum & juniorum qui in regione mea ſunt, qui inveſtigans inveſtigavi cum Sapientibus clericis & laicis.*

King Edmund *at* London, *where he ſummoned both the Spiritualty and Temporalty, and called them by one general Name of Wiſemen: Here was* Conventus ſapientum Spiritualium & temporalium. *But it is beſt to hear the ancient Tranſlator himſelf,* Edmundus Rex congregavit magnam Synodum Divini ordinis & ſeculi apud London' civitatem in ſancto Paſch. ſolenni, &c. *And another of his Parliaments beginneth thus,* Hæ ſunt inſtitutiones quas Edm. Rex & Epiſcopi ſui cum ſapientibus ſuis inſtituerunt apud Culinconam, &c. *& paulo poſt,* Ego Edmundus Rex mando & præcipio omni populo ſeniorum & juniorum qui in regione mea ſunt, qui inveſtigans inveſtigavi cum ſapientibus clericis & laicis.

Circ. Ann 940, Wilkins ibid. pa. 72, &c.

Rex *Canutus* Wintoniæ: Per regem & venerandum Sapientum concilium: Ibi erat *venerandum Concilium Sapientum:*

King Canutus *at* Wincheſter; *by the King and the reverend Council of his Wiſemen: There was* venerandum Concilium Sapientum:

Wilkins ibid. 126, 127, &c.

pientum: *For ſo was that Parliament, being of ancient Time tranſlated into* Latin, *called; but hear the Title it ſelf:* Hæc ſunt ſtatuta *Canuti* Regis Anglorum, Danorum, Norvegar' venerando ſapientum ejus Concilio ad laudem & gloriam Dei & ſui regalitatem & commune commodum habita in Sancto Natali Domini apud Wintoniam, &c.

All which and many more are extant and publickly known, but I will add that which I read in the Legier Book of the late Monaſtery of Saint Edmondsbury, *now in my Hands, of an ancient Hand-writing, wherein is cited a Parliament holden in the fifth Year of this K.* Canutus's *Reign; but I will keep Silence, and let the Book it ſelf ſpeak.* Rex *Canu-*
Pryn on 4 Inſt. 78. *tus* an' regni ſui 5. viz. per 130. Annos ante compilationem decretorum quæ an' Dom. 1150. fuer' compilat', an. 7. pontificatus Papæ Eugenii tertii, & ante compilation' aliorum canonum quorumcunque cunctos regni ſui prælatos procereſque ac magnates ad ſuum convocans parliamentum, in ſuo publico parliament' per-

Sic enim apud Majores parliamentum illud Latine redditum nuncupatur: Sed inſcriptionem ipſam proferam, *Hæc ſunt ſtatuta* Canuti, *Regis Anglorum, Danorum, Norvegarum, venerando Sapientum ejus concilio, ad laudem & gloriam Dei, & ſui regalitatem, & commune commodum, habita in Sancto Natali Domini apud Wintoniam, &c.*

Quæ omnia & multa plura extant & ſatis ſuperque dignoſcuntur: attexam tamen quod legi in Libro quodam nuper Monaſterii Burgi Sancti Edmundi & penes me exiſtente, charactere multum antiquo ſcripto, ubi citatur parliamentum de anno Regis *Canuti* quinto: At ſilebo, & liber ipſe de ſe faciet teſtimonium. *Rex* Canutus, *anno regni ſui quinto*, videlicet, *Per centum & triginta annos ante compilationem Decretorum, quæ anno Domin'* 1150. *fuerunt compilat', anno ſeptimo Pontificatus Papæ* Eugenii *tertii, & ante compilationem aliorum Canonum quorumcunque, cunctos regni ſui Prælatos, procereſque, ac magnates ad ſuum convocans Parliamentum, in ſuo publico Parliamento,*

perſi-

perſiſtentibus perſonaliter in eodem Wulſtano *&* Adelnodo *Archiepiſcopis, &* Ailwino *Epiſcopo Elmhamenſe, & aliis Epiſcopis ipſorum ſuffraganeis, ſeptem ducibus cum totidem Comitibus, necnon diverſorum Monaſteriorum nonnullis Abbatibus, cum quamplurimis gregariis militibus, ac cum populi multitudine copioſa, ac omnibus adtunc in eodem Parliamento perſonaliter exiſtentibus, votis Regiis unanimiter conſentientibus, præceptum & decretum fuit, Quod Monaſterium Sancti Edmundi, &c. ſit ab omni juriſdictione Epiſcoporum comitatus illius ex tunc imperpetuum funditus liberum & exempt', &c. Illuſtris Rex* Hardicanutus *prædicti Regis* Canuti *filius hæres & ſucceſſor, ac ſui patris veſtigiorum devotus imitator, &c. cum laude & favore* Ægelnod' *Dorobornenſis, nunc Cantuarienſis, &* Alfrici *Eborac' Epiſcoporum, aliorumque Epiſcoporum ſuffragan', necnon cunctorum regni ſui mundanorum principum, deſcriptum conſtituit roboravitque præceptum.* Qua immunitate dictum Monaſterium uſum fuiſſe non me latet, uſque ad diſſolutionem inde, an.

ſiſtentibus perſonaliter in eodem Wulſtano & Adelnodo Archiepiſcopis & Ailwino Epiſcopo Elmhamenſe, & aliis Epiſcopis ipſorum ſuffragan', ſeptem ducibus cum totidem comitibus necnon diverſorum Monaſteriorum nonnullis Abbatibus, cum quamplurimis gregariis militibus, ac cum populi multitudine copioſa, ac omnibus adtunc in eodem parliamento perſonalit' exiſtentibus votis regiis unanimiter conſentientibus, præceptum & decretum fuit, quod monaſterium Sancti Edmundi, &c. ſit ab omni juriſdictione Epiſcoporum comit' illius ex tunc imperpetuum funditus liberum & exemptum, &c. Illuſtris Rex Hardicanutus præd' Regis Canuti filius, hæres & ſucceſſor, ac ſui patris veſtigiorum devotus imitator, &c. cum laude & favore Ægelnod' Dorobornenſis nunc Cantuarienſis & Alfrici Eborac' Epiſcopor', aliorumque Epiſcoporum ſuffragan', necnon cunctorum regni ſui mundanorum principum deſcriptum conſtituit roboravitque præceptum. *Which Immunity I know that the ſaid Monaſtery held until the Diſſolution thereof*

in the 31 *Year of the Reign of King* H. *the* 8.

But let us proceed, and yet omit many, and touch only that which hath been controverted. It is ſaid that Silent leges inter arma, *and that during all the Time of the Conqueror, no Parliament was lawfully aſſembled,* &c. *for* Silent leges inter arma, *and during all his Reign, either the Sword was not put up into the Scabbard, or if it were, the Hand was always upon the Hilt ready to draw it again. But that a Parliament was aſſembled and holden according to the Common Laws of* England *in* William *the Conqueror's Time, it is evident, for that an Act eſtabliſhed at a Parliament holden in the Reign of* William *the Conqueror was pleaded and adjudged to be firm and good, and accordingly put in Execution by the Judges of the Realm, which they neither would nor could have done, if it had been commanded by the powerful Will of the Conqueror, and not eſtabliſhed by a Parliament duly aſſembled according to the Form and Frame of the Common Law. And therefore as well for Manifeſtation hereof, as for*

triceſimo primo Regis Henrici octavi.

Sed, omiſſis quamplurimis, progrediamur, id tantum percurrentes quod controverſum fuerit. *Siluiſſe* aiunt *Leges inter arma*, nullumque per omne tempus victoris legitime convocari Parliamentum, &c. *ſilent enim Leges inter arma*, totoque ejus regiminis tempore, aut diſtrictus nuſquam interquievit gladius, aut perpetuo manus inſtitit capulo, iterato evaginatura. Convocari tamen Parliamentum, & juxta Leges municipales Angliæ teneri, regnante *Willielm'* illo ſubactore, perſpicuum eſt, eo quod Actum ad Parliamentum ſub *Willielm' Victore* ſancitum placitando producebatur, & fixum ratumque fuiſſe adjudicabatur, executionique pariter a Judicibus hujus regni demandabatur; quod eorum fuiſſet nec velle nec poſſe, ſi ex arbitrio dominantis Subjugatoris ſolummodo imperatum fuiſſet, & Parliamento ad normam Legis communis modo debito convocato non ſtabilitum fuiſſet. Quamobrem, tam ad hoc enucleandum, quam ad id quod aſſerui plene demonſtrandum, 21 *E.* 3. *f.* 60.

f. 60. *a.b.* iſte legitur caſus, Rex proſecutus fuit breve de Attachiamento (ut loquimur) ſuper Prohibitionem *verſ. Leveſque de Norwich, de ceo que per lou Labbey de Seint Edmond de Berrie fuit foundue per les progenitores le Roy, & exempt de cheſcun juriſdiction dordinar' que nul ordinar' viſit' illonques, & que nul alaſt countre lordinance & le foundation avantdit,* &c. *Sur altercat' que fuit enter un Arſaſt jadis Eveſque de Norwich, & un B. jadis Abbe de Berrie, de les exemptions avantdits, en temps de W. le Conqueror, a ſon Parliament a certain jour tenu, fuit ordeigne per le Roy & per Larcheveſque de Canterburie & per touts les auters Eveſques de la terre, Countees, & Barons, Que a quel heure de cel temps en avant, que Leveſque ou aſcun de ſes ſucceſſours ſi alaſſant countre les points de la foundation & exemption avantdit, que celuy que ſerra Eveſque pur la temps payera al Roy ou a ſes heires* 30. *talents: Et auxy counta que le Roy manda ſa prohibition al Eveſque que il nentr' my les fraunch' ne attempteroit les priviledges de Leſgliſe de Seint Edmond avantdit,*

Proof of that which hath been ſaid, you ſhall read in the Book Caſe of 21 Ed. 3. f. 60. a. b. *that the King ſued a Writ of Attachment upon a Prohibition againſt the Biſhop of* Norwich *for that where the Abbey of St.* Edmondsbury *in the County of* Suffolk *was founded by the Progenitors of the King, and exempt from all Juriſdiction of the Ordinary, and that no Ordinary ſhould viſit there, and that none ſhould go againſt the ſaid Ordinance and the Foundation aforeſaid: That upon Controverſy between* Arfaſtus *late Biſhop of* Norwich *and* B. *late Abbot of* Bury, *of the Exemptions aforeſaid, in the Time of* William *the Conqueror, at his Parliament on a certain Day holden, it was ordained by the King, the Archbiſhop of* Canterbury, *and all the other Biſhops of the Land, the Earls, Barons,* &c. *That at what Time the Biſhop of* Norwich, *or any of his Succeſſors, ſhould go againſt the Points of the Foundation, and Exemption aforeſaid, that the Biſhop for the Time being ſhould pay to the King or to his Heirs* 30 *Talents of Gold, and declared further, how the King ſent a Prohibition*

to the Biſhop, that he ſhould not enter into the ſaid Franchiſe, nor Attempt any Thing againſt the Privilege of the ſaid Church of St. Edmond, *and that notwithſtanding the ſaid Prohibition the then Biſhop of* Norwich *had viſited the Abbey aforeſaid, and had ſummoned the Abbot to ſhew the Charters of their Foundation, wrongfully and in Deſpight of our ſovereign Lord the King; whereunto the then Biſhop pleaded Not guilty, and he was found Guilty by the Verdict of the Enqueſt. Whereupon it was adjudged, that the Temporalties of the Biſhop ſhould be ſeiſed into the King's Hands. But it was adviſed and reſolved by all the Judges, that in Right of the Talents they could not give Judgment, for two Cauſes, 1. For that the Prohibition was the original Suit, and that was determined by the Judgment in the Prohibition, that the Temporalties of the Biſhop ſhould be ſeiſed into the King's Hands, which then was the proper Judgment in that Suit. 2. Concerning the Talents, they were a Penalty ordained by Parliament in that Caſe, ſo that the Penalty had no Dependance upon the Prohibition, which il* (ſcilicet Epiſcopus Norwicenſis) *nien contriſteant la prohibition, ſi ad viſit en Labbey avantdit, & les fiſt ſummondre de monſtrer les charters de lour foundation, a tort & en deſpite de noſtre Seignior le Roy: A que Leveſque dit, que il fuit de rien culpable, & trove fuit per enqueſt quil fuit culpable, per que agard fuit que les temporalties de Leveſque fuiſſent ſeiſies en le maine le Roy: Et fuit adviſe a toute le Councell en droit de les beſantes, que ils ne purr' nul Judgement doner*; Et hoc duabus de cauſis, 1. Eo quod Prohibitio, quæ lis fuit originalis, determinabatur ſententia de Prohibitione lata, *que les temporalties fueront ſeiſies en le maine le Roy*, quod aptum tunc temporis in ejuſmodi lite fuit judicium: 2. *De les beſants, ceſt un eſpeciall peine que eſt ordeigne en la Parliament de ceo, iſſint que cco neſt pas rien dependaunt ſur le primer original*: Conſulebatur vero ſimul & a Judicibus adjudicabatur, Epiſcopum Norwicenſem dictæ pœnæ talentorum jacturam feciſſe Regi, formulamque juris *(Scire facias)* Epiſcopo

copo ea de re concedendam fuiſſe: Qua conceſſa comparuit Epiſcopus & fecit reſponſum, & deinde, judicium ferebatur, quod Rex recuperaret talenta, prout ex eo caſu judicialiter deciſo clare eluceat.

is the original Suit; but it was adviſed and reſolved by the Judges, that the Biſhop of Norwich *had forfeited the ſaid Penalty of the Talents to the King, and that they ought to grant a* Scire fac. *to the then Biſhop for that Purpoſe, which was granted accordingly, upon which Writ the Biſhop appeared and pleaded, and thereupon Judgment was given, that the King ſhould recover the ſaid Talents, as by the ſaid Book Caſe judicially adjudged appeareth.*

Qui ſi forte caſus Opponentes non latuiſſet, abunde eis ſatisfactum eſſet. Et inſigne hoc judicium fidem facit de antiquo illo tractatu cujus eſt titulus, *Modus tenendi Parliamentum: Hic deſcribitur modus quomodo Parliamentum Regis Angliæ & Anglicorum ſuorum tenebatur tempore Regis* Edwardi *filii Regis* Etheldredi; *qui quidem modus fuit per diſcretiores regni, coram* Will. *Duce Normanniæ, & Conqueſtore & Rege Angliæ, ipſo Conqueſtore hoc præcipiente, & per ipſum approbat' & ſuis temporibus & Succeſſoribus ſuorum Regum Angliæ uſitatus:* Quo

Which Caſe if the Opponents had ſeen or known, they would have therewith reſted ſatisfied. And this notable Judgment giveth Credit to that antient Treatiſe intitled thus, (a) Modus tenendi Parliamentum. Hic deſcribitur modus quomodo Parliamentum Regis Angliæ & Anglicorum ſuorum tenebatur tempore Regis Ed. filii Regis Eltheldredi, qui quidem modus fuit per diſcretiores regni, coram Williel' Duce Normanniæ, & Conqueſtore & rege Angliæ, ipſo Conqueſtore hoc præcipiente, & per ipſum approbat' & ſuis temporibus & ſucceſſor' ſuorum regum Angliæ

(a) Pryn on 4 Inſt. 1, 2, 3, &c. 78, &c. 4 Inſt. 12.

liæ uſitat': *Wherein the Aſſembly of the Kings, the Lords and Commons, according to the Manner continued to this Day, is ſet down, which I have in a fair and very ancient written Hand, whereby it is manifeſt that* Conventus Nobilium & Sapientum, &c. *included both the Lords and the Commons of the Parliament.*

F.N.B. 14. D. *It is evident that there were Tenants in ancient Demeſne before the Conqueſt; and for a Certainty therein, and to know of what Manors ſuch Tenants did hold, it appears by the Book of* Domeſday, *that all the Tenants that did hold of any of thoſe Manors that were in the Hands of King* Edw. *the Son of King* Etheldred, *or of King* William *the Conqueror, were Tenants in ancient Demeſne. And theſe Tenants then had, and yet have theſe Privileges amongſt others, for that they were bound by their Tenure to plow and husband,* &c. *the King's Demeſnes before and in the Conqueror's Time, therefore they were not to be returned Burgeſſes to ſerve in Parliament, to the End they might attend the King's Husbandry the bet-*

Regum, procerum, & Communitatis Conventus, juxta modum in hodiernum uſque diem approbatum, exprimitur; Cujus quidem vetuſtiſſimis conſignatum literis mihi eſt exemplar. Et hoc evincit manifeſte *Coventum Nobilium & Sapientum, &c.* tum Proceres tum Communitatem Parliamenti incluſiſſe.

Perſpicuum eſt tenentes fundi de antiquo dominico (ut loquimur) extitiſſe, nondum ſubjugata hac inſula. Sed ut certam rem habeamus, & de quibus maneriis hujuſmodi occupantes terras ſuas tenuerunt intelligamus, apparet ex libro qui inſcribitur Domus Dei, quod omnes poſſeſſores terrar' maneriorum, quæ erant Regis Edw. filii Regis Etheldredi, vel Regis Willielmi Subactoris, fuerunt tenentes fundorum de antiquo dominico: Et hii tunc ut etiam hodie, his inter alia gaudebant privilegiis, eo quod ratione tenuræ ſuæ aſtricti eſſent ad colendas, &c. Regis terras dominicales tam ante quam ſub victore; hac nimirum de cauſa, ad deſerviendum in Parliamento ut Burgenſes non cogebantur, ut eo melius

melius agriculturæ aſſervirent: 2. Sumptibus Militum Comitatuum Parliamento inſervientium nihil conferebant: Quæ immunitates (ceſſet licet cauſa) hucuſque manent. Erant idcirco Parliamenta, quo & Milites & Burgenſes evocabantur tum Subjugatoris temporibus tum antea: & ut habeas quo quieſcas, *vide Fitz. Nat. Bre.* 14. *e.* 49 *E.* 3. 22. *b.* 23. *a.* 40 *E.* 3. 25. 11 *Hen.* 4. 2. *&c.* Sunt etiam pervetuſta illa oppida quæ vocamus Burga longe quæ habet Anglia antiquiſſima; illa enim, quæ nunc Urbes & Comitatus, erant olim Burga, & ſic appellata, ex his enim ad Parliamentum, convenerunt Burgenſes, quæ verba ſunt ipſiſſima *Littletoni Lib.* 2. *cap.* 10. *vide* 40 *Aſſ. pla.* 27. 11 *Hen.* 4. 2. 22 *Ed.* 4. 11. *&c.* Liquet itaque Burga antiquiſſima eſſe Angliæ oppida, & conſequenter multis ſeculis ante hujus regni expugnationem extitiſſe: Eorundemque quamplurima a ſubjugationis tempore in Civitates incorporata & in Comitatus diſtincta animadverti, fuiſſe tamen Burga (e quibus electi fuiſſent Burgenſes Parliter. 2. *They were not to be contributory to the Fees to the Knights of Shires that ſerved in Parliament: Which Privileges (though the Cauſe ceaſeth) continue to this Day: Therefore there were Parliaments unto which the Knights and Burgeſſes were ſummoned both before and in the Reign of the Conqueror: For your Satisfaction herein, ſee* F. N. B. 14. e. 49 E. 3. 22. b. 23. a. 40 E. 3. 25. 11 H. 4. 2. &c. *Alſo the ancient Towns called Boroughs are the moſt ancient Towns within* England, *for thoſe Towns which now are Cities and Counties, in ancient Time were Burghs, and called Burghs, for out of thoſe ancient Towns called Burghs came the Burgeſſes to Parliament, which are the very Words of* Littleton, Lib. 2. cap. 10. Vide 40 Aſſ. p. 27. 11 H. 4. 2. 22 E. 4. 11. &c. *So as it appeareth that the ancient Burghs are the moſt ancient Towns of* England, *and conſequently long Time before the Conqueſt: And I have found many of them ſince the Conqueſt incorporated into Cities, and diſtinguiſhed into Counties ſince the Conqueſt, but had been*

ancient

ancient Burghs (from whence came the Burgeſſes to the Parliament) Time out of Mind before the Conqueſt: Nay divers of the moſt ancient Burghs, that yet ſend Burgeſſes to the Parliament, flouriſhed before the Conqueſt, and have been of little or no Account to have any ſuch Privileges newly granted to them at any Time ſince. And I could yet never find when any of them, or any other the ancienteſt Burghs, were of ancient Time ſince the Conqueſt endowed with that Privilege.

amenti) ultra recordationem hominum, nondum devicta hac gente: Immo perplura vetuſtiſſimorum Burgorum, quæ hodie ſuos ad Parliamentum mittunt Burgenſes, ante ſubactionem illam florebant; adeoque parvi exinde fuerunt momenti, aut ita potius deſpicata, ut hujuſmodi privilegia eis recenter donari veriſimile non ſit: Tempus enim quo horum aliquod, aliave vetuſtiſſima Burga, antiquitus a victoria Normanna, iſto privilegio extiterunt dotata, ab ullo obſervatum haud reperio.

Richardus Hagustadenſis & Math. Pariſ. in brevi Hiſtoria.

* Vide Wilkins 304.

Ex chronico de Peterborough.

Vide Wilkins 318, 319, &c.

King H. 1. An. Dom. 1100. Cum ſuorum conſilio decrevit ut monetagium* commune quod capiebatur per civitates vel comitatus quod non fuer' tempore Edw. Reg. hoc ne amodo fiet. Item quod Eccleſias non venderet nec ad firmam daret, mortuo Epiſcopo vel Abbate. *And this King aſſembled another Parliament on* Candlemas-Day *at* London *Anno Domini* 1123.

King H. *the ſecond, in the Year of our Lord God* 1185. *(as teſtifieth* Matthew Paris) Convocavit clerum regni & po-

Rex Henricus primus anno Domini 1100. *cum ſuorum concilio decrevit ut monetagium commune quod capiebatur per civitates vel comitatus, quod non fuer' tempore Edw. Regis, hoc ne amodo fiet. Item quod Eccleſia non venderet nec ad firmam daret, mortuo Epiſcopo vel Abbate.* Et Rex idem aliud convocavit Parliamentum Londini, die Purificationis beatæ Mariæ Virginis Anno Domini 1123.

Rex Henricus ſecundus an. Dom. 1185. (ut teſtatur Mathæus Pariſ.) Convocavit Clerum regni & Populum cum omni Nobilitate

bilitate ad Fontem Clericorum.

Habuit Rex Johannes Parliamentum Anno a ſuſcepto ejus regimine ſexto, ut ex ejuſdem reſcriptis e Cancellaria conſtat, in hæc verba: *Rex Vicecomiti, &c. Sciatis quod conſenſum eſt cum aſſenſu archiepiſcoporum, comitum, baronum, & omnium fidelium noſtrorum Angliæ, quod novem Milites per totam Angliam invenient decimum Militem bene paratum equis & armis ad defenſionem regni noſtri, &c.*

Sed longius in iſtis procedere, nihil aliud eſt quam ſi deaurarem aurum, vel ipſo Oceano unam minutiſſimam ſuppeditarem guttam. De nomine *Parliamenti* duo conſideremus: 1. Verbi ſignificationem: 2. Tempus quo ſuprema hæc curia nomen ſibi indidit *Parliamenti.* Primum qd' attinet, duabus de cauſis ita dicitur. 1. Eo quod ſingulum ejuſdem fori altiſſimi membrum vicem agit Judicis, & unuſquiſque eo loci ſine ſpiritu vel contradictionis vel obſequii ex corde loqueretur, nempe a dictione Gallicana *Parler la ment* pulum cum omni nobilitate ad fontem clericorum.

King John *held a Parliament in the ſixth Year of his Reign, as it appeareth by his Writs of the Chancery in theſe Words:* Rex vicecomiti, &c. Sciatis quod conſenſum eſt cum aſſenſu Archiepiſcoporum, comitum, baronum, & omnium fidelium noſtrorum Angliæ, quod novem milites per totam Angl. invenient decimum militem bene paratum equis & armis ad defenſionem regni noſtri, &c. Vide Wilkins 353, &c.

But to proceed any farther were but to gild Gold, or to add a little Drop to the great Ocean. Concerning the Name of the Parliament two Things fall into Conſideration, firſt what the Word ſignifieth, 2. When this ſupreme Court was chriſtened by the Name of Parliament: *Touching the firſt, it is ſo called for 2 Cauſes, firſt, becauſe that every Member of that high Court hath judicial Place, and for that every Man there ſhould without any Spirit, either of Contradiction or Smoothing,* parler la ment, *ſpeak judicially his Mind, it is called* Parliament. *2. The Laws there made are called Acts of Parliament, becauſe they are to be expounded,*

pounded, being Part of the Laws of the Realm, by the Judges of the Law, according to the Mind and true Meaning of the Speakers that were the Makers of theſe Acts, as teſtamentum *is to be expounded* ſecundum mentem teſtatoris, *and* arbitramentum ſecundum mentem arbitratoris. *As to the* 2. *the* Saxons *called this Court* Micel gemott, *the great Aſſembly,* Wittena gemott, *the Aſſembly of the Wiſe Men, the* Latin *Authors of thoſe Times called it* Commune concilium, Magna curia, Generalis conventus, &c. *And let it be granted, that* William *the Conqueror changed the Name of this Court, and firſt called it by the Name of a* Parliament, *yet manifeſt it is by that which hath been ſaid, that he changed not the Frame or Juriſdiction of this Court in any Point. And the very Names in Subſtance that were attributed to this Court before the Conqueſt, are continued after the Conqueſt to this Day: For in the Mirror of Juſtices, as appeareth before, it is called* Concilium generale: Fleta lib. 2. cap. 2. Habet etiam Rex Curiam ſuam in

appellatur *Parliamentum:* 2. Leges ibidem ſancitæ vocantur Acta Parliamenti, quia (cum ſint Legum regni pars) a Legis Judicibus ſunt explicandæ, juxta mentem & veram intentionem loquentium, qui & horum fuerunt conditores, non aliter quam & *Teſtamentum ſecundum mentem Teſtatoris, & arbitramentum ſecundum mentem arbitratoris.* Quoad ſecundum, hanc Curiam nominaverunt Saxones **Micel gemott** magnum conventum, **Wittena gemott** Sapientum conventum; Latini Authores eorundem temporum *Commune concilium, Magnam curiam, Generalem conventum, &c.* Et dato hoc, quod Willielmus ille Victor nomen hujus Curiæ immutavit, ac primo ei dedit nomen *Parliamenti,* ex antedictis tamen patet formam eam ſive juriſdictionem in nullo innovaſſe. Et eadem ipſa nomina quæ huic Curiæ ante ſubactionem noſtram tribuebantur, exinde deducuntur, hodieque inveteraverunt: In ſpeculo enim Juſticiariorum (uti ſupra videre eſt) dicitur *Concilium generale: Fleta lib. 2. cap. 2. Habet etiam Rex Curiam*

ſuam

ſuam in concilio ſuo in Parliamentis ſuis, præſentibus Prælatis, Comitibus, Baronibus, Proceribus, & aliis viris peritis. 8 Rich. 2. Avowry 260. aliiſque multis codicibus dicitur *Rex & Concilium:* Regiſtro originali, fol. 280. nominatur *Magnum Concilium:* In dorſo clauſ. 16 *Edw.* 2. *M.* 5. *Henricus de bello monte Baro de magno & ſecreto concilio Regis:* & rot' Parl' anno 3 *Edw.* 4. parte 1. *M.* 2. nuncupatur *Magnum concilium:* a Bracton, lib. 2. cap. 2. vocatur *Magna Curia:* Anno 17 Edw. 2. de Templariis, *Super quo convocatis majoribus de Concilio Domini Regis, tam Juſticiariis quam laicis perſonis in Parliamentum, Concordatum eſt in Parliamento, &c.* Et in Statutis quamplurimis ſub *Hen.* 3. *Edw.* 1. & regibus ſuccedentibus dicitur *Commune concilium, Commune concilium Regis,* & *Commune concilium regni:* Quin & ſic ſe habet reſcriptum de Vaſtatione, multaque alia tum originalia tum judicialia. Sed de hoc plura qui vult, octavam Commentariorum meorum conſulat partem in caſu Principis. Hanc mihi ſumam con-

in concilio ſuo in parliamentis ſuis, præſentibus Prælatis, Comitibus, Baronibus, Proceribus, & aliis viris peritis. 8 R. 2. Avowry 260. *and in many other Books it is called* Rex & concilium. *In the original Regiſter, fol.* 280. *it is called* Magnum concilium. *In* Dorſo clauſ. 16 E. 2. M. 5. Henricus de bello monte Baro de magno & ſecreto concilio Regis: *And* Rot' Parliament' an. 3 Ed. 4. parte prima *M.* 2. *it is called* Magnum concilium. Bracton, lib. 1. cap. 2. *termeth it* Magna Curia. Anno 17 E. 2. de Templariis, Super quo convocatis majoribus de concilio Domini Regis tam Juſticiariis quam laicis perſonis in Parliamentum, concordatum eſt in Parliament', &c. *And in many Statutes in the Reigns of* H. 3. Ed. 1. *and ſucceeding Kings, it is called* Commune concilium, *and* Commune concilium Regis, *and* Commune concilium regni, *and ſo runneth the Writ of* Waſte, *and many other original and judicial Writs. But if any be deſirous to ſee more of this Kind, let him look into the eighth Part of my Reports in the Prince's*

Prince's Caſe. So as I conclude, that the Nature and Name of the Court, in Uſe before the Conqueſt, continueth to this Day.

Pryn on 4 Inſt. 2, &c.

And where ſome do ſuppoſe, that in the Parliament holden at Weſtminſter *in the third Year of the Reign of King* Edw. 1. *called* Weſtm. *the* 1. *this Word* Parliament *firſt crept in, where it is called* The firſt general Parliament *by the Aſſent of the Archbiſhops, Biſhops, Abbots, Priors, Earls, Barons, and all the Commonalty of the Land ſummoned to the ſame,* &c. *It is manifeſt that the Name was long before that Time, as well by that which hath already been ſaid, as for that in the ninth Year of* E. 2. *Son and immediate Succeſſor to King* Edw. 1. *at a Parliament then holden, it is ſaid thus,* Sciatis quod cum dudum temporibus progenitorum noſtrorum quondam regum Angliæ in diverſis Parliamentis ſuis, &c. *which could not have truly been ſaid if the Name had firſt begun in the*

Co. Lit. 110. a.

Reign of his Father. This is not that Court that in France *bears the Name of* Parliaments, *for they are but ordinary Courts of Juſ-*

cluſionem, naturam ſimul & nomen hujus curiæ, ante victoriam Normannam aſſueta, in hodiernum uſque permanere diem. Et, quoniam crediderunt nonnulli, ad Comitia Anno 3. regnantis Edwardi primi, vulgo Weſtm. 1. primum irrepſiſſe vocabulum hoc *Parliamentum*, (ubi dicitur, *Primum Parliamentum generale* ex aſſenſu Archiepiſcoporum, Epiſcoporum, Abbatum, Priorum, Comitum, Baronum, totiuſque communitatis terræ illuc ſummonitorum, &c.) nomen multum ante tunc in uſu fuiſſe tum hoc quod ſuperius memoravi evincit manifeſte, tum quod anno 9 Regis *Ed.* 2. filii, proximique ſucceſſoris Regis *Ed.* 1. ad Parliamentum eodem anno convocatum, dicitur, *Sciatis quod cum dudum temporibus progenitorum noſtrorum quondam Regum Angliæ in diverſis parliamentis ſuis, &c.* Quod aſſeri nequaquam vere potuit ſi a patre ſuo adeo nuperrime nomen eſſet conſtitutum. Nemini in dubium veniat, quod forum iſtud ejuſmodi ſit, cujuſmodi ſunt in Gallia illa, quæ nomen *Parlia-*

mentorum

mentorum ſortita ſunt; inferiores enim ſunt quædam juſtitiæ Curiæ, quæ (ſiqua fides apud Paulum Jovium) prius illic a nobis inſtituebantur: Eſt autem hoc, illud forum de quo nominando *Parliamentum* idem ſentiunt Anglia & Scotia, quodq; Galli vocaruut *Aſſemblee des eſtats*, vel *les Eſtats*, Germani vero Diet.

Fleta ubi ſupra de hac Curia ait, *Ubi terminatæ ſunt dubitationes judiciorum, & novis injuriis emerſis nova conſtituuntur remedia, & unicuique juſtitia prout meruerit retribuetur ibidem.*

Magiſter Plowden in ſuis Commentariis 388. *Le Parliement eſt Court de treſgrand honour & juſtice, de que nul doit imaginer choſe diſhonourable.* Miſſum faciam Forteſcue (qui e ſummo tribunali Angliæ quondam jus dixit) in ſuo *de Laudibus Legum Angliæ* libello, & alios quamplures; & mihi de hac re faciet orationis exitum, ille omnium ſui temporis Antiquariorum facile princeps, qui apte, diſtincte, immo ornate ſummam totius concludit, fol. 128. b. *Quod ad Angliæ Tribunalia, Curias, ſive Juris fora ſtice, which (if you believe* Paulus Jovius) *were by us firſt ſettled there: But this is that which both* England *and* Scotland *agree in naming of it a* Parliament, *which the* French *doth term* Aſſemblee des Eſtats, *or* les Eſtats, *and the* Germans a Diet.

Fleta ubi ſupra *ſaith of this Court*, Ubi terminatæ ſunt dubitationes judiciorum, & novis injuriis emerſis nova conſtituuntur remedia, & unicuiq; juſtitia prout meruerit retribuetur ibidem.

In Mr. Plowden's Com. 388. Le Parliement eſt Court de treſgraund honour & juſtice de que nul doit imaginer choſe diſhonourable. *I will pretermit* Forteſcue, *ſometime Chief Juſtice of* England, *in his Treatiſe* De Laudibus Legum Angliæ, *and many others, and will conclude this Point with him that is the chief Antiquary of his Time, becauſe he concludeth the Sum of all aptly, diſtinctly, and eloquently*, fol. 128. b. Quod ad Angliæ Tribunalia, Curias, ſive Juris fora attinet, in triplici ſunt apud nos differentia, alia

Plowd. 398. b. 11 Co. 14. a.

Cambden.

alia enim ſunt Eccleſiaſtica, alia Temporalia, & unum mixtum, quod maximum, & longe ampliſſimum, non ita vetuſto nomine e Gallia mutuato, *Parliamentum* dicitur. Majores noſtri Anglo-Saxones *Wittena gemott*, i. Prudentum conventus, & *Ge-rædniss*, i. Concilium, & *Micil ſynod* (a Græca dictione, Synodus) i. Magnus conventus; Latini ejus & ſubſequentis ævi ſcriptores, *Commune Concilium*, *Curiam altiſſimam*, *Generale Placitum*, *Curiam magnam*, *Magnatum conventum*, *Præſentiam Regis*, *Prælatorum*, *Procerumque collectorum*, *Commune totius regni Concilium*, &c. vocarunt. Utque univerſum Ætoliæ Concilium *Panetolium* Livio nominatur, ita *Pananglium* recte dici poſſit. Ex Rege enim, Clero, Nobilibus, Majoribus, Equitibus & Burgenſibus electis; ſive ut ſignificantius dicam ſtylo forenſi, ex Rege, Dominis ſpiritualibus, & temporalibus, atque ex communitate conſtat, qui univerſæ Angliæ corpus repræſentant. Statis autem temporibus * nön habetur, ſed a Rege pro arbitrio indicitur, quoties de rebus

* Olim aliter.

attinet, in triplici ſunt apud nos differentia; alia enim ſunt Eccleſiaſtica, alia Temporalia, & unum mixtum, quod maximum & longe ampliſſimum, non ita vetuſto nomine e Gallia mutuato, Parliamentum *dicitur. Majores noſtri Anglo-Saxones* Wittena gemott, *id eſt, Prudentum conventus, &* Ge-rædniſs, *id eſt, Concilium, &* Micil Synod (*a Græca dictione Synodus*) *id eſt, Magnus conventus; Latini ejus & ſubſequentis ævi ſcriptores,* Commune Concilium, Curiam altiſſimam, Generale placitum, Curiam magnam, Magnatum conventum, Præſentiam Regis, Prælatorum, Procerumque collectorum, commune totius regni Concilium, *&c. vocarunt; Utque univerſum Ætoliæ Concilium* Panetolium *Livio nominatur, ita* Pananglium *recte dici poſſit: Ex rege enim, Clero, Nobilibus, Majoribus, Equitibus & Burgenſibus electis, ſive ut ſignificantius dicam ſtylo forenſi, ex Rege, Dominis ſpiritualibus & temporalibus, atque ex communitate conſtat, qui univerſæ Angliæ corpus repræſentant. Statis autem temporibus non habetur, ſed a Rege pro arbitrio indicitur, quoties*

quoties de rebus arduis & urgentibus, ne quid detrimenti reſpublica capiat, conſultandum, ejuſdemque ſolius arbitrio diſſolvitur. Summam autem & ſacroſanctam authoritatem habet in legibus ferendis, confirmandis, antiquandis, interpretandis, proſcriptis, in integrum reſtituendis, litibus inter privatos difficilioribus decidendis; & ut ſemel dicam, in omnibus quæ ad reipublicæ ſalutem, vel etiam privatum quemcunque ſpectare poſſint.

arduis & urgentibus, ne quid detrimenti reſpublica capiat, conſultandum, ejuſdemque ſolius arbi- Nota.
trio diſſolvitur. Summam autem & ſacroſanctam authoritatem habet in legibus ferendis, confirmandis, antiquandis, interpretandis, proſcriptis in integrum reſtituendis, litibus inter privatos difficilioribus decidendis, & ut ſemel dicam, in omnibus quæ ad Reipublicæ ſalutem, vel etiam privatum quemcunque ſpectare poſſint.

Hoc ſpeculo clariſſime item diſcerni poteſt uſque a temporibus ſæpius nominati Regis Arthuri, immenſa Miniſtrorum legis municipalis, eorundemque curiarum inferiorum antiquitas: Exempli gratia, de cuſtodibus ſive (ſi dicam) Senatoribus comitatuum, ita legitur, *cuſtodes ſeu præpoſiti comitatus*, ſeculis ſubſequentibus dicti Vicecomites, qui (inquit Author noſter) *fueront ordeignes per viels Roys quant les Countees ſe demiſterent des gards*, pariter de Turnis & Curiis Comitatus. Manebant hujuſmodi Miniſtri, & Comitatuum diviſio (prout

In this ancient Mirror you may alſo clearly diſcern as far as the Reign of the often named King Arthur, *the great Antiquity of the Officers and Miniſters of the Common Law, and of their inferior Courts; as for Example, of the Offices of the Keepers or Senators of the Shires or Counties,* Cuſtodes ſeu Præpoſiti Comitatus, *of later Times called Sheriffs, who (ſaith this Author)* fueront ordeignes per viels Roys quant les Countees ſe demiſter' des gards, *and of his Torns and County-Courts: Which Officers and Diviſion of Shires continued (as you may read,*

amongſt the Laws of thoſe ſeven Kings) though with much Encroachment, during the Heptarchy, as taking one or two Examples for many: Amongſt the Laws of King Ina *it is provided in theſe Words,*

Vide LL. Inæ. c. 8.

Gif hwa him rightes bidde beforan Scirman oththe othrun deman, *the ancient tranſlation thus,* Si quis rectum ſibi roget coram aliquo Scirman (i. Præpoſito comitatus) vel alio judice & habere non poſſit, & accuſatus vadium recti dare nolit, emendet 30 *s.* & infra ſeptem noctes faciat ei recti dignum.

Vide ibid. c. 36.

And in another Place, Gif he Ealdorman ſy tholige his ſcire, Qui furem ceperit vel captum reddiderit vel ipſum dimiſerit vel furtum celaverit, reddat ipſum furem ſecundum weram ſuam, ſi Ealdermannus, *i.* Præpoſitus Comitatus, ſit, perdat Comitatum ſuum niſi Rex parcere velit ei. *If the Sheriff do it he ſhall loſe the Cuſtody of his Shire or County: And afterwards,* Si quis diſcedat

Ibid. c. 39.

a Domino ſuo ſine licentia vel in alium Comitatum ſe furetur, & deinceps inveniatur, redeat inter leges ſeptem illorum regum legitur) auctis licet undequaque pro poſſe ſuo finibus ſub Heptarchia: Quod exemplo uno & altero tibi inſtar multorum innoteſcat, inter Regis Inæ Leges in hæc verba cautum eſt, *Gif hwa him rightes bidde beforan Scirman oththe othrun deman,* quod antiquitus ita redditur, *Siquis rectum ſibi roget coram aliquo* Shirman *(i. Præpoſito Comitatus) vel alio judice, & habere non poſſit: & accuſatus vadium recti dare nolit, emendet* 30 s. *& infra ſeptem noctes faciat ei recti dignum.*

Et rurſus, *Gif he Ealdorman ſy tholige his ſcire, Qui furem ceperit vel captum reddiderit, vel ipſum dimiſerit, vel furtum celaverit, reddat ipſum furem ſecundum weram ſuam ſi Ealdermanus, i. Præpoſitus comitatus, ſit, perdat comitatum, niſi Rex parcere velit ei:* Si Vicecomes delinquat, cuſtodiam ſui comitatus amittet. Et deinceps, *Si quis diſcedat a Domino ſuo ſine licentia, vel in alium Comitatum ſe furetur, & deinceps inveniatur, redeat illuc ubi antea fuit, & emendet Domino ſuo* 40 s. *&c.*

Et

illuc ubi antea fuit & emendet domino ſuo 40 *s.* &c.

Et quanquam Saxones huic miniſtro fecerunt nomen quod & vulgo hodie in uſu eſt, diebus tamen multo ante elapſis miniſterium iſtud extitiſſe, vel pede Saxonum in Anglia nondum poſito, extra controverſiam plane eſt. Dictio, *Shireve*, Vicecomes, e binis vocabulis Saxonicis mutuatur, videlicet, *Scyre*, id eſt, comitatus, & *Reve*, *id eſt*, *Cuſtos ſive Præpoſitus Comitatus*, & nonnunquam (uti ſupra) vocabatur *Scirman* ſive *Ealdorman*: Hodie etiam literæ ejus patentes ſunt, *Commiſimus vobis cuſtodiam Comitatus*. Regem *Alfredum* Angliam in Comitatus diſtinxiſſe affirmantibus libenter concedo, (ob id nimirum quod longe eorundem certiſſimam fecerit diviſionem; cum enim ſub Heptarchia unus in alterius fines ſæpenumero irrepſerit, plurimæque vetuſtæ prorſus interierint metæ, totum hoc ſua partitione in ordinem reduxit): Mihi modo non averſentur affirmanti, multum ante natum regem *Alfredum*, regnum

And albeit the Saxons *gave this Officer the vulgar Name uſed to this Day, yet it is manifeſt that the Office (itſelf) was of ancient Time before they ſet any Foot in* Engl. *This Word* Sheriff *is derived of two* Saxon *Words*, viz. *of* Scyre, *that is, the Shire or County, and* Reve, *that is*, Cuſtos, *or* Præpoſitus Comitatus, *the Keeper or Guardian of the Shire: And ſometime (as you ſee) they were called* Shireman, *or* Ealderman *of the Shire. And to this Day his Patent is*, Commiſimus vobis cuſtodiam Comitatus. *So I agree well with them which affirm that King* Alfred *divided* England *into Shires or Counties, in that he made the moſt certain Diviſion of them; for where, during the Time of the Heptarchy, there were many Incroachments one upon another, and many ancient Bounds obſcured, all that he reformed by his exact Partition: But they muſt alſo agree with me, that long before the Birth of King* Alfred *this Kingdom had been divided into Shires or Counties.*

See L.L. Hoeli. p. 121, 157, &c. Co. Lit. 109. b. 168. a.

Co. Lit. 168. a.

Alfred divided *England* into Shires or Counties, de Novo.

ties. But hereof, at this Time, this little ſhall ſuffice.

hoc in comitat' diſtributum fuiſſe. Sed de hoc paucula hæc plus quam ſatis.

The Plea of *Pinenden.* Temp. *W.* 2.

I have in my Cuſtody an antient Record intitled Kanc' de placito apud Pinendenam inter Lanfrancum Archiepiſcopum Cant', & Odonem Bajocenſem Epiſcopum tempore magni Regis Williel' qui Anglicum regnum armis conquiſivit: *The Effect whereof is, That* Lanfrank *Archbiſhop of* Canterbury *brought a Writ of Right Patent againſt the ſaid* Odo, *of the Manors of* Raculfe, Sandwic', Rateburg', Widetun, Saltwode, cum Burgo Heth ad Saltwode pertinente, Langport, Huoenden, Roking, Broche, Detling, Preſtitune, Sunderhurſt, Earheth, Orpintune, Einsford, &c. una cum libertatibus & pertinentiis de Soca, Saca, Toll, Team, Flymena, Firmith, Grithbreach, Storſteale, Haunfare, Infangtheof, cum omnibus aliis conſuetudinibus paribus iſtis, vel minoribus iſtis, in terris & in aquis, in ſylvis, in viis, & in pratis, & in omnibus aliis rebus infra Civi-

Penes me eſt antiquum monumentum, cujus eſt titulus, *Kanc' de placito apud Pinendenam inter Lanfrancum Archiepiſcopum Cant', & Odonem Bajocenſem Epiſcopum tempore magni Regis Will' qui Anglicum regnum armis conquiſivit:* Quod ſic intelligendum, Lanfrancus Archiepiſcopus Cantuarienſis reſcriptum proſecutus fuit de jure ſuo recuperando (quod apud nos eſt breve de Recto patente) contra dictum Odonem de maneriis de *Raculfe, Sandwic', Rateburg', Widetun, Saltwode, cum Burgo Heth ad Saltwode pertinente, Langport, Huoenden, Roking, Broche, Detling, Preſtitune, Sunderhurſt, Earheth, Orpintune, Einsford,* &c. *una cum libertatibus & pertinentiis de Soca, Saca, Toll, Team, Flymena, Firmith, Grithbreach, Storſteale, Haunfare, Infangtheof, cum omnibus aliis conſuetudinibus paribus iſtis, vel minoribus iſtis, in terris & in aquis, in ſylvis, in viis, & in pratis, & in omnibus aliis*

aliis rebus iuſra Civitatem & extra, & in omnibus alis locis: Inde vero hoc breve vi præcepti de Tolt, ut loquimur, ad Curiam comitatus allatum fuit: Et actum illud publicum ait, *Quod præcepit Rex Comitatum totum abſque mora conſidere, & omnes Francigenas, & præcipue Anglos, in antiquis legibus & conſuetudinibus peritos in unum convenire: Qui cum convenerint apud Pinendenam pariter conſiderunt, &c. Huic placito interfuerunt Erneſtus Epiſcopus de Rovec', Augelricus Epiſcopus de Ciceſtr', vir antiquiſſimus & Legum terræ ſapientiſſimus, qui ex præcepto Regis advectus fuit, ad ipſas antiquas Legum conſuetudines diſcutiendas & edocendas in una quadriga, Richard' de Tunebreg, Hugo de Monteforti, Willielmus de Acres, Haymo Vicecomes, & alii multi, &c. Barones Regis & ipſius Archiepiſcopi, atque illorum Epiſcoporum homines multi, &c. cum toto iſto Comitatu multæ & magnæ authoritatis viri, &c. Et ab omnibus illis probis & ſapientibus hominibus qui affuerunt fuit ita diratiocinatum, & etiam a toto Comitatu recordatum atque judicatum,*

tatem, & extra, & in omnibus aliis locis: *Which Writ was removed into the County Court by a Writ called a* Tolt: *And the Record ſaith,* Quod præcepit Rex comitatum totum abſque mora conſidere, & omnes Francigenas, & præcipue Anglos in antiquis legibus & conſuetudinibus peritos in unum convenire: Qui cum convenerint apud Pinendenam pariter conſiderunt, &c. Huic placito interfuerunt Erneſtus Epiſcopus de Rovec', Augelricus Epiſcopus de Ciceſtr', vir antiquiſſimus & legum terræ ſapientiſſimus, qui ex præcepto Regis advectus fuit, ad ipſas antiquas legum conſuetudines diſcutiendas & edocendas, in una quadriga, Richardus de Tunebreg, Hugo de Monteforti, Willielmus de Acres, Haymo Vicecomes, & alii multi, &c. Barones Regis & ipſius Archiepiſcopi, atque illorum Epiſcoporum homines multi, &c. cum toto iſto Comitatu multæ & magnæ authoritatis viri, &c. Et ab omnibus illis probis & ſapientibus hominibus qui affuerunt fuit ita diratiocinatum, & etiam a toto Comitatu recorda-

Vide LL. Hoeli. p. 316. Sententia Patriæ in Determinandis Cauſis.

recordatum atque judicatum, quod ſicut ipſe Rex tenet ſuas terras liberas & quietas in ſuo dominico, ita Archiepiſcopus teneat ſuas terras prædictas omnino liberas & quietas in dominico ſuo &c. *And let not this ancient Judgment in a Writ of Right ſeem ſtrange; for ſince that Time, and to this Day, the Judgment for the Tenant in a Writ of Right is,* Quod teneat terram illam, &c. quietam (*or*) in pace, &c. *And under this Record it is thus teſtified.* Hujus placiti, multis teſtibus multiſque rationibus determinatum, finem poſtquam Rex audivit, laudavit, laudanſq; cum conſenſu omnium principum ſuorum confirmavit & ut incorruptus perſeveraret firmiter præcepit. *And the Cauſe of this Controverſy is there alſo expreſſed in theſe Words.* Tempore magni Regis Willielmi, qui Anglicum regnum armis conquiſivit, & ſuis ditionibus ſubjugavit, contigit Odonem Bajocenſem Epiſcopum & ejuſdem Regis fratem multo citius quam Lanfrancum Archiepiſcopum in Angliam venire, atque in Comitatu de Chent cum

quod ſicut ipſe Rex tenet ſuas terras liberas & quietas in ſuo dominico, ita Archiepiſcopus teneat ſuas terras prædictas omnino liberas & quietas in dominico ſuo, &c. Nemini autem mirum videatur judicium iſtiuſmodi in brevi de Recto; eodem enim tempore, ſicut & hodie, Judicium pro Tenente in brevi de Recto eſt, *Quod teneat terram illam, &c. quietam,* vel, *in pace, &c.* Fides vero huic monumento adhibetur his verbis. *Hujus placiti, multis teſtibus multiſque rationibus determinatum, finem poſtquam Rex audivit, laudavit, laudanſque cum conſenſu omnium Principum ſuorum confirmavit, & ut incorruptus perſeveraret firmiter præcepit.* Simul & Litis hujus origo adjicitur. *Tempore magni Regis Willielmi, qui Anglicum regnum armis conquiſivit, & ſuis ditionibus ſubjugavit, contigit Odonem Bajocenſem Epiſcopum & ejuſdem Regis fratrem, multo citius quam Lanfrancum Archiepiſcopum in Angliam venire, atque in Comitatu de Chent cum magna potentia reſidere, ibique poteſtatem non modicam exercere. Ac quia*

illis

illis diebus in comitatu illo quiſquam non erat, qui tantæ fortitudinis viro reſiſtere poſſet propter magnum quam habuit poteſtatem, terras quamplures de Archiepiſcopatu Cantuarienſi, & conſuetudines nonnullas ſibi arripuit atque uſurpans ſuæ dominationi (addidit) Poſtea vero non multo tempore contigit præfatum Lanfrancum Cadomenſis Eccleſiæ Abbatem juſſu Regis in Angliam quoque venire, atque in Epiſcopatum Cant', Deo diſponente, totius Angliæ Primatum ſublimatum eſſe; ubi dum aliquandiu reſideret, & antiquas Eccleſiæ ſuæ terras multas ſibi deeſſe inveniret, & ſuorum negligentia anteceſſorum illas diſtributas & diſtractas fuiſſe reperiſſet, diligenter inquiſita & bene cognita veritate, Regem quam citius potuit, & non pigre inde requiſivit, ut Juſtitia ſecundum Legem ſibi fieret, &c. Et hoc loco ſupplementi Præfationi meæ ſuperiori annexum ſat ſit.

magna potentia reſidere, ibique poteſtatem non modicam exercere. Ac quia illis diebus in Comitatu illo quiſquam non erat qui tantæ fortitudinis viro reſiſtere poſſet propter magnam quam habuit poteſtatem, terras complures de Archiepiſcopatu Cantuar', & conſuetudines nonnullas ſibi arripuit, atque uſurpans ſuæ dominationi (addidit) Poſtea vero non multo tempore contigit præfatum Lanfrancum Cadomenſis Eccleſiæ Abbatem juſſu Regis in Angliam quoque venire, atque in Epiſcopatum Cantuar', Deo deſponente, totius Angliæ primatum ſublimatum eſſe, ubi dum aliquandiu reſideret, & antiquas Eccleſiæ ſuæ terras multas ſibi deeſſe inveniret, & ſuorum negligentia anteceſſorum illas diſtributas atque diſtractas fuiſſe reperiſſet, diligenter inquiſita & bene cognita veritate, regem quam citius potuit, & non pigre inde requiſivit, ut Juſtitia ſecundum legem ſibi fieret, &c. *And thus much by way of Addition to my former Preface ſhall ſuffice.*

Nonus iſte liber Commentariorum meorum

I have in this ninth Work reported certain Caſes which

have been adjudged and reſolved, together with the Reaſons and Cauſes thereof, to the End the Learned that know the Law may be confirmed, ſuch as know it not may be inſtructed, the Poſſeſſions and Intereſts of all in general according to Right ſtrengthened and quieted, Love and Charity between Man and Man continued, unneceſſary Suits, the Cauſes of Contention and Expence, prevented, and the Reign of our dread Sovereign, for his Zeal of Juſtice, renowned and honoured.

And it is very obſervable out of what Root the Doubts and Queſtions herein adjudged and reſolved did grow: The moſt difficult whereof do ſpring out of theſe two Roots, either out of Statutes enacted in that ſupreme Court of Parliament (whereof I have ſpoken) or out of ſuppoſed Variety of Opinions and Rules in our Books. Out of Acts of Parliament principally in two Sorts, either when an ancient Pillar of the Common Law is taken out of it, or when new Remedies are added to it: By the

caſus nonnullos, una cum rationibus cauſiſque eorundem Judiciorum, judicatos & definitos in publicum promit, ad doctos, Legem intelligentes, confirmandos, neſcientes inſtituendos, ad poſſeſſiones & jura uniuſcujuſque (prout decet) in pace ſtabilienda, ad amorem & charitatem fovendum, ad querimonias minus utiles præcidendas, litis ac diſpendii fontes occludendos, ad ſupremæ denique Majeſtatis regimen, a ſuo in juſtitia rite adminiſtranda fervore, & ſplendidius & honore auctius reddendum.

Res imprimis obſervatione digna eſt, e qua ſtirpe quæſtiones & controverſiæ modo decretæ ac diſcuſſæ germinaverint; quippe quarum perplexiores e binis his radicibus pullularint, vel ex ſtatutis in ampliſſima illa parliamenti Curia (de qua ſupra dixi) editis & ſancitis, vel ex imaginaria illa potius quam vera opinionum, regularumq; in libris noſtris diſcrepantia: Ex actis Comitialibus duobus præcipue modis; antiquo aliquo nimirum legis ſublato fundamento; aut recentioribus

tioribus appoſitis remediis: E primo cum pericula tum difficultates exoriuntur; a ſecundo, lex recte apprehenſa, neutiquam fit commodior, ſed multifariam impedita, vis ejus plus nimis enervatur: Habeas hoc unum exemplar loco utriuſque: In 5 *E.* 3. 14. Dominus *Willielmus Herle*, ſupremus in Curia placitorum communium Judex, ait, ſtatutum de Donis conditionalibus ſtabilitum fuiſſe regnante *Edwardo* Primo, (qui (inquit) regum omnium antecedentium fuit ſagaciſſimus,) idque hæreditatis ſanguini Donatorum ſtabiliendæ cauſa: Hoc tamen ipſum ſtatutum, dum unum e legis firmamentorum præcipuis labefactaret ſimul ac reſcinderet (videlicet, quod hæreditates univerſæ eſſent feudum ſimplex) proſpicere nullius potuit prudentia reſtrictis hiſce hæreditatibus qualia vel quanta ſimul irruebant incommoda: Sed ad hoc digitum quaſi intendi, in præfationibus 3. & 4. mei operis: Hujus itaque generis innovationis deſtituendæ voto, nihil amplius inde dicam hoc tempore. Quod ad imaginariam illam opinio-

Firſt ariſe Dangers and Difficulties; and by the Second the Common Law rightly underſtood is not bettered, but in many Caſes ſo fettered, that it is thereby very much weakened. Take one Example for both: In 5 Edward 3. 14. *Sir* William Herle, *Chief Juſtice of the Court of Common Pleas, ſaith, That the Statute* De Donis conditionalibus *was made in the Reign of King* Edward *the Firſt, (who (ſaith he) was the moſt ſage King that ever was,) and the Cauſe of the Statute was to ſalve the Heritage in the Blood of them to whom the Gift was made; and yet that Statute ſhaking a main Pillar of the Law, that made all Eſtates of Inheritance Fee-ſimple, no Wiſdom could foreſee ſuch and ſo many Miſchiefs as upon thoſe fettered Inheritances followed: But hereof have I given a Touch in the Prefaces to my third and fourth Work: And therefore deſiring that this Kind of Innovation might be left, I will for this Time leave it. Concerning the ſuppoſed Variety of Opinions and Rules in our Books, I truſt in many Caſes herein the ſtudious Reader*

Co. Lit. 19. a. 392. b. 10 Co. 38. b.

Reader ſhall obſerve (as in my former Works he hath done) that the Law truly diſtinguiſhing (for Cawley 132. ubi lex non diſtinguit, nec nos diſtinguere debemus) *they be in theſe Caſes well and juſtly accorded. And I affirm it conſtantly, that the Law is not incertain* in abſtracto, *but* in concreto, *and that the Incertainty thereof is* hominis vitium, *and not* profeſſionis: *And to ſpeak plainly there be two Cauſes of the Uncertainty thereof* in concreto, viz. præpoſtera lectio *and* præpropera praxis, *prepoſterous Reading and over-ſoon Practiſe.*

A ſubſtantial and a compendious Report of a Caſe rightly adjudged doth produce three notable Effects, firſt it openeth the Underſtanding of the Reader and Hearer, ſecondly, it breaketh through Difficulties, and thirdly, it bringeth home to the Hand of the Studious, Variety of Pleaſure and Profit; I ſay it doth ſet open the Window of the Laws, to let in that gladſome Light, whereby the right Reaſon of the Rule (the Beauty

num & regularum librorum noſtrorum diſcordiam attinet, obſervabit (ut ſpero) ſtudioſus Lector ex multis in lucem jam editis caſibus (quod & prioribus meis obſervavit operibus) eam, ſi quæ forte ſe obtulerit, difficultatem ac diſcrepantiam ſcite pariter & (ut dicam) adamuſſim reconciliari. Quin & hoc audacter pronuncio, Legem non eſſe incertam *in abſtracto*, ſed *in concreto*, ejuſque incertitudinem eſſe *hominis vitium*, non *profeſſionis*; &, hoc palam profitear, ejus quæ habetur incertitudinis *in concreto* duas ſolummodo eſſe cauſas, viz. *præpoſteram Lectionem* & *praxin præproperam.*

Vera & ſuccincta caſus Relatio recte dijudicati tres habet effectus notandos; 1. Tum Legentis tum Audientis aperit intelligentiam; 2. Scrupulos perrumpit; 3. Studentis manum & deliciarum & emolumenti varietate implet: Pandit dico Legis feneſtras, ut lætifica illa lumina, quæ rectam regulæ rationem (Legis ſplendorem) perſpici faciant evidenter, admittantur; nucem duram frangit ut facile ju-

cunda deguſtetur nuclea; ornat denique fructuum jucundorum & utilium varietate repoſitoria illorum qui nec plantaverunt nec irrigaverunt. Quæ (caſibus tortuoſis & difficillimis, ſive deliberatione (nempe *ſur demurrer*, ut loquimur) deciſis, ſive palam in Curia determinatis) nemo ſolus ultimis ſuis conatibus, nec omnes actores ipſi per ſe extra juſtitiæ Curiam, nec in Curia, ſolenni argumentatione prius non adhibita (ubi Deus opt. max. ſitientis jus & juſtitiam (ut credere cogor) intelligentiam aperit ſimul & extendit) attigiſſe unquam potuiſſent. E præcipuis enim ex aliis legum noſtrarum municipalium honoribus eſt, ſpinoſiores nunquam definiri aut diſcerni quæſtiones *in tenebris*, vel *ſub ſilentio ſuppreſſis rationibus*, ſed in facie (ut dicam) Curiæ, idque argumentis prius habitis ſolennibus & elaboratis, primo per Juriſconſultos utriuſque partis pro tribunali (& ſi lis agatur in Curia placitorum communium, per Servientes ad Legem tantum); & iterum de Tribunali per Judices, ubi argumentatio habetur (a

of the Law) may be clearly diſcerned; it breaketh the thick and hard Shell, whereby with Pleaſure and Eaſe the Sweetneſs of the Kernel may be ſenſibly taſted, and adorneth with Variety of Fruits both pleaſant and profitable, the Storehouſes of thoſe by whom they were never planted nor watered. Whereunto (in thoſe Caſes that be tortuoſi *and of great Difficulty, adjudged upon Demurrer or reſolved in open Court) no one Man alone with all his true and uttermoſt Labours, nor all the Actors in them themſelves by themſelves out of a Court of Juſtice, nor in Court without ſolemn Argument, (where (I am perſuaded) Almighty God openeth and inlargeth the Underſtanding of the deſirous of Juſtice and Right) could ever have attainted unto. For it is one amongſt others of the great Honours of the Common Laws, that Caſes of great Difficulty are never adjudged or reſolved* in tenebris *or* ſub ſilentio ſuppreſſis rationibus; *but in open Court, and there upon ſolemn and elaborate Arguments, firſt at the Bar by the Counſel learned of either Party (and if the*

the Caſe depend in the Court of Common Pleas, then by Serjeants at Law only); *and after at the Bench by the Judges, where they argue* (*the puiſne Judge beginning and ſo aſcending*) ſeriatim *upon certain Days openly and purpoſely prefixed, declaring at large the Authorities, Reaſons and Cauſes of their Judgments and Reſolutions in every ſuch particular Caſe* (habet enim neſcio quid energiæ viva vox): *a Reverend and honourable Proceeding in Law, a grateful Satisfaction to the Parties, and a great Inſtruction and Direction to the attentive and ſtudious Hearers.*

In this, as in the Reſt of my Works, my chief Care and Labour hath been (*for Advancement of Truth*) *that the Matter might be juſtly and faithfully related, and* (*for avoiding of Obſcurity and Novelty*) *that it might be in a legal Method and in the Lawyers Dialect plainly delivered, that herein no Authority cited might be wittingly omitted or coldly applied; no Reaſon or Argument made on either Side willingly impaired; no Man's Re-*

Judicibus incipiens junioribus, & ſic curſu aſcendente) *ſeriatim* diebus quibuſdam publice & conſulto ſtatis, qui authoritates, rationes & cauſas ſententiarum & determinationum ſuarum fuſius reddunt & explicant (*habet enim neſcio quid energiæ viva vox*:) venerabilis in lege & honorandus proceſſus, grata partibus ſatisfactio, attentis denique & ſtudioſis auditoribus plena inſtitutio.

Hoc, ſicut & cæteris meis operibus, præcipua mihi fuit & cura & ſtudium (ad veritatem erigendam) ut res recte fideque referretur, & (ad evitandam obſcuritatem & novitatem) ut in methodo Legali Juridicorumque idiomate plane emitteretur, ut nullum productum teſtimonium ſcienter omitteretur, vel jejune applicaretur; nulla ex utrinque ratio vel argumentum imminueretur; nullius ſive expreſſe ſive tacite læderetur exiſtimatio; nullus author ſeu authoritas prolata irreverenter dehoneſtaretur; iique denique, qui (ut opinor) caſus futuri ſint dirigentes,

tes, ad publicam tranquilitatem firmandam, prelo committerentur & promulgarentur.

Omnipotens Deus (qui ſummo ſuo beneficio hoc ut perficerem vires dedit) mihi teſtis eſt, me, non ex oſtentatione aliqua, aut ex audacia ſuaſionis alicujus de propria mea ſcientia, hiſce me immiſcuiſſe laboribus: Verum tamen interim eſt, me ab incunabulis in perſpiciendis cognoſcendiſque multis fuiſſe cupidiſſimum: Et profeſſioni meæ pluris me agnoſco debitorem, quam quod omnes mei exantlati pariter ac fideles retribuere queant labores: Et ut profiteor, mihi non eſſe (ſcio enim quæ mihi deſunt) quo ſolvam; ita fidem meam obligo, me nunquam futurum vel ingratum, vel pigrum in præſtando quantum maximis meis vigiliis eniti poſſim aut valeam. A docto Lectore hoc mihi in deſiderio eſt, quod & grandævo Bractono (venerando olim Curiæ de Banco Judici (ut in Archivis conſtat) & de Legibus Scriptori) fuit, *Ut ſi quid ſuperfluum vel perperam poſitum in hoc opere invenerit, illud*

putation directly or indirectly impeached; no Author or Authority cited, unreverently diſgraced; and that ſuch only, as (in my Opinion) ſhould hereafter be leading Caſes for the publick Quiet, might be imprinted and publiſhed.

Almighty God (who hath of his great Goodneſs enabled me hereunto) knoweth that I have not taken theſe Labours either for Vain-glory, or upon Preſumption of any Perſuaſion of Knowledge: But true it is, that I have been ever deſirous to know much: And do acknowledge my ſelf to owe much more to my Profeſſion, than all my true and faithful Labours can ſatisfy: And as I truly confeſs, that I have no Means (for I know my own Wants) to quit that Debt, ſo I faithfully Promiſe never to be found unthankful or unwilling to perform what by my uttermoſt Endeavour ſhall lie in my Power. My Deſire of the learded Reader, with old Bracton *(ſometime a famous Judge of the Court of Common Pleas (as I find in Record) and a Writer of the Laws) is,* Ut ſi quid ſuperfluum vel perperam poſitum in

in hoc opere invenerit, illud corrigat & emendet, vel conniventibus oculis pertranſeat, cum omnia habere in memoria & in nullo peccare, divinum ſit potius quam humanum.

corrigat & emendet, vel conniventibus oculis pertranſeat; cum omnia habere in memoria & in nullo peccare, divinum ſit potius quam humanum.

Vale.

DOW-

DOWMAN's *Caſe.*

Mich. 25 & 26 Eliz.

In C. B. Rot. 144.

Filmer, York, ſſ. THE Aſſiſe came to recogniſe if *Edw. Vavaſor* Eſq; *George Vavaſor* Gent. *Rich. Coats, John Lawſon, William Muſgrave, Robert Thiſſylwood* and *Rob. Ward* unjuſtly, &c. diſſeiſed *Thomas Dowman* Eſq; and *Elizab.* his Wife of their Freehold in *Spaldington, Willitoft,* and *Southcate,* within thirty Years now laſt paſt, &c. And whereupon the ſaid *Thomas* and *Elizabeth* by *Henry Creſſey* their Attorney complain, That they diſſeiſed them of 6 Meſſuages, 300 Acres of Land, 100 Acres of Meadow, and 200 Acres of Paſture with their Appurtenances, &c. And the aforeſaid *Edward, George, Richard, John, William, Robert Thiſſylwood,* and *Robert Ward,* by *Edward Latimer* their Attorney come, &c. and upon this for certain Cauſes the Juſtices here ſpecially moving, Day is given before the ſame Juſtices to the aforeſaid *Edward, George, Richard, John, William, Robert,* and *Robert* to plead here, until *Tueſday* next following, &c. The ſame Day is given to the aforeſaid *Thomas* and *Elizabeth* here, &c. At which Day come as well the aforeſaid *Thomas* and *Elizabeth,* as the aforeſaid *Edward, George, Richard, John, William, Robert,* and *Robert,* by their Attornies aforeſaid: And upon this, and certain Cauſes the Juſtices here ſpecially moving, the Aſſiſe aforeſaid is farther adjourned before the ſame Juſtices unto the Juſtices Inn in *Chancery* Lane *London,* until the Morrow of Saint *Martin* next coming, at which Day at the aforeſaid Inn of the Juſtices, before the aforeſaid Juſtices, come as well the aforeſaid *Thomas* and *Elizabeth,* as the aforeſaid *Edward, George, Richard, John William, Robert,* and *Robert,* by their Attornies aforeſaid; and upon this the aforeſaid *George, Richard, John, William, Robert,* and *Robert* ſay, that they have nothing in the aforeſaid Tenements, with the Appurtenances in the View of the Recognitors of the Aſſiſe aforeſaid put, and in the Plaint aforeſ.

ſpecified, nor had at the Day of the Orig. Writ of the Aſſiſe aforeſ. brought, nor ever after, nor any Injury, nor Diſſeiſin to the aforeſ. *Tho.* and *Eliz.* thereof did: And of this they put themſelves upon the Aſſiſe; and the aforeſ. *Tho.* and *Eliz.* likewiſe, *&c.* Therefore let the Aſſiſe be taken betw. them, *&c.* And the aforeſ. *Edw.* anſwereth as Tenant of the Freehold of the Tenements aforeſ. with the Appurt. in View of the Recognitors of the Aſſiſe aforeſ. put, and in the Plaint aboveſaid ſpecified; --- and ſaith, That the Aſſiſe thereof between him the ſaid *Edw.* and the aforeſ. *Thomas* and *Eliz.* ought not to be, becauſe he ſaith, that one *Peter Vavaſor* Eſq; was ſeiſed of the aforeſ. Tenem. with the Appurt. in the View of the Recognitors of the Aſſiſe aforeſ. put, and in the Plaint aforeſ. ſpecified, amongſt other Things in his Demeſn as of Fee; and he hereof ſo being ſeiſed, one *Andr. Windſor*, Eſq; *Will. Vavaſor*, *Peter Vavaſor* the younger, and *John Launidere*, Gent. at another time, that is to ſay, the 2d Day of *Jan.* in the 15th Year of the Reign of the ſaid Lady the now Q. out of the Court of *Chancery* of the ſaid Lady the Q. the ſaid Court of *Chancery* then being at *Weſtminſt.* in the County of *Middleſex*, ſued forth a certain Writ of the ſaid Lady the Q. of Entry upon Diſſeiſin in the *Poſt*, againſt the aforeſ. *Peter Vavaſor*, Eſq; of the aforeſ. Tenem. with the Appurt. in the View of the Recognitors of the Aſſiſe aforeſ. put, and in the Plaint aforeſ. ſpecified, with the Appurt. amongſt other things, the ſame *Peter Vavaſor*, Eſq; then being Tenant of the Freehold of the Tenem. aforeſ. with the Appurt. to the then Sheriff of the County of *York* directed, (and ſo plead a com. Recov.) which Recov. in Form aforeſ. had, was had, and was to the Uſe of the aforeſ. *P. Vavaſor*, for the Term of his natural Life, without Impeachment of any Waſte; and after his deceaſe, then to the Uſe of the eldeſt Son lawfully begotten of the Body of the ſaid *Peter Vavaſor*, Eq; and the Heirs Males of the Body of the ſame eldeſt Son lawfully begotten; and for Default of ſuch Iſſue Male of the Body of the ſame eldeſt Son, then to the Uſe of the ſecond Son of the Body of the aforeſ. *P. Vavaſor*, Eſq; lawfully begotten, and the Heirs Males of the Body of the ſame ſecond Son lawfully begotten, (and ſo unto the ninth Son;) and for Default of ſuch Iſſue Male of the Body of the ſaid ninth Son, then to the Uſe of the ſaid *Edward Vavaſor*, now Defend. Brother of the ſaid *Peter Vavaſor*, Eſq; for the Term of his natural Life, without Impeachm. of any Waſte; and after his deceaſe, then to the Uſe of the eldeſt Son lawfully begotten of the Body of the ſaid *Edw.* and the Heirs Males of the Body of ſuch 1ſt Son; and for Default of ſuch Iſſue Male of the Body of ſuch eldeſt Son, then to the Uſe of the ſecond Son of the Body of the ſaid *Edw.* lawfully begotten, and the Heirs Males of the Body of the aforeſ. 2d Son lawfully begotten, (and ſo to the 9th Son of the ſaid *Edw.*) and for want of ſuch Iſſue Male of the Body of ſaid 9th Son,

then to the Uſe of one *George Vavaſor*, another Brother of the aforeſ. *Peter Vavaſor*, Eſq; for the Term of his natural Life, without Impeachm. of any Waſt; and after his deceaſe then to the Uſe of the eldeſt Son lawfully begotten of the Body of the ſaid *George*, and the Heirs Males of the Body of the ſame eldeſt Son lawfully begotten; and for Default of ſuch Iſſue Male of the Body of ſuch eldeſt Son, then to the Uſe of the 2d Son of the Body of the aforeſ. *George* lawfully begotten, and the Heirs Males of the Body of the ſame 2d Son lawfully begotten, (and ſo to the 9th Son of the ſaid *Geor.*) and for Default of ſuch Iſſue Male of the Body of the ſaid 9th Son, then to the Uſe of one *Ra. Vavaſor*, another Brother of the ſaid *Peter Vavaſor*, for the Term of his natural Life, without Impeachm. of any Waſt; and after his deceaſe, then to the Uſe of the eldeſt Son lawfully begotten of the Body of the ſaid *Ralph*, and the Heirs Males of the Body of the ſame eldeſt Son lawfully begotten; and for Default of ſuch Iſſue Male of the Body of the ſaid eldeſt Son lawfully begotten, then to the Uſe of the 2d Son of the Body of the aforeſaid *Ralph* lawfully begotten, and the Heirs Males of the Body of the ſame 2d Son lawfully begotten, (and ſo to the 9th Son of the aforeſ. *Ralph*;) and for Default of ſuch Iſſue Male of the Body of the ſaid 9th Son, then to the Uſe of one *Marmaduke Vavaſor*, another of the Brothers of the aforeſ. *P. Vavaſor*, for the Term of his natural Life, without Impeachm. of any Waſt; and after his deceaſe, then to the Uſe of the eldeſt Son lawfully begotten of the Body of the aforeſ. *Marmaduke*, and the Heirs Males of the Body of ſuch eldeſt Son lawfully begotten; and for default of ſuch Iſſue Male of the Body of the ſame eldeſt Son, then to the Uſe of the ſecond Son of the Body of the aforeſ. *Marmaduke* lawfully begotten, and the Heirs Males of the Body of the ſame 2d Son lawfully begotten, and ſo to the 9th Son of the ſaid *Marmaduke*;) and for Default of ſuch Iſſue Male of the Body of the ſame 9th Son, then to the Uſe of one *Rob. Vavaſor*, another Brother of the aforeſ. *P. Vavaſor*, for the Term of his natural Life, without Impeachm. of any Waſt; and after his deceaſe, then to the Uſe of the eldeſt Son lawfully begotten of the Body of the ſaid *Rob. Vavaſor*, and the Heirs Males of the Body of the ſame eldeſt Son lawfully begotten; and for Default of ſuch Iſſue Male of the Body of the ſame eldeſt Son, then to the Uſe of the ſecond Son of the Body of the aforeſaid *Robert Vavaſor*, and the Heirs Males of the Body of the ſame ſecond Son lawfully begotten, (and ſo to the 9th Son of the ſaid *Robert*;) and for Default of ſuch Iſſue Male of the 9th Son, then to the Uſe of *Tho. Vavaſor*, another Brother of the ſaid *Peter Vavaſor*, Eſq; for the Term of his natural Life, without Impeachm. of any Waſt; and after his deceaſe, then to the Uſe of the eldeſt Son of the Body of the aforeſ.

Tho. Vavaſor lawfully begotten, and the Heirs Males of the Body of the ſaid eldeſt Son lawfully begotten; and for Default of ſuch Iſſue Male of the Body of the ſame eldeſt Son, then to the Uſe of the ſecond Son of the Body of the aforeſ. *Tho. Vavaſor* lawfully begotten, and the Heirs Males of the Body of the ſame ſecond Son lawfully begotten, (and ſo to the 9th Son of the aforeſ. *Tho.*) and for Default of ſuch Iſſue Male of the Body of ſuch 9th Son, then to the Uſe of *Rich. Vavaſor*, another Brother of the ſaid *Peter Vavaſor*, Eſq; for the Term of his natural Life, without Impeachm. of any Waſte; and after his Deceaſe, then to the Uſe of the eldeſt Son of the Body of the ſaid *Richard Vavaſor* lawfully begotten, and the Heirs Males of the Body of the ſame eldeſt Son lawfully begotten; and for Default of ſuch Iſſue Male of the Body of the ſame eldeſt Son lawfully begotten, then to the Uſe of the ſecond Son of the Body of the ſaid *Richard* lawfully begotten, (and ſo to the 9th Son of the afareſaid *Richard*;) and for Default of ſuch Iſſue Male of the Body of the ſaid 9th Son, then to the Uſe of the Heirs Males of the Body of *Peter Vavaſor* of *Spaldington*, Knt. lawfully begotten; and for Default of ſuch Iſſue Male, then to the Uſe of the right Heirs of the ſaid *Richard Vavaſor* for ever. By virtue of which Recovery and Seiſin in Manner and Form aforeſaid had, and by Force of a certain Act of a Parliament of the Lord *Henry* the 8th, late King of *Engl.* held the 4th Day of *Feb.* in the 27th Year of his Reign, made for Transferring of Uſes into Poſſeſſion, at *Weſtminſt.* in the County of *Middleſex*, the aforeſ. *Peter Vavaſor*, Eſq; was ſeiſed of the aforeſ. Tenements with the Appurtenances, in the View of the Recognitors of the Aſſiſe aforeſ. put, and in the aforeſaid Plaint ſpecified *inter alia*, in his Demeſne as of Freehold, for the Term of his Life, without Impeachm. of any Waſt; the Remainder thereof after his deceaſe farther as aboveſaid expectant; and the ſaid *Peter* ſo thereof being ſeiſed, the ſaid *Peter* at *Spaldington* aforeſ. died without any Iſſue Male of his Body lawfully begotten; after whoſe deceaſe the ſaid *Edward* into the aforeſ. Tenements with their Appurtenances, in the View of the Recognitors of the Aſſiſe aforeſ. put, and in the Complaint aforeſ. ſpecified (amongſt other) as in his Remainder thereof entred, and was, and yet is ſeiſed in his Demeſn as of Freehold for the Term of his Life, without Impeachment of any Waſte. And the aforeſaid *Tho. Dowman* and *Elizabeth* claiming, &c. (And ſo gave Colour to the Plaintiff.) And the aforeſ. *Tho. Dowman* and *Elizabeth*, as to the aforeſaid Plea of the ſaid *Edward* above in Bar of the Aſſiſe aforeſaid pleaded, ſay, That they, for any thing in the ſaid Plea before alledged, from having the Aſſiſe aforeſaid of the Tenements aforeſaid with the Appurtenances, ought not to be barred, becauſe

cauſe they ſay, That well and true it is, that the aforeſaid *Peter Vavaſor*, Eſq; was ſeiſed of the Tenem. aforeſ. with the Appurt. in his Demeſn as of Fee; and he the ſaid *Peter* being ſo thereof ſeiſed, the aforeſ. Recov. of the Tenem. aforeſ. with the Appurt. was had by the aforeſ. *And. Windſor*, *Will. Vavaſor*, *Peter Vavaſor* the Younger, and *John Laundere*, againſt the aforeſ. *Peter Vavaſor*, Eſq; in Manner and Form as the ſaid *Edward* above hath alledged: But the ſaid *Tho. Dowman* and *Eliz.* farther ſay, That the Recovery aforeſ. in Form aforeſ. by the aforeſ. *Andrew*, *Will. Vavaſor*, *Peter Vavaſor* the Younger, and *John Laundere*, againſt the aforeſ. *Peter Vavaſor*, Eſq; of the Tenements aforeſaid, with the Appurt. in Form aforeſ. had, and the Seiſin of the Tenem. aforeſ. with the Appurten. thereupon in Form aforeſ. had, were to the only Uſe and Behoof of the aforeſ. *Peter Vavaſor*, Eſq; and his Heirs for ever. By Colour whereof, and by Force of the aforeſaid Act of transferring of Uſes in Poſſeſſion, &c. the aforeſ. *Peter Vavaſor*, Eſq; was ſeiſed of the Tenem. aforeſ. with the Appurt. in his Demeſn as of Fee; and ſo thereof being ſeiſed, the ſaid *Peter Vavaſor*, Eſq; at *Spaldington* aforeſ. of ſuch his Eſtate died thereof ſeiſed, without Iſſue of his Body lawfully begotten. After whoſe Death the ſaid Tenem. with the Appurt. deſcended to the ſaid *Elizab.* then being the Wife of the ſaid *Tho. Dowman*, as Siſter and Heir of the aforeſ. *Peter Vavaſor*, Eſq; by which the ſaid *Tho. Dowman* and *Eliz.* in the ſaid Tenem. with the Appurt. entred, and were thereof ſeiſed in their Demeſn as of Fee, in the Right of the ſaid *Eliz.* until the aforeſ. *Ed. Vavaſor*, and the aforeſ. *George*, *Richard*, *John Lawſon*, *Will. Muſgrave*, *Rob. Thiſſylwood*, and *Rob. Ward*, them the ſaid *Thomas Dowman* and *Eliz.* thereof unjuſtly and without Judgm. did diſſeiſe, as they above againſt them complain'd; without that, that the aforeſ. Recovery of the Tenem. aforeſ. with the Appurt. by the aforeſaid *Andrew Windſor*, *Will. Vavaſor*, *Peter Vavaſor* the Younger, and *John Laundere* againſt the aforeſ. *Peter Vavaſor*, Eſq; in Form aforeſ. had, was to the Uſes in the Bar of the ſaid *Edw.* above ſpecified, as, &c. (And thereupon the Parties are at Iſſue.) And the Jurors ſay upon their Oath, That the aforeſ. *Peter Vavaſor*, Eſq; was ſeiſed of the Tenem. aforeſ. in their View put, and in the Plaint aforeſ. ſpecified, with the Appurt. in his Demeſn as of Fee; and he the ſaid *Peter* being thereof ſo ſeiſed, the aforeſ. Recovery was had by the aforeſaid *Andrew Windſor*, *William Vavaſor*, *Peter Vavaſor* the Younger, and *John Laundere*, againſt the aforeſ. *Peter Vavaſor*, Eſq; of the ſame Tenem. with the Appurt. in Manner and Form as the aforeſ. *Edw.* above in Pleading hath alledged; and further the Recognitors of the Aſſiſe aforeſaid ſay upon their Oath, That a certain Indenture was made between the aforeſaid *Peter*

Vavaſor, Eſq; of the one Party, and the aforeſaid *Andrew Windſor*, *William Vavaſor*, *Peter Vavaſor* the Younger, and *John Laundere* of the other Party, bearing Date the firſt Day of *February* in the 15th Year aboveſaid: The Tenor of which Indenture follows in theſe Words.

This Indenture made the firſt Day of February *in the 15th Year of the Reign of our Sovereign Lady* Elizabeth, *by the Grace of God Queen of* England, France *and* Ireland, *Defender of the Faith, &c. between* Peter Vavaſor *of the* Middle Temple *in* London, *Eſq; of the one Party, and* Andrew Windſor *of the ſame Houſe, Eſq;* William Vavaſor *of* Linton *in the County of* York, *Gent.* Peter Vavaſor *the Younger of* Spaldington *in the County of* York, *Gent. and* John Laundere *of* Staples-Inn *in or near* London, *Gent. on the other Party, Witneſſeth, That it is covenanted, concluded, condeſcended, declared, and fully agreed betwixt the ſaid Parties, and either of the ſaid Parties, for him, and his and their Heirs, Executors, and Adminiſtrators doth conclude, condeſcend, declare, and agree by theſe Preſents to and with the other, his and their Heirs, Executors, and Adminiſtrators in Manner and Form following: That is to ſay, Whereas the ſaid* Andrew, William, Peter *the Younger, and* John, *have this preſent Term of St.* Hill. *recovered to them and to their Heirs for ever, by Writ of* Entre ſur diſſ. in le poſt *had and proſecuted againſt the ſaid* Peter Vavaſor, *Eſq; before Sir* James Dyer, *Knt.* Richard Harper, Roger Manwood, *and* Robert Mounſon, *Juſtices to our ſaid Sovereign Lady the Queen's Majeſty of her Court of Common Pleas at* Weſtminſter, *according to the uſual Order and Form of Common Recoveries heretofore uſed, the Manor of* Spaldington *with the Appurtenances, and divers other Lands, Tenements and Hereditaments, ſcituate, lying and being in the Towns, Pariſhes, Hamlets and Fields of* Spaldington, Willytoft, Gripthorpe, Bubwith, Brighton, Southcave, *and* Replingham, *in the ſaid County of* York, *at the Time of the ſaid Recovery had being the Inheritance of the ſaid* Peter Vavaſor, *Eſq; other than ſuch Meſſuages, Lands, Tenements and Hereditaments of the ſaid* Peter Vavaſor, *Eſq; lately purchaſed of one* Henry Johnſon, *Eſq; by the Names of the Manor of* Spaldington, 40 *Meſſuages,* 30 *Toſts,* 30 *Gardens,* 3 *Dove-houſes, one Windmill,* 2000 *Acres of Land, five hundred Acres of Meadow, two thouſand Acres of Paſture, five hundred Acres of Wood,*

Wood, two thouſand Acres of Moor with the Appurtenances in Spaldingron, Bubwith, Brighton, Willitoft, Gripthorpe, Southcave, *and* Replingham, *That the Intent and true Meaning of all the ſaid Parties now is, and at the Time of the ſaid Recovery ſo had and ſuffered was, That the ſaid* Andrew, William, Peter *the Younger, and* John, *and their Heirs, and the Heirs of every of them, immediately from and after the ſaid Recovery ſo had and executed, ſhould and ſhall ſtand and be ſeiſed of the ſaid Manor and of all other the Lands, Tenements, and Hereditaments, in the ſaid Recovery meant and intended to be compriſed, that is to ſay, of and in the ſaid Manor of* Spaldington, *with the Appurtenances, and alſo of and in the Meſſuages, Toſts, Gardens, Lands, Tenements and Hereditaments, with the Appurtenances in* Spaldington, Willitoft, Gripthorpe, Bubwith, Brighton, Southcave; *and* Replingham, *at the Time of the ſaid Recovery had, being the Inheritance of the ſaid* Peter Vavaſor, *Eſq; the Lands, Tenements, and Hereditaments lately purchaſed by the ſaid* Peter Vavaſor *of* Henry Johnſon *Eſq; only excepted as is aforeſaid, to the only Uſes and Intents hereafter by theſe Preſents ſet forth and declared, and to none other Uſes, Intents, nor Purpoſes: That is to ſay, to the Uſe of the ſaid* Peter Vavaſor, *Eſq; for Term of his natural Life, without Impeachment of any Manner of Waſte, and after the Deceaſe of the ſaid* Peter Vavaſor, *Eſq; then to the Uſe and Behoof of the eldeſt Son lawfully begotten of the ſaid* Peter Vavaſor, *Eſq; and of the Heirs Males of the Body of the ſaid eldeſt Son lawfully begotten: And for Default of ſuch Iſſue Male of the Body of ſuch eldeſt Son, to the Uſe of the ſecond Son of the Body of the ſaid* Peter Vavaſor *lawfully begotten, and of the Heirs Males of the Body of the ſaid ſecond Son lawfully begotten, &c. (And ſo to the 9th Son of the ſaid* Peter.) *And for Default of ſuch Iſſue Male of the Body of ſuch 9th Son, to the Uſe of* Edward Vavaſor, *Brother of the ſaid* Peter Vavaſor, *Eſq; for Term of his natural Life without Impeachment of any Waſte, and after his Deceaſe to the Uſe of the eldeſt Son lawfully begotten of the Body of the ſaid* Edward, *and the Heirs Males of the Body of the ſaid eldeſt Son lawfully begotten: And for Default of ſuch Iſſue Male of ſuch eldeſt*

Son, to the Uſe of the ſecond Son of the Body of the ſaid Edward Vavaſor, *lawfully begotten, and of the Heirs Males of the Body of the ſaid ſecond Son lawfully begotten,* &c. (*And ſo to the ninth Son of the ſaid* Edward.) *And for Default of ſuch Iſſue Male of the Body of ſuch ninth Son, to the Uſe of* George Vavaſor *Brother to the ſaid* Peter Vavaſor *Eſq; for Term of his natural Life without Impeachment of any Waſte, and after his Deceaſe to the Uſe of the eldeſt Son lawfully begotten of the Body of the ſaid* George Vavaſor *and of the Heirs Males of the Body of the ſaid eldeſt Son lawfully begotten: And for Default of ſuch Iſſue Male of the Body of the ſaid eldeſt Son, to the Uſe of the ſecond Son of the Body of the ſaid* George Vavaſor *lawfully begotten, and of the Heirs Males of the Body of the ſaid ſecond Son lawfully begotten,* &c. (*And ſo to the ninth Son of the ſaid* George.) *And for Default of ſuch Iſſue Male of the Body of ſuch ninth Son, to the Uſe of* Ralph Vavaſor, *Brother to the ſaid* Peter Vavaſor *Eſquire, for Term of his natural Life without Impeachment of any Waſte, and after his Deceaſe to the Uſe of the eldeſt Son lawfully begotten of the Body of the ſaid* Ralph Vavaſor, *and of the Heirs Males of the Body of the ſaid eldeſt Son lawfully begotten: And for Default of ſuch Iſſue Male of the Body of ſuch eldeſt Son, to the Uſe of the ſecond Son of the Body of the ſaid* Ralph Vavaſor *lawfully begotten and of the Heirs Males of the Body of the ſaid ſecond Son lawfully begotten,* &c. (*And ſo to the ninth Son of the ſaid* Ralph.) *And for Default of ſuch Iſſue Male of the Body of ſuch ninth Son, to the Uſe of* Marmaduke Vavaſor *Brother to the ſaid* Peter Vavaſor *Eſquire, for the Term of his natural Life without Impeachment of any Waſte, and after his Deceaſe to the Uſe of the eldeſt Son lawfully begotten of the Body of the ſaid* Marmaduke Vavaſor, *and of the Heirs Males of the Body of the ſaid eldeſt Son lawfully begotten,* &c. (*And ſo to the ninth Son of the ſaid* Marmaduke.) *And for Default of ſuch Iſſue Male of the Body of ſuch ninth Son, to the Uſe of* Robert Vavaſor *Brother to the ſaid* Peter Vavaſor *Eſq; for Term of his natural Life without Impeachment of any Waſte, and after his Deceaſe to the Uſe of the eldeſt Son lawfully begotten of the Body of the ſaid* Rob. Vavaſ. *and of the Heirs Males of the Body of the ſaid eldeſt Son lawfully begotten,* &c.

(*And*

(*And ſo to the ninth Son of the ſaid* Robert.) *And for Default of ſuch Iſſue Male of the Body of ſuch ninth Son, to the Uſe of* Thomas Vavaſor *Brother of the ſaid* Peter Vavaſor, *Eſq; for Term of his natural Life, without Impeachment of any Waſte; and after his Deceaſe, to the Uſe of the eldeſt Son lawfully begotten of the Body of the ſaid* Thomas Vavaſor, *and of the Heirs Males of the Body of the ſaid eldeſt Son lawfully begotten*, &c. (*And ſo to the ninth Son of the ſaid* Thomas.) *And for Default of ſuch Iſſue Male of the Body of ſuch ninth Son, to the Uſe of* Richard Vavaſor *Brother to the ſaid* Peter Vavaſor, *Eſq; for Term of his natural Life, without Impeachment of any Waſte; and after his Deceaſe, to the Uſe of the eldeſt Son lawfully begotten of the Body of the ſaid* Richard Vivaſor, *and of the Heirs Males of the Body of the ſaid eldeſt Son lawfully begotten*, &c. (*And ſo to the ninth Son of the ſaid* Richard.) *And for Default of ſuch Iſſue Male of the Body of ſuch ninth Son, to the Uſe of the Heirs Males of the Body of Sir* Peter Vavaſor *of* Spaldington, *Knt. lawfully begotten: And for Default of ſuch Iſſue Male, to the Uſe of the right Heirs of the ſaid* Richard Vavaſor *for ever. Provided*, &c.

And farther, the Recognitors aforeſaid ſay upon their Oath aforeſaid, That the aforeſaid Tenements, with the Appurtenances, in their View put, and in the Plaint aforeſaid ſpecified, and in the Recovery aforeſaid compriſed, are Parcel of the Manors, Lands and Tenements in the Indenture aforeſaid ſpecified, and not other, nor divers: But whether the Indenture aforeſaid, after the Recovery aforeſaid, by the aforeſaid *Peter Vavaſor*, Eſq; in Form aforeſaid made and had, bearing Date the aforeſaid firſt Day of *February*, and firſt delivered the aforeſaid 15th Day of *February* in the 15th Year aboveſaid, after the Recovery aforeſaid, being to the Uſes in the ſame ſpecified, be good and ſufficient in Law, to lead and declare the Uſes of the aforeſaid Recovery of the aforeſaid Tenements in the View of the Recognitors aforeſaid put, and in the Plaint aforeſaid ſpecified, with the Appurtenances, or not, the ſaid Recognitors are altogether ignorant, and thereof pray the Advice of the Juſtices aforeſaid, and of the Court here, *&c.* And if to the ſame Juſtices, and to the Court here, it ſhall ſeem, that the Indenture aforeſaid, by the aforeſaid *Peter Vavaſor*, Eſq; after the aforeſaid Recovery in Form aforeſaid had and made, bearing Date the aforeſaid firſt Day of *February*, and firſt delivered the 15th Day of *February* in the 15th Year aboveſaid, after the Recovery aforeſaid, being to the Uſes in the ſaid Indenture ſpecified, be good and ſufficient in Law to lead and declare the

Uſes

Uſes of the Recovery aforeſaid, of the Tenements aforeſaid, in the View of the Recognitors aforeſaid put, with the Appurtenances, and in the Plaint aforeſaid ſpecified; then the ſaid Recognitors ſay upon their Oath aforeſaid, that the ſaid Recovery of the Tenements aforeſaid, in View of the Recognitors aforeſaid put, with the Appurtenances, and in the Plaint aforeſaid ſpecified, was to the ſame Uſes in the ſaid Bar of the ſaid *Edward* ſpecified in Manner and Form as the ſaid *Edward* in his Bar aforeſ. hath above alledged: And that the aforeſ. *George*, *Rich. Coats*, *John*, *William*, *Robert Thiſſylwood*, and *Rob. Ward*, did not diſſeiſe the aforeſaid *Tho. Dowman* and *Elizabeth* of the Tenements aforeſ. in their View put, and in the Plaint aforeſ. ſpecified, with the Appurtenances, as the ſaid *George*, *Richard Coats*, *John*, *William*, *Robert* and *Robert*, above have alledged; and if it ſhall ſeem to the ſame Juſtices, and to the Court here, that the Indenture aforeſ. by the aforeſ. *Peter Vavaſor*, Eſq; after the Recovery aforeſ. in Form aforeſaid made and had, bearing Date the aforeſ. firſt Day of *Feb.* and firſt delivered the aforeſ. 15th Day of *Feb.* in the 15th Year aforeſ. after the aforeſ. Recovery is inſufficient in Law, to lead and declare the Uſes of the Recovery aforeſ. of the Tenements aforeſ. in View of the Recognitors put, and in the Plaint aforeſ. ſpecified; then the ſaid Recognitors ſay, upon their Oath aforeſ. that the ſaid Recovery of the Tenements aforeſ. was not to the Uſes in the ſaid Bar of the ſaid *Edward* ſpecified in Manner and Form as the aforeſ. *Tho. Dowman* and *Elizabeth* above have alledged; and that the aforeſ. *Tho. Dowman* and *Elizabeth* were ſeiſed of the Tenements aforeſaid, in the View of the ſame Recognitors put, and in the Plaint aforeſ. ſpecified, with the Appurtenances, in their Demeſne as of Fee, in the Right of the ſaid *Elizabeth*, until the aforeſ. *Edw. Vavaſor*, *George Vavaſor*, *Rich. Coats*, *John Lawſon*, *Will. Muſgrave*, *Rob. Thiſſylwood*, and *Rob. Ward*, them the ſaid *Thomas Dowman* and *Elizabeth* thereof unjuſtly and without Judgment, but not with Force and Arms, diſſeiſed them; and then they aſſeſs the Damages of the ſaid *Tho. Dowman* and *Elizabeth*, by occaſion of the Diſſeiſin aforeſaid, beſides their Coſts and Charges by them about their Suit in this Behalf expended to 20*s.* and for their Coſts and Charges to 10*s.* And becauſe the Juſtices here will adviſe themſelves of and upon the Premiſſes before that they give their Judgment thereof, Day is given to the Parties aforeſ. before the Juſtices here aforeſaid, at the Inn of the Juſtices in *Chancery-lane*, *London*, until *Saturday* next after a Month of St. *Michael* next following, &c. to hear their Judgment thereof, becauſe the ſaid Juſtices here thereof not yet, &c. and divers other Continuances, until *Saturday* next after the Morrow of *All Souls*, &c. until

Note.

until *Saturday* next after the Morrow of St. *Martin*, &c. and until *Wedneſday* next after 8 Days of the *Holy Trinity*, &c. At which Day, before the aforeſ. *Rob. Shute* and *John Clench*, then Juſtices, &c. at the *aforeſ. Inn of the Juſtices*, as well the aforeſ. *Tho. Dowman* and *Eliz.* as the aforeſaid *Edward, George, Richard Coats, John, William, Robert*, and *Robert*, by their Attornies come. And becauſe the Juſtices aforeſ. here, &c. further Day is given to the Parties aforeſ. before the Juſtices of the ſaid Lady the Q. to take Aſſiſes in the aforeſ. County of *York* aſſigned, at the aforeſ. Caſtle of *York*, until *Monday* the 6th Day of *Auguſt* next coming, &c. before which Day the ſaid Lady the now Q. by other her Letters Patents, whoſe Date is at *Weſtm.* in the 24th Year of her Reign, the Tenor of which followeth in theſe Words, &c. *Elizabeth*, &c. To her beloved and faithful *John Clench*, third Baron, and *Francis Gawdy*, one of her Serjeants at Law, Greeting: Know ye, &c. (And then follow the Letters Patents, &c.) And becauſe the ſame Juſtices here will farther adviſe themſelves of and upon the Premiſſes, before they give their Judgment thereof, Day, &c. before them the ſaid *John Clench* and *Francis Gawdy*, then Juſtices, &c. at the aforeſ. Inn, until *Saturday* next after the Morrow of *All Souls*, &c. At which Day the aforeſ. *John Clench* and *Fran. Gawdy*, then Juſt. of the L. the Q. to take Aſſiſes in the aforeſ. County of *York* at the Inn aforeſ. came not, but withdrew themſelves from the ſaid Inn, becauſe before the ſaid Day for the infection of the Air, and of the Plague of Men in the City of *Lond.* and the Suburbs thereof, as alſo in the City of *Weſtm.* then being, the Term of St. *Michael*, which then at *Weſtm.* in the County of *Middleſ.* was holden at *Weſtm.* aforeſ. unto the Caſtle of the L. the Q. &c. is adjourned and there holden, &c. Afterwards the ſaid L. the Q. by other Letters Patents, conſtituted *John Clench*, and *Fran. Rodes* one of her Serjeants at Law, Juſtices to Aſſiſes in the aforeſ. County of *York*, &c. And the ſaid Juſtices, by Virtue of the ſaid Letters Patents, afterwards, that is to ſay, *Monday* in the 4th Week of *Lent* in the 25th Year of the Reign of the ſaid L. the now Q. at the Caſtle of *York* came, before whom then and there come the aforeſ. *Tho. Dowman* and *Eliz.* by their Attorney aforeſaid, and pray a Writ of Reattachment to the aforeſ. *Edw, George, Richard Coats*, &c. that they be before the Juſtices of the L. the Q. at the next Aſſiſes, in her ſaid County of *York* to be taken, aſſigned, to be holden at the aforeſ. Caſtle of *York*, to hear the Record, and their Judgm. of the Aſſiſe aforeſ. which was in the Court of the ſaid L. the now Q. at the Caſtle aforeſ. ſo that that Aſſiſe then be there in the State, as it was in the Court of the ſaid L. the now Q. before the aforeſaid *John Clench* and *Francis Gawdy*, Juſtices to Aſſiſes, &c. at the aforeſ. Caſtle of *York*, the aforeſ. *Monday* the 6th Day of *Aug.*

in

in the 24th Year of the Reign of the ſaid L. the now Q. on which Day the Aſſiſe aforeſ. was adjourned, before the ſaid *John Clench* and *Fran. Gawdy*, then Juſtices, &c. from the aforeſ. Caſtle of *York* unto the aforeſ. Inn of the Juſtices in *Chancery-lane*, *London*, until the aforeſ. *Saturday* next, after the aforeſ. Morrow of *All Souls* then next following, &c. At which next Aſſiſes, holden at the Caſtle of *York* aforeſ. on *Monday* the 29th Day of *July* in the 25th Year of the Reign of the ſaid L. the now Q. before the aforeſ. *John Clench* and *Fran. Gawdy*, then Juſtices to Aſſiſes, &c. came as well the aforeſ. *Tho. Dowman* and *Eliz.* by their Attorney aforeſ. as the aforeſ. *Edward*, *George*, *Richard Coats*, *John*, *William*, *Robert*, and *Robert*, by the aforeſ. *Tho. Hall* their Attorney; and the Sheriff, that is to ſay, *Thomas Wentworth*, Eſq; now ſent, that the aforeſ. *Edw. Vavaſor*, *George*, *Richard Coats*, *John*, *William*, *Robert*, and *Robert*, had been, &c. And upon this, Day is given to them to be before the Juſtices of the ſaid L. the now Queen of the Bench, in the Bench at *Weſtm.* on the Morrow of *All Souls* next coming, to hear and receive what to the ſaid Juſtices of the ſaid L. the Q. of the Bench aforeſ. ſhould then ſeem fit to be conſidered in this Behalf, becauſe the ſaid *John Clench* and *Francis Rodes*, Juſtices to Aſſiſes, &c. thereof not yet, &c. And the Aſſiſe aforeſ. with all touching the ſame, to the ſaid Juſtices of the Bench is ſent, &c. (*The Warrant of Attorney follows, and the Writ of Reſummons in the Roll; and the Tenor of the Writ of Reattachment and Return of the ſaid Writ.*) *Elizabeth*, &c. To the Sheriffs of *York*, Greeting: Reattach *Edw. Vavaſor* Eſq; *George*, *Rich. Coats*, *John*, *William*, *Robert*, and *Robert*, or their Bailiffs, if they ſhall not be found before our Juſtices to Aſſiſes in your County to be taken, aſſigned, at the Caſtle of *York* in your County, upon *Monday* the 22d Day of *July* then next to come, to hear the Record and their Judgment of the Aſſiſe of *Novel diſſeiſin*, which was in our Court at the Caſtle aforeſ. which ſaid Aſſiſe *Tho. Dowman* Eſq; and *Eliz.* his Wife there arraigned againſt them of 6 Meſſuages, 300 Acres of Land, 100 Acres of Meadow, and 200 Acres of Paſture, with the Appurtenances, in *Spaldington*, *Willitoft*, and *Southcave*, ſo as that Aſſiſe then be there in the ſame State as it was in our Court, before *John Clench*, third Baron of our Exchequer, and *Fran. Gawdy*, one of our Serjeants at Law, our Juſtices to Aſſiſes in your County to be taken aſſigned, at the aforeſ. Caſtle of *York*, on *Monday* the 6th Day of *Aug.* laſt paſt, on which Day the Aſſiſe aforeſ. for certain Cauſes, was from thence adjourned before the ſame our Juſtices unto the Inn of the Juſtices in *Chancery-lane*, *London*, until *Saturday* next after the Morrow of *All Souls* then next following; and have here the Names of the Pledges, and this Writ. *John Clench*, at the Caſtle of *York*, the 11th Day of *March* in the 25th Year of our Reign,

Frankland

Frankland Creſſy. The within named *Edward Vavaſor*, *George*, *Richard Coats*, *John*, *William*, *Robert*, and *Robert*, hath not any Thing, nor any of them have any Thing in my Bailiwick, by which they can be attached, or any of them can be attached, nor have they, or any of them hath a Bailiff or Bailiffs, nor are they, or any of them, to be found in the ſame. *Thomas Wentworth*, Eſq; Sheriff. And now here, that is to ſay, at *Weſtminſter* aforeſaid at this Day, that is to ſay, at the aforeſaid Morrow of *All Souls*, came as well the aforeſaid *Thomas Dowman* and *Elizabeth*, by the aforeſaid *Henry Creſſy* their Attorney, as the aforeſaid *Edward Vavaſor*, *George*, *Rich. Coats*, *John*, *William*, *Robert*, and *Robert*, by *Tho. Algar* their Attorney: And becauſe the Juſtices of the Bench here will adviſe themſelves of and upon the Premiſſes, before they give their Judgment thereof, Day is given to the Parties here until in 8 Days of St. *Hilary*, (and ſo it is continued to 8 Days of St. *Hillary* the Year following:) At which Day here come as well the aforeſaid *Thomas Dowman* and *Eliz.* as the aforeſaid *Edward Vavaſor*, *George*, *Richard Coats*, *John*, *William*, *Robert*, and *Robert*, by their Attornies aforeſaid; and upon this, the Premiſſes being ſeen, and by the Juſtices here fully underſtood, it ſeemeth to the ſaid Juſtices here, that the aforeſaid Indenture, by the aforeſaid *Peter Vavaſor* Eſq; after the aforeſaid Recovery, in Form aforeſaid made and had, was good and ſufficient in the Law to lead the Uſes of the Recovery aforeſaid, of the Tenements aforeſaid, with the Appurtenances, ſo that the ſame Recovery of the Tenements aforeſaid, with the Appurtenances, in the View of the Recognitors of the Aſſiſe aforeſaid put, and in the Plaint aforeſaid ſpecified by the aforeſaid *Andrew Windſor*, *William Vavaſor*, *Peter Vavaſor* the younger, and *John Laundere*, againſt the aforeſaid *Peter Vavaſor* Eſq; in Form aforeſaid had, was to thoſe Uſes in the aforeſaid Bar of the aforeſaid *Edward Vavaſor* above ſpecified, in Manner and Form as the ſaid *Edward* in his Bar aforeſaid above hath alledged; therefore it is conſidered, that the aforeſaid *Tho. Dowman* and *Elizabeth* take nothing by their Writ aforeſaid, but be in Mercy for their falſe Clamour, *&c.* And the aforeſaid *Edward Vavaſor*, *George*, *Richard Coats*, *John*, *William*, *Robert*, and *Robert*, go thereof without Day, *&c.* Vide poſt. 14. b.

DOWMAN's

DOWMAN's *Caſe.*

Paſch. 28 Eliz. *which is entred in* Communi Banco inter plac' terræ, Mich. 25 & 26 Eliz. Rot. 144.

1 Anderſ. 125. Moor 191. Skinner 53. Rep. Q. A. 197, 212.

THomas Dowman Eſq; and *Eliz.* his Wife brought an Aſſiſe of *Novel Diſſeiſin* before *John Clench* and *Francis Rodes* Juſtices of Aſſiſe in the County of *York*, againſt *Ed. Vavaſor*, *George Vavaſor*, and others; and complained they were diſſeiſed of their Freehold in *Spaldington*, *Willitoft*, and *Southcave* in the ſame County, *&c.* and made their Plaint of 6 Houſes, 300 Acres of Land, 100 Acres of Meadow, and 200 Acres of Paſture; and all but the ſaid *Edward Vavaſor* pleaded, *Nul tort nul diſſeiſin*, and the ſaid *Edward* pleaded, That one *Peter Vavaſor* Eſq; was ſeiſed of the Tenements aforeſaid put in View, and now in Plaint in Fee, againſt whom *Andrew Windſor* Eſq; *William Vavaſor*, and others, 2 *Jan. an' regni d'næ El.* 15. brought a Writ of Entry in the Poſt of the Tenements aforeſaid, againſt the ſaid *Peter Vavaſor*, returnable *Octob. Hill.* at which Day a Common Recovery was had againſt him with ſingle Voucher, and executed by *Habere facias ſeiſinam* 4 *Feb. &c. quæ quidem recuperatio in forma præd' habebat'*, and was to the Uſe of the ſaid *Peter* for his Life without Impeachment of Waſte, and afterwards to the Uſe of his eldeſt Son in Tail, and ſo to the 9th Son in Seniority in Tail; and for want of ſuch Iſſue, to the Uſe of the ſaid *E. Vavaſor*, Brother of the ſaid *Peter*, for his Life, without Impeachment of Waſte, and afterwards to the Uſe of his eldeſt Son, and to the Heirs Males of his Body, and ſo to the 9th Son in their Seniority of the like Eſtate; and for want of ſuch Iſſue, to the Uſe of the ſaid *G. Vavaſor*, *Ra. Vavaſor*, *Mar. Vavaſor*, *Robert Vavaſor*, *Thomas Vavaſor*, and *Rich. Vavaſor*, Brothers of the ſaid *Peter*, to every of them the like Eſtate, with like Remainders to their 9th Iſſue Male, in their Seniority in Tail; and afterwards to the Uſe of the Heirs Males of *P. Vavaſor* Knight, lawfully

Cr. Jac. 512.

begotten; and afterwards to the Uſe of the right Heirs of the ſaid *Rich. Vavaſor*, and alledged the Execution of the Uſes by Force of the Stat. of 27 *H.* 8. and the Death of the ſaid *Peter Vavaſor* without Iſſue; after whoſe Death he entred as in his Remainder, and gave Colour to the Plaintiffs. To which the Plaintiff replied and confeſt the Recovery, as the ſaid *E.* had alledged, but further ſaid, That the ſaid Recovery was to the Uſe of the ſaid *Peter* and his Heirs, and that after the Death of *Peter* the Tenements deſcended to the ſaid *Eliz.* Wife of the ſaid *Tho. Dowman*, as Siſter and Heir of the ſaid *Peter*, &c. *Abſq; hoc quod recuperatio prædicta Tenementorum præd'*, &c. *in forma prædicta habita, fuit ad uſus in barra prædict' Edwardi ſuperius ſpecificat'*, *prout*, &c. And thereupon Iſſue was joined, and it was found by the Recognitors of the Aſſiſe, That the ſaid *Peter* being ſeiſed in Fee ſuffer'd the ſaid Recovery * of the Tenements aforeſaid, as the ſaid *Edward* had alledged; and further the Recognitors of the Aſſiſe ſaid, *Quod quædam indentura facta fuit inter præfat' Petrum Vavaſor & præd' Andream Winſor* and others, the Recoverors, of the other Part, *cujus tenor ſequitur in hæc verba*; which Indenture bears Date *primo die Februarii anno* 15 *El. Reginæ*, and witneſſeth, *That it is covenanted, concluded, condeſcended, declared and fully agreed between the ſaid Parties, and either of the ſaid Parties, for himſelf and his and their Heirs, doth conclude, condeſcend, declare and agree by theſe Preſents to and with the other, that is to ſay, whereas the ſaid* Andrew, &c. *have this preſent Term of St.* Hillary *recovered to them and their Heirs by Writ of* Entrie ſur diſſeiſin in le poſt, *againſt the ſaid* Peter Vavaſor, *according to the uſual Order and Form of Common Recoveries heretofore uſed, the Manor of* Spaldington, &c. *That the Intent and true Meaning of all the ſaid Parties now is, and at the Time of the ſaid Recovery had and ſuffer'd, was, that the ſaid Recoverors and their Heirs immediately from and after the Recovery ſo had and executed ſhould and ſhall ſtand and be ſeiſed of the ſaid Manor*, &c. *to the only Uſes and Intents hereafter by theſe Preſents ſet forth and declared, and to no other Uſes, Intents and Purpoſes, that is to ſay*, and declares and expreſſes the ſame Uſes mentioned and alledged in the Bar of the ſaid *E. Vavaſor*, without any Variance. And further the ſaid Recognitors of Aſſiſe found, That the Tenements now put in View were, &c. Parcel of the ſaid Manor of *Spaldington, Sed utrum Indentura præd' poſt recuperationem præd' per præfat' Pet. Vavaſor armig' in forma præd' fact' & habit' ger' dat' præd' primo die Februarii ac prim' deliberat' 15 die Februarii anno 15 ſupradict'*

27 H. 8. cap. 10.

* Rep. Q. A. 212.

ſupradict' poſt recuperationem præd' exiſten' ad uſus in eandem ſpecific' ſit bona & ſufficiens in lege ad ducendos & declarandos uſus præd' recuperationis præd' tenementorum in viſu recognitorum poſit', & in querela præd' ſpecific' necne, iidem recognitores penitus ignorant, & inde petunt adviſamentum Juſtic' & Cur' hic, & ſi videbitur Curiæ, That the ſaid Indenture is good and ſufficient, &c. Then they found that the ſaid Recovery of the Tenements aforeſaid was to the ſame Uſes in the Bar of the ſaid *E. Vavaſor*, as the ſaid *E.* had alledged; and that the other Defendants had done no Wrong nor Diſſeiſin; and if the ſaid Indenture is not good and ſufficient, &c. then they found againſt all the Defendants. And for Difficulty the ſaid Juſtices of Aſſiſe did adjorn the Parties and the Record before the Juſtices of the Common Pleas, *De audiendo & recipiendo quod eiſdem Juſticiar' Dominæ Reginæ de præd' Banco adtunc & ibid' conſiderand' videbitur in hac parte.* And in this Caſe two Queſtions were moved and argued by the Serjeants, at the Bar. ¶ 1. If the ſaid Indenture made after the ſaid Recovery, was ſufficient in Law to direct and declare the Uſes of the ſaid precedent Recovery? ¶ 2. If upon a ſpecial Point in Iſſue upon an *abſque hoc*, the Recognitors of Aſſiſe cou'd give a ſpecial Verdict. ¶ And as to the firſt it was argued, That the ſaid Indenture was not ſufficient to declare and direct the Uſes of the ſaid precedent Recovery, for 5 Reaſons and Cauſes. 1. When a Recovery is ſuffer'd (it being without Conſideration) immediately after the Recovery the Law adjudges it to be to the Uſe of him who ſuffers the Recovery and his Heirs: Then when the Uſe in the Caſe at Bar was veſted in *Peter Vavaſor* immediately after the Recovery executed, before the ſaid Indentures made, this Uſe ſo veſted can't be deveſted by any Declaration or Agreement ſubſequent; and the Deed indented ſhall not conclude the Heir in this Caſe, becauſe it being ſubſequent, can't by the Law deveſt that which was veſted immediately after the Recovery had. And to this Purpoſe they cited the Books in (a) *(a)* 39 *Aſſ. p.* 3. & 46 *E.* 3. *Aſſiſe* 357. Where an Infant brought an Aſſiſe againſt *T.* of certain Land, the Defendant ſaid that *J.* Uncle of the Infant, whoſe Heir he is, held the ſaid Land of him by Homage, Eſcuage, and four Marks Rent, and died ſeiſed; and becauſe the Plaintiff was within Age, he ſeiſed the Tenements by Reaſon of Wardſhip: To which the Plaintiff ſaid that the ſaid *J.* held in Socage, &c. To which *T.* the Defendant ſaid, to ſay *that* you ſhall not be admitted, for the ſaid *J.* your Uncle upon a Debate betwixt us acknowledged to hold the ſame Land of us by ſuch Services by Deed indented; and demanded Judgment, if he ſhall be received to ſay the contrary,

(a) Poſtea 10.b. Fitz. Aſſiſe 334.

and ſhewed the Deed, &c. and that Caſe for Difficulty was adjourned into this Court, and there it was adjudg'd that the ſaid Acknowledgm. or Declaration by Deed indented ſhould not conclude the Heir of *J.* and the Reaſon of *Thorp* Chief Juſtice, who gave the Judgment, was, becauſe by the Deed indented, other Services could not be granted, which were not due before, wherefore take the Aſſiſe. So in this Caſe at Bar the Deed indented ſubſequent ſhall not conclude the Heir of *Peter Vavaſor*, becauſe it can't deveſt the Uſe, which was by Operation of Law veſted immediately after the Recovery: And they alſo cited 35 *H.* 6. 33. *b*, *John* (*a*) *Crook's* Caſe, where the like Acknowledgm. by Deed indented was made, &c. and Eſtoppel pleaded; and it was adjudged, that the Declaration by Deed indented, for the Certainty of the Services ſhould not bind the Heir of the Tenant, who was Party to the ſaid Deed indented. Secondly, It was objected, That every Declaration of Uſes upon Recoveries, Fines, &c. of Lands, Tenements and Hereditaments ought to be * certain (otherwiſe there will be no Certainty of Inheritances) and this Certainty ought to be chiefly in 3 Things, *ſc.* in Perſons to whom; in Lands, &c. of which, and in Eſtates by which Uſes ſhall be limited and declared; and if Certainty fails in any of them, the Declaration is not ſufficient. But here in the Caſe at the Bar, there was not any of theſe Certainties, when the Recovery was ſuffered; and therefore the Declaration ſubſequent inſufficient, *Oportet quod certæ perſonæ; certæ terræ, &c. & certi ſtatus comprehendantur in declaratione uſuum.* The 3 Objection was, That the Limitation and Declaration of the Uſes ought to be compleat of it ſelf, without any Reference to Indentures or other Writings to be made afterwards; For then it is but an imperfect Communication, and no compleat Declaration: And that it was but a Communication they alledged three Reaſons; 1. That the Uſes were many, and of great Variety of Eſtates. 2. That it concerned the Eſtabliſhment of his Inheritance of a great Yearly Value in his Name and Family, and therefore the Intention of the Parties never was to leave it to the ſliding and ſlippery Memory of Men, which would be loſt in a ſhort Time, and eſpecially when the ſaid *Elizabeth* (one of the Plaintiffs) was his Siſter and Heir, before whom he preferred others of his Name and Blood. 3. Several of the Uſes and Eſtates could not be limited with ſuch Qualities and Privileges by word without Deed, as the Uſe limited to the ſaid *Peter Vavaſor*, (and to divers others) for Life, without (*b*) Impeachment of Waſte, which Privilege to be diſpuniſhable of Waſte, none can have by Word without Deed; and therefore all the Words which paſſed betwixt the Parties before, or at the Time of the Recovery, were referred to Indentures

(*a*) Br. Eſtoppel 23. Fitz. Eſtop. 57. 8 Co. 54. a. Plowd. 136. a. b. Hob. 31. Co. Lit. 12. a. Poſtea 10. b.

* Poſtea 10. a.

(*b*) 11 Co. 83. a b. 82. b. Co. Lit. 220. a. Poſtea 10. b. Moor 317, 327. 2 Inſt. 146. 2 Co. 23. a. b 82. a. 4 Co. 63. a. Dy. 10 pl. 37. 47. pl. 11. Bridgm. 102. Hob. 132. Hetl. 77. 1 Rol. Rep. 182, 183. 2 Rol. Rep. 325. 2 Leon. 128. 3 Leon. 225. 4 Leon. 71. Co. El. 40, 41. Plowd. 135. b, 141. a. 2 H. 6. 35 a. Fitz. Waſte 39 1 H. 7. 15. a. 21 H. 6 47. a. 20 H. 7. 4. a. 22 H. 7 24. a. 31. a. 1 Bulſtr. 136. Perk. Sect. 721. 19 H. 6. 63. b. 10 H. 7. 3. a. 16 H. 7. 4. b. Poph. 193, 194, 195. 8 Co. 76. b. Br. Waſte 71. Latch 269.

to be made thereof, and ſo but a Communication, and no compleat Agreement: *Quia id perfectum eſt quod ex omnibus ſuis partibus conſtat, & nihil perfectum eſt dum aliquid reſtat agendum.* The 4th Object. was, That the ſaid Indenture was but Directory, and Declaratory of the Uſes of the Recovery, and was not of any Force to raiſe or create any Uſe: Then when the Iſſue is, whether the ſaid Recovery was ſuffered to the ſaid Uſes mention'd in the Bar, the ſaid Indenture ſubſequent might peradventure be good Evidence to perſuade the Recognitors of the Aſſiſe, that the ſaid Recovery was ſuffered to the ſaid Uſes, but of it ſelf being ſubſequent to the Recovery it is not ſufficient in Law to direct the Uſes of the precedent Recovery, unleſs by the Agreement of the Parties the Uſes were ſo declared before, or at the Time of the Recovery, and then the Declarat. precedent, and not that which was ſubſequent, is the Declaration which binds in Law, and the Subſequent is but Evidence to prove the Precedent: And therefore if the ſaid *Edw. Vavaſor* had pleaded the ſaid Recovery, and pleaded alſo the Indenture ſubſequent to the Effect as the Recognitors have found it, that would be altogether inſufficient, for the Indenture ſubſequent is but the Report and Evidence of a former Thing, *ſc. that the true Meaning of all the ſaid Parties, &c. at the Time of the ſaid Recovery, &c. was, that the ſaid Recoverers, &c.* and Evidence ſhall never be pleaded, becauſe it tends to prove Matter in Fact; and therefore the Matter in Fact ſhall be pleaded; and if that is denied, the Evidence is to be given to the Jury, and not to the Court. And therefore in 9 *E.* 3. 5. *b.* and 6. *a. John Darcy* brought a *Qua' Imp'* againſt the Biſhop of *Durham*, of a Diſturbance to preſent to the Church of *Simondsbury*, and declared that King *Ed.* 2. was ſeiſed of the Manor of *Wreckes* in *Tindale* to which the Advowſon is appendant, and preſented, *&c.* and made the Deſcent of the Manor to the King that now is, who gave the Manor, with the Fees and Advowſons to the Plaintiff and his Heirs, *&c.* to which the Def. ſaid, that the Advowſon is not appendant to the Manor, *&c.* to which the Pl. replied, that to this Averment the Defend. ſhould not come, for we ſay, That one *Ed.* late King of *Scotland* was ſeiſed of the Manor of *Wreckes*, and of the Advowſon, and preſented to the Church as appendant, and ſhewed how afterwards the Manor come to the Hands of K. *Edward* the Grandfather by Forfeiture of *John Baliol*, and ſhewed how afterwards the Kings preſented as appendant to the Manor, wherefore the Plaintiff did not conceive that againſt ſo many Preſentments as appendant, that the Defendant ſhould be received to ſay that the Avowſon is not appendant. And Sir *William Herle*, who gave the Rule

Poſtea 11. a. b.

Rule, ſaid, the Preſentments of which you ſpeak are but Evidence to the Jury that the Advowſon is appendant, and Evidence ſhall not ouſt the Defend. of his Plea. The 5th and laſt Objection was, That if theſe Declarations ſubſequent ſhould be ſufficient in Law to declare the Uſes of a precedent Recovery, for as much as they will be reſtrained to no certain Time, and therefore may be made many Years after, by that Means, Eſtates, Leaſes and Intereſts in and out of the Lands veſted in the mean Time would be thereby defeated, which would be full of Miſchief and Inconvenience. And the Caſe of *Arthur* (*a*) *Baſſet*, which you may ſee reported by the Lord *Dyer*, 3 & 4 *Ph. & Ma.* 136. that Indentures made four Years after a Recovery were held ſufficient to declare the Uſes of a precedent Recovery, was agreed to be good Law; for in the ſaid Caſe of *Baſſet* the Recovery was ſuffered in 16 *H.* 7. and the Indentures made *anno* 20 *H.* 7. (which was long before the Statute of transferring of Uſes into Poſſeſſion) at which Time an Uſe being but a Thing in Confidence might be directed and altered, according to the Intention of the Parties. And after the Caſe had been often argued by the Serjeants at the Bar, the Caſe was argued by the Juſtices at the Bench. And it was unanimouſly reſolved by all the Juſtices of the Bench, that the ſaid Indenture (*b*) ſubſequent was ſufficient to direct and declare the Uſes of the precedent Recovery againſt the ſaid *Peter Vavaſor* and his Heirs, for ſo it is concluded and declar'd by the Deed indented, that the Intent and true Mean. of all the Parties now is, *and at the Time of the ſaid Recovery was, That the ſaid Recoverers, &c. ſhould ſtand ſeiſed, &c. to the only Uſes and Intents by theſe Preſents ſet forth and declar'd, and to no other Uſe, Intent or Purpoſe.* Againſt which expreſs Affirmation and Declaration by Deed indented, the ſaid *Peter* or his Heirs ſhall never be admitted or received to ſay, that no ſuch Uſes were declared at the Time of the ſaid Recovery, but that the ſaid Recovery, notwithſtanding the ſaid ſubſequent Declaration ſhall be conſtrued and adjudged by Force of an Uſe implied by Operation of Law, to be to the Uſe of the ſaid *Peter* and his Heirs: But this Declaration by the ſaid Deed indented has this Operation in Law againſt the ſaid *Peter* and his Heirs, that there was a Preſent, certain and compleat Agreement and Declaration of the ſaid Uſes at the Time of the ſaid Recovery, for ſo the Indenture expreſly purports; and therefore all that has been objected, That the Declaration ought to be Precedent, or preſent and (*c*) certain and compleat, and not as a Communication with Reference to Matter to be put in Writing afterwards was well agreed; but now this Deed indented in Judgment

(*a*) 2 Rol. 782. Jenk. Cent. 212. Dy. 136. pl. 1, &c.

(*b*) Hut. Arg. 48. Moor 192. 2 Rol. Rep. 561. 1 Vent. 368. Poſtea 11. b. Cr. Jac. 512.

(*c*) Ant 9. a.

of Law doth import and witneſs againſt the ſaid *Pet. Vavaſor* and his Heirs, foraſmuch as nothing appears to the Contrary, that there was a certain and compleat Declaration of Uſes at the Time of the ſaid Recovery, and this ſtands upon pregnant and apparent Reaſon; for in as much as *Peter* and his Heirs are only to take Advantage for want of Declaration of Uſes, Reaſon requires, that this Declaration of the ſaid *Peter* by his Deed indented ſhould ſtand againſt him and his Heirs: And this Caſe is not like the ſaid Caſes in (*a*) 39 *Aſſ.* & 46 *E.* 3. cited before; for in ſuch Caſe, if the Lands were held before in Socage, the Tenant could not create or grant Knight's Service, which was not due before; and in the Record the Infant was not made Heir to *J.* But here without Queſtion *Pet. Vavaſor* the Tenant of the Land might at the Time of the Recovery limit what Uſes he would, and *Eliz.* is Heir to *Peter*: And the Reaſons of the Book in (*b*) 35 *H.* 6. are, 1. The Heir in ſuch Caſe was not bound, becauſe the Words of the Charter were but by way of Recital: 2. That the Word of the Deed indented were all the Words of the Lord, and not of the Tenant, the Heir of whom ſhould be bound, and that the Brother of the half Blood was not Heir to the Ten't, who was Party to the Deed. But in our Caſe, 1. It is not by way of Recital, but an expreſs Affirmation and Declaration: 2. It is the Acknowledgment and Declaration of the Ten't of the Land it ſelf, and the ſaid *Elizab.* one of the Plaintiffs is Heir to *Pet. Vavaſor*. *Vide* 10 *E.* 3. 22. 24. *Rob. de Vale's* Caſe. And as to the Objection which was made, That the ſaid Privilege to be without (*c*) Impeachment of Waſte can't be without Deed, &c. To that it was anſwered and reſolved, that if it was admitted that a Deed in ſuch Caſe ſhould be requiſite, yet without Queſtion all the Eſtates limited would be good; altho' it is admitted, that the Clauſe concerning the ſaid Privilege would be void. And therefore if a Man infeoffs one by Parol to the Uſe of *A.* for Life, without Impeachment of Waſte, with divers Remainders over, admitting that the Clauſe of without Impeachment of Waſte in ſuch Caſe ſhould be void; yet the Eſtate for Life, with the Remainders over is well executed. And a (*d*) Difference was taken between Indentures precedent, which ſhall direct the Uſes of a ſubſequent Recovery, and Indentures ſubſequent: For when precedent Indentures are made, and afterwards a Recovery follows accordingly, there no Averment can be taken by Parol, that the Recovery was to other Uſes than are declared in the Indenture; for nothing veſts in any till the Recovery is had; and in ſuch Caſe a Declaration by Parol will not control the Declaration by Deed: But againſt an Indenture ſubſequent, declaring the Uſes of a Recovery precedent, there Averment may be taken that other Uſes, than in ſuch Inden-

(*a*) 39 Aſſ. 3. pl. 3. 46 E 3. Aſſiſe 357. Antea 8. b.

(*b*) 35 H. 6. 33 b. Br. Eſtop 23. Fitz. Eſtop. 57. 8 Co. 54. a. Plowd. 136 a.b. Hob. 31. Co. Lit. 12. a. Ant. 9. a.

(*c*) Ant. 9. a.

(*d*) 5 Co. 26. Cr. Jac. 29. 1 Brown 191. 1 Rol. Rep. 42. Palm. 507. Cr. El. 218 Bridgm. 113. 2 Co. 76. a.

Indenture are declared, were expreſſed and limited before and at the Time of the Recovery, becauſe by ſuch Limitation, the Uſe and Eſtate was veſted according to ſuch Limitation, which cannot be deveſted by any Declaration by Indenture ſubſequent. It was alſo reſolved (as appears before) that the ſaid Declaration ſubſequent by Deed indented ſhould ſtand good againſt the ſaid *Peter Vavaſor* and his Heirs, for as much as appeareth, there was no other Declaration of any other Uſe: But if after the Recovery had, *Peter Vavaſor* had ſold, or given, or charged the Lands to others, which would be defeated and annulled by the Declaration ſubſequent, there ſuch ſubſequent Declaration of it ſelf ſhould not ſubvert the mean Eſtates, Charges, or Intereſts, unleſs it could otherwiſe be proved, that by the certain and compleat Agreement of the Parties, the Recovery was had to ſuch Uſes, for by Judgment of Law ſuch Declaration ſubſequent ſhall be ſufficient, when no other certain and compleat Declaration or Limitation of any other Uſe, either at the Time, or before the Recovery be made, or any Eſtate or Intereſt mean be veſted: And as when a Common Recovery is ſuffered without Conſideration, it is in Judgment of Law, without any Proof to the Uſe of him who ſuffers the Recovery, if nothing is proved to the Contrary; ſo when ſuch ſubſequent Declaration (as in the Caſe at Bar) is made, it ſhall be ſufficient of it ſelf, without any other Proof of the Declaration of the ſame Uſes, either before, or at the Time of the Recovery, if no other Limitation of Uſe was made, nor any mean Eſtate or Intereſt of any other thereby defeated. And becauſe the Intention of the Parties is the Direction of Uſes, in the Argument of this Caſe many Caſes were put, where an Act ſubſequent ſhall declare the Intention of a general Act precedent: As if (*a*) Tenant in Tail has Iſſue two Daughters, and dies, and the Elder enters into the Whole, and afterwards makes a Feoffment thereof with Warranty, this is a lineal Warranty for one Moiety, and a collateral Warranty for the other, for the Feoffment ſubſequent ſhall declare the Intention of the general Entry, that it was only for her ſelf, or otherwiſe it would be a Warranty which commenced by Diſſeiſin for one Moiety, and therewith agreeth *Lit. cap. Gar. f.* 160. So if the Lord comes upon the Tenancy, and takes and drives away an Ox, if he impounds it, the Taking ſhall be adjudged for a Diſtreſs; but if he kills the Ox, this Act ſubſequent ſhall declare his Intention *ab initio*, and ſhall make him a (*b*) Treſpaſſer, and therewith agree 12 *Edw.* 4. 8. *b.* 28 *Hen.* 6. 5 *&c.* And as to the (*c*) Fourth Reaſon or Objection which was made, that it was but Matter of Evidence tending to prove to what Uſes the Recove-

(*a*) Lit. Sect. 710. Co. Lit. 373 b. Lit. f. 161. a.

(*b*) Fenk. Sect. 190, 191. Cr. Jac. 148. 8 Co. 146. b. Fitz. Treſp. 67. Poſt. 22. b. Br. Diſtreſs 82.

 ry (*c*) Ant. 9. b.

ry was had, that has been anſwered before, that in Judgment of Law it is ſufficient to declare the Uſe when nothing appears to the contrary, as in the Caſe of Indentures precedent, or when a Recovery is ſuffered without any Conſideration, and without Limitation of any Uſe: But as to the Point of Pleading, it was reſolved, that as well in the Caſe at Bar, as in the Caſe of an Indenture precedent, and Recovery ſuffered without Conſideration, the uſual Form of Pleading ought not to be altered, *ſc.* to aver that the Recovery was ſuffered to ſuch Uſes, and upon the Evidence the Court ought to direct the Jury according to Law, or that they ſhould find the Truth of the Caſe, as in the Caſe at Bar they do. And the Juſtices in this Caſe cited a former Reſolution in the Point in the Court of Wards, between the ſame Parties, *Hill.* 21 *El.* the whole ſpecial Matter as before being found by Office, and tranſcribed into the ſame Court, where by Sir *Chriſt. Wray*, and Sir *James Dyer* Aſſiſtants to the ſaid Court, and by the Advice alſo of other Juſtices, it was reſolved, That the ſaid Indentures ſubſequent were ſufficient to declare the Uſes of the Recovery precedent, becauſe nothing appeared to the contrary. And as to the fifth and laſt Reaſon or Objection which was made, it was anſwered and reſolved, That no Miſchief or Inconveniency could enſue upon this Conſtruction, as was pretended at the Bar, but great Inconveniency would enſue on the other Side, for the Inheritances of many Subjects in *England* depend upon ſuch Declarations ſubſequent, or at leaſt upon Indentures which in Truth were delivered after the Recoveries ſuffered, or Fines levied. And theſe Reſolutions ſtand with the common Opinion of Men learned in the Law, and common Experience; and the Alteration of ſuch Opinions which concern Aſſurances of Inheritances would be too dangerous.

Hutt. Argum. 48.
Moor 192.
2 Rol. Rep 362.
1 Ventr. 368.
Cro. Jac. 512.
Antea 10. a.

As to the 2d Point, it was objected, That the Jurors could not give their Verdict at large, but in a Writ of Aſſiſe, Treſpaſs, or the like, where the general Iſſue is pleaded, and not when Iſſue is joined upon a Matter collateral to the Point of the general Iſſue; for there the Jury ought to find the Iſſue preciſely, without giving their Verdict at large. And they endeavoured to prove it by Reaſon and by Authorities in Law: For they ſaid that at the Common Law before the Statute of *Weſtm.* 2. *cap.* 30. the Jurors in every Action ought to have given their Verdict directly and preciſely, either in the Affirmative, or Negative, according to the Iſſue joined, and not at large; and this is well proved by the ſaid Statute. *Item, ordinatum eſt, quod Juſtic' ad Aſſiſas capiendas aſſign' non compellant Juratores dicere preciſe ſi ſit diſſeiſin' vel non, dummodo*

2 Inſt. 425.
Co. Lit. 227. b.

modo dicere voluerint veritatem facti & petere auxilium Juſticiariorum. Which Act as to Actions is taken by Equity, but only to ſuch Actions which are general, and have general Iſſues, as Aſſiſe, Treſpaſs, and the like, and not to Actions which comprehended Certainty, altho' the general Iſſue be pleaded. It extends alſo to general Actions, where the general Iſſue is pleaded, and not when Iſſue is joined upon a ſole and certain Point out of the general Iſſue; and therefore the Stat. ſays, *non compellant Juratores dicere preciſe ſi ſit diſſeiſina vel non:* And that is when *Nul tort nul diſſeiſin* is pleaded, which is the general Iſſue in an Aſſiſe. And the Reaſon thereof was, becauſe upon the general Iſſues in Writs, which comprehend no Certainty many and doubtful Matters may be given in Evidence; ſo that as the Pl. and Def. in ſuch Caſes are at Liberty upon the general Iſſue, to give what Evidence they will; ſo are the Jurors at Liberty when the Matter is intricate and doubtful in Law, to find the ſpecial Matter, *& petere auxilium Juſticiariorum.* But when either the Writ is certain, or when the Iſſue is joined only upon a Point in certain, there they can't be ſo inveigled and perplexed, as upon a general Writ and general Iſſue: And this is the Reaſon that the Stat. ſhall be taken by Equity, as to Actions which are in equal Miſchief, but not as to Iſſues which differ in Cauſe and Reaſon; and therefore in 7 *H.* 4. 11. *a. J. B.* brought an Action of Treſpaſs againſt *T. de R.* for breaking his Cloſe, digging his Land, *ſc.* three Acres of Meadow, and ſpoiling and carrying away his Graſs: The Defendant pleaded it was his Freehold, upon which Iſſue was joined, and the Jury found a ſpecial Verdict, *ſc.* That the Plaintiff's Anceſtors were ſeiſed of five Acres of Lands in another County in Fee, and the Defendant's Anceſtor of the ſaid three Acres of Meadow in Fee; and an Exchange was made between them by Parol without Deed, *ſc.* That the Plaintiff's Anceſtor ſhould have the three Acres of Meadow, and the Defendant's Anceſtor the ſaid five Acres of Land, by Force whereof each of them entered and continued in all their Life-times, and died ſeiſed; after whoſe Death the Plaintiff entred into both, whereupon the Defendant entred into the Meadow, and was ſeiſed four Weeks before the Treſpaſs, and digged, *&c.* and prayed the Opinion of the Juſtices by the Statute of *W.* 2. *cap.* 30. *Hankford*, you are not now in an Aſſiſe, for your Charge is but to ſay, who was Tenant of the Freehold at the Time of the Treſpaſs ſuppoſed, ſo you have nothing to do whether the Entry be congeable or not; wherefore the Jury found for the Defendant, and upon that Judgment was given. By which it appears, that upon the ſaid collateral Iſſue of his Freehold a ſpecial Verdict could not be

Br. Treſpaſs 81, Br. Verdict 10. Poſtea 14. a.

given, and that this Caſe was out of the ſaid Act of *W.* 2. *c.* 30. which Act was cited in the ſaid Book: And in (*a*) Attaint in 8 *E.* 4. 29. The Jurors asked if they might give their Verdict at large, as in Aſſiſe, and the Juſtices ſaid that they could not, (*b*) 9 *H.* 7. 5. *Brian* Ch. Juſtice held, That in Reſcous, which is a Writ conceived upon a ſpecial Matter, *ſc.* the Tenure, Diſtreſs and Reſcous, the Verdict ſhall not be given at large, altho' the general Iſſue is pleaded: So in Debt, which always comprehends Certainty, altho' *nil debet* is pleaded, the Verdict ſhall not be given at large, becauſe theſe and the like Writs, which comprehend Certainty, are out of the Miſchief of the ſaid Statute. But the Statute extends to Treſpaſs, becauſe the Writ is as general as the Aſſiſe, becauſe the Plaint and Count in them are general, for which Reaſon there the Verdict ſhall be given at large, and that is by the Statute; but in no ſpecial Caſe where the Matter is ſpecially counted, no Verdict at large. And (*c*) 9 *H.* 7. 13. *b. Fairfax* held, That in no Caſe where the Iſſue is joined upon a certain Point, the Verdict ſhall be given at large, but in Treſpaſs, which is a general Writ, if the Defendant pleads, *Not guilty*, the Jurors may give their Verdict at large; and ſo in an Aſſiſe upon *Nul tort nul diſſeiſin*, the Jury may give their Verdict at large. So in 23 *H.* 8. *Br. Verdict* 85. the Court of Common Pleas cannot ſuffer Verdicts at large in a Writ of Entry in the Nature of an Aſſiſe, becauſe it is *Præcipe*, and comprehends Certainty. And in the *Reports* of the Lord *Dyer*, now newly printed, *Paſch* 11 *El.* (*d*) 283, 284. in Aſſiſe betwixt *Butler* and *Crouch* for Land in the County of *Somerſet*, upon an *abſq*; *hoc* Iſſue was taken upon a Preſcription, upon which the Jury gave a ſpecial Verdict; and it was reſolved by all the Juſtices of the Common Pleas *in Cubiculo meo*, (as the Lord *Dyer* reports) that upon this ſpecial Iſſue by an *abſque hoc*, and not a general Iſſue, a preciſe Verdict ought to be given of the one Part or the other; which was a Reſolution in the Point, as it was ſtrongly urged, and over-rules the Point now in Queſtion. But it was reſolved by Sir *Ed. Anderſon* Chief Juſtice, and all the Juſtices of the Bench, That the ſpecial Verdict in the Caſe at Bar was well found; they held, That in all Pleas, as well of the Crown as in Common Pleas, *ſ.* Actions real, perſonal and mixt, and upon all Iſſues joined, either between the King and the Party, or between Party and Party, the Jury may find the (*e*) ſpecial Matter, which is pertinent, and tends only to the Iſſue joined, upon which, being doubtful to 'em in Law, they may pray the Opinion of the Court: And this they may do by the Com. Law, which has ordained, that Mat-

(*a*) 7 E. 4. 29. a. Poſtea 14. b. Br. Attaint 87. Br. Verd. 58. Fitz. Verd. 10

(*b*) 9 H. 7. 4. b. Br. Verd. 56. Plow. 92. a.

(*c*) Plow. 92. a. Br. Verd. 83. Poſt. 14. b. 2 Anderſ. 37.

(*d*) Dy. 283, 284. pl. 33. Poſt. 14. b.

(*e*) Dy. 218. Dy. 77. 2 Anderſ. 37. Moor 858. 2 Inſt. 425. Hob. 227. Co. Lit. 226. b. 227 b. Plow. 92. a. b. 93. a. 101. b. Goldsb. 24. 3 Leon. 136. Stamf. Pleas. Cor. 164. b. 165. a.

Matters in Fact ſhall be tried by Jurors, and Matters in Law by the Judges: And as *ad (a) quæſtionem facti non reſpondent Judices, ita ad quæſtionem Juris non reſpondent Jurat'*; but their Duty is to find *veritatem facti*, and to refer the Diſcuſſion of the Law to the Juſtices, and therefore their finding is called *(b) Veredict'*, *quaſi dict' veritatis*, the Saying of the Truth, and the Determination of the Judges is called *Judicium*, *quaſi Juris dictum*, *i. e. Ipſa viva vox Juris*, the Saying of the Law, and the Wiſdom of the Law was to refer Things to Perſons in which they had Knowledge, and were expert, according to the ancient Rule, *Quod (c) quiſque norit in hoc ſe exerceat*; and therefore the Law will not compel neither the Jurors, who have not Knowledge in the Law, to take upon them the Knowledge of Points in Law, either in Caſes which concern Life or Member, or Inheritances, Freehold, Goods, or Chattels, but leave them to the Conſideration of the Judges; nor the Juſtices of Aſſiſe, nor any other Judges, be it in Pleas of the Crown, or Common Pleas, to give their Opinion of Queſtions and Doubts in Law upon the ſudden; but in ſuch Caſes have the Truth of the Caſe found, and upon Conference and Conſideration to adjudge according to the Law in ſuch Caſes. And therefore it was reſolved, That the ſaid Act of *W.* 2. *c. (d)* 30. was but an Affirmance of the Common Law; and this appears by the Statute it ſelf, and by Authorities in Law in all Succeſſions of Ages. And as to the Statute, the precedent and ſubſequent Clauſes were conſidered. The Precedent is, *(e) Habeant omnes Juſticiarii de Bancis in itineribus Clericos irrotulantes omnia plac' coram eis placitata, ſicut antiquitus habere conſueverunt*, which Clauſe appears to be in Affirmance of the Common Law. The ſubſequent is, *Et (f) de cætero non ponant Juſticiarii in aſſiſas aut Juratis aliquos Juratores niſi eos qui ad hoc prius ſint ſummoniti*, for at the Com. Law they ought to come in by the Return of the Sheriff. And ſo the middle Clauſe touching the Point in Queſtion, that *Juſtic', &c. non compellant Juratores dicere præciſe, &c.* was but a Declaration of the Common Law, as well for the Relief of the Jurors, who upon their Oath ſhall not be compelled to find at their Peril Things doubtful to them in Law, but alſo for a good Caveat to Juſtices of Aſſiſe and other Judges, that they do not upon the ſudden over-rule Queſtions in Law; for every Judge ought in giving his Judgment in doubtful Caſes to avoid two Things, *ſc. Præcipitationem, quia ad pœnitentiam properat cito qui judicat: Et moroſam cunctationem, ſc.* either when the Law is determined, or to make a Queſtion in Law where none is, to delay the Party, which is in Effect a Denying of Juſtice.

(a) 1 Rol. Rep. 132. 2 Bulſt. 204, 251, 305, 314. 2 Siderf. 127. Plowd. 114. b. Poſtea 25. a. 8 Co. 155. a. 11 Co. 10. b. Co. Lit. 125. a. 155. b. 226. a.

(b) Co. Lit. 226. a.

(c) 8 Co. 130. a. 11 Co. 10. b. 12 Co. 66. Co. Lit. 125. a. 13 Co. 11.

(d) 2 Inſt. 421, 422, 423, &c.

(e) 2 Inſt. 425.

(f) 2 Inſt. 426.

And

And for the better Direction of Judges in ſuch Caſes, and for the Advancement of common Right, it is enacted by the next Chapter following, *ſc. (a) c.* 31. *Cum aliquis placitatur coram aliquibus Juſtic', proponat exceptionem* (*ſ.* a Matter which he ſuppoſes will ſerve him in Law) *& petat qd' Juſticiarii eam allocent quam ſi allocare noluerint, & ille qui exceptionem propoſuerit, ſcribat illam exceptionem & petat quod Juſticiarii ſigillum ſuu' apponant in Teſtimonium, Juſticiarii apponant ſigilla ſua, &c.* and this was to prevent Precipitation of Judges in over-ruling, *ex improviſo*, Queſtions in Law: For it is a good Rule in the (*b*) 9th Chapter of *Judges*, Conſider, conſult, and then give Judgment. *Vide* for the Bill of Exception, *(c) 9 Aſſ. p.* 8. *(d)* 11 *H.* 4. 52. *b.* 65. *b.* 92. *a. b.* 21 *E.* 4. 11. *b. Regiſt.* 182. *a. b. Book of Entries*, Tit. *Error in the Diviſion of Exception.*

By Authorities in Law touching the 2d Point of the Caſe now in Queſtion, and 1. of ſpecial Verdicts given in Criminal Cauſes, either in Caſe of Indictment at the King's Suit, or in Appeal at the Suit of the Party, 3 *E.* 3. *Itinere North. (f) Coron.* 284. *S.* was indicted of the Death of *N.* and arraigned upon it, and pleaded Not guilty, and the Jury gave a ſpecial Verdict to this Effect, That a Contention was moved betwixt them, whereupon the ſaid *N.* now dead ſtruck *S. cum quodam baculo fraxineo in capite, ita quod cecidit, & præd' S. ſtatim cum ſurrexit fugit in quantum potuit, & præd' N. ipſum ſecutus fuiſſet cum præd' baculo ad ipſum interficiend' ſi potuiſſet, & ipſum fugavit uſq; quendam murum inter duas domus ſcituatum, ultra quem tranſire non potuit ullo modo, & cum percepiſſet præd' N. ipſum velle interfeciſſe cum præd' baculo, & quod mortem ſuam propriam evadere non potuiſſet niſi ſe defendiſſet, cepit quendam Polhach & ipſum N. cum eod' repercuſſit in capite ita qd' ſtatim inde obiit, &c. unde dic' qd' præd' S. ſe defendend' præd' N. interfecit, & non per feloniam aut malitiam præcogitatam, &c.* and this Verdict finding the Matter at large was received, and he had his Pardon of courſe, and therewith agree 3 *E.* 3. *Coron (g)* 286. 43 *(h) Aſſ. p.* 31. *(i)* 26 *H.* 8. 5. *a.* 44 *(k) E.* 3. 44. *a.* In an Appeal of Death againſt *Will. Halbener*, he pleaded Not guilty; and the Jury found a Verdict at large, *ſc.* That the Deceaſed ſtruck the Defendant on the Neck, ſo that he fell to the Ground, and when the Defendant was upon the Ground, the Deceaſed drew his Knife to have killed the Defendant, and the Defendant lying upon the Ground drew his Knife, and the Deceaſed was ſo haſty to have killed the Defendant, that he fell upon the Defendant's Knife, and ſo killed himſelf: And it was adjudged, that foraſmuch as the Deceaſed killed himſelf in the Manner, it was adjudged upon this ſpecial Verdict, that the Defendant was Not guilty, and his Goods not forfeited. *Vide Fitz. (l) Coron.* 94. and therewith agree *(m)* 44 *Aſſ. p.* 17.

(a) 45 *E.*

(*a*) Weſtm. 2. c. 31. 2 Inſt. 426, 427, 428.

(*b*) Judg. c. 19. v. 30. in fine.

(*c*) Br. Challenge 97. Br. Error 110. Fitz. Challenge 8.

(*d*) Br. Error 50. Fitz. Error 66.

(*e*) Br. Challenge 180. Fitz. Challenge 60.

(*f*) Stamf. Pl. Cor. 15. a. 165. a.

(*g*) Stamf. Pl. Cor. 15. a. 16. a. 165. a.

(*h*) Stamf. Pl. Cor. 15. a. Br. Cor. 125. Fitz. Cor. 226

(*i*) Br. Corone 1.

(*k*) Br. Corone 12. 14. 44 Aſſ. 17. Fitz. Corone 94. Stamf. Pl. Cor. 16.

(*l*) Stamf. Pl. Cor. 15. b. 16. a. 165. a. 42 E. 3. 44. a.

(*m*) Supra K. & L.

(*a*) 45 *E.* 3. 20. *a.* In a *Formedon* the Damandant counted of a Gift made to *J. de C.* in Frankmarriage with *Johan* the Donor's Siſter, the Tenant pleaded, That the Tenements were given in Fee-ſimple, and traverſed, that he did not give them *modo & forma* as the Writ ſuppoſes: And afterwards by *Niſi prius* before *Whichingham* and *Chi're* a Deed was ſhewed in the Evidence that the Donor gave to *J. de C. in liberum maritagium tenementa præd' cum Johan' ſorore ſua, habend' & tenend' tenementa præd' præd' Johanni & Johannæ, & hæredibus ſuis imperpetuum; & quia aliqua verba in dicto facto contenta, ſunt in liberum maritagium, & aliqua in feodo ſimplici, Juratores neſciunt indicare veritatem, & petunt diſcretionem Juſticiariorum ſuperinde:* And upon this Verdict ſo found at length, Judgment was given againſt the Demandant, becauſe a Fee-ſimple, and not an Eſtate in Frankmarriage, paſt by the Deed. By which Judgment it appears, That in a Writ which comprehends Certainty (as in a *Formedon*) a ſpecial Verdict may be given. *Vide* 16 *E.* 3. *Verdict* 21. *Vide* 42 *E.* 3. 1. in *Dower*, 47 *E.* 3. 19. *in Præcipe quod reddat*, upon an Iſſue collateral to the Point of the Writ. 30 *E.* 3. & 9 *H.* 7. 3. *in Reſcous*, 41 *E.* 3. 10. *in Accompt.* 40 *E.* 3. 2. *in Debt.* 28 *H.* 8. *Dyer* 32. *b. in Debt. Paſch.* 1 & 2 *Phil. & Mar. Dy.* 115. *b. in Covenant. Mich.* 1 & 2 *Eliz. Dyer* 173. *in Attaint.* 2 *El. Dyer* 192. *b. in Debt.* 9 *El. Dyer* 260. *in Debt. Mich.* 10 & 11 *Eliz. Dyer* 279. *b. in Debt.* 13 *El. Dy.* 300. *b. in Ejectione firmæ.* 32 *H.* 8. *Dy.* 47. *in Treſpaſs. Paſch.* 1 & 2 *Phil. & Mar. Dy.* 114. *in Treſpaſs. Plow. Com.* 92. *in Aſſiſe of freſh Force brought by the Parſon of Honey-Lane.*

(*a*) 45 E. 3. 19. b. 20. a. Br. Frankmarriage 1. Br. Eſtates 8. Fitz. Tail 14. 10 Co. 117. b.

And *Note*, Reader, In all Caſes when Jurors find the (*b*) ſpecial Matter doubtful in Law pertinent and tending to the Iſſue which they are to try, there the Court ought to accept it, but when they find Matter at large which is not pertinent, and tending to the Point in Iſſue, upon which they are to give their Verdict, there the Court ought to diſallow it, as impertinent to the Iſſue, and to their Charge. And upon this Difference the Books which have ſome ſhew of Contrariety are well reconciled. For Example, in the Caſe of 7 *H.* 4. 11. *a.* the Iſſue in (*c*) Treſpaſs, being joined upon the Freehold at the Time of the Treſpaſs, foraſmuch as it is found that the Pl. enter'd into the ſaid three Acres of Meadow, upon whom the Def. entred, and was ſeized by four Weeks before the Treſp. altho' they found an Exchange by Parol of Lands in ſeveral Counties which was (*d*) void in Law, ſo as the Entry of the Pl. was lawful; yet the Iſſue being joined upon the Freehold at the Time of the Treſpaſs, *Hankford* ſaid to the Jury, in ſuch Caſe, according to Law, *ſ.* your Charge was but to ſay, who was Tenant of the Freehold the Day of the Treſpaſs; ſo whether the Entry of the Plaintiff be lawful

(*b*) 11 Co. 13. a. Hob. 53. 2 Rol. 701, 702. Hard. 347. Dy. 362. pl. 15. Hutt. 121. Cro. El. 481. Cro. Car. 65, 76, 212. 1 Sid. 96. Plow. 112. b. 114. b.

(*c*) Br. Treſpaſs 81. Br. Verdict 10. Antea 12. a.

(*d*) 1 Rol. 814. Co. Lit. 50. a. Perk. Sect. 244.

or

or not, you have nothing to do, wherefore the Jury found for the Def. Which Book proves, That the Jurors can't find Matter at large which is not within their Charge, and with which, having regard to the Iſſue joined, they have nothing to do: By which is ſtrongly implied, That if the ſpecial Matter had been within their Charge, and tending to the Iſſue, with which they had to do, that it ſhould be allowed; and in the ſaid Book of (*a*) 7 *E.* 4. 29. *a.* it doth not appear what was the Iſſue, nor what ſpecial Matter they would have found; and therefore tis to be intended according to the ſaid Difference. And as to the Opinions in (*b*) 9 *H.* 7. in the ſame Caſes there is Difference of Opinions, and therefore they are to be reconciled as aforeſaid. And as to the ſaid Opinion of (*c*) 11 *El.* and in the ſame Caſe there was other clear Matter to arreſt the Judgment; and the Opinion which was conceived in that Point was *in cubiculo*, without open Argument, and therefore if it ſhall not be intended according to the ſaid Difference, it has not any Warrant of any Book ruled in the Point, but is againſt all the ſaid Judgments and Authorities in Law in all Succeſſions of Ages; and afterwards Judgment was given in the principal Caſe, as follows,

(*a*) Br. Attaint 87. Br. Verdict 58. Fitz Verdict 10.

(*b*) 9 H. 7. 13. b. Plowd. 92. a. Br Verdict 83. Antea 12. b.

(*c*) Dyer 283, 284. pl. 33. Antea 12. b.

Ad quem diem venerunt tam præd' Tho. Dowman & El. quam præd' Ed. Vavaſor & Geo. Vavaſor, &c. per attorn' ſuos præd', & ſuper hoc viſis præmiſſis, & per Juſtic' hic plene intellectis, videtur eiſdem Juſticiariis, quod præd' indentura per præfat' Pet. Vavaſor armigerum poſt præd' recuperationem in forma præd' factam & habitam, fuit bona & ſufficiens in lege ad ducendos & declarandos uſus recuperationis præd' de tenementis præd' cum pertinentiis in viſu poſitis, &c. ſuperius ſpecificatis, & quod recuperatio præd' per præfat' Andream Windſor, &c. verſus præfat' Pet. Vavaſor armigerum in forma præd' habita, fuit ad eoſdem uſus in præd' barra præd' Edw. Vavaſor ſuperius ſpecificat' modo & forma prout idem Edwardus in barra ſua præd' ſuperius allegavit. Ideo conſideratum eſt, quod præd' Thomas Dowman & Elizabetha nihil capiant per breve ſuum præd' ſed ſint in miſericordia pro falſo clamore ſuo, & quod prædicti Defendentes eant inde ſine die. After the ſaid Reſolution in the Court of Wards, *Dowman*, not ſatisfied with it, brought the ſaid Writ of Aſſize after the Death of Sir *James Dyer*, Chief Juſtice of the Common Pleas, who was a Judge of profound Knowledge and Judgment in the Laws of the Land, and eſpecially in the Form of good Pleading, and the true Entry of Judgments, &c. and of a great Piety and ſincerity, who from his Heart abhorred all Corruption and Deceit, of a bountiful and generous Diſpoſition, and a Patron

Vide ante 7. a.

Patron and Encourager of Men learned in the Laws and expert Clerks of singular Diligence and Observation, as appears by his Book of *Reports*, all wrote with his own Hand, and of a handsome, reverend, and venerable Countenance and Personage. And according to the said Differences it was resolved *Mich.* 44 & 45 *Eliz.* by the two Chief Justices *Popham* and *Anderson*, and by *Periam* Chief Baron, and *Gawdy* Justice, in the Case of *John Littleton* Esq; which was referred to them by the Command of Queen *Elizabeth*. And so was it resolved by all the Justices of the Common Pleas, *Termino Mich. anno 9 Jacobi Regis*, upon Evidence to a Jury at Bar in the Case of Sir *Richard Champernon*, who claimed the whole Inheritance of *Charles* late Earl of *Devon*, That Indentures subsequent were sufficient to direct the Uses of a Fine precedent against the Earl and his Heirs, for the Reasons and Causes, and with the Cautions aforesaid.

ANNE

ANNE BEDINGFIELD's *Caſe.*

Hillary, 28 Elizabeth.

In C. B. in Dower.

1 Leon. 284. 4 Leon. 87.

ANNE Bedingfield, late Wife of *Edmond Bedingfield* Eſq; (Son and Heir of *Henry Bedingfield*, of *Oxborough* in the County of *Norfolk* Knt.) brought a Writ of Dower againſt *Tho. Bedingfield* Eſq; Son and Heir of the ſaid *Edmund*, to be endowed of the Manors of *Oxborough*, *Nefton*, and many other Manors, Lands, and Tenements, in the County of *Norf.* of a great yearly Value, *&c.* And in this Caſe divers Points were reſolved by the Court of Common Pleas. 1. That where in the ſaid Writ the ſaid *Tho.* caſt an Eſſoin, it was challenged, becauſe by the Statute *de eſſoniis calumniandis* made 12 *E.* 2. it is enacted, *Quod non jacet eſſonium in breve de Dote:* But, Becauſe the Common (*a*) Eſſoin has been always allowed in a Writ *de Dote*, therefore the Juſtices conſtrued the Statute to extend to an Eſſoin of the King's Service, and not to a Common Eſſoin, *& eo potius*, becauſe the ſaid Act adds a Reaſon of the Purview *ſ. quia videtur deceptio & prorogatio Juris*, and that is properly to be intended of an Eſſoin of the King's Service, which is a Delay and Prorogation of Right by a Year. *Vide* 4 *E.* 3. 36. *b.* (*b*) 4 *Aſſ. pl.* 2. *Long* (*c*) 5 *E.* 4. 70. *a.* Then the ſaid *Tho.* purchaſed a Writ out of the Chance-

(*a*) 1 Rol. 822. Br. Eſſoin 110. 2 E. 4. 21. b. Noy 144.

(*b*) Br. Eſſoin 86. Fitz. Eſſoin 63.

(*c*) Br. Eſſoin 106.

ry called a Writ of (*a*) *Circumspecte agatis*, setting forth, that whereas the said *Edm.* was seized of the Manor of *Necton* in the County of *Norfolk* in Fee, and held it of the Q. in Chief by Knight's Service, and died thereof seized, the said *Tho.* of full Age, *prout per quandam Inquisition' compert' est, &c.* by Reason whereof the Queen has seized as well the said Manor, as the Manors of *Oxborough*, *Ashil*, &c. and because the Q. was bound to restore the Tenements, *tam integre, &c.* as they came to her Hands, therefore the Judges were commanded to surcease *Domina* (*b*) *Regina inconsulta:* It was resolved, That this Writ, which is in Nature of an Aid Prayer of the K. can't extend to any Manors not found in the Office, because the Q. by the Law can't seize more Manors than are comprised within the Office. And as to the Manor of *Necton*, which appears by the Writ to be only found in the Office, the Case was well debated at the Bar and Bench. And the Tenant's Counsel cited the Books of 8 *E.* 3. 15. 18 *E.* 3. 38. 19 *E.* 3. *Aid de Roy* 64. 39 *E.* 3. 8. 46 *E.* 3. 19. 11 *H.* 4. 39. *b.* 5 *H.* 5. 13. *a.* & 13 *R.* 2. *Brief* 646. 9 *H.* 6. 40. *F. N. B.* 153. *f.* 154. *d.* by which it appears that where the Heir is within Age, and in Ward of the K. and committed over, and is impleaded, or comes in as Vouchee in a Writ of *Dower*, that Aid of the K. shall be granted; And altho' in the Case at Bar, it appears by the Office mentioned in the Writ, that the Heir was of full Age at the Time of his Ancestor's Death, yet that will not make any Difference; for the K. when he has primer Seisin, may as well endow the Wife in Chancery, as where the Heir is within Age, and in his Ward; And that appears by the Stat. *de Prærogativa Regis, c.* (*c*) 4. *Rex assignabit viduis post mortem virorum suorum qui de eo tenuerunt in capite, dotem suam quæ eis contingit, &c. licet hæredes fuerint plenæ ætatis, &c.* And upon these Authorities and Reasons the Court gave Day over in the same Term to the Demandant, to shew Cause why the Writ should not be allowed. At which Day the Serjeants of the Demandant's Counsel (a Pleader of the *Inner Temple* being present and also of Counsel in the Cause) shewed Cause to the Court why the said Writ should not be allowed. They agreed, that in all the Books Aid was granted of the K. in a Writ of *Dower* brought against the Heir, or when the Heir was vouched within Age, and in Ward of the King; and it ought also to be confessed, that the granting of it, if it was not grantable by Law, was not Error. But it is enacted by the Statute *de Bigamis*, (*d*) *c.* 3. *de dotibus mulierum ubi aliqui custodes hæreditat' maritorum suorum custodias habent ex dono vel concessione Regis, sive custodes rem petitam tenent*

(*a*) 1 Leon. 284, 285. 4 Leon. 87. Hard. 428. Vide for this Writ 21 E 3. 44. 22 E. 3. 13, 14. 31 E 3. tit. Saver Default 37 2 R. 3. 13. F. N. B. 153. f. 154 d. & Regist. &c.

(*b*) 1 Leon. 285. 4 Leon. 87. 2 Rol. 398. 1 Rol Rep 207.

(*c*) 1 Leon. 285. 4 Leon 87. Stamf. Prærog. 15 b 16, 17, &c. Postea 17. a.

(*d*) 1 Leon. 285. 4 Leon. 87. 2 Inst. 271. Stamf. Prærog. 16. b.

ant, ſive hæredes dictorum tenementorum vocentur ad warrant', ſi excipiant, qd' ſine Rege reſpond' non poſſunt, non ideo ſuperſedeatur, quin in loquela præd', prout juſtum fuerit, procedatur; which Stat. is not vouched or remembred in any of the Books, and is expreſs in the Point, that in ſuch Caſes, be the Heir Tenant or Vouchee, *non ſuperſedeatur, quin in loquela, &c. procedatur*, which is ſo well penned, that it extends as well to the ſaid Writ of *Circumſpecte agatis*, as to Aid Prayer. And in (*a*) 4 *H.* 7. 1. *a. b.* Tit. *Aid le Roy*, 33. *in Dower* againſt the Committee of the K. during the Nonage of the Heir, the Def. ſhewed, how it was found by Office, that the Father of the Husband of the Demandant was ſeized in Fee of certain Land, and held of the K. and had Iſſue the Husband, and died; and the Husband entred, and died, his Heir within Age, without any Livery, and all this Matter found by Office; wherefore the K. ſeized and committed to the Defendant. Judgment if Action? and thereupon was a Demurrer: And it was adjudged that ſhe ſhould be endowed: And there Sir *Tho.* (*b*) *Brian* Chief Juſtice of *C. B.* who gave the Rule in the Caſe, ſaid, it appears that Right is in the King; wherefore we will proceed no farther without Aid of the King, wherefore ſue to the King: But when (*c*) *Townſend* Juſtice cited the ſaid Statute *de Bigamis*, which ouſts the Party of Aid in that Caſe, *Brian*, having Conſideration of the ſaid Act, alter'd his Opinion, and diſcharged 'em from ſuing to the King, and awarded, that the Demandant ſhould recover her Dower, *Omnia habere in memoria & in nullo penitus errare, potius eſt deitatis, quam humanitatis.* And if the ſaid Stat. had not been remembred, the Aid alſo had been granted in (*d*) 4 *H.* 7. as it had been in the ſaid Books. But to make a full Anſwer to the Caſe in Queſtion, *Diſtinguenda ſunt tempora, & concordabunt leges.* The ſaid Stat. *de Bigamis* was enacted at a Parliament held 4 *E.* 1. And the Stat. *de Prærogativa Regis* was made 17 *E.* 2. And before the Statute *de Prærogativa Regis*, the K. when the Heir was of full Age, had but *primam ſeiſinam capiend' exitus, &c.* as it is ſaid in the Chapter next before; and in ſuch Caſe the King is not Guardian, and therefore can't endow the Wife at the Com. Law. For as a Writ of *Dower* lay againſt Guardian in Chivalry, during the Minority of the Heir, or the Guardian might endow her without any Suit during the Minority of the Heir, if he would; but after full Age, although he held over the Land for the Value of the Marriage, no Writ of *Dower* lay againſt him, nor could he endow the Wife, becauſe after full Age of the Heir he was not Guardian, and none who has but a Chattel (except the (*e*) Guardian only) can endow the Wife of a

(*a*) Stamf. Prærog. 16. b. 2 Inſt. 271. Hardr. 428.

(*b*) 2 Inſt. 271.

(*c*) 2 Inſt. 271.

(*d*) 4 H. 7. 1. a. Supra. a.

(*e*) 6 C. 57. b. Co. Lit. 35. a. 38. b. Br. Dower 63. 1 Rol 681. 9 H. 6. 6. b. 24. b. 47 Aſſ. 15 per Finchden. F. N. B. 148. a. 150 b.

Freehold; neither did a Writ of *Dower*, which is a real Action, lie againſt him, as appears in 6 *E.* 3. 16. *b.* he ought to be (*a*) Guardian, and named Guardian, and a Writ of *Dower* brought in ſuch Caſe againſt the Heir, within Age ſhall abate, for it ought to be brought againſt the Guardian, and therewith agree 17 *E.* 3. 79. 9 *H.* 6. 6. *b.* *Vid. Temp. E.* 1. *Dower* (*b*) 863. *Vide* 8 *E.* 3. 63. *a. b.* *Dower* lies againſt Guardian within Age, and againſt the Heir at full Age, (*c*) 46 *E.* 3. 19. 7 *E.* 3. 10. *b.* 9 (*d*) *E.* 4. 31. *b.* and in 8 *E.* 3. 15. *b.* a Woman brought a Writ of *Dower* againſt *Hen. Bolton* as Guardian in Chivalry, who pleaded, that he had nothing but a Leaſe for 6 Years, of the Leaſe of *John Mowbray* Guardian of the Lands; Judgment of the Writ. And there it is held, that the Writ of *Dower* doth not lie againſt (*e*) him in reſpect of the Poſſeſſion, if he be not Guardian, wherefore the Demandant maintained that he was Guardian. 2 *E.* 3. 15. *b.* A Writ of *Dower* brought againſt Tenant by *Elegit* ſhall abate. 8 *E.* 2. *Brief* 809. *Dower* was brought againſt Tenant for * Years, and abated by award, but there *Berisford* ſaith, it is good againſt a Guardian, becauſe he anſwers in the Name of the Heir. So the King when the Heir is of full Age, could not by the Com. Law have endowed the Wife, becauſe he is not Guardian; but has in Effect the Profits of the Land but for a Year, and therefore the Makers of the Stat. *de* (*f*) *Bigamis anno* 4 *E.* 1. if the K. could have endowed the Wife when the Heir was of full Age, they would have ouſted delays in ſuch Caſe as they did, and *à fortiori* then when the Heir was within Age: But at that Time, *ſ.* 4 *E.* 1. the King when the Heir was of full Age, could not endow the Wife, but ſuch Power as he has was given him by the Stat. *de Prærogativa Regis*, made in 17 *E.* 2. long Time after; which Act *de* (*g*) *Prærogativa Regis*, altho' it gave Power to the King to endow the Wives, *&c. licet hæredes fuer' plenæ ætatis*, yet the Statute adds, *ſi viduæ illæ voluerint*; ſo as the Stat. leaves it to the Election of the Wife, either to be endowed in the Chancery, or at the Common Law, and by Conſequence the Writ of *Dower* (which is favoured in Law, and to be likened to no other *Præcipe*) is not to be ſtayed by Aid Prayer in that Caſe. Upon which the Court took Adviſement and Conſideration: And afterwards the Court, for the Reaſons and Cauſes aforeſaid, diſcharged the Tenant from ſuing to the Queen, and gave Day, in the beginning of *Eaſter* Term next following, to plead an Iſſuable Plea peremptorily. In which Term the Tenant's Counſel offered to plead Detainment of Charters by the Demandant, *&c.* which was in *Eaſter*-Term, and *Trinity*-Term following well argued at the Bar and Bench: And upon good Advice and Conſideration, theſe Points were reſolved by the Court.

(*a*) Co. Lit. 38. b. Br. Brief 431. 9 H. 5. 4. b.
(*b*) Brief 863.
(*c*) 46 E. 3. 19. b. 20. a. Br. Dower 20.
(*d*) Br. Dow. 94. Br. Brief 486.
(*e*) 6 Co. 57. b. 8 E. 3. 15. b.
* 6 Co. 57. b. 8 E. 3. 15. b.
(*f*) 11 Leon. 285. 4 Leon. 87. 2 Inſt. 271. Stanf. Prærog. 16. b. Antea 16. a.
(*g*) Ant. 16. a. Stanf. Prærog. 15. b. 16, 17, &c. 1 Leon. 285. 4 Leon. 87.
1 Show. 273. Salk. 252. Comb. 183.

1. The (*a*) Charters ought to concern the Land whereof Dower is demanded, and not other Lands descended to the Heir. *Vide* (*b*) 33 *H.* 6. 51. *a. b.* resolved in the Point (*c*) 22 *H.* 6. 42. *b.* And the Law in this Case well allows that this Rebutter of the Action is a good Plea in a Writ of *Dower* for two Reasons: 1. The Charters are the (*d*) Sinews of the Inheritance of the Husband's Heir, and she is not worthy to demand Dower of the Husb.'s Inheritance who will wrongfully detain from his Heir (by whom she is to be endowed) the Muniments which might defend the said Inheritance; for Charters are called Muniments, *a muniendo, quia muniunt & defendunt Hæreditatem, &c.* 2. There is a greater Privity when a Wife is endowed of the immediate Estate, which her Husband's Heir has by descent, than when she is endowed by a Stranger, or of another Estate; for if the Wife be endowed of the immediate Estate descended to her Husband's Heir, if she be after impleaded, she shall vouch the Heir, and shall be newly endowed of other Lands which the Heir has; but if the Wife be endowed by the Husband's or Heir's Alienee, if she be impleaded, she shall not vouch the Alienee to be newly endowed: And that is the Reason that when a Woman brings a Writ of *Dower* against the Alienee of the Husband, *&c.* and he vouches the Heir, the Demandant may Witness that the Heir has Lands descended to him in the same County (for the (*e*) Original doth not extend to another County) and pray that she may be endowed of his Estate, and that is for the Benefit of her Voucher to be newly endowed, *vide* in 4 *E.* 3. 36. *b.* and 6 *E.* 3. 11. *a. b.* the Tenant in a Writ of *Dower* vouched the Heir of the Husband; and the Demandant testified that he by Descent, *&c.* in the same County; and (*f*) Judgment was given against the Heir if he had, and if not against the Tenant. In 6 *E.* 3. 20. *b.* The Wife of a Stranger brought a Writ of *Dower*, and the Tenant vouched the Heir, *&c.* the Demandant shall not recover against the Heir, because there wants Privity. In 18 *E.* 3. 36. *b.* in *Dower* the Ten't vouched, and the Vouchee vouched the Heir of the Husband of the Demandant; the Demandant testified that the Heir had Assets by descent in the same County, the Demandant shall not recover against the Heir, but against the Tenant only, for there is not immediate Privity betwixt the Demandant and the Heir, for the Demandant shall recover against the Heir only, when the Ten't in Demesn vouches him. *Vide Regist. Judic.* 15. 16 *E.* 3. *Dower* 56. 3 *El. Dy.* (*g*) 202. And that is the Reason that the Heir only shall plead Detainment of Charters, and not a Stranger, as shall be after said. *Vide F. N. B.* 8 *E.* 50 *E.* 3. 7. *b.* And the Reason which *Newton* gives in (*b*) 22 *H.* 6. 42. *b.* that the Heir shall have this Plea

(*a*) Doct. pl. 150. 1 Rol. 679. Br. Dower 1. 18 H. 8. 1. a. Dy. 37. pl. 42. Plow. 85. a. b. 4 H. 7. 10 a. 9 E. 4. 47. a. 22 H. 6. 16. a.

(*b*) Fitz. Dower 9. Br. Dower 4.

(*c*) Fitz. Dower 6.

(*d*) 1 Co. 1. b. Co. Lit. 6. a. 2 Rol. 31. 11 Co. 50. b.

(*e*) Winch 88.

(*f*) 2 Rol. 751. Cr. Jac. 688. Dy. 202. pl. 71. Hutt. 71, 72. Winch. 81, 88.

(*g*) Dyer 202. pl. 71.

(*h*) Br. Dower 26. Fitz. Dow. 35. Dy. 230. pl. 53. Perk. Sect. 357.

Plea of Detainment of Charters, &c. *ſc.* that if the Heir had the Charters of his Land, he might peradventure plead in Bar of her Dower, can't be the Reaſon thereof; for when the Heir has pleaded that he has been always ready, and yet is to render Dower, &c. if the Demandant would render to him his Charters, it is a full Confeſſion of the Action, if the Demandant will deliver the Charters, and therefore after the Charters delivered, the Heir ſhall not plead over, but the Demandant ſhall have her Judgment immediately, as ſhall hereafter more fully appear.

2. He who pleads this Plea ought to ſhew the (*a*) Certainty of the Charters; whereupon a certain Iſſue may be joined, or that they are in a Cheſt or Box locked or ſealed; which imports ſufficient Certainty, upon which a certain Iſſue may be taken: And in both Caſes an Action of *Detinue* may be grounded and brought by the Heir, 22 *H.* 6. 16. *a.* 2 *H.* 7. 6. *a.* 14 *H.* 6. 4. *a.* 21 *E.* 3. 8. *b.* 18 *H.* 8. 1. *a.*

(*a*) Co. Lit. 286. b. Doct. pl. 150. Dy. 230. pl. 53. Br. Dower 67. Plowd. 85. a. b. Poſtea 100. a. Fitz. Dower 17.

3. No (*b*) Stranger, altho' he be Tenant of the Land, and has the Evidences conveyed to him, can in a Writ of *Dower*, plead Detainment of Charters, but this Plea lies only in Privity, *ſcil.* for the Heir of the Husband, as hath been ſaid. Alſo the Heir in divers Caſes is in Degree of a Stranger, and therefore ſhall not plead Detainment of Evidences, and that he ſhall not do in five Caſes. 1. If the (*c*) Heir has the Land by Purchaſe. 2. If the Heir has (*d*) delivered the Charters to the Wife, he ſhall not plead Detainment of them, for the Wife has them by his own Act, as it is reſolved in 7 *E.* 3. *Dower* 101. 3. If the Heir be not (*e*) immediately vouched, *ſc.* by the Tenant in the Writ of *Dower*, but by his Vouchee, as has been ſaid 18 *E.* 3. 36. *b.* 4. If the Heir comes in as (*f*) Vouchee, having no Land in the County where the Dower is demanded. 5. If he comes in as Tenant by (*g*) Receit, he ſhall not plead Detainment of Charters, as appears in 16 *E.* 3. *Dower* 57, 75. and many other Books; and the Reaſon thereof is manifeſt; if the true Form of Pleading in that Caſe be well obſerved; for he, who pleads Detainment of Charters in Bar of of Dower, ought to plead, that he has been always ready, and yet is to render Dower, if the Demandant would deliver to him his Charters; and Tenant by Receit, or ſuch Vouchee as is aforeſaid, can't plead it, becauſe he can't plead that he has been always ready to render Dower; when the Demandant can't recover againſt the Heir in ſuch Caſes either being Vouchee or received, nor can he render to the Demandant the

(*b*) Cr. El. 367. Co. Lit. 39. a. Poſtea 19. a. Doct. pl. 150. 10 Co. 94. b. Dy. 230. pl. 52. Perk. Sect. 361. 10 E. 3. 49. Fitz. Dow. 112. Vet. N. B. 9. b.

(*c*) Dy. 230. pl. 52. Doct. pl. 150.

(*d*) Doct. pl. 150.

(*e*) Doct. pl. 150. Dy. 230. pl. 52.

(*f*) Doct. pl. 150.

(*g*) Doct. pl. 22, 151. Dy. 230. pl. 52.

Dower which to her by Law belongs. But if a Man is ſeiſed of three Acres in three Towns, *ſ. A. B.* and *C.* in one County, and enfeoffs a Stranger of one Acre with Warranty, and dies, now the Heir may aſſign the Wife one Acre in Satisfaction of her Dower, as well in the Acre whereof the Stranger is enfeoffed, as of the other Acres deſcended to the Heir; for by Courſe of Law ſhe ſhall have Dower againſt the Heir, in Diſcharge of the whole Tenancy, as well that which he ought to warrant, as that which is deſcended to him in the ſame County, in which Caſe the Heir may agree with the Wife, as well out of Court as in Court, for that which by the Law he is bound to do, and being vouched by the Feoffee in a Writ of *Dower*, he ſhall plead it in Bar, as it is adjudged in 33 *E.* 3. *Judgment* (154) 254. & 8 *E.* 3. 69. *a. b. Michael Treweny*'s Caſe; and by the ſame Reaſon in ſuch Caſe, the Heir being Vouchee ſhall plead Detainment of Charters, *&c.* for he may well ſay, that he has been always ready, and yet is to render Dower to the Demandant, in diſcharge of the whole Tenancy in the ſame County; for by the Law, the Demandant ought to be entirely endowed againſt the Heir. And therewith alſo agrees 17 *E.* 3. 58. *b.* where in *Dower* the Tenant vouched the Heir in Ward, the Guardian by the Warranty ſaid, That the Demandant detained from him the Heir, where the Land is held in Knight's Service; and if ſhe would render the Heir, he has been always ready, (*nota hoc*) and yet is to render Dower: And there Exception is taken to it, becauſe this Plea lies for none but him who always, after we were dowable, could have rendred Dower, and you could not before now render: To which it was anſwered, That we are he againſt whom ſhe ſhall recover, and the Tenants ſhall hold in Peace, and we might always by Law have made Agreement for that which we held, becauſe by the Law ſhe ſhall be ſerved of Dower of that which we hold, ſo that to us in lieu of *Withernam* the Anſwer is given. *Et videtur Curiæ*, That the Guardian Tenant by the Warranty ſhould have ſuch Anſwer, whereupon the Demandant traverſed the Eloinment of the Infant: In 8 *E.* 3. 55. *a.* In a Writ of *Dower* the Tenant made Default after Default, wherefore the Demandant prayed Seiſin of the Land; whereupon came one *John*, and ſaith, That the Tenant held for the Term of his Life, his Leaſe, the Reverſion to him, and prayed to be received, and was received, and ſaid that he was Heir to the Husband of the Demandant, of whom ſhe demanded Dower, and ſaid that ſhe

Co. Lit. 31. a. Cr. Jac. 688.

Cr. Jac. 688.

Co. Lit. 39. a.

ſhe detained two Charters touching his Inheritance, and ſhewed what, &c. and ſaid that if ſhe would render him his Charters, he ſhould be ready to render her Dower, &c. and becauſe Tenant by receit can't Render her Demand, and he is a Stranger, this Plea doth not lie in his Mouth: And thereupon Seiſin of the Land was awarded to the Wife.

And ſo note two good Differences, 1. (a) Between the Heir being immediate Vouchee, having Aſſets in the ſame County, and when he is vouched by a Vouchee, or when the Heir has nothing but in a foreign County; for in the firſt Caſe he may plead always ready, &c. to render Dower, and in the other two not. (b) 2. Between the Heir having Land in the ſame County, when he is immediately vouched, and when he is Tenant by Receit, for in Caſe of Receit the Judgment ſhall be given againſt the Tenant, and not againſt the Heir, ſo that the Plea lies not in his Mouth, ſ. that he is yet ready to render Dower, for he can't render to the Demandant her Demand. *Vide* 7. *E.* 3. *Dower* 101. 6 *El. Dy.* 230. *Vide* 7 *E.* 2. *Dower* 150. 11 *H.* 3. *ib.* 187. 45 *H.* 5. *ib.* 174. 14 *H.* 4. 30. 36 *H.* 6. 7. 41 *E.* 3. 11. 6 *E.* 3. 45.

(a) Doct. pl. 151.

(b) Doct. pl. 151.

4. In a Writ of *Dower* againſt (c) Guardian in Chivalry, he ſhall not plead Detainment of Charters, for he can't conclude his Plea, and if the Demandant will deliver him the Charters, &c. for the Charters which concern the Inheritance of the Heir ſhall not be delivered to the Guardian, as it is adjudged in 10 *E.* 3. 49. *a.* But the (d) Guardian in a Writ of *Dower* may plead Detainment of the Heir by the Demandant, and that he has been always ready, &c. *ut ſupra*, for the Ward belongs to him; and if the Demandant detains the Ward, and doth not render him to the Guardian unmarried; or if ſhe renders to him being married, ſhe ſhall loſe her Dower, and therewith agree 8 *E.* 3. 70. 7 *E.* 3. 57. *a.* 22 *H.* 6. 16. *a.* 2 *H.* 7. 6. *a.* 17 *E.* 3. 58. *b.* 16 *E.* 2. *Dower* 144. *Vide* what manner of Charters or Evidences the Demandant in *Dower* ought to detain, that the Heir may plead, &c. 41 *E.* 3. 11. *a. b.* 6 *E.* 3. 45. *b.* &c. And ſo all the Books in all theſe Points are well agreed. And when (in the Caſe at Bar) the Tenant perceived that if he ſhould plead ſuch Plea, that the Demandant might deliver the Charters in (e) Court, and pray Judgment upon his Confeſſion immediately, as appears in 10 *E.* 3. 49. *a.* 21 *E.* 3. 8. *b.* 9 *E.* 4. 47. *a.* &c. He waived his Plea touching theſe Matters. And in *Trinity*

(c) Doct. pl. 151. 10 Co. 94. b. Co. Lit. 39. a. Dy. 230. pl. 52.

(d) Doct. pl 151. Co. Lit. 39. a.

Q.

(e) Doct. pl. 151.

Term, when the Demandant expected that he would have confeſſed the Action, he pleaded, *Ne unques accouple in loyal matrimony:* Whereupon it was written to the Biſhop of *Norwich*, who certified, *Quod infranominati Edmund' & Anna legitimo matrimonio copulati fuerunt.* To which Certificate, being ſhort and direct to the Point, no Exception was ever taken: Whereupon the Demandant had Judgment, and divers Manors Parcel of the Demand aſſigned for Dower, which the Demandant leaſed to divers Perſons named by the Tenant, in Conſideration of 1000 Marks Fine, and 500 *l.* Rent *per Annum*.

THE

THE CASE of an AVOWRY.

In the King's Bench.

IN the Caſe of an Avowry in the King's Bench, this Point was principally moved and debated, that is to ſay, if there is Lord and Tenant by Fealty and Rent, and the Tenant makes a Leaſe for Years, and the Leſſor has done Fealty, and paid the Rent continually, and yet the Lord diſtrains the Cattle of the Leſſee for the Rent, when in Truth none is in arrear, and avows upon a meer Stranger who never had any Thing, as upon his very Tenant for the Arrearages of the Rent, if the Leſſee ſhould be without Remedy in this Caſe. And the Opinion of *Priſot*, (*a*) 34 *H.* 6. 46. was objected, where he holds, That if there is Lord, Meſne and Tenant, and the Lord avows upon a Stranger, and not upon the Meſne, the Tenant is without Remedy: And ſo if a Termor brings a Replevin, and he avows upon other than the Leſſee, the Termor is without Remedy: And that the common Opinion of all our Books is, That a (*b*) Stranger to the Avowry ſhall not plead nothing in arrear, or a Tenure by leſſer Services, or any other Plea, but only (*c*) out of his Fee, or a Thing which tantamounts, 17 *E.* 3. 14. *b.* 15. *a.* 34 *E.* 3. *Avowry* 247. (257) 38 *E.* 3. *Avowry* 61. 39 *E.* 3. 34. *a. b.* 43 *E.* 3. 13. *a.* 2 *H.* 6. 1. *a. b.* & 54. 34 *H.* 6. 21. *a. b.* 35 *H.* 6. 51. *a. b.* 37 *H.* 6. 23. 38 *H.* 6. 23. *b.* 7 *E.* 4. 10. 13 *E.* 4. 6. *b.* 14 *H.* 8. 4. 26 *H.* 8. 6. *a. b.* & 22 *H.* 6. 2. *b.* it is ſaid, That it is a Poſition in Law, That a Stranger to the Avowry ſhall not plead, but out of his Fee, &c. It was alſo objected, That Leſſee for Years could not pray in Aid of his Leſſor, and ſo make him Party to plead, becauſe the Leſſor is a Stranger to the Avowry, and the Leſſee might plead as much as the Leſſor himſelf might, and that is, out of his Fee. And ſo are the Books in

(*a*) Poſtea 22. a. b. Fitz. Avow. 25. Br. Avow 15. Br. Aid 16.

(*b*) Doct. pl. 330.

(*c*) Co. Lit. 1. b.

Co. Lit. 312.

* 1 Rol. 165. * 18 *E.* 3. 7. *a.* 17 *E.* 3. 9. *b.* 54 *E.* 3. *Avowry* 258. 3 *E.* 2. (*a*) *Aid* 151. 6 *E.* 4. 3. *a.* 12 *E.* 4. 5. *a.* 5 *H.* 5. 5. *a. b.* 2 *H.* 7. 10. *b.* 8 *H.* 7. 8. *b.* &c. unleſs the Leſſee makes his Leſſor privy in Eſtate to him, upon whom the Avowry was made. *Vide* 3 *E.* 2. *Avowry* 186.

(*a*) 3 E. 2. Aid 161. 1 Rol. 165.

Yet it was reſolved, That the Leſſee for Years ſhall be by Law relieved in this Caſe; and for the better Underſtanding of the Law in this Caſe, two Differences in Law were obſerved. Firſt, (as hath been ſaid) a (*b*) Stranger to the Avowry ſhall plead nothing, but out of his Fee, or a Thing which tantamounts, and that is true as to the Pleading of any Matter in Bar of the Avowry; but the right Tenant, altho' he is a Stranger to the Avowry, yet being made Party he ſhall plead Matter in Abatement of the Avowry, as ſhall appear. Another Difference is, when the Leſſee for Years, or for Life, ſhall have Aid of one who is a Stranger to the Avowry, and when not; for upon a (*c*) general Allegation, that ſuch a Stranger was ſeiſed in Fee and leaſed to him for Life or Years, he ſhall not have Aid, as the Books before cited prove, becauſe it would be in vain in ſuch Caſe to grant Aid, when the Leſſee may plead out of his Fee as well as his Leſſor; but upon ſpecial Matter diſcloſed, he ſhall have Aid of his Leſſor, who is very Tenant. And therefore if the Leſſee in ſuch Caſe alledges, that his Leſſor was, and (*d*) yet is ſeiſed of the Tenancy in his Demeſne as of Fee, and held it of the Lord by the Services, &c. of which Services the Lord has been, and yet is ſeiſed by the Hands of the Leſſor, as by the Hands of his very Tenant, and that the Tenant has leaſed the Land to him, and that the Lord, to charge the Plaintiff unjuſtly, has avowed upon one, who has nothing in the Tenancy; and thereupon he prays in Aid of his Leſſor; in this Caſe, upon this ſpecial Matter, he ſhall have Aid, becauſe without his Leſſor he can't plead this Matter in Abatement of the Avowry, nor ſhall the Lord be compelled to avow upon the Leſſor: And by this ſpecial Matter there appears true Privity in Eſtate and Seigniory betwixt the true Tenant and the Lord, ſo that there wants no Privity in this Caſe, nor will the Law eſteem him, who is true Tenant in Law, to be a Stranger to the Lord; and the falſe Avowry of the Lord upon the Stranger who is not Tenant ſhall not hurt the Leſſee againſt the Truth of the Caſe, *quia veritas nihil veretur niſi abſcondi.* And the Law will never ſuffer a Falſity to ſuppreſs Truth. And this is well proved by the Books cited before; as, taking one for Example, in the ſaid Book of 18 *E.*

(*b*) Doct. pla. 161, 217.

(*c*) 1 Rol. 165.

(*d*) 1 Rol. 165.

(*a*) 3.

(*a*) 3. 7. *a.* the Case was such; *A.* brought a *Replevin* against *Will. Weylond*, who avowed for Rent-Service upon the Issue in Tail, the Plaintiff shewed, That a Stranger to the Avowry leased to him for Life, and prayed in Aid of him, and was ousted of the Aid because the Lessor could not plead more than the Lessee, because they are both Strangers; but there upon special Matter pleaded he shall have Aid of him, to the End that both may join in a Plea of Abatement of the Avowry, which the Lessee himself alone shall not plead: For the Lessee to have Aid may say, That the Donor before the Stat. infeoffed the Donee in Fee to hold of him, and that the Lessor is Assignee of the Feoffee, and has tendred the Services, and compelled the Lord to avow upon him. To which Sir *Rich. Wilby* Ch. Just. who gave the Rule, said, Plead then this Matter if you will have Aid. Which Case proves both the Differences, *sc.* That a Stranger to the Avowry shall compel the Avowant to avow upon him; which is as much as to say, That he shall abate the Avowry made upon him who has nothing, and compel the Lord to avow upon him who is his right and true Tenant. 2. That upon such special Matter which tends to drive the Lord to avow upon his very Tenant, he shall have Aid of a Stranger to the Avowry: And the Law requires, That the Lord shall always avow upon him who is his Tenant in Right and in Law, and to do it the Lord shall be compelled by special Pleading, and therewith agrees *Littleton, cap. Releases, fol.* 106. if the Tenant is disseised, and the Lord takes the Cattle of the Disseisee, and he sues a Replevin, and the Lord avows upon the Disseisor who is Tenant in Possession, the Disseisee by Pleading of the special Matter shall abate the Lord's Avowry upon the Disseisor, and (*b*) compel him to avow upon him, because the Disseisee is Tenant to him in Right and in Law. *Vide (c)* 20 *H.* 6. 9. *b.* by *Newton, (d)* 48 *E.* 3. 8. by *Fitz. a fortiori*, in the principal Case, when the Lord avows upon one who has nothing, upon the special Matter shewed the Lessor shall join in Aid to the Lessee, and shall abate the Avowry made upon him who has nothing, and compel the Lord to avow upon his Tenant in Right and in Law; and therewith agrees 4 *E.* 3. 50. *b.* 51. *a. Hugh de Luche* brought a Replevin of his Cattle against *W. de Stringlond*, who avowed upon three Sisters, as Daughters and Heirs of *Alice Sager*, by Reason that they held of him certain Tenements by Homage, Fealty, and Escuage, and by the Services of 10 *s. per Annum*, *&c.* and for Homage Arrear he avowed: To which the Plaintiff said, True it is, that *Alice Sager* held of you the said Tenements by Fealty, and 6 *d. per Annum* for all Services, which *Alice* did enfeoff us of the same Tenements, and we have oftentimes tendred our

(*a*) 1 Rol. 165. Fitz. Aid 139.

(*b*) Lit 107. b. Lit. Sect. 454. Co. Lit. 268. a. 3 Co. 23. b. 35. a. Post. 21. b.

(*c*) Co. Lit. 268. a.

(*d*) 48 E. 3. 8. b. per Finchden. Br. Avowry 31. Fitz. Avowry 83. Postea 21. b.

our Fealty, Judgment, if you can avow upon other than upon us, or for more Services than, &c. To which Plea in Abatement of the Avowry Exception was taken, becauſe the Plaintiff was a Stranger to the Avowry: To which it was anſwer'd and reſolv'd, That the Plaintiff was privy enough, becauſe he was Tenant of the Land, and had tendred the Services: And there it is expreſly ſaid, That the Iſſue of this Avowry could not be taken on the Right of the Services, but abate the Avowry, and compel the Lord to avow upon the Pl. and then might they plead to the Right of the Services. *(a)* 48 *E.* 3. 8. *b.* by *Finchden*, & 16 *E.* 3. *Avowry* 90. *acc. Vide* 39 *E.* 3. 34. *a. b.* & *(b)* 10 *H.* 6. 26. *b.* 31 *E.* 3. *Avowry* 111. *a fortiori* when the Lord ſhall avow upon one who has nothing in the Land, he who is the very Tenant, and by whoſe Hands the Lord has received the Services, ſhall compel him (as *Littleton* (c) ſaith) to avow upon him. *Vide* 9 *H.* 5. 15. *a.* and in 34 *E.* 3. *Avowry* 258. the Pl. was ouſted of Aid, becauſe he did not ſhew the ſpecial Matter to give him cauſe of Aid. And in this Point the Law is curious; for altho' the Lord avows upon the right Perſon, yet if he doth not convey to him his true Title to the Land, his Avowry ſhall abate; and therefore if a Man avows upon one as Heir to his Mother, where he is Heir to his Father, this Avowry ſhall abate. 13 *E.* 3. *Avowry* 102. & 11 *H.* 4. 54. 10 *H.* 4. *Avowry* 193. 3 *E.* 3. 69. *Vide* 27 *E.* 3. 88. *a.* So if in Replevin the Defendant avows upon the Pl. as upon his very Tenant, the Pl. in Abatement of the Avowry may ſay, That he has nothing but for Term of Life of the Leaſe of *W.* the Reverſion now to his Son and Heir, and pray in Aid of him, to the Intent to compel the Lord to avow upon him who is his Tenant in Law; and therewith agrees 3 *H.* 6. 12, 13. and *Fitz.* in abridging the Caſe, Tit. *Aid* 57. ſaith, that this Plea goes in Abatement of the Avowry; and for this Cauſe by the Rule of the Book he had Aid of a Stranger to the Avowry. *Vide* 15 *E.* 3. *Aid* 33. Tenant in Dower had Aid of the Heir in Reverſion, who was a Stranger to the Avowry. And the great Wiſdom and Policy of the Law was well obſerved, which has fully provided for the Remedy of this Caſe; for in Avowry for Rent-Service, &c. the Pl. being Tenant for Years, or for Life, ſhall have Aid of his Leſſor before Iſſue joined, becauſe without him the Leſſee can't plead, as appears in *(d)* 2 *H.* 5. 1. 7 *E.* 4. 23. *a.* 6 *E.* 4. 3. *a.* 21 *E.* 3. 12. *b.* 13 *Eliz. Dyer (e)* 229. to the End the rightful and very Tenant joining with him may abate the feigned Avowry made upon him who has nothing, or upon one who is not rightful Tenant, and compel the Lord to avow upon him who is Tenant in Law: And it would be a great Abſurdity, and Defect in the Common Law, if the falſe and feigned Avowry

(a) Antea 21. a. Br. Avowry 31. Fitz. Avowry 83.

(b) Br. Avowry 117.

(c) Antea 21. a.

(d) Fitz. joinder in Aid 7.

(e) Dyer 289. pl. 59.

Avowry upon him who has nothing ſhould charge the Termor with Arrearages of Rent where none were due, and *Lex Angliæ non patitur abſurdum:* And if any ſuch Defect had been in the Law, as was objected, the Makers of the Act of (*a*) 21 *H.* 8. *c.* 19. would have provided a Remedy as well for the Tenant, and all Leſſees and other Strangers to the Avowry againſt the Lords, as they did for the Lords againſt the Tenants and their Leſſees, as appears by the Preamble, and not to have bound the Tenants, Leſſees, *&c.* and left the Lords at Liberty. And it was ſaid at the Bar, that in ſome Caſe the Lord was left to the Com. Law, and could not avow within the ſaid Act of 21 *H.* 8. and that is, when the Lord comes to diſtrain, and (*b*) ſees the Cattle upon the Tenancy, and the Tenant drives them off into other Land not held, and the Lord freſhly follows them and diſtrains them there, as he well may, as it is held in 44 *E.* 4. 20. *b.* 6 *R.* 2. *Reſcous* 11. 11 *H.* 7. 4. *a.* 21 *H.* 7. 40. *a.* 34 *H.* 6. 18. *b.* 16 *E.* 4. 10. *a. b.* That this Caſe is out of the ſaid Stat. becauſe the Purview is, *If the Lord diſtrein upon the ſame Manors, Lands or Tenements,* &c. *that the Lord of whom the ſame Lands, Tenements, or Hereditaments been ſo holden, may avow as within his Fee and Seigniory,* and the Diſtreſs is taken in Lands not held of him, nor in his Fee and Seigniory; and therefore this Caſe is out of the ſaid Act. But it was reſolved, that this Caſe is within the Purview of the ſaid Act; for, 1. it is clearly within the Miſchief within the Preamble, and the Act is made to ſuppreſs Fraud: 2. upon the Matter the Diſtreſs is taken upon the Land held, for the Lord can't diſtrain out of his Fee, but the View of the Lord and his freſh Suit makes the Diſtreſs to be in Judgment of Law taken within his Fee, or a Thing which tantamounts; and as *Thorp* ſaith in 44 *E.* 3. 20. *b.* the Taking ſhall always refer to the firſt Place, and it would be inconvenient that the Act of the Tenant himſelf, (againſt whom the Act was made) ſhould make the good Act of little or no Effect. But *Nota*, Reader, If one comes to diſtrain for (*c*) Damage-feaſant, and ſees the Cattle, and the Owner drives them off, he can't diſtrain them Damage-feaſant, but is put to his Action of Treſpaſs. 16 *E.* 4. 10. *b.* & 2 *E.* 2. *Avowry* 182. For there the Cattle ought to be Damage-feaſant at the Time of the Diſtreſs; and ſo a Difference.

(*a*) Co. Lit. 268. b.

(*b*) Co. Lit. 161. a. 268. b. 2 Inſt. 131. 33 H. 6. 53. a. Br. Diſtreſs 13, 83, 91, 100. Plowd. 38. a. Fitz. Diſtreſs 2. Fitz. Reſcous 13. Br. Avowry 13. in Fine.

(*c*) Plowd. 38. a. Co. Lit. 161. a.

And as to the other Caſe which *Priſot* puts, *ſ.* If there is Lord, Meſne, and Tenant, and the Lord avows upon a Stranger, and not upon the Meſne, the Tenant is without Remedy; and it was urged, that it was good Law, for the Ten't upon any ſpecial Pleading, as in the Caſe of the Leſſee, can't

Antea 20.

can't have Aid of the Meſne, becauſe he is Tenant in Fee-ſimple, and the Meſne can't join with him, becauſe he is a Stranger to the Avowry, for the Meſne ſhall never join with the Tenant, but when the Avowry is made upon the Meſne, and both theſe Points are reſolved in (*a*) 13 *E.* 4. 6. *a. b.* and in other Books, 31 *E.* 3. *Joinder in Aid* 14. 17 *E.* 3. 15. *a. b.* the Abbot of *Furney*'s Caſe and there is a Defect obſerved in the Com. Law in ſuch Caſe, which is prayed to be amended and reformed by the Juſtices, as in other Caſes to avoid Miſchief they have done. *Vide* 39 *E.* 3. 34. *a. b.* And it was reſolved and well agreed, That the Opinion of (*b*) *Priſot* in this Caſe is good Law to the End that *Priſot* intended; for it is true, that *Priſot* intended that the Tenant is without Remedy either to plead any Plea, or to plead nothing in Arrear, *&c.* becauſe he is a Stranger to the Avowry; or by ſpecial Pleading to pray in Aid of the Meſne, for as hath been ſaid, he is Tenant in Fee-ſimple, and can't pray in Aid, and the Meſne can't join with him, becauſe the Lord has not avowed upon the Meſne; and therefore as to theſe three Ways, the Tenant, as *Priſot* intended, is without Remedy, and his Opinion as to theſe is well warranted by the Authority of the ſaid Books, but that the Common Law has left the Tenant without any Remedy in ſuch Caſe, it appears fully and commonly to the contrary in our Books. And therefore, when there is Lord, Meſne, and Tenant, and the Meſne pays the Rent and doth the Services due to the Lord, and yet the Lord (*c*) diſtrains the Tenant peravail for them, and impounds his Cattle, in that Caſe the Tenant may immediately reſort to his Meſne, and tell him the Caſe, and pray him to acquit him: Now the Law has given Power to the (*d*) Meſne to go to the Pound, and take the Cattle of the Tenant peravail out of the Pound and deliver them to him, and put his own Cattle in the Pound in lieu of them, and ſue a (*e*) Replevin and ſo make himſelf Party, and then if the Lord will avow upon the Stranger, he may ſhew the Truth of the Matter, and abate any feigned Avowry made upon the Stranger, and compel the Lord to avow upon him, who is his true Tenant in Law; and altho' not diſtreined in his Default, is a good Plea in a Writ of *Meſne*, yet if the Meſne will not do it upon (*f*) Requeſt, the Tenant upon the Matter is diſtrained in his Default, and therefore he ſhall have a Writ of *Meſne* and recover his Damage, as it is held in (*g*). 7 *H.* 4, 18. *a. b.* 4 *E.* 3. 35. 15 *E.* 3. *Joinder in Aid* 15. 17 *E.* 3. 44. *b.* (*b*) 34 *H.* 6. 47. *a. b.* 13 *E.* 4. 6. *a. b.* & *F. N. B.* 136. *b.* And if the Lord will not ſuffer the Meſne in ſuch Caſe to take the Cattle of the Tenant out of the Pound, he is a (*i*) Treſpaſſor *ab initio*; for he doth not uſe them according to the Nature

(*a*) Br. Meſne 24. Poſt. 23 a 111 a. Br. Replevin 42.

(*b*) Poſtea 20. a.

(*c*) 2 Rol. 125. F. N. B. 136. H. Co. Lit. 100. a.

(*d*) Poſt. 110. b. 111. a. Co. Lit. 100. a.

(*e*) Co. Lit. 145. b.

(*f*) Poſt. 111. a.

(*g*) Co. Lit. 100. a. Br. Meſne 4. 2 Rol. 125. Br. Replevin 14.

(*h*) 2 Rol. 430. Br. Replevin 54. Co. Lit. 100 a.

(*i*) Perk. Sect. 190, 191. Cr. Jac. 148. Fitz. Treſpaſs 67. Antea 11. a. 8 Co. 146. b.

ture of a Diſtreſs; and therewith agrees (*a*) 13 *E.* 4. 6. *a. b.* But let the Tenant look to it, that in ſuch Caſe he ſues not a *Replevin* of his Goods, and has Deliverance of them, for that ſhall be accounted his own Folly that he doth not make Requeſt to the Meſne *ut ſupra*; for then if the Lord ſhall avow upon a Stranger, the Tenant is without Remedy by his own Default; but in ſuch Caſe after the Tenant has deliverance of his Cattle by *Replevin*, if the Lord avows upon the Meſne, there the Tenant may requeſt the Meſne to join with him to plead in his Diſcharge, and if the Meſne will not, the Tenant may have a Writ of (*b*) *Meſne* againſt him, and recover his Damages: For now by Matter *ex poſt facto*, he is diſtreined in his Default, as it is held in 39 *E.* 3. 34. *a. b.* where the Caſe was, That *Henry Percy* was Lord Paramount, *Gilbert Umfrevell* Earl of *Angus*, Meſne, and a Tenant peravail, of divers Manors, *ſ.* 10 Towns, *&c.* the ſaid Lord paramount diſtrained (*c*) the Tenant peravail, the Tenant pleaded a Releaſe by Deed of the ſaid Lord Paramount to the Meſne, to hold by leſſer Services; *& non potuit*, becauſe he was a Stranger to the Avowry: And there it was held, That the Tenant in ſuch Caſe is at no Miſchief, for he might have required the Meſne upon whom the Avowry was made to have joined with him in Anſwer, and if he had come, they two might have joined in the Plea which the Tenant now pleads, and if the Meſne would not have joined with the Tenant, he might have againſt him a Writ of *Meſne* and therein recovered his Damages againſt him; and if the Tenant doth not requeſt the Meſne, it ſhall be accounted his own Folly, which are Word for Word the Words of the Book: And therewith agree 17 *E.* 3. 15. *a. b.* and 12 *E.* 4. 2. *a.* 7 *E.* 4. 19. *b.* And it is to be obſerved, that in ſuch Caſe the Meſne ought to join (*d*) *gratis*, for there is no Proceſs of Law to compel him to appear, as in the Caſe of Aid Prayer, but only upon the Tenant's Requeſt he ought to appear *gratis*, and therewith agrees 7 *E.* 4. 19. *b. Vide* 34 *H.* 6. 46. *a.* And ſo may the Leſſor, upon whom an Avowry is made, join *gratis* with the Leſſee, the Plaintiff in the *Replevin*, and therewith agree 45 *E.* 3. 7. *a. b. &* 39 *H.* 6. 7. *b.*

(*a*) Antea 22. b. Br. Meſne 24. Br. Replevin. 42. Poſt. 111. a.

(*b*) Co. Lit. 100. a.

(*c*) Doctrin. placit. 165.

(*d*) Doctrin. placit. 320.

Laſtly, in the principal Caſe, if the Leſſee (or if the Tenant peravail in the Caſe of the Meſnalty) is preſent when the Lord or his Bailiff comes to diſtrain, if (*e*) nothing is in Arrear, he may well make Reſcous, and ſo relieve himſelf, as it was reſolved in *Bevil's Caſe, in the fourth Part of my Reports, f.* 8. *Vide* 2 *H.* 4. 22. *b.* 8 *H.* 4. 1. *a.* 4 *E.* 6. *Br. Diſtreſs* 75. *By the Juſtices*, 31 *E.* 3. *Reſcous* 17. 39 *E.* 3. 45. 39 *H.* 6. 7. *a. F. N. B.* 102. 27 *Aſſ.* 51. *and* 28 *Aſſ. p.* 50. So that the Leſſee, or Tenant peravail, has a certain Proviſion by the Law to relieve himſelf in the Caſes aforeſaid, unleſs by his Laches or miſdoing he preju-

(*e*) Co. Lit. 47. b. 160. b. 1 Rol. 673. 4 Co. 11. b. Br. Diſtreſs 75. F. N. B. 102. E.

prejudices himſelf. And foraſmuch as notwithſtanding the Statute of 21 *H.* 8. *cap.* 19. the Lord may at this Day avow upon one Perſon certain, as upon his very Tenant, according to the Com. Law, (for the ſaid Stat. enacts, *That the Lord*, &c. (*a*) *may avow*, &c. *as in Lands within his Fee and Seigniory*, which doth not toll the Common Law, but gives a Liberty to the Lord to purſue the one or the other,) I have thought neceſſary to report this Caſe, whereby all the Books are well reconciled, the Doubts well reſolved, and no Abſurdity or Miſchief permitted, that is not remedied, by the Common Law.

(*a*) Co. Lit. 268. b. Poſtea 36. a.

The

The Caſe of the Abbot of Strata Mercella.

Skin. 605, 606.

Mich. 33 & 34 Eliz.

IN a *Quo warranto* againſt *Owen Vaughan* for uſing theſe Liberties and Franchiſes amongſt others, without Warrant, that is to ſay, To have Waifs, Strays, Goods of Felons, *&c.* in *Llanihangel* in the County of *Montgomery*; as to Waifs and Strays, the Defendant claimed them by Preſcription, and as to Goods of Felons he pleaded, *Quod Johan' nuper Abbas de Strata Mercella licite (a) habuit & gaviſus fuit infra Llanihangel præd' bona & catalla felonum, & ad uſum ſuum proprium diſpoſuit, uſque* 4 *Diem Febr. Anno* 27 *H.* 8. And pleaded the Statute of 27 *H.* 8. by which all Monaſteries under the yearly Value of 200 *l.* were given to the King, in as large and ample Manner as the Abbots, *&c.* then had, or ought to have them; and that the ſaid Abbey of *Strata Mercella*, and the Poſſeſſions thereof, were under the yearly Value of 200 *l.* and pleaded alſo the Statute of 32 *H.* 8. *cap.* 20. by which it is enacted, *That all Liberties, Privileges, and Franchiſes, and temporal Juriſdictions which the late Owners of the ſaid Abbies*, &c. *have uſed and exerciſed lawfully*, &c. *within three Months before the ſaid Act of* 27 *H.* 8. *ſhall by the ſaid Act of* 32. *be revived, and ſhall be really and actually in the King, his Heirs and Succeſſors*; by Force whereof K. *H.* 8. was ſeiſed of the ſaid Franchiſes, *ſ.* to have Felons Goods within *Llanihangel* aforeſaid in his Demeſne as of Fee in the Right of his Crown, and ſo ſeiſed, and being alſo ſeiſed of the

Moor 297. Co. Ent. 540. nu. 7. 2 Rol. 61, 62.

(a) Palm. 83.

27 H. 8. c. 27.

Manor of *Tallerthege* in *Llanihangel*, &c. in the said County, (late Parcel of the Possessions of the said Abbey of *Strata Mercella*) granted by his Letters Patent *anno* 37 *H.* 8. the said Manor to Sir *Arthur Darcy* Knt. in Fee, with ge-
(*a*) 10 Co. 65. a. neral Words, that is to say, (*a*) *tot, talia, tanta, hujusmodi, eadem & consimilia, libertates, francheſias, privilegia, jurisdictiones, &c. quot, qualia, quanta, & quæ dictus nuper Abbas, &c. habuit, tenuit, sive gavisus fuit infra, &c.* By Force whereof the said *Arthur Darcy* was seised as well of the Manor aforesaid, as of the Liberties, &c. aforesaid in Fee; and so seised of the said Manor enfeoffed the Defendant in Fee (for altho' there were divers mean Conveyances, this was the Case in Substance) and then he made a Conclusion for all his Plea, *viz. Et eo warranto clamat libertates, francheſias, & privilegia præd' tanquam ad Manerium præd' ſpectan' & pertinent'.* And upon this Plea, as to the Goods and Chattels of Felons, the Queen's Counsel demurred in Law. And it was argued on the Part of the Queen, That the Defendant's Claim to have the Goods and Chattels of Felons was insufficient for two Reasons; 1. Because he doth not shew, That the Abbot had the
(*b*) 2 Inst. 281 Co. Lit. 114. a. Stamf. Præ. 69. 50 a. 46 E. 3. 16. b. 1 H. 7. 23. b. 2 Roll. 270. Br. Coron. 129. 9 H. 7. 11 b. 20. a 21 H. 7. 33. b. Fitz. Prescription 27. 8 H. 4. 2. a. 3 Inst. 55, 227. Kelw. 150. b. Postea 27. Br. Estray 13. Goods of (*b*) Felons by Charter within *Llanihangel*; for by Prescription, or any Usage, he could not have them, for altho' he shall not be compelled to shew the Charter in Court, or to plead an Exemplification of it, because the Charter was made to a Stranger, yet he ought to have pleaded That the Abbot had the said Franchise by Charter. 2. That the Substance of the Plea wants Trial, for the Effect of his Plea is, *Quod præd' nuper Abbas licite habuit & gavisus fuit infra, &c. bona & catalla felonum, &c.* And these two Points were often argued at the Bar in divers several Terms; and the Effect of the Arguments on the Queen's Part, as to the first, was, That the Abbot could not have Felons Goods by Prescription or any Usage, but by Charter, *quod fuit concessum per totam Curiam. Vide* the Authorities, and the Reasons and Causes thereof in *Foxley's Case, in the 5th Part of my Reports f.* 109. *b.* & 110. *a.* whence it was inferred, that the Defendant ought to have pleaded in certain, That such King granted to some of the Predecessors of the said Abbot, &c. or to the said Abbot himself, to have Felons Goods within the Town of *Llanihangel*, &c. and not *quod præd' Abbas habuit & gavisus fuit*, &c. and especially in a *Quo warranto*, in which the Defendant ought to shew a full and perfect Title to himself. As to the Second, it was objected, That the Plea was insufficient, because every Plea
(*c*) Postea 30. b. 31. a. ought to be (*c*) triable, either by the Country, if it contains Matter of Fact, or by the Justices, if it contains Matter in Law, or by the Record it self, if it consists

of Matter of Record, *Pl. Com.* 231. *a. b.* But this Plea is not triable by the Country for two Reaſons. 1. Becauſe the Subſtance of the Iſſue conſiſts of Matter of Record; for without Matter of Record the Abbot could not have them, which can't be tried by the Country, but the Law attributes ſo much Honour and Credit to them, that they ſhall be tried only by (*a*) themſelves, and not by the Country. *Vide* * 37 *H.* 6. 21. *Pl. Com.* 7. & 23. 8 *El.* 242. and *Hind's* Caſe in the 4th Part of my Reports, *f.* 71. 2. Matters in Law are not triable by the Country, no more than Matters in Fact by the Juſtices, *quia ſicut* (*b*) *ad quæſtionem Facti non reſpondent Judices, ita ad quæſtionem Juris non reſpondent Juratores.* But in this Caſe the Defendant has comprehended in his Plea, *qd' præd' nuper Abbas licite habuit, &c.* which tends to Matter in Law which is not enquirable by the Country; and yet the Defendant has not ſhewed his Caſe in ſo certain and ſpecial a Manner that the Court can judge whether the Abbot by the Law had Belons Goods or not; and therefore it is agreed in (*c*) 22 *E.* 4. 40. *b.* the Lord *Liſle's* Caſe, a Man was bound in a Bond, and the Condition was, That if he came to *B.* ſuch a Day, and there ſhewed the Obligee or his Counſel a ſufficient Diſcharge of an Annuity of 40 *s.* which he claimed out of two Houſes, *&c.* that then, *&c.* And in Debt on this Bond the Defendant pleaded, That he came to *B.* at the Day aforeſaid, and there offered to ſhew the Plaintiff's Counſel a ſufficient Diſcharge thereof, and they refuſed, upon which the Plaintiff demur'd in Law. And, after long Argument it was adjudged, That the Plea was inſufficient, for his Plea ought to have alledged what manner of (*d*) Diſcharge he offered to ſhew, *viz.* A Releaſe, or Unity of Poſſeſſion, or other Matter of Diſcharge, upon which the Court might judge if it was ſufficient or not; for the Country ſhall not enquire of it, but it ought to be adjudged by the Court, which the Judges can't do, if the ſpecial Matter be not ſhewed to them; but if the Iſſue be taken, that the Obligor came not there, that ſhall be tried by the Country, for that is matter in Fact, of which the Court has not Conuſance; and all this appears in the ſaid Book. *Vide Pl. Com.* (*e*) 112. Amy Townſend's *Caſe*, & (*f*) 159. *b. in the Lady* Hale's *Caſe*, *&c.*

(*a*) 4 Co. 71. a. b. * Co. Lit. 117. b 260. a. Poſtea 31. a.

(*b*) Co Lit. 125. a. 155. b. 226. a. 303. b 2 Bulſt. 204. 251, 305, 314. 1 Sid. 127. Plow. 114. b. 1 Rol. Rep. 132 Ant. 13. a. 8 Co. 155. a. 10 Co. 10. b.

(*c*) Plowd. 7. b Br. Condit. 183 Hob. 107. 1 Leon. 72.

(*d*) Cr. El. 914.

(*e*) Plow. 114. b.

(*f*) Plow. 259. b.

And as to the Objection which may be made, That it will be miſchievous to the Subject to compel him to ſhew, or to plead the Charters made to Abbots, Priors, *&c.* as well for the (*g*) infinite Search for them, as for the Impoſſibility to get them, many of them being loſt, or defaced, or poſſeſſed by one only; to that it was anſwered, That there is not any ſuch Miſchief, either for the Incertainty, or for the Impoſſibility; for although the Charters are loſt, yet they

(*g*) 2 Co. 48. a. 11 Co. 14. b. Hob. 298. Bridgm. 31. Poſtea 35. b.

are enrolled of Record, of which every one may have an Exemplification; or if such Inrolment can't be found, yet Allowances in Eyre (as by the Law ought to be) are of Record of all such Franchises, by which it appears by Force of these Charters such Franchises were allowed. Against which it was argued on the Defendant's Part, That the Plea was sufficient; upon which Judgment ought to be given for the Defendant: And that the whole Consideration of this Case chiefly consists upon the true Construction of the said Stat. of (*a*) 32 *H.* 8. and therefore the final Intention of the Act, and the Purview thereof are to be considered: The Intention of the Act was to advance these Possessions as well in Valuation as Estimation, to revive actually and really such Privileges, Liberties, Franchises, and Temporal Jurisdictions which the late Owners of the Abbies had, *&c.* then it is to be considered, what Privileges, Liberties, Franchises and Jurisdictions were extinct in the Crown by the Accession of the said Possessions to it. And as to that, it is to be known, that when the King grants any Privileges, Liberties, Franchises, *&c.* which were Privileges, Liberties or Franchises in his own Hands, as Parcel of the Flowers of his Crown, as (*b*) *bona & catalla Felonum, Fugitivorum, Utlagatorum, &c. bona & catalla waviata, extrahur', deodanda, wreccum Maris, &c.* within such Possessions, there if they come again to the K. they are merged in the Crown, and he has 'em again *in Jure Coronæ*: And if the Wreck, or Goods waifed, Estrays, *&c.* were appendant before to Possessions, now the Appendancy is extinct, and the King is seised of them *in Jure Coronæ*. But (*c*) when a Privilege, Liberty, Franchise or Jurisdiction was at the Beginning erected and created by the King, and was not any such Flower before in the Garland of the Crown, there, by the Accession of them again to the Crown they are not extinct, nor the Appendancy of them severed from the Possessions; as if a (*d*) Fair, Market, Hundred, Leet, Park, Warren, *& similia*, are appendants to Manors, or in Gross, and afterwards they come back to the King, they remain as they were before in *esse* not merged in the Crown, for they were at first created and newly erected by the King, and were not in *esse* before, and Time and Usage has made them appendant. Which Difference was agreed *per totam Curiam*; and this appears in our Books, as for the first Part of the Difference (*e*) 6 *E.* 3. 32. *a. John Darcy*' Case, the Case of Forfeiture of Ward; & 30 *H.* 8. *Dyer* (*f*) 44. 43 *E.* 3. 32. 43 *Ass. p.* 10. 1 & 2 *Ph. & Mar. Dyer* (*g*) 108. and for the second Part of the Difference, 11 *H.* 4. 5. *a.* & 15 *E.* 4. 7. *b.* the Case of the Market, 4 *Ed.* 3. 42. the Case of the Hundred,

(*a*) 32 H. 8. c. 20.

(*b*) 1 Mod. Rep. 232. Cr El 592. Moor 474. 1 Anders. 87. Palm. 78. Argument in Quo Warranto 123.

(*c*) Argument in Quo Warranto 123.

(*d*) 1 Anders. 87. Moor 474. Palm. 78.

(*e*) 10 Co. 64 b.

(*f*) Dy. 44. pl. 32.

(*g*) Dy. 108. pl. 30.

dred, 10 *H.* 7. 21. the Caſe of the Earldom: All which Privileges, Liberties, Franchiſes, and Spiritual Juriſdictions of the firſt Quality (which were the ancient Revenues and Flowers of the Crown) being merged in the Crown, are now by this Act (*a*) revived again actually and really in the K. his Heirs and Succeſſors: For as to thoſe of the later Part of the Difference, there needs no Act of Parliament to revive them, for they were not extinct. So that the Patentee, in ſuch Caſe of Felons Goods, ſhall have them as the ſame Franchiſe which is in *eſſe* in the Crown. And therefore it was obſerved, that the ſaid general Words uſual in Patents, *tot, talia, &c. eadem & conſimilia, quot, qualia, quanta, & quæ, &c. dictus nuper Abbas habuit, &c.* have ſeveral and diſtinct Significations; for by Force of this Word *eadem*, the Franchiſes themſelves as Hereditaments in *eſſe* in the Crown ſhall paſs, and by Force of (*b*) *talia & conſimilia, &c.* the Patentee ſhall have the like to them the Abbot had, for thoſe themſelves the King can't grant, becauſe they were merged in the Crown. And it was well agreed, That if the K. by his Letters Patent grants to *J. S.* and his Heirs, *Catalla felonum* within his Manor of *D.* and afterwards *J. S.* grants to the King his Heirs and Succeſſors, the Manor with the ſaid Franchiſe, and afterwards the King by his Letters Patent grants to *J. N.* and his Heirs, the ſaid Manor, and further grants to him and his Heirs within the ſaid Manor, *tot, talia, tanta, eadem & conſimilia privilegia, libertates, & franchefias, quot, qualia, quanta, & quæ* the ſaid *J. S.* had; in that Caſe in a *Quo Warranto J. N.* ought not to plead in ſuch general Manner as the Defendant now has done; but ought to plead in (*c*) ſpecial the firſt Charter made of the ſaid Felon's Goods, and the Regrant, *&c. quod fuit conceſſum per totam Curiam.* But it was ſtrongly urged by the Defendant's Counſel, that by (*d*) Force of the ſaid Act of 32 *H.* 8. the Defendant might aver, *quod Johannes nuper Abbas de Strata Mercella licite habuit & gaviſus fuit infra Llanihangel bona & catalla Felonum*; for therein the Defendant in his Plea has purſued the Words of the ſaid Act, which are, *That all Privileges, &c. which the ſaid Owners of the ſaid Abbies, &c. have uſed and exerciſed lawfully within three Months before the ſaid Act of* (*e*) 27 H. 8. *ſhall be by Force of the ſaid Act of* 32 H. 8. (*f*) *revived, &c.* For the Defendant has pleaded, That the ſaid late Abbot, *&c.* lawfully has uſed and exerciſed to have the Goods and Chattels of Felons, till the ſaid 4th Day of *February Anno* 27 *H.* 8. and this was compared to divers other Statutes; as to *Vernon's Caſe in the 4th Part of my Reports, f.* 3. *a.* where the Statute of 27 *H.* 8. *c.* 10. which ſpeaks *for the Jointure of the Wife*, gives Averment, that

(*a*) Cr. Jac. 242.

(*b*) 1 Jones 349.

(*c*) Godb. 398.

(*d*) 2 Co. 48. b. Cr. Car. 543. Hob. 300. Bridgm. 142.

(*e*) 27 H. 8. c. 27.

(*f*) Cr. Jac. 242.

an Eſtate upon another expreſs Condition, may be averr'd *for the Jointure of the Wife*: And ſo upon the Stat. of Uſury, (*a*) 13 *El.* and upon the Stat. of (*b*) 23 *H.* 6. upon Bonds taken by Sheriffs, and the like. And where it is objected, that this Iſſue is not triable, it was anſwered, That it ſhall be tried by the Country, for (*licite*) is concluded within the other Words, *ſ. habuit & gaviſus fuit*, for (if *licite* had been omitted) in the Senſe of the Stat. it had been implied, as the Stat. of *Glouceſter*, *c.* 3. which ſaith, whereof no Fine is (*c*) levied in the K.'s Court, is as much as to ſay, whereof no Fine is lawfully levied in the King's Court. So 11 *H.* 4. 80. upon the Stat. of *W.* 2. *c.* 5. *Si Epiſcopus Eccleſiam conferat*, is as much as to ſay, *Si Epiſcopus Eccleſiam* (*d*) *legitimo modo conferat*, and in the Stat. of *W.* 2. *de Donis conditionalibus*, the Words *ad dona prius facta non extenditur*, are to be intended of Gifts (*e*) lawfully, and in due manner made by the Donees, before the Stat. *Pl. Com. in the Ld.* Barkley's *Caſe*; and therewith agrees 12 *H.* 4. *Formedon* (*f*) 15. And the Stat. of (*g*) 1 *E.* 4. *c.* 2. which enacts, that all manner of Indictments taken in Torns or Leets ſhall be deliver'd to the Juſtice of Peace at the next Seſſions, *&c.* and that they ſhall proceed upon them, extends only by Conſtruct. of Law to proceedings upon lawful and ſufficient Indictments, and makes no inſufficient (*h*) Indictment good, as it is held in 4 *E.* 4. 31. *a. b.* And that is the fundamental and directory Reaſon of the Com. Law, for the Com. Law ſaith, That no Conſpiracy lies when the Party was indicted; but altho' he be indicted, if the Indictm. be not ſufficient in Law, the Party ſhall not have his Writ of (*i*) *Conſpiracy*, for when the com. Law ſpeaks generally, it is to be intended in a good and lawful Senſe. So it was concluded, That if this word *licite* had not been added, it had been implied, and by Conſequence the Addition of it ſhall not make an Alteration of the Trial, for (*k*) *expreſſio eorum quæ tacite inſunt nihil operatur*: And becauſe the Def. ought to purſue the Stat. in his Plea, and not to omit this Word *licite*, and that if it had been omitted in the Stat. it had been implied, for this Reaſon it was concluded, that this Iſſue ſhall be triable by the Country. And it was ſaid, that the Stat. of 32 *H.* 8. has great Reaſon to direct ſuch Summary Courſe of Averment for the Impoſſibility and (*l*) Infiniteneſs of Search, many of the ſaid Religious Houſes being founded before Time of Memory, and their Charters of Franchiſes alſo made before Time of Memory, and ſome by general, obſcure, ambiguous and obſolete Words; and altho' ſuch Franchiſes have been allowed in Eyre, yet the Allowance in Eyre of it ſelf only is not pleadable, and perhaps ſuch Allowances being of ſo great Antiquity, have been by Caſualty, or Length of Time, *quod*

(*a*) 2 Co. 80. a. 13 El. c. 8.
(*b*) 23 H. 6. c. 10.
(*c*) Lit. ſect. 731. Co. Lit. 381. b.
(*d*) Co. Lit. 381. b.
(*e*) Plow. 246. b.
(*f*) Co. Lit. 381. b. Poſtea 140. a. Plow. 246. b.
(*g*) 2 Inſt. 190, 191. Stanf. Cor. 85. b. 86 a. b. 5 Co. 112. b
(*h*) Co. Lit. 381. b. Raſt. Sher. 27. Br. Preſentm. in Court 16. Br. Parliam. 53. Fitz. Tourn de Viſcount 3. 5 Co. 112. b. Stanf. Cor. 87. a. b.
(*i*) F. N. B. 114. d. 1 Bulſtr. 151.
(*k*) 1 Mod. Rep 190 Hob. 170. 10 Co. 39. a. Lit Rep. 111. Hard. 92. 1 Rol. Rep. 310. 2 Rol. Rep. 393. Palm. 433, 437. 4 Co. 73. b. 5 Co. 11. a. 8 Co. 56 b. 145 a 11 Co. 60 a.
(*l*) Co. Lit. 191. a. 205. a. 2 Inſt. 365. 2 Saun 351. 2 Bulſtr. 131. Latch 25. Ant. 25. a. 2 Co. 48. a. 11 Co. 14. b. Hob. 298. Bridgm. 34.

quod eſt edax rerum, defaced or loſt; and for theſe Reaſons, and for avoiding of Incertainty of Queſtions and Sutes, and for raiſing the Value of theſe Poſſeſſions, the Stat. of (*a*) 32 *H.* 8. has altered the manner of Pleading which the com. Law would have required. And upon this Caſe great Doubt was conceived by *Popham* Ch. Juſt. *Gawdy*, and the Court, and it depended in Argument and Adviſement, as a Caſe of great Conſequence till *Hill.* 39 *El.* in which Term 3 other Matters were moved againſt the Defendant's Claim. 1. Becauſe it doth not appear by the Defendant's Claim what Eſtate the ſaid Abbot had in the ſaid Franchiſes, but generally, (*b*) *qd' licite habuit & gaviſus fuit, &c.* and perhaps he had them but by Leaſe for Years, or for Life, *&c.* and the Stat. of 27 *H.* 8. doth not give the King morethan the Abbot had, and the Stat. of 32 *H.* 8. doth not revive more than was extinct; and by the Letters Patent of 37 *H.* 8. the Defendant has pleaded a Grant of the ſaid Franchiſes as Franchiſes revived by the Act, and in *eſſe* at the Time of the Grant. The 2d Objection was, That when the Defendant has claimed *bona & catalla waviata & extrahuras*, by Preſcription appendant to the ſaid Manor, *& bona & catalla felonum* by Force of the ſaid Act of 32 *H.* 8. and Poſſeſſion of the ſaid Abbot, the Defendant concludes his claim to all, *& eo warranto clamat libertates, Francheſias, & privilegia præd' tanquam ad Manerium præd' ſpectant' & pertinent'* whereas *bona & catalla felonum* without Queſtion can't be appendant, or appurtenant to the ſaid Manor, becauſe they lie not in Preſcription, and the Claim, without the Concluſion of *eo warranto*, had been inſufficient; and it is all one to have no Concluſion, and an inſufficient Concluſion. *Vide* 22 *H.* 6. 35. *a. b.* 36 *H.* 6. 17. 37 *H.* 6. 39 *H.* 6. Laſtly, it was objected, That the Defendant in his Claim has conveyed the ſaid Manor to himſelf by Feoffment, which is pleaded without Deed, and has not conveyed to himſelf any Title to the ſaid Franchiſes, which can't paſs without Deed, and then without Queſtion Judgment ought to be given againſt him, for he has no Title, and the Franchiſes, if any were, remain with the Feoffor.

(*a*) 32 H. 8. c. 20.

(*b*) Cr. El. 57, 87.

As to the 1ſt of theſe 3 Object. it was anſwered, 1. That a General having and enjoying of them, ſhall be intended of a having and enjoying in Fee-ſimple, and that a particular Eſtate or Intereſt ſhall not be preſumed, if it be not ſpecially ſhewed; and therefore *prima facie* it ſhall be intended a Fee-ſimple. 2. That the Def. in this Caſe has purſued the Words of the Stat. but it was granted, that the Pleading had been clearer, if the Defendant had alledged, That the ſaid Abbot was ſeiſed of them in Fee till the ſaid Act of 27 *H.* 8. and in the End taken the Averment according to the Statute. But the Court did not give Judgment upon that Point. As to the 2d, the Court gave no Reſolut. for ſome

Cr. El. 57, 87.

Cr. El. 87.

27 H. 8. c. 27.

ſaid it ſhould be taken good *reddendo ſingula ſingulis*; and ſome held the contrary. But it was reſolved *per totam Curiam*, That if the *(a)* Queen grants the Manor of *D.* to *J. S.* and his Heirs, and within the ſame Manor to have Waifs, Eſtrays, *bona & catalla felonum, &c. dicto Manerio ſpectan' & pertin'*, that in a Grant theſe Words *dict' manerio ſpectan' & pertin'* do not refer to Felons Goods, or other Franchiſes which lie in Point of Charter, which can by no Uſage nor Time be appendant or appurtenant to a Manor; but they ſhall paſs altho' they were never demiſed or uſed with the Manor. But the Doubt was conceived in the Caſe at Bar, when it was by way of Pleading. *Vide* Juſtice *(b)* Windham's *Caſe, in the 5th Part of my Reports.* But as to the laſt Objection, it was reſolved *per totam Curiam*, without any Queſtion, That foraſmuch as the Defendant has not conveyed to himſelf any Title to the ſaid Felon's Goods, *&c.* that for them Judgment ſhould be given againſt him, and ſo it was.

(a) Palm. 77, 78. 2 Rol. 192.

(b) 5 Co. 7. b. 8. a.

Nota, Reader, upon the Arguments of this Caſe, 4 Things are worthy Conſideration. 1. What ancient Franchiſes ought to have Allowance, and what not. 2. How one in a *Quo Warranto* may claim Franchiſes, which lie in Point of Charter, without ſhewing or pleading a Charter, and where he ſhall be compelled to plead a Charter. 3. When one claims ſuch Franchiſes by the ſaid general Words *de tot, talia, eadem, & conſimilia privilegia, &c.* as ſuch a one had, *&c.* what Eſtate he to whom the Reference is made, ought to have in the Franchiſes. 4. Something is neceſſary to be ſaid of the manner of Trials allowed by the Common Law; for beſide the three mentioned in the ſaid Arguments, there are many other.

(c) 2 Inſt. 281. Co. Lit. 114. a. 2 Rol. 270. Stanf. Prærog. 50. 46 E. 3. 16. b. 1 H. 7. 23. b. Br. Coron. 129. Br. Eſtray 15. 9 H. 7. 11. b. 21 H. 7. 33. b. Fitz. Preſcript. 27. 8 H. 4. 2. a. 3 Inſt. 55, 227 Kelw. 150. b. 5 Co. 9. b. 10. a. 9 H. 7. 20. a. Ant. 24. b. (d) Lit. Sect. 170. f. 38. a. b. Co. Lit. 113. b. 114. a. (e) Dy. 245. pl. 67. (f) Br. Conuſance 46. Br. Patent 105.

As to the firſt, it is to be known, That every Franchiſe, Liberty or Privilege, either lies in Point of Charter, and can't be claimed by Preſcription, as *bona & catalla (c) felonum, &c.* or in Preſcription and Uſage in *pais*, without the Help of any Charter, as Wreck, Waif, Eſtrays, *&c.* Of Franchiſes which lie in Point of Charter, either they are before Time of Memory, or within Time of Memory, *ſ.* from the Time of *R.* 1. *Lit. (d)* 38. *Regiſt.* 158. 20 *H.* 6. 3. *a.* 34 *H.* 6. 36. *a. b.* 5 *E.* 3. 50, 51. 6 *E.* 3. 18. 8 *El.* (e) *Dyer* 245. If they were granted before Time of Memory, as many of the Charters and Grants to Abbots, Priors, and other ſuch religious Corporations are, they are granted either by ſpecial Words, as they ſeldom or never were, or by general, old, obſcure, ambiguous, and obſolete Words; as in 30 *(f) Aſſ.* 31 K. *Will.* the Conqueror granted to the Abbot of *Battaile*,

taile, qd' habeat (a) Curiam ſuam regalem; 34 *Aſſ.* 14. The Conqueror granted to the Abbot of *Glaſſenbury*, *omnem regiam (b) poteſtatem.* 14 *H.* 6. 12. K. *H.* 2. founded the Houſe of S. *Bartholomew*, and granted that they ſhould be as free in their Church as the K. in his (c) Crown. 10 *H.* 7. 13. *b.* 14. *a.* in ancient Times the K. granted *(d) omnia jura ſua regalia:* The K. *Canutus*, and *Ed. the Confeſſor*, granted to the Abbot of *Bury*, *qd' nulla ſecularis perſona, aut miniſter Reg' in aliquo ſe intromittat in burgo ſancti* Edmundi, *aut hominib' in eo manentib' niſi Abbas & Convent' & eorum Miniſtri*, and many others which I have ſeen: And be ſuch (e) Grants of Franchiſes ſpecial or general, certain or obſcure, *&c.* yet foraſmuch as they are made before Time of Memory, and ſo of themſelves they are not any Record pleadable, they ought to have the Aid and Support of ſome other Matter of Record, within Time of Memory, as *(f)* Allowance before Juſtices in Eyre, or before the Juſtices of the King's Bench, which is more than an Eyre, either in Caſe before the Juſtices of the Com. Pleas, or before the Barons of the Excheq. or by Force of a Confirmation by Charter of Record of ſome K. within Time of Memory, and ſhall not be now allowed, but for ſuch Part of the Grant which ſo has been *(g)* allow'd and confirm'd, altho' it be all in one and the ſame Patent. But Uſage only, which is but Matter in Fact, will not ſupport a Record before Time of Memory in ſuch Caſe; and therewith agree 26 *Aſſ.* 24. 30 *Aſſ.* 31. 34 *Aſſ.* 14. 1 *H.* 4. 3. 2 *E.* 4. 22. 21 *H.* 7. 29. 9 *H.* 7. 12. 10 *H.* 7. 14. *a.* 16 *H.* 7. 16. 20 *H.* 7. 7. 8 *H.* 8. *Keilway* 189, 190. *Vid.* 8 *E.* 3. 18. 17 *E.* 3. 11. 12 *H.* 4. 23. 8 *H.* 6. 4. 28 (38) *Aſſ.* 1. And when ſuch ancient Grant is general, obſcure or ambiguous, it ſhall not be now *(h)* interpreted as a Charter made at this Day, but it ſhall be conſtrued as the Law was taken at the Time when ſuch ancient Charter was made, and according to the ancient Allowance on Record. 33 *H.* 6. 22. 10 *H.* 7. 13. *b.* & 14. *a.* 16 *H.* 7. 9. 12 *H.* 4. 12. 14 *H.* 6. 12. *a.* 35 *H.* 6. 54. 9 *H.* 7. 11. 6 *E.* 3. 54, 55. 7 *E.* 3. 40, 41. 18 *E.* 3. *Conuſans* 39. 34 *Aſſ.* 14. 40 *Aſſ.* 21. But if the Charters were granted within Time of Memory, then they are pleadable, without ſhewing any Allowance or Confirmation, as by the Books aforeſaid appears. Of Franchiſes which may be claim'd by Preſcription, as Wreck, Waif, Stray, *&c.* as they may be originally claimed by Uſage, which is a Matter in *pais*, ſo Uſage may ſupport them without the Aid of any Record, either of Creation, Allowance or Confirmation; and therewith agree the Books aforeſaid.

(a) Br. Conuſance 46. Br. Patent 105.
(b) Br. Conuſ. 20, 48. 12 H. 4. 12. b.
(c) 14 H. 6. 11. b.
(d) Br. Patent 110.
(e) 2 Rol. 268, 269.
(f) Cr. Jac. 313. 1 Jones 291, 292. 2 Inſt. 281. 2 Bulſt. 296.
(g) Poſt. 34. a
(h) Co. Lit. 8. b. 94. b. 10 H. 7. 13. b. 14. a. Br. Pat. 110. Palm. 91. Cr. El. 633, 905. Latch 47. 2 Inſt. 2, 282, 336. Davis 16. b.

As to the ſecond it is true, that it is ſaid in 6 *E.* 3. 55. & 8 *E.* 3. 10 & 11. and commonly in other Books, That the *(i) Quo Warranto* for Franchiſe is in the Nature of the King's Writ of Right in ſuch Caſe, and that the Defendant in it ought to make a ſufficient Title againſt the King; and let us ſee how this Title ſhall be made.

(i) Cr. El. 125.

And for the better Underſtanding of the Reaſon of it, and of the Books which have treated thereof, it muſt be known, That it is enacted by a Statute made 18 *E.* 1. called *Statutum de* (*a*) *Quo Warranto novum*, concerning the Writ that is called *Quo Warranto*, our Lord the King hath eſtabliſhed, that all thoſe who claim to have quiet Poſſeſſion of any Franchiſe, before the Time of King *Richard*, without Interruption, and can ſhew the ſame by a lawful Enqueſt, ſhall well enjoy their Poſſeſſion. And in Caſe that ſuch Poſſeſſion be demanded for Cauſe reaſonable, our Lord the King ſhall confirm it by Title. And thoſe that have old Charters of Franchiſe, ſhall have the ſame Charters adjudged according to the Tenor and Form of them: And thoſe that have loſt their Liberties ſince *Eaſter* laſt paſt, by the aforeſaid Writ, according to the Courſe of Pleading in the ſame Writ heretofore uſed, ſhall have Reſtitution of their Franchiſe loſt; and from henceforth they ſhall have according to the Nature of this preſent Conſtitution.

(*a*) 2 Inſt. 280, 281.

1 Rol. 181. Sayer's Argument in Quo Warranto 15. 2 E. 3. 28. b. 29. a.

In 2 *E.* 3. 29. The King brought a *Quo Warranto* againſt *Rog. Mortimer* and *Johan* his Wife, before Juſtices in Eyre in the County of *Middleſex*, to ſhew by what Warrant they claimed to have Conuſance of every Manner of Plea, as well of the Crown as other, *contra voluntatem noſtram*, in their Manor of *T.* where *Roger de Mortimer* and *Johan* ſaid, That *Walter de Lacy*, Anceſtor of the ſaid *Johan* was ſeiſed of the ſaid Manor of *T.* and of other Lands afore Time of Memory, that is to ſay, in the Time of *R.* 1. and had the ſaid Franchiſe to have Conuſance of Pleas in the ſaid Manor, long Time before *R.* 1. from which *Walter* the Inheritance deſcended to many Daughters, and conveyed Part after Partition made, to the Wife of the Defendant, in Allowance of other Lands, *&c.* and the Defendants prayed in Aid of the other Coparceners, and the Juſtices denied the Aid; and becauſe the Defendants held themſelves to the Aid, and would not ſay other Thing, the Juſtices in Eyre forejudg'd them of the ſaid Franchiſe; and thereupon the Defendants brought a Writ of Error out of the Chancery, returnable in the King's Bench; and the firſt Judgment was reverſed for two Reaſons, which Sir *Jeffry Scrope* openly declared. 1. That the Juſtices ouſted the Defendants of Aid, where the Aid was grantable. 2. That they have forejudged the Defendant of the Franchiſe, *i. e.* to forfeit the Franchiſe for ever; for in ſome Caſe the Franchiſe ought to be ſeiſed into the King's Hands, and in ſome Caſe ſeiſed as in his Right till he has made Fine, and in ſome Caſe ſhall be forejudged: But Forejudger holds for ever: And therefore there *Scrope* ſaid, we ſee by this Record

Record, that the Juſtices ouſted the Defendant of the Aid, where by Law the Aid is grantable; and further awarded that they ſhould be forejudged of the Franchiſe, becauſe they would not otherwiſe plead, but held themſelves to the Aid; where for want of Pleading the Franchiſe ought not to be forejudged, but ſeiſed, altho' the Defendant's Anſwer had not been ſufficient; therefore the Court awarded that the Judgment be as erroneous, *&c.* and for null held, *&c.* and ſue you to have the Franchiſe.

But *Nota*, Reader, that it is to be underſtood, and ſo it may be collected by the Book, That the ſaid Franchiſe had been allowed before Juſtices in Eyre. And therewith agrees 18 *H.* 6. *(a) Preſcription* 45. If a Man has Allowance in Eyre of Franchiſes which lie in Point of Charter, as to have Conuſance of Pleas, *&c.* that he may preſcribe (by the Help of ſuch Allowance of Record) in ſuch Franchiſes. And ſo, as it ſeems, is the ſaid Statute of 18 *E.* 1. well expounded, that is to ſay, That the Party who has ſuch Allowance, which is ſuch Poſſeſſion as the Statute intends, may preſcribe in ſuch Franchiſes which lie in Point of Charter. And it ſtands upon great Reaſon, for the Charter may be made before the Conqueſt, and of ſuch Antiquity, that the Charter it ſelf and every Enrolment of it is utterly periſhed and conſumed; and therewith agrees 8 *H.* 8. *(b) Keilway ubi ſupra.* And as to the Objection which was made, that in the Caſe at Bar no Trial could be by the Country, whether the Abbot had Felons Goods. *Vide* 8 *E.* 3. 10. *b.* & 11. *a. John* brought a Replevin of Sheep againſt the Abbot of *Peterborough*, and divers others, The Abbot avowed the Taking by Reaſon that he is Lord of the Hundred of *F.* within which Hundred he has Franchiſe to have all the Chattels of Felons and Fugitives within the ſame Hundred, to take them by himſelf or his Officers; and that *Robert le Porter* ſtole the ſaid Sheep, being the Goods of the ſaid *John* the Plaintiff, and would have driven the Sheep aforeſaid through the Town of *C.* within the ſame Hundred; whereupon the ſaid Abbot and the others would have arreſted the ſaid *Robert* as a Felon, and thereupon *Robert* fled to the Church of *Libbone*, which is within the ſame Hundred, and there before a Coroner of the ſaid County he confeſſed the ſaid Felony, and thereupon he made Abjuration; ſo the Abbot is ſeiſed of the ſaid Sheep, as of his own Goods by his ſaid Franchiſe. To which Avowry Exception was taken, becauſe he claims *catalla Felonum & Fugitivorum*, and has not ſhewed Title of Right,

(*a*) 2 Inſt. 281.

(*b*) 2 Inſt. 281. 2 Rol. 201. Yelv. 189, 190. Antea 28. a.

as

as to ſay, That he and his Predeceſſors have been ſeiſed from all Time (that is to ſay with Allowance *ut ſupra)* or by the King's Charter. To which it was anſwered, Foraſmuch as he has ſaid, that he has ſuch Franchiſe, he need not to ſhew the Plaintiff by what Title he claims to have ſuch Franchiſe: But when the King brings his *(a) Quo Warranto* againſt him, then muſt he ſhew his Title. And the Plaintiff was awarded to anſwer over, *ex quo ſequitur*, that the general Avowry, that the Abbot had ſuch Franchiſe, that is to ſay, to have Felons Goods within the ſaid Hundred, being awarded good, that it is iſſuable and triable by the Country, whether the Abbot had ſuch Franchiſe or not; for if the Matter of the Avowry was not iſſuable and triable, the Avowry could not have been awarded to be good.

(a) Palm. 90. Cr. Jac. 43.

But Quære of this Avowry.

As to the 3. *Termino Hill.* 40 *Eliz. Edward* (*b*) *Amereditb*, Eſq; put in his Claim into the Exchequer for Iſſues, Goods and Chattels of Felons, *&c.* within his Manor of *Stokenham*, and of the Hundred of *Colridge* within the County of *Devon*, which fell *in Anno* 35 *&* 36 *Eliz.* and the Caſe was ſuch: King *H.* 8. was ſeiſed in Fee of the ſaid Manor and Hundred, and *inter alia*, by his Letters Patent, 25 *Feb.* 35 *H.* 8. granted to Queen *Katharine* his Wife the ſaid Manor and Hundred *inter alia* for her Life, and by other Letters Patent, 28 *Feb.* 35. granted that the Queen ſhould have, for Term of her Life, within the ſaid Manor and Hundred (*bona &*) *catalla felonum, fugitivorum, utlagatorum, &c.* Fines, Amercements, Iſſues, *&c.* as well of Royal Officers, as of others, *&c. annum, diem, & vaſtum, &c.* to be diſcharged of Purveyance for the K. his Heirs and Succeſſors, and of Carriages, to be exempt from the Juriſdiction of the Admiral, and to have Admiral's Juriſdiction, and to nominate Coroners and Eſcheators, *&c.* and afterward Queen *Katharine* died, and conveyed the ſaid Manor and Hundred by mean Deſcents to Queen *Mary*; who 22 *Junii Anno* 1. by her Letters Patent granted the ſaid Manor and Hundred to *Francis* Earl of (*c*) *Huntington*, and *Katharine* his Wife (late Parcel of the Poſſeſſions of *Margaret* Counteſs of *Salisbury*, and afterwards aſſigned to Queen *Katharine* for her Jointure) and that they within the ſaid Manor and Hundred ſhould have, (*d*) *tot, talia, eadem, & hujuſmodi Libertates, Privilegia Franchefias, Juriſdictiones, &c. quot, qualia, quanta, & quæ prædict' Comitiſſa* Sarum, *aut aliquis vel aliqui præmiſſa aut aliquam inde parcellam ante tunc habentes,*

(b) Poſt. 52. a. 2 Rol. Rep. 156. Palm. 81. Hard. 456. 1 Vent. 409, 412. 2 Brownl. 341.

(c) 3 Bulſt. 292.

(d) 3 Bulſt. 292.

bentes, poſſidentes, aut ſeiſiti inde exiſtentes unquam habuerunt, tenuerunt aut gaviſi fuerunt, &c. infra præmiſſa, &c. ratione vel prætextu alicujus cartæ, doni, ſeu conceſſionis, ſeu aliquarum literarum patentium, &c. To have and to hold to them in Tail, with divers Remainders in Tail, the Remainder over in Fee, with a general *Non obſtante*; and conveyed the ſaid Manor and Hundred with all Liberties, Privileges, Franchiſes, &c. by mean Coveyances, to the ſaid *Edward Ameredith* and his Heirs. And upon all this Matter the Queſtion was, if *Ameredith* ſhould have all the ſaid Franchiſes, &c. which were granted, as aforeſaid to Queen *Katharine*. And in that Caſe two Queſtions were moved, one, becauſe the Reference in the Letters Patent of Queen *Mary* was general, *ſc. quot, qualia, quanta, & quæ aliquis ſeu aliqui, &c.* And then the Grant of the Liberties being general, (*a*) *tot, talia, &c.* without expreſſing any in certain, and the Reference being alſo general, it was objected it was too incertain in the King's Caſe: But the Caſe in 20 *E.* 3. (*b*) Avowry was well agreed; for there altho' the Grant of the Liberties was general, yet the Reference was certain: But it was reſolved by *Periam* Chief Baron, & *totam Curiam*, that altho' the Grant and Reference (*c*) were general, yet it ought to be applied to a certain Particular, as in that Caſe to the Charter made to Q. *Katharine*. *Et* (*d*) *certum eſt quod certum reddi poteſt*: And they agreed that ſuch general Grants had been often allowed in the Exchequer. The ſecond Doubt was, That foraſmuch as Queen *Mary* had granted an Inheritance in the Franchiſes, &c. ſuch general (*e*) Grant, with ſuch general Reference ſhould not be applied to a Grant which the King made for Life only; and that was the greater Doubt: For it was objected, That if Queen *Mary* had referred it to the Charter made to Queen *Katharine*, yet without a ſpecial Grant, that they ſhould have ſuch Liberties in Tail, &c. which Queen *Katharine* had for Life, ſuch Liberties which ſhe only had for Life ſhould not paſs to them in Tail: for the Queen's Grant ſhall be taken to a common Intent: But here the Caſe is ſtronger, For the Charter of Queen *Mary* doth not refer to the Charter of Q. *Katharine*, but only by general Words, *prout aliquis ſeu aliqui alii, &c.* But it was reſolved, That when a Charter has * general (*f*) Reference to other Charters, it is as much in Law as if all the Charters had been recited, for they are of Record. And although Queen *Katharine* had

(*a*) Moor 417, 418.

(*b*) 20 E. 3. Avowry 129. Cart. 148.

(*c*) Plow. 12. b. Cr. El. 794. Poſt. 47. a. 52. a. Hob. 174. Raym. 54. 10 Co. 46. b. 64. a. 2 Rol. 185, 201.

(*d*) 4 Co. 66. b. 5 Co. 5. a. Co Lit. 45. b. 96. a. 142. a. Lane 51. Hetl. 98.

(*e*) 6 Co. 6. a.

* Q. if a general Miſchief may not follow on this Ground?

(*f*) 10 Co. 64. a. Raym. 54. Supra. in c.

Q. had the Manor and Hundred but for Life, yet it is within the expreſs Words of the Reference, *viz. aliquis ſeu aliqui præmiſſa ante tunc habentes, poſſidentes, aut ſeiſiti inde exiſtentes, unquam habuerunt, tenuerunt, ſeu gaviſi fuerunt,* ſo that Queen *Katharine* was within this Word (*ſeiſiti*) for ſhe was ſeized of the Manor, *&c.* And I acquainted *Popham* Chief Juſtice with this Reſolution, and he agreed with it: And it was well obſerved, That the Reference doth not extend to the Quantity of the Eſtate, but to the Quality of the Franchiſes, whereof they to whom the Reference was made were ſeized, be they ſeized for Life, in Tail, or in Fee.

Cr. El. 794.

(*a*) Ant. 24. b. 25. a. 3 Bul. 130. (*b*) Mo. 621, 622. Stamf. Cor. 152, 153. Co. L. 156. b. 294. a. 3 Inſt. 27, 28, 29. Fitz. Cor. 34. Br. Cor 153. Br. Trial 103. 142. B. N. C. 221. Br. Jurors 48. 1 H. 4. 1. a. (*c*) 2 Co. 16. b. 4 Co. 93. b. Hard. 340. Bridgm. 21. (*d*) 2 E. 2. Fitz. Trial 46. 2 Rol. 577. 4 Inſt. 279. Dy. 185. pl. 65 Moor 14, 15. 1 And. 20, 21. 17 E 3. 50. b. Br. Trial 36, 88. Doct. pl. 148. Raſt. Ent. 228. a. Fitz. Trial 55. (*e*) Br. Trial 90. Br. Appeal 137. 2 Rol. Rep. 577. (*f*) 1 Bulſt. 130. 1 Rol. Rep. 305. 2 Rol. 572, 573. Co. Lit. 380 b. (*g*) 1 Bulſt 130. 1 Rol. 287, 796. Cr. Jac. 420, 441, 442, 581. Poph. 130. 2 Sand. 212, 213 8 Co. 58. b. Cr El. 569. Pal. 231, 245, 252. 1 Rol. Rep 305 Yelv. 58. 1 Sid. 321, 322.

As to the 4th Point, there are (*a*) diverſe Manners of Trial allowed by the Com. Law, beſide the ſaid three mentioned in the Argument of this Caſe, that is to ſay, of Matters in Fact by Jurors; of Matters in Law by the Juſtices; and of Matters of Record by the Record itſelf. As in Treaſon the Trial of one who is a (*b*) Peer of the Realm, *i. e.* a Lord of the Parliament, ſhall be upon an Indictment of Treaſon or Felony, tried by his Peers, without any Oath, but upon their Honours and Allegiances; but in an Appeal at the Suit of a Subject they ſhall be tried *per probos & legales homines juratos, &c.* 10 *E.* 4. 6. *b. &c.* (*c*) Cuſtoms and Uſages of every Court ſhall be tried by the Judges of the ſame Court, if they be pleaded in the ſame Court, 11 *E.* 4. 2. *b.* In (*d*) *Dower* or (*e*) *Appeal* brought of the Death of her Husband, or in *Aſſize* brought by a Woman who was the Wife of *B.* if the Tenant or Def. pleads that the Husband is living, the Trial ſhall not be by Jury, but by the Juſtices, upon Proofs made before them, for greater Expedition, 6 *E.* 3. 29. 17 *E.* 3. 30. 43 *Aſſ. p.* 26. 8 *H.* 6. 23. *a.* 33 *H.* 6. 8, 9, 10. *Diverſity of Courts* 119. 36 *Aſſ.* 5. *Vide* 39 *Aſſ. p.* 9. 43 *Aſſ. p.* 4. In a Writ of *Error* to reverſe a Fine for Nonage, or in an *Audita querela* to reverſe a Recognizance or Statute for Nonage, there the Age ſhall be tried by the (*f*) Inſpection of the Juſtices, and not by the Country; for that which Judges of Record do as Judges, ſhall not be tried by Jury. If an Infant appears by (*g*) Attorney, it is Error, but it ſhall be tried by Jury, and not by the Juſtices; for the Making of the Warrant of Attorney is the Act of the Party without Examination of the Juſtices: And yet the Appearance by Attorney is recorded by the Court, and therefore if the Plaint. makes Attorney in Court, and the Def. pleads that the Pl. is dead, and one appears and ſays, he is the Plaintiff, which is denied by the other Party, The Juſtices ſhall adjudge if he who now appears be the ſame Perſon who before made an Attorney in Court; and therewith agrees 34 *H.* 6. 43. If the Ten't in a real Action vouches

A.

A. as heir within age, or if the ten't for life be impleaded, and he prays in aid of *A.* in rev'on within age, and prays that the parol may demur, *&c.* in both caſes, if the demandant replies that he is of full age, it ſhall not be tried by the country for the great delay to the demand't; but a writ ſhall be awarded to the ſheriff, commanding him *qd' ve. fa. tali die præd'* A. *ut per aſpect' corporis ſui conſtare poterit præfat' Juſtic' noſtris ſi præd'* A. *ſit plenæ ætat', necne, &c. Vide* 17 *E.* 2. *Accompt* (*a*) 121. 33 *E.* 3. *Accompt* 130, *&c.* (*b*) *Maihem* may be tried by inſpection of the Court, 28 *Aſſ.* 5. 21 *H.* 7. 33. *b.* 11 *E.* 4. 2. If queſtion be made if theſe be the ſummoners or viewers which appear, it ſhall be tried by the examinat. of the juſtices, 33 *H.* 6. 10. *a.* Earl (*c*) or not Earl, Baron or not Baron, ſhall not be tried by jury nor by the juſtices, but by the K.'s Writ, as appears in the *Counteſs of Rutland's caſe, in the* (5.) *6 part of my Rep.* 35 *H.* 6. 46. *a. &c.* 19 *E.* 4. (*d*) in a plea of alien born, the league between the K. and the ſovereign of the alien ſhall be tried by the Record of the Chancery, for every league is of record. And generally all matters of record ſhall be tried by the record it ſelf, and not by jury, or otherwiſe, 19 *H.* 6. 52. 9 *H.* 7. 2. *a.* 5 *E.* 4. 3. *a.* 16 *H.* 7. 3. 1 *H.* 7. 29. *b. Plow. Com.* 231. *a.* If antient demeſne be pleaded of a manor and denied, it ſhall be tried by the record of the book of (*e*) Domeſday in the Excheq. but if iſſue be taken, that certain acres are parcel of the manor, which is antient demeſn, it ſhall be tried by jury; for it can't be tried by the ſaid book, 22 *Aſſ.* 45. But *vide* 44 *E.* 3. 32. *a.* in (*f*) an attachment upon a prohibition they were at iſſue, if the ſuit in Court-chriſtian was for tithes, or for rent reſerved; and it was tried by jury, and not by the rolls of the Biſh. for they are not of record. The ſame law of all other Courts, which are not of record, 34 *H.* 6. 49. *a.* 9 *E.* 4. 43. and therewith agrees 44 *E.* 3. 32. *a.* and (*g*) probate of a will ſhewed forth under the ſeal of the ordinary, yet the other party may plead, that he who is dead died inteſtate, as it is held 44 *E.* 3. 16. *a.* So if iſſue be taken upon the probate of a will, or if adminiſtration was committed (altho' they ſhew the Bp's let. teſtimonial) it ſhall be tried by jury; and therewith agrees 13 *El. Dy.* (*h*) 294. *b. vid.* 21 *H.* 6. 24 *a.* When a man is found ideot from his birth by office, he who is ſo found ideot, (falſly as he ſuppoſes) may come in Perſon into chancery before the chancellor, and pray that before him and ſuch Juſtices or ſages of the law, which he ſhall call to him (and are called the King's counſel) he may be examined, if he be ideot or not; or his friends may ſue a writ out of the chancery, returnable in the chancery, to bring him into the chancery, *ibid' cor' nob' & conſilio noſtro examinand'*; and if it be found upon ſuch examination, that he is no ideot, the office found thereof, and the whole examination which has been made by force of the writ, or the K.'s Commiſſion, is utterly void, without any traverſe,

(*a*) Bulſt. 131. 1 Rol. 117.
(*b*) 2 Rol. 578. Br. Trial 57, 60. Br. App. 46, 70. Fitz. Cor. 209. Plow. 125. a.
(*c*) 6 Co. 53. a. 7 Co. 15. a. Calvin's Caſe, 12 Co. 70, 94, 95. Co. Lit. 16. b. Style 252, 353. Fitz. Challenge 44. Br. Challenge 18. 22 Aſſ. 24. Moor 767. 2 Inſt. 50. 2 Rol. 575. Poſtea 49. a.
(*d*) 19 E. 4. 6. b.
(*e*) Dy. 250. pl. 87. Hob. 188. Salk. 57.
(*f*) Fitz. Attachment, ſur Prohibition 6. Br. Attachment ſur Prohib. 3.
(*g*) Poſtea 41. a. Br. Averment 48. Fitz. Eſtoppel 9. Plowd. 282. a. Br. Eſtop. 36. Doctr. pl. 353.
(*h*) Dyer 294. pl. 7.

monſtrans de droit, or other ſuit, as appears by the *regiſter & F. N. B.* (*a*) 233. *Vide* 16 *E.* 3. *Livery* 30. *Nota Lect'*, now by the Stat. made *an'* 32 *H.* 8. *c.* 46. Ideots and their lands are in the ſurvey of the court of wards, *&c.* An (*b*) apoſtate ſhall be certified by the abbot, or other religious governor to whom he owes obedience, *F. N. B.* 233. *Regiſter* 267. *a.* In ſome caſes, as in (*c*) general baſtardy, (*d*) excommengement, loyalty of matrimony, profeſſion, and divers other eccleſiaſtical matters ſhall be tried by the certificate of the Bp. In *appeal*, and upon approvement, the Def. in ſome caſes may plead Not guilty, and try it with the Pl. by combate, or (*e*) battail in proper perſon before the juſtices, 17 *Aſſ. p.* 1. (*f*) 19 *H.* 4. 3. So in a writ of right the Ten't may join iſſue upon the meer right, and try it by combate or battle by his champion, with a freeman the champion of the demandant (and not in perſon) before the juſtices, 9 *E.* 4. 35. *a.* (*g*) 1 *H.* 6. 6. *b.* 3 *H.* 6. 55. *b.* If it be in queſtion whether the Sheriff made ſuch a return, it ſhall be tried by the Sher. 9 *H.* 4. 1. *a. b.* trial by certificate of the Sher. upon a writ directed to him in caſe of privilege, if one be citizen (*i*) or foreigner, 10 *H* 6 10. If a queſtion be made if ſuch a one be Sher. it ſhall be tried by the exam'on of the Sher. himſelf, 10 *H.* 4. 7. *b.* yet he is made by let. patent of record, and therefore it may likewiſe be tried by record, 32 *H* 6. 26. *b.* A return made by the Under-ſher. if it be denied, ſhall be tried by the Under-ſher. and the Sher. can't diſavow it, if he confeſs him to be his Under-ſher. 10 *H.* 4. 7. *b.* If an approver ſays that he commenced his appeal before the coroner by dureſs, it ſhall be tried by the coroner, and if the coroner denies it, he ſhall be hanged, 12 *Aſſ.* 29. 12 *E.* 3. *Coro.* 118. Trial if the Stat. ſhewed forth be the true Stat. or not, ſhall be by the exam'on of the mayor and clerk of the Stat. who took the Stat. and not by jury, *F. N. B.* 104. *a. Regiſt.* 27 *E.* 3. 42. (49.) (*k*) Cuſt. of *Lond.* ſhall be tried by the mayor and aldermen, and certified by the mouth of the recorder, 5 *E.* 4. 30. 21 *E.* 4. 16. In an aſſiſe the ten't ſays that the lands are ſeiſed in the K.'s hands, it ſhall be tried by the exam'on of the eſcheator, 9 *H.* 4. 1. 38 *Aſſ.* 16. If one in avoidance of an (*l*) utlagary alledge, that he was in priſon at *Bourdeaux ultra mare*, *in ſervitio Majoris de Bourdeaux*, it ſhall be tried by the certificate of the mayor, 4 *E.* 4. 10. And in like caſes ſuch trials ſhall be by the certificate of the marſhal (*m*) of the hoſt, 21 *E.* 4. 10. *Lit.* 21. *F. N. B.* 85. and by the Capt. of (*n*) *Calice*, 21 *E.* 4. 11. 1 *H.* 7. 5. by a meſſenger of a thing done beyond ſea, as in (*o*) *Bartie's* caſe, 2 *El.* 176. *vid.* 10 *H.* 4. 3. At the *petit cape*, the ten't ſaid that he was impriſoned 3 days before the default, and 3 days after, it ſhall be tried by the exam'on of the attorney 13 *R.* 2. *Excminat.* 22. Not attached by 15 days in *aſſiſe*, ſhall not be tried by jury, but by exam'on of the Bailiff; ſo that the ten't was not ſummoned *ſecundum legem terræ*, ſhall not be tried by Jury, but by wager of law, and

(*a*) F. N. B. 233. b.
(*b*) F. N. B. 233. c.
(*c*) Co. Lit 74. a. 1 Rol. 361. Palm. 301. Hob. 179, 296. Plow. 12. b. 12 Co. 67.
(*d*) Co. Lit. 134. a. 8 Co. 68.
(*e*) Br. Appeal 55. Br. Battle 6.
(*f*) 9 H. 4. 3. b. Fitz. Cor. 78. Br. Battle 1.
(*g*) Fitz. Droit 1 Br. Droit 20.
(*h*) Fitz. Trial 36.
(*i*) Co. Lit 74. a.
(*k*) Co. Lit. 74. a. 2 Rol. 579. Hob. 85. Br. Trial 138. Cr. Car. 517.
(*l*) Co. Lit. 74. a. Cr. Car. 365. 2 Rol. 583.
(*m*) 21 E. 4. 17. b. Co. Lit. 74. a.
(*n*) 2 Rol. 83, 583.
(*o*) Dyer 176. pl. 30. Jenk. Cent. 220. 3 Inſt. 180. Moor 329.

Wager

wager of law countervails a jury; for the tenant ſhall make his law *de duodecima manu*, *i. e.* eleven beſide himſelf, (and that for to avoid delay) unleſs it be againſt a Corporation, as Mayor and Commonalty, for then it ſhall be tried by the Country for Neceſſity, becauſe he can't wage Law. In a Writ of *Deceit*, upon a Recovery by Default, the Trial ſhall be, if the Judgment was given upon the *Petit Cape*, by the Summoners, if upon the *Grand Cape*, by Summoners, Pernors, or Viewers, and not by the Country, 48 *E.* 3. 11. *b.* So if a Recovery by Default in a real Action be pleaded, to which the other ſays, not compriſed, it ſhall not be tried by Jury, but by the Summoners and Viewers, 10 *H.* 4. 7. and yet there is no Remedy if they ſay falſly; and therefore *ubi eſt majus periculum, ibi cautius eſt agendum* The Cauſe of Challenge ſhall be tried by two (*a*) Triers to be appointed by the Juſtices, 9 *E.* 4. 5. *b.* 15 *E.* 4. 24. *a.* 4 *E.* 4. 18. 18 *E.* 4. 18. *a.* 16 *E.* 4. 7. *b.* 14 *H.* 7. 1. *b.* 19 *H.* 6. 48. *b.* 20 *Aſſ.* 15. 7 *H.* 4. 46. *a.* But Trial of any of the Grand Jury ſhall be taken before four Knights. Alſo Trial may be in Debt upon a ſimple Contract, Detinue, *&c.* either by Wager of Law of the Defendant himſelf, or by Jury at the Defendant's Election. *Vide* 30 *Aſſ. p.* 19. Trial by Jury of Attornies of the Common Pleas, and the Exchequer. As to divers other Trials, as 1. *Per* (*b*) *medietatem linguæ*. 2. *Per primos Juratores & alios, & per primos* only, upon not compriſed and Certificate of Aſſiſe. 3. By Jury with Witneſſes adjoined. 4. By Trial by Grand Aſſiſe, above the Numb. of 12. that is to ſay by 16, *&c.* 5. By Trial in *Attaint* by 24. I have omitted theſe and divers other the Like, becauſe they are Trials by Jurors, and for them, *vide* 22 *E.* 3. 14. the Statutes of 25 *E.* 3. *Stat. Staple*, *c.* 8. 27 *E.* 3. *Stat. Staple*, *c.* 8. 21 *H.* 6. 4. 28 *E.* 3. *c.* 14. 2 *H.* 5. *c.* 3. 8 *H.* (6) 8. *c.* 28. *The Stat. of York*, *cap.* 2. 43 *E.* 3. 2. 44 *E.* 3. 34. 11 *Aſſ. p.* 19. 7 *Aſſ.* 20. 18 *Aſſ. p.* 11. 29 *Aſſ.* 57. 40 *Aſſ.* 34. 30 *E.* 3. 8. *b.* 7 *H.* 4. 4. 5 *H.* 7. 8. *b.* 4 *Aſſ.* 19. 22 *Aſſ.* 16. 29 *Aſſ.* 7. 31 *Aſſ. p.* 6. 38 *Aſſ.* 4. 40 *Aſſ.* 4. 48 *Aſſ.* 1. 5 *H.* 5. 1 *H.* 6. 5. 4 *H.* 6. 28. 12 *H.* 4. *& cætera patent.* Concerning Trials by particular Cuſtom, I wholly omit them on purpoſe. It appears by ancient Records, as well before the Conqueſt as ſince (for no Credit is to be given to Conjectures) that then there was another Manner of Trial in criminal Cauſes, and that was called *Ordalium*, and in the *Saxon* Language (*c*) *Ordel*, which is as much as to ſay, *expers Criminis*; for *or* in the ſaid Language is privative, and *del* is Part, *i. e. no Party*, or *Not guilty*, and then the Defendant being arraigned, and pleading Not guilty, might chooſe whether he would put himſelf upon

(*a*) 2 Rol. 663. 664.

(*b*) 10 Co. 104. a. Poph. 35. Cr. El. 305, 818, 841. Dy. 144. pl. 59, 60. Dall. 22. pl. 5. Jenk. Cent. 216. 3 Inſt 27. Stanf. Coron. 159. a. b.

(*c*) Seld. Janus 84, 85. Spelm. Gloſſ. Tit. Ordalium.

upon God and the Country, which is upon the Verdict of 12 Men (as they do to this Day); or upon God only, and therefore it was called *Judicium Dei*, preſuming that God would deliver the Innocent, *ſc.* if he was of free Eſtate, then *per Ignem*; *ſc.* to paſs over *novem vomeres ignitos nudis pedibus*; and if he eſcaped *illæſus*, then he ſhould be acquitted, and if not, he ſhould be condemned; *& ſi pars rea fuit ſervilis conditionis*, then he might put himſelf upon the Trial of God, *ſc. per aquam*, and that in diverſe Manners: All which appear in *Lambard verbo Ordalium*, with all the ſuperſtitious Vanities appertaining to it: And thereof *Glanvil* wrote, who wrote in the Time of *H.* 2. *lib.* 14. *cap.* 1. & 2. & 17 *Regis Johannis in Turri London' membr'* 25. *Rex Petro de Scudamor & aliis, &c. Mandamus vobis quod conveniatis una cum Vicecom' noſtro* Winton' *ad diem & locum competentem, & tanquam Juſticiarii noſtri capi faciatis judicium ferri a Robin' fre' Petit pas, quod ei adjudicatum eſt per Juſticiarios noſtros itinerantes tempore interdicti, & tunc capi non potuit quia appellatus fuit de morte hominis, & cum legem inde ceperitis, faciatis inde quod judicium dederit, mandamus enim Vicecom' noſtro* Wintoniæ, *&c.* This Manner of Trial was called *Vulgaris purgatio*, and utterly forbid by the Canons of the Church, as Temptations of God, and not lawful Trials, and that they were Invented *fabricante Diabolo: Et in Gloſſ. dicitur, Vulgaris purgatio prohibetur, quia fabricante Diabolo eſt inventa, cum ſit contra præceptum Domini, Non tentabis Dominum Deum tuum.*

See Rot. Par. 14 H. 3. M. 1. De Juſtitia faciendâ loco Ignis & Aquæ.

And afterwards the ſaid Trial called *Ordel, viz. judicium ignis & aquæ*, was taken away by Parliament: And that appears *Rot. Pat. Anno* 3 *H.* 3. *membr.* 5. For the Record ſays, *Proviſum fuit per Regem & Concilium, &c.*

And this was the true Manner of the ſaid Trial of * *Ordel*: And altho' it was firſt forbidden by the Canons, yet it remained in uſe within this Realm, till it was utterly taken away by Authority of Parliament. † And *Monomachia*, i. e. *Duellum* is alſo forbid by the Canons, but yet foraſmuch as it is not taken away by Parliament, it (in ſome Caſe as appears before) remains even to this Day. Of this Manner of Trial by Combate or Battle, not only *Glanvil* writes *lib.* 2. *cap.* 3. & 5. as he writes alſo of *Ordel*, but *Bracton*, *lib.* 3. *Tractat'* 3. *cap.* 21. *fol.* 140. And *Briton*, *cap.* 22. writes only of

* See Selden's Analecton, lib. 2. c. 8. De Diis Syris 169. Notes on Eadmer. 192, 203, &c. and Notes on Polyolbion 270. See alſo Spelman, verb. Judicium Dei, Hundredum, Juvata, &c. Paſquire's Reſearches lib. 4. c. 4.

† 2 Inſt. 248. 3 Inſt. 157, 158, 159.

of the Trial by Battail, and not of *Ordel*, becauſe that, when they wrote, was utterly taken away and condemned. *Vide Deuter. cap.* 18. *ver.* 10. All which (becauſe many have erred in this Point of Antiquity) I thought worthy to be imparted to the ſtudious Reader. 2 Inſt. 248.

BUCKNAL's *Caſe.*

Paſch 42 Eliz.

In the Common Pleas.

Paſch. 42 *Eliz.* in *Bucknal*'s Caſe in the *Common Pleas*, divers Points were reſolved, 1. That there is a Difference when the Lord in his Avowry varies from the Truth of the Quality of the Services, by Colour of Seiſin and Poſſeſſion which he has got from his Tenant; and when he varies from the Truth of the Quantity of the Services, by reaſon of Seiſin which he has got of more than he ought to have of the ſame Nature; as the Caſe there was: *Bucknal* avowed, becauſe the Plaintiff held of him certain Land, by Fealty, Rent, and Suit of Court, and alledged Seiſin (*a*) of all, and for the Rent Arrear, *&c.* where the true Tenure was by Fealty and Rent only, in this Caſe the Seiſin of the Suit is not material, becauſe it is of another Quality and Nature, and the Tenancy originally was not charged with any Service of ſuch Quality as Suit; and therefore in ſuch Caſe the Tenure is traverſable. But where the Rent was 2 *s. per an.* if the Lord has got quiet and voluntary Seiſin of more Rent than he ought, as of 3 *s.* (without any Coercion of diſtreſs) there becauſe the Tenancy is charged with Service of ſuch Nature and Quality, and it is not to be preſumed that the Tenant would voluntarily pay more Rent than he ought, there the Seiſin in an Avowry is traverſable, and not the Tenure. And the Stat. of *Mag' Char'*, *c.* 10. (*b*) *Nullus diſtringatur ad faciendum majus ſervitium de feodo militis, nec de*

Cr. El. 799. Winch 18. Doct. pl. 318. F. N. B. 10 g. h. Pl. Com. 94. b.

(*a*) Co. Lit. 153. a.

(*b*) 2 Inſt. 21. 8 Co. 65. a. F. N. B. 10. c. Plowd. 243. b.

de alio libero tenemento, quam inde debetur, by Conſtruction extends to the Right, and not to the Poſſeſſion: To which Purpoſe on that Act the Writ of *Ne* (*a*) *injuſte vexes*, which is in the Right, is grounded; and therewith expreſly agree *F. N. B.* 10. *c.* & *Regiſt'* 4. *a.* *Vide* 10 *E.* 3. 25. 22 *E.* 3. 18. *b.* and this alſo appears in the old Book of 18 *Ed.* 2. *Avowry* 217. In *Repl.* brought by *R.* the Def. avow'd upon the Pl. becauſe one *C.* was ſeiſed of the Tenancy, and held of the Avowant by Fealty, and 20 *d. per ann.* of which Services he was ſeiſed by the Hands of *C.* &c. as by the Hands of his very Tenant, which *C.* enfeoffed the Pl. and for 20 *d.* Arrear for one Year be avowed upon the Pl. to which the Pl. ſaid, that the ſaid *C.* his Feoffor held of the Avowant by Fealty and 12 *d.* and as to that nothing arrear. To which bar of the Avowry Exception was taken, becauſe he did not anſwer to the Seiſin. To which *Shard* of Counſel with the Pl. anſwered, That the Pl. is a ſtrange Purchaſer, where he can't have (*b*) *Ne injuſte vexes*, wherefore he ought to diſcharge himſelf by Plea. But Sir *William Bereford*, Chief Juſtice of the Common Pleas, gave the Rule; You may ſay that the Seiſin was by outragious Diſtreſs, and that you do not ſay; wherefore we hold the Seiſin rightful, and you do not deny the Seiſin; and therefore adviſe of it: For which Reaſon *Shard* by the Rule of the Court traverſed the Seiſin. In which was obſerved the great Regard the ancient Judges had of Seiſin and Poſſeſſion to maintain it againſt the ſaid Stat. of (*c*) *Magna Charta*, altho' the Act was in the Negative, and therefore the ſtronger. *Vide* 34 *E.* 1. *Diſclaimer* 30. an Infant ſhall anſwer to the Seiſin had by his own Hands: in 8 *E.* 3. 18. *b.* *Robert de Woodhouſe* Archdeacon of *Richmond*, brought an *Aſſiſe* of *Darrein Preſentment* againſt the Prior of *Pomfret*, and prayed that the Aſſiſe would inquire, who had preſented the laſt Parſon to the Church of S. *Sampſon of York*; and afterwards *Robert* was Nonſuit; wherefore it was awarded, that the Prior ſhould have a Writ of the Biſhop; but *ceſſet executio* till the Colluſion was enquired of; and there Sir *William Herle* Ch. Juſtice of the Bench charged the Recognitors of the Aſſiſe, firſt to enquire among themſelves if the Writ was brought by Colluſion, to make the Advowſon come into Mortmain; and if they ſhould find that the Writ was brought by Colluſion, that they ſhould not enquire of the Right of the Prior; but if they ſhould not find Colluſion, then they ought to enquire of the Right of the Prior, and if he had Right, then, which of his Predeceſſors preſented, and in the Time of what King. And in Evidence to prove the Prior's Right, a Charter of King *Stephen* was ſhewed, by which the ſaid King gave the ſaid

(*a*) 2 Inſt. 21. 8 Co 65. a. Plow. 243. b.

(*b*) F.N.B. 11. c.

(*c*) Mag. Char. c. 10. Antea 33. a.

ſaid Advowſon to ſuch a Prior, his Predeceſſor, and to his Succeſſors; and the Enqueſt return'd and ſaid, That the Writ was not brought by Colluſion, and farther ſaid, That the Prior or his Succeſſors had never preſented within Time of Memory, but always the Archdeacon and his Predeceſſors: To which *Herle* Chief Juſtice ſaid, We have no Warrant to enquire of the Right of the Archdeacon, but of the Prior's Right; wherefore you are to ſay, if the Prior has Right, or not; and when the Enqueſt were in doubt what to ſay, *Herle* ſaid, altho' a Man had Right before Time of Memory, if he nor his Anceſtors were never ſeiſed after Time of (*a*) Memory, he is ouſted of his Right; and therefore according to your Intent, if you have ſaid the Truth, that the Prior or any of his Predeceſſors were never in Poſſeſſion after Time of Memory, you may ſafely ſay that the Prior has no Right. *Et ita dixerunt.* *Nota* Reader, I have put this Caſe at length, becauſe it is notable for divers Points, and chiefly for the great Reſpect the Judges gave to the Poſſeſſion, without regarding any ancient Charter of the King, or any Right by Colour thereof, altho' it was Matter of Record, and betwixt the Charter and the Caſe then in Queſtion there were not above 176 Years, and that in the Caſe of a Prior, who in many Caſes ſhall not be ſo prejudiced by the Laches of the Predeceſſors, as a private Man.

(*a*) Ant. 28. a.

But in the Caſe of Seiſin of more Rent than ought to be, that ſhall bind in an (*b*) Avowry. But in *Ne injuſte vexes*, *Ceſſavit*, *Aſſiſe*, *Reſcous* or *Treſpaſs*, ſuch Seiſin of more Rent ſhall be avoided, for there the Tenure and not the Seiſin is traverſable: And for theſe Differences, *vide* 10 *E.* 3. 25. 12 *E.* 3. *Avowry* 104. 22 *Aſſ.* 68. 28 *Aſſ.* 33. 5 *H.* 5. 4. 10 *H.* 6. 3. *b.* 30 *H.* 6. 5. 33 *H.* 6. 44, 45. 37 *H.* 6. 25. 12 *E.* 4. 7. *b.* 16 *E.* 4. 11. 21 *E.* 4. 64. *F. N. B.* 10. *Plo. Com.* Woodland's *Caſe*, 94, 95. 4 *E.* 2. *Avowry* 200. notwithſtanding the Statute of *Magna Charta*, the Lord ſhall avow for Relief according to the Seiſin of the Quantity of the Knight's Fee that the Lord has encroached, for *relevium non eſt ſervitium*, but incident to Service.

(*b*) 4 Co. 11 b. 2 Inſt. 21. Flowd. 94. b. 10 H. 7. 11. b. 8 Co. 65 a. Doct. pl. 318. F. N. B. 9, 10.

But this Caſe of Seiſin in caſe of Avowry receives certain Limitations: For 1. (*c*) the Iſſue in Tail ſhall avoid in an Avowry Seiſin had by the Hands of Tenant in Tail, 20 *E.* 3. *Avowry* 131. *F. N. B.* 10. 2. The Succeſſor of a Biſhop or Prior, *&c.* ſhall avoid in an Avowry Seiſin by the Hands of the Predeceſſor. 3. The very Tenant of the Land ſhall avoid ſuch Encroachment of Rent in Avowry, if he has a Deed to ſhew the Contrary; but none ſhall have *Contra* (*d*) *formam Feoffamenti*, but the Feoffee or his

(*c*) 10 Co. 103 a. 4 Co. 11. b. 2 Inſt. 21, 118.

(*d*) 4 Co. 121. b. 2 Inſt. 118.

his Heirs, 10 *H.* 7. 11. 22 *H.* 6. 50. *F. N. B.* 163. 18 *E.* 3. 18. 3 *E.* 3. 27, 28. 10 *E.* 3. 25. 22 *E.* 3. 18. 28 *Aſſ.* 33. 28 *E.* 3. 92. 22 *H.* 6. 3. 30 *H.* 6. 7. 33 *H.* 6. 22. 39 *H.* 6. 7. 7 *E.* 4. 24. 5 *H.* 5. 4. 14 *H.* 4. 5. 11 *E.* 3. *Avowry* 106. 4 *E.* 3. *Avowry* 201, 202. 12 *R.* 2. *Avowry* 266. that in Avowry the Heir of the Feoffee, upon a Deed ſhewed, ſhall avoid Seiſin by his own Hands, 31 *E.* 1. *Avowry* 244, & 31 *E.* 1. *Avowry* 241. 6 *E.* 2. *Avowry* 216. 4 *E.* 2. *Avowry* 202. 32 *E.* 3. *Avowry* 114. & *in* 19 *E.* 3. *Avowry* 122. *Wilby* ſaid, that he had ſeen between Privy and Privy, Privy and Stranger, and Stranger and Stranger, the ſame Point to avoid Encroachment of Seiſin in Avowry adjudged upon ſhewing of a Deed. And all this is grounded upon the Statute of *Malbridge*, *c.* (*a*) 9. *Qui autem per Cartam pro certo ſervitio tot ſolidorum annuatim pro omni ſervitio ſolvend' feoffati ſunt, ad ſectam vel ad aliud, contra formam feoffamenti de cætero non teneantur.* 4. Encroachment of Seiſin is not material, where there is no Tenure, 20 *E.* 4. 2. *b.* 22 *H.* 6. 2. *b.* 5. Such Seiſin ſhall be avoided by Coercion of Diſtreſs, 12 *E.* 4. 7. *b.* 8 *H.* 6. 17. *a. b.* 47 *E.* 3. 4. *a.* 6. If the Rent be payable at two Days, and the Lord encroaches Seiſin at four Days of the Year, and at two Days, where he ought to pay it but at one, this Encroachment being voluntary ſhall be avoided in Avowry, becauſe they agree in the Sum. 21 *E.* 4. 8.

(*a*) 2 Inſt. 117, 118.

And it is worthy Obſervation, Where and How Seiſin in Avowry ſhall be traverſed. 1. In (*b*) Avowry the Tenant ſhall not plead, Never ſeiſed of the Services generally, for thereby he leaves the Lord no Remedy, neither by Avowry, nor by Cuſtoms and Services; and therefore if he be (*c*) Tenant in Fee-ſimple, he ought to diſclaim, or he ought to plead out of his Fee, and ſo traverſe the Tenure; and therewith agree 22 *H.* 6. 3. & 30 *H.* 6. *Avowry* 15. by all the Juſtices. And where it is ſaid in 5 *E.* 4. 2. that the very Tenant ſhall not plead out of his Fee, for if it ſhould be found againſt him, it is not peremptory to him, but it ſhall be peremptory to the Lord, and ſo not equal, and therefore in ſuch Caſe he ſhall diſclaim; the contrary to that is adjudged in (*d*) 28 *H.* 6. 10. in the Point, and *Forteſcue* there ſhewed two or three Judgments in Terms. *Vide* 15 *E.* 2. *Avowry* 214. 24 *E.* 3. 34. 11 *H.* 4. 10. 12 *H.* 4. 23. 8 *H.* 6. 17. *a. b.* & 21 *H.* 6. 22. 21 *H.* 7. 10. and *Brook* in abridging the Saying in 5 *E.* 4. 2. *Hors de ſon fee* 15. ſays, *quod non eſt lex*; And the Abridgment of *Fitzherbert* of 35 *H.* 6. 19. *Hors de ſon fee* 17. is not warranted by the Book at large. 2. He who denies Seiſin after the Limitation, ought firſt to acknowledge a Tenure, to the End the Lord may have his Writ of *Cuſtoms and Services*; as if the Lord alledges

(*b*) Doct. pl. 132.

(*c*) Doct pl. 132.

(*d*) 28 H. 6. 10 a.

the

the Tenure by Fealty, Rent, and Suit of Court, and alledges Seisin within Time of Limitation, and avows for Suit arrear, the Tenant may confess the Tenure by Fealty and Rent; and to the Suit, never seised after the Limitation. And therewith agree 15 *E.* 2. *Avowry* 214. (*a*) 18 *E.* 3. 10. *b.* & 22 *E.* 3. 232. against the Opinion ill reported, in (*b*) 10 *H.* 6. 6. *b.* & 7. *a.* 3. If the Lord avows for Services, and alledges Seisin by the Hands of the Plaintiff, or any other in the *Replevin*, as by the Hands of his very Tenant, the Tenant may plead that the Avowant was never seised by his Hands, &c. and therewith agree 24 *E.* 3. 50. 19 *E.* 2. *Avowry* 224. (*c*) 22 *H.* 6. 2. *b.* & 3. *a.* 4. That Seisin is not traversable, but only of that for which the Avowry is made, unless Seisin be alledged of a Superior Service (for which the Avowry is not made) which in Law is a Seisin of the Inferior, as in (*d*) 26 *H.* 8. 1. *a.* where the Tenure is by Rent and divers other Services, and Seisin is alledged in all, and Avowry for the Rent only, there the Seisin of the Rent is only traversable: But if the Tenure be by Homage, Fealty, Escuage, and Rent of 2 *s.* and Seisin alledged in all, and he avows for Homage, he shall be received to traverse the Seisin of the Escuage, for that is Seisin of the Homage, 21 *E.* 3. 52. *a.* 13 *E.* 3. *Avowry* 103. 19 *E.* 2. (*e*) *Avowry* 224. And where it is said, That when the Lord varies in the Nature and Quality of the Services, that the Tenure is traversable, that is true, when the Tenant confesses Tenure in Part, as is aforesaid; but he can't traverse the whole Tenure; as if the Defendant in *Replevin* avows upon the Plaintiff for Rent and Services as upon his very Tenant, the Plaint. can't say that he holds the same Land of a Stranger, without that, that he holds of the Avowant, but he ought to disclaim, or plead out of his Fee; and therewith agree 10 *H.* 6. 6. *b.* & 7. *a.* 35 *H.* 6. *Avowry* (*f*) 37 *H.* 6. 25. *a.* 11 *H.* 4. 11. 19 *E.* 2. *Avowry* 222. 15 *E.* 2. *ibid.* 214. And at first, the Plaintiff in the Case at Bar would have pleaded, That he held the Land in the Advowry, and other Lands by Fealty and Rent, without that, that he held the Land in the Avowry *modo & forma*; and the Court was moved, If the Plea in Bar of the Avowry was good? And the Plaintiff's Counsel conceived that the Plea was good, and they cited the Books in (*g*) 8 *H.* 7. 5. *a.* & 13 *H.* 7. 25. *b.* where the Case was, That in *Replevin* the Defendant avowed, That the Plaintiff held of him one Acre of Land by Fealty, and 12 *d.* and for Rent Arrear; the Plaintiff said, That he held the said Acre, and another Acre of Land in the same Town by the Services of 6 *d. absq; hoc*, that he held the one Acre of the Avowant *modo & forma*; and *Brian* there conceived the Traverse good. But

(*a*) Fitz. Avow. ry 97.
(*b*) Fitz. Avowry 9. Br. Avow. 116. Postea 35. a.
(*c*) Fitz. Avow. 14. Br. Avow. 56.
(*d*) Br. Avow. 1.
(*e*) 4 Co. 8. b.
(*f*) Fitz Avow. 28. Br. Avow. 76.
(*g*) Godb 24. Br. Advowry 87. Br. Double Plea 90.

the Court preferred the Book of 5 *H.* 5. 4. *b.* where the Caſe was, in (*a*) *Replevin* in this Court the Def. avowed, by reaſon the Pl. held of him 4 Yards of Land, call'd *Criſpinlond*, by Fealty, and 10 *s.* Rent *per Ann. &c.* of which Services he was ſeiſed, *&c.* and for Rent arrear. The Pl. ſaid, that he held of him 2 Yards of Land by Fealty, and 5 *s.* Rent only, without that, that he held 4 Yards in the Manner and Form as he had avowed: And *Hull*, who gave the Rule, held it no Plea; for as to diſcharge of 5 *s.* Rent, it went in Bar; and as to that, that he held but 2 Yards, it went in Abatement, and ſo contained double and different Matter: Alſo he anſwered not to the Seiſin, *&c.* wherefore by the Rule of the Court, the Pl. pleaded in Abatement of the Avowry, and ſaid that he held 2 Yards of the Def. by the Services of Fealty, and 5 *s.* and the other 2 Yards by Fealty, and demanded Judgment of that Avowry; the Concluſion of which Plea made it ſingle enough: To which the Avowant replied, that he held of him in Manner and Form as he had avowed; and thereupon Iſſue was joined; and therewith agrees 18 *E.* 3. 18. *a.* where the Def. in *Replevin* avow'd upon the Pl. becauſe he held of him a Carve of Land by Homage, Fealty, and 10 *s. per Ann. &c.* the Pl. ſaid, That he held that Carve and another Carve by Homage, Fealty, and Rent of 10 *s.* as one entire Tenancy, and demanded Judgment of the Avowry, which ſuppoſes the Parcel in groſs by it ſelf, (and a good Plea; for otherwiſe he might be double charged,) and the Avowant maintained that the Carve in the Avowry was an entire Tenancy, *&c.* But it was reſolved, That if the Pl. agrees with the Avowant in the Services, and varies in the Quantity of Land, there a Traverſe may be, without that, that he holds *modo & forma*, or with a *Tantum* (one only.) And therefore in 20 *H.* 6. 20, 21. if the Def. avows becauſe the Pl. holds 16 Acres of him by certain Services, and the Pl. ſays that he holds thoſe 16 Acres, and other 16 Acres, without that, that he holds 16 Acres, *&c. tantum*, the Avowry ſhall abate. Alſo if he makes ſeveral Avowries, ſuppoſing 2 Acres to be ſeverally held, where they are held by entire Services, or *econtra*. *Vide* (*b*) 9 *H.* 6. 27. *a.* (*c*) 7 *H.* 4. 102. 4 *E.* 3. 34. 43 *E.* 3. 13. 47 *E.* 3. 5 *E.* 4. 4. 2. *temp. E.* 1. *Avowry* 228. 2 *E.* 2. *Avowry* 184. 24 *E.* 3. 34. 32 *E.* 3. *Avowry* 114. 46 *E.* 3. 16. 41 *E.* 3. *Avowry* 77. And afterwards the Pl. in the principal Caſe agreed with the Avowant in the Quantity of the Tenancy, confeſſed the Tenure by Fealty and Rent, and as to the Rent, *Nihil* arrear, and traverſed the Tenure *modo & forma*, ſc. *abſq; hoc*, that the Tenancy was held by Fealty, Rent, and Suit of Court, in Manner and Form, *&c.* And the Traverſe was good by the Rule of the Court, although the Avowry was made for Rent only;

where-

(*a*) Fitz. Avow. 48. Br. Avow. 49.

(*b*) Fitz. Replevin 4. Br. Avowry 9.

(*c*) 7 H. 4 10. a. Br. Avow. 37. Fitz. Avow. 50.

whereupon Iſſue was joined, and 'twas found, that the Land was held by Fealty and Rent, and not by Suit of Court; and altho' the Avowry was made for Rent arrear, yet foraſmuch as the Tenure alledged by the Avowant was traverſed and found againſt him, it was adjudged *M.* 42 & 43 *El.* againſt the (*a*) Avowant, for it would be in vain to make it traverſable; and yet if it be found againſt the Avowant, that he ſhould have a Return. And *Lit. lib.* 3. *cap. Attornment* 127. ſays, That the Seigniory is entire, altho' there are divers Manner of Services, which the Tenant ought to do, and Tenure by Fealty and Rent is another Tenure than the Defendant has alledged in his Avowry; wherefore Judgment was given for the Plaintiff.

(*a*) Cr. El. 799.

Nota Reader, altho' the Purview of the Act of (*b*) 21 *H.* 8. *c.* 19. be general, *That the Lord may avow*, &c. *as in Lands and Tenements within his Fee and Seigniory, alledging the ſame Lands to be holden of him, without naming any Perſon certain, or upon any Perſon certain*; yet all neceſſary Incidents are intended, and therefore the Avowant ought to alledge Seiſin by ſome Hands, (*c*) 27 *H.* 8. 4. *b.* agrees; but the ancient Form of alledging Seiſin ſhall not be altered, and therefore the Avowry ſhall be made generally after the Stat. of 32 *H.* 8. *c.* 2. as it was uſed before; but the Plaintiff in Bar of the Avowry may plead never ſeiſed within 40 Years, *&c.* and therewith agree 1 *Mar.* (*d*) *Brook* 107. & 14 *El. Dyer* (*e*) 315. And if the Lord by the Stat. of 21 *H.* 8. alledges Seiſin in his Avowry, and avows the Diſtreſs, as within his Fee and Seigniory, and upon no Perſon in certain, in ſuch Avowry every Plaintiff in the *Replevin*, be he Termor or other, may have every Anſwer to the Avowry, which is ſufficient, and alſo have Aid and every other Advantage in Law; and it is not now an Exception, that he is a Stranger to the Avowry; for in ſuch Caſe, foraſmuch as the Avowry is upon no Perſon in certain, either none is a Stranger to it, or every one is a Stranger to it: And therewith agree 34 *H.* 8. *Br. Avowry* 115. 27 *H.* 8. 4. *b.* & 20. *b.*

(*b*) Ant. 23. b. Poſtea 136. a. Co. Lit. 268. b. 269. b.

(*c*) Br. Avowry 4. Cr. Car. 83.

(*d*) 8 Co. 65. a. Br. Avow. 107. B. N. C. 444.

(*e*) Dy. 315. pl. 101. Cr. Car. 83. 8 Co. 65. a.

Executors.

HENSLOE's *Case.*

Trin. 42 Eliz. Reg.

See 6 Mod. 204, 205. 1 Salk. 307, 308, 311. Skinner 198. Carthew 345. Rep. C. A. 145.

Henſloe brought an Action of *Debt* againſt *Gage* and others, as Executors; the Defendants pleaded in Abatement of the Writ, that the Teſtator made one *Hilleſley* Coexecutor with them, who had adminiſtred, *&c.* not named in the Writ, Judgment of the Writ. To which the Plaintiff ſaid, That before any Adminiſtration, *&c.* the ſaid *Hilleſley*, being cited with the others to prove the will before the Ordinary, refuſed, and the Defendants only proved the ſaid Will, *&c.* upon which the Defendants demurred in Law. And it was objected, That after this Refuſal *Hilleſley* could not adminiſter for two Reaſons. 1. Becauſe *Hilleſley* may wave the Executorſhip, and ſhall not be Executor againſt his Will; *jus Teſtamentorum pertinet ad Ordinarium*, as it is ſaid in (*a*) 4 *H.* 7. 13. *b.* when *Hilleſley* once refuſed before the Ordinary, who is lawful Judge of the Cauſe, and thereby waved the Executorſhip, and utterly diſcharged himſelf thereof, he can't reſume it afterwards; as in all Caſes of Intereſt and Authorities, when one waves and refuſes to take the Intereſt or Authority, and eſpecially before a lawful Judge in an ordinary Courſe of Proceeding, he ſhall never after agree to it. And therefore ſuppoſe in this Caſe that *Hilleſley* had been joined in the Writ, and he had pleaded, Never Executor, or ever adminiſtred as Executor, ſhall he be afterwards received to adminiſter? It was ſaid clearly no. 2. It was ſtrongly urged, That

(*a*) Plow. 185. a. 282. b. Br. Dett. 140. Fitz. Executor 41.

That if all the Executors are cited before the Ordinary to prove the Will, and all refuſe, the Ordinary may accept this Refuſal, and thereupon commit Adminiſtration, and after that Refuſal they ſhall never take upon them the Charge of the Will, nor adminiſter as Executors, becauſe they have before a lawful Judge in an ordinary Courſe of Proceeding waved it before; and if they might all refuſe before the Ordinary, and this Refuſal ſhall bind them, what Reaſon is there if any of them refuſe before him, that it ſhall not bind them? And as when Executors (agreeing to the Will) adminiſter, they can't afterwards refuſe, as it is held in (*a*) 9 *E.* 4. 33. *a.* 47. *b.* *Plow. Com. Greisbrook's* Caſe 280. So when any of the Executors once before a competent Judge refuſe, they ſhall not after agree. 2. It was objected that the Bar was not good, becauſe the Defendants have not alledged, that the Will was proved, according to the Opinions in (*b*) 3 *H.* 7. 14. *a.*

(*a*) Fitz. Executor 35. Br. Execut 90. Br. Ordinary 13. Poſtea 37. b.

(*b*) Poſtea 37. b.

But it was reſolved without open Argument, That the Plaintiff's Replication to maintain his Writ was not ſufficient; for notwithſtanding the Refuſal of *Hilleſley* in this Caſe, he might adminiſter after at his Pleaſure. And the Court took this Difference, When many are named Executors, and ſome of them (*c*) refuſe, and ſome of them prove the Will, thoſe who refuſe may afterwards at their Pleaſure adminiſter, notwithſtanding this Refuſal before the Ordinary: But if all refuſe before the Ordinary, and the Ordinary commits Adminiſtration to another, there they can't afterwards adminiſter: And this Difference is proved by our Books in 21 *E.* 4. 24. *a.* where it is reſolved by the Juſtices, That if (*d*) 20 are named Executors, and one proves the Will, it ſufficeth for them all, and the Refuſal before the Ordinary is not any Eſtoppel againſt them to adminiſter after when they pleaſe, in our Law, and we have no Regard in this Point to the Law of the Church: And the Executor who proves ought to (*e*) name them who refuſe in every Action to recover the Teſtator's Debts, and they may (*f*) releaſe the whole Debt (Duty): And it is clear that they who refuſe ſhall have an Action by Survivor. But it is held in 36 *H.* 6. 8. *a.* That if a Man makes two Executors, and both refuſe before the Ordinary, now they can never after adminiſter as Executors by Force of the Will, for now the Teſtator dies (*g*) inteſtate: Otherwiſe when one proves, and the other refuſes before the Ordinary, the other may adminiſter with him when he will; in (*h*) 41 *E.* 3. 22. *a.* One Executor brought an Action of *Debt*, and ſhewed forth the Will, which proved that he had another Executor, and the Defendant pleaded to the Writ that he is alive: To which the Plaintiff ſaid, That before the Ordinary he was diſcharg'd of the Adminiſtration, and that he never

(*c*) Dyer 160. pl. 42. 1 Salk. 307, 308. Cr. El. 92. Moor 273. 1 Leon. 135. 2 Brownl. 58, 59. Wentw. 54, 59. Owen 44. 1 Rol. 907. 1 Anderſ. 27. Hardr. 111. Swinb. 358. 2 R. 3. 20. b.

(*d*) Br. Executor 117.

(*e*) Went. 59, 60. Plowd. 184. b. 2 R. 3. 20. b. 22. a. Br. Execut. 168. Perk. 8. 485. Thelo. 58. Salk. 307, 311. 1 Rol. Rep 176.

(*f*) 5 Co. 28. a. Br. Adminiſter 20.

(*g*) Dyer 236. pl. 27.

(*h*) 1 Rol. Rep. 176. Fitz. Executors 463. Br. Executors 27. Statham Executors.

never adminiſtred, and becauſe he might adminiſter at his Pleaſure, it was adjudged that the Writ ſhould abate. But it is reſolved by *Littleton*, *Newton*, and *Danby* in (*a*) 7 *E.* 4. 13. *a.* That if all the Executors refuſe before the Ordinary, they may prove the Will afterwards. In 22 *E.* 3. 19. *b. Debt* by (*b*) two Executors, and Will ſhewed, the Def. ſaid, that in the Will three are made Executors, the third not named, *&c.* Judgment of the Writ; the Pl. replied, that the Third refuſed before the Ordinary, and would not adminiſter, and was diſcharged by the Ordinary, *&c.* and it was adjudged that the Writ ſhould abate. And therewith agree 15 *E.* 3. (*c*) *Executors* 8. (*d*) 42 *E.* 3. 26. *a. b.* (*e*) 11 *H.* 4. 83. *b.* 35 *H.* 6. 37. *a.* 21 *H.* 6. 23. *b.* 3 *R.* 3. 20. *b.* But it appears in (*f*) 50 *E.* 3. 9. *a.* (*g*) 3 *H.* 7. 14. *a.* That if all refuſe before the Ordinary, he may grant Adminiſtration.

2. It was reſolved, That in *Debt* againſt one as Executor, it is a good (*h*) Plea to ſay, That the Teſtator made him and another Executor, who has adminiſtred, and is alive, without ſaying that the Will is proved; and therewith agree 33 (*i*) *H.* 6. 38. *a.* 32 (*k*) *H.* 6. 25. *b.* 22 (*l*) *H.* 6. 59. *b.* 3 *H.* 4. *Adminiſtration* 22. For after the Executors have adminiſtred, and ſo have once (*m*) taken upon them the Charge of the Executorſhip, they can't afterwards refuſe, (*n*) 9 *E.* 4. 33. *a.* 37. *Plow. Com. Greisbrook's* Caſe 280. So that it was reſolved, that the Plea in Bar was good: And ſo the Doubt conceived in (*o*) 3 *H.* 7. 14. *obiter* well explained. Alſo the Plaintiff in his Replication has ſhewed, that the Will was proved, *&c.* and ſo, if neceſſary, has made the Bar good. And I well agree that this Caſe was upon manifeſt and manifold Authorities and Judgments in Books adjudged according to Law, which was the Reaſon that in a Caſe ſo clear the Judges did not ſhew the Reaſon and Cauſes of the ſame Differences, nor made any anſwer to the ſaid Objections, which ſome learned in the Law deſired for their Satisfaction to be done. As to that it is to be known, That it is held in 2 *R.* 3. *Teſtament* 4. That it is but of (*p*) late Years that the Church had the Probate of Wills in this Land, until it was by an Act, *&c.* for *Lay* People have Probate of Wills in all other Places, except *England*; and in many Places in *Engl.* the Lords of Manors have Probate of Wills at this Day in their Temporal Courts. And *Tremail* there ſaid, That he is Steward in his Country, and the free Tenants and Bondmen prove their Wills before him in the Court Baron, and ſo it has been uſed from Time whereof, *&c.* and therewith agreed *Fineux*, and all the Juſtices in 11 *H.* 7. 12. *b.* That the Probate of Teſtaments belonged not to the Spiritual Court, but of late, *&c.* and they have it not by the Spiritual Law. And *Linwood*, who was Dean of the Arches, and wrote *Anno Dom.* 1422.

(*a*) 7 E. 4. 12. b. 13. a. Fitz. Adminiſter. 8. Br. Executors 111. Plowd. 281. b.
(*b*) Fitz. Variance 66. Fitz. Executors 93.
(*c*) 15 E. 3. Fitz. Executors 80.
(*d*) Fitz. Executors 67. Br. Executors 31. Perk. Sect. 485.
(*e*) 11 H. 4. 83. b 84. a. Br. Det. 65. Br. Adminſt. 20.
(*f*) Fitz. Adminiſtrator 19. Br. Adminiſtrator 15. Br. Executors 39.
(*g*) Poſtea.
(*h*) Doctrin. pl. 170. Swinb. 358.
(*i*) Fitz. Executors 25. Br. Executors 20.
(*k*) Br. Executors 166.
(*l*) Fitz. Executors 18. Br. Executors 78. Br. DoublePlea 53.
(*m*) 1 Mod. Rep. 213.
(*n*) Fitz. Executors 35. Br. Execut. 90. 9 E. 4. 47. a. b. Br. Ordinary 13.
(*o*) Antea 37. a. ſupra. Plow. 281. b. Fitz. Adminiſtrator 11.
(*p*) 2 Rol. 217. 2 Inſt. 331, 488. Perk. Sect. 486. 11 H. 7. 12. b. Br. Teſtam. 27. 5 Co. 16. a. b. Caudrey's Caſe. 1 Sid. 46. Vaugh. 207. Selden Juriſdiction de Teſtaments 9, 10. Vide Salk. 37. contra.

in the Reign of K. *H. 6. lib.* 3. Tit. *de Teſtamentis, fo.* 124. *l.* confeſſes that Probate of Wills belongs to the Ordinaries, *de* (*a*) *conſuetudine Angliæ & non de communi jure*, and that in other Realms the Ordinaries had it not: And in another Place he affirms, the Power of the Biſhop in Probate of Wills, *per conſenſum regis & ſuorum procerum ab antiquo.* And I have a Book publiſhed in *Latin*, *Anno Dom.* 1573. by the moſt reverend Prelate *Matthew Parker* Archbiſhop of *Canterbury*, very expert in Matters of Antiquity, in which it is affirmed in theſe Words, *Rex Angliæ olim erat conciliorum Eccleſiaſtic' præſes, vindex temeritatis Romanæ, propugnator religionis, nec ullam habebant Epiſcopi authoritatem præter eam quam a Rege acceptam referebant, jus teſtamenta probandi non habebant, adminiſtrationis poteſtatem cuique delegare non poterant.* Then foraſmuch as probate of Wills is given to the Spiritual Court, whereof they had not Juriſdiction before, when they have proved the Will, their Authority is executed, and they have not Power to take the Refuſal of any when any of the Executors prove the Will. And therefore the Refuſal of any of the Executors before the Ordinary in ſuch Caſe is void. The Executors have their Title by the Will, which is temporal, and to the Goods and Chattels alſo which are temporal, as it is agreed in *Plow. Com.* in *Griesbrook's Caſe* 280. which Will is compleat as to all Goods and Chattels in Poſſeſſion and Reverſion; and as ſhall be after ſaid, to (*b*) releaſe Debts and Duties before any Probate. But as to bringing of Actions in the King's Courts, the Judges do not admit the Executors to ſue for Things in Action, unleſs they ſhew the Will proved duly under the Seal of the Ordinary; but always the King's Courts have uſed to allow the Probate of any of the Executors, to enable them all to bring Actions: So that the Probate of the Will don't give them any Intereſt or Title either to the Things in Action or in Poſſeſſion, for they have their whole Title and Intereſt by the Will, and not by the Probate: But yet without the Probat, the Judges will not allow them to bring Actions, and therefore all the ſaid Books in ſo many Succeſſions of Ages, affirming clearly the Refuſal before the Ordinary by one Executor, when another proves the Will, to be void, prove that the Eccleſiaſtical Judge has no Power to take the Refuſal in ſuch Caſe, for without Queſtion the Executor has Power to refuſe. And as to the Objection, which has been made, That he has once

(*a*) 2 Inſt. 488. Carter 127. Swinb. 351.

(*b*) Co. Lit. 292. b. Plow. 203, 277. b. 281. a. 5 Co. 28. a. Hutt. 31. 1 Rol. 917. Poſtea 39. a. 10 Co. 52. a. Raym. 481. Swinb. 281. Moor 119. Went. 51, 141, 151, 321. Lucas 171.

once waved the Executorſhip, and therefore ſhall not afterwards take it upon him; to that it may be anſwered, Foraſmuch as the Eccleſiaſtical Judge has no Power to receive that Refuſal or Diſagreement, it is upon the Matter made to a Stranger, and by Conſequence void, and of no Force to bar the Plaintiff to take it afterwards, as in the like Caſe it is reſolved in 14 *H.* 8. and this is alſo affirmed by all the other Books, which prove the Refuſal void. And as to the ſecond Reaſon, that is to ſay, That the Eccleſiaſtical Judge may take the Refuſal of all, and by Conſequence of any of them; to that it may be anſwered, That as originally the Eccleſiaſtical Judge had no Power to prove Wills, but it was given him as appeareth (*a*) before; ſo originally the Eccleſiaſtical Judge could not commit Adminiſtration to any, who might ſue or be ſued as Adminiſtrator; but that alſo was given to the Ordinary by an Act, *ſc.* by the Act of (*b*) 31 *E.* 3. *cap.* 11. by which it is enacted, That in Caſe a man dies Inteſtate, The Ordinary ſhall depute the next and moſt faithful Friends of the Inteſtate, to adminiſter his Goods, which Deputies ſhall have an Action to demand and recover the Debts due to the ſaid Inteſtate in the King's Courts to adminiſter, *&c.* and ſhall anſwer alſo in the King's Courts to others to whom the ſaid Deceaſed was held and bound, in the ſame Manner as Executors ſhall anſwer, and ſhall be accountable to the Ordinaries, as Executors are in Caſe of a Will, as well in Time paſt, as in Time to come.

(*a*) Antea 37. b.

(*b*) Cr. Car. 106. 1 Jones 175. 5 Co. 82. b. Plow. 278. a. b. 279. a. Cr. El 40. 2 Inſt. 398. Noy 53. Selden's Juriſdiction de Teſtaments 24. Carter 126, 128, 130, 132, 133, 134, 136. Co. Lit. 133. b. Swinb. 351. 1 Keb. 854. F. N. B. 120. d.

Now it is neceſſary to know two Things. 1. What the Law was before the Stat. and 2. What Alteration the Stat. of 31 *E.* 3. has made: And as to the firſt, three Points are to be obſerved. 1. That of (*c*) ancient Time, as appears by Record when a Man died Inteſtate, and had made no Diſpoſition of his Goods, nor committed his Truſt to any, in ſuch Caſe the King, who is *Parens patriæ*, and has the ſupreme Care to provide for all his Subjects, that every one ſhould enjoy that which he ought to have, uſed by his Miniſters to ſeize the Goods of the Inteſtate, to the Intent they ſhould be preſerved and diſpoſed for the Burial of the Deceaſed, for Payment of his Debts, to advance his Wife and Children, if he had any, and if not, thoſe of his Blood. And this appears in *Rot' Clauſ. de* 7 *H.* 3. *m.* 16. (*d*) *Bona inteſtatorum capi ſolebant in manu Regis*, *&c.* And afterwards this Care and Truſt was committed to Ordinaries, for none could be found more fit to have ſuch

(*c*) Swinb. 351. Cart. 129, 131.

(*d*) Cart. 125, 131. 1 Vent. 303. 1 Sid. 46, 371. Selden's Juriſdiction de Teſtamentis 22.

ſuch Care and Charge of his tranſitory Goods after the Death of the Inteſtate, than the Ordinary, who all his Life had the Cure and Charge of his immortal (*a*) Soul, as it is ſaid in *Plow. Com.* 280. in *Griesbrook's Caſe*. And therefore he was to this Purpoſe conſtituted *in* (*b*) *loco Parentis*: And that appears by what has been ſaid before, and alſo by the Conſtitution of *John* (*c*) *Stratford* Archb. of *Cant.* at a Synod in *London*, *Anno Dom.* 1380. where he confeſſed, That the Adminiſtration of the Goods of an Inteſtate was granted to Ordinaries, *conſenſu Regis & Magnatum Regni*. But no (*d*) Power was given to the Ordinary to ſell or give the Goods or diſpoſe of any of 'em to his own Uſe, or any other. And yet it is true, as it is ſaid in the Books, that he has a Property in the Goods of the Inteſtate, but that is *ſecundum quid*, and not *ſimpliciter*: And according thereunto it is reſolved *per totam Curiam M.* 8 & 9 *El. Dyer* 255, 256. That (*e*) the Ordinary himſelf had no Authority to ſell any of the Goods of the Inteſtate, altho' they are in danger of periſhing. Alſo 18 *Hen.*6. 23. *b.* and other Books agree, That the Ordinary can't (*f*) releaſe a Debt due to the Inteſtate; and yet if the abſolute Intereſt of the Debt was in him, he might releaſe it, altho' he could not have an Action. As Exec' before probate of the Will may (*g*) releaſe a Debt due to the Deceaſed, becauſe they have the abſolute Intereſt of the Debt in them, altho' they can't have an Action before probate, as it was adjudged *in Communi Banco*, *Paſch.* 1 *Jacobi Regis* betwixt (*h*) *Middleton* and *Rymot*, againſt the Opinion of *Weſton*, *Plow. Com.* 277, 278. in *Griesbrook's Caſe*. And that which the Ordinary himſelf might do before the ſaid Act, he may, in reſpect of the Multitude of Cauſes within his Dioceſe, commit to another: But his Committees can't do more than he himſelf can; as it is alſo reſolved *M.* 8 & 9 *El. Dy. ubi ſupra*. 2. It was not given to the Ordinary, nor to his Deputies or Committees, that they ſhould have any Action to recover any Debt, or to take any Advantage of any Covenant, or of any other Thing in Action, before the ſaid Act, which is alſo a manifeſt Proof, That the Com. Law gave him no abſolute Power in the Goods, for then the Law would have given him Power alſo to recover the Debts and Things in Action of the Inteſtate. And therefore in 19 *E.* 3. *Covenant* (*i*) 24. (which was before the Act of 31 *E.* 3.) in an Action of Covenant brought by the Executors of *N.* who ſhewed forth Letters of Adminiſtration delivered by the Ordinary, Sir *Richard Wilby* Chief Juſtice who gave the Rule, ſaid, the Ordinary could not have ſuch Action, wherefore, how can he give this Action to another? *Stone*, A Man has not ſeen, That the Ordinaries ſhall have

(*a*) Plow. 277. a.

(*b*) Swinb. 351. Poſtea 40. b.

(*c*) 2 Inſt. 488. Cart. 131, 132.

(*d*) Swinb. 351.

(*e*) Dy. 255, 256 pl. 8. 1 Keb. 854. Swinb 251, 252. 8 Co. 135. b. 1 Rol. 918. Went. 250. 2 Inſt. 398.

(*f*) 5 Co. 28. a. 8 Co. 135. b. Plow. 277. b.

(*g*) Raym. 481. Co. Lit. 292. b. 5 Co. 28. a. Swinb. 281. Antea 38. a. Hutt. 31. Plow. 277. b. 281. a. 1 Rol. 917. 10 Co. 52. a. Moor 119. Went. 51, 141, 151, 321.

(*h*) 5 Co. 28. a. Co. Lit. 292. b.

(*i*) Selden Juriſdiction de Teſtamen. 24. Fitz. Adminiſtrators 20. in fine.

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an Action but of Goods, whereof they were ſeized and ouſted. *Wilby*, That's true: And afterwards it was awarded that they ſhould take nothing by their Writ *quia non executores, & actio non datur per Statutum. Vide* 19 *E.* 3. (*a*) *Adminiſtration* 18. 35 *E.* 3. *Executors* 105. * 11 *H.* 4. 71. 10 *H.* 6. 22. 18 *H.* 6. 23. *b.* 10 *E.* 4. 1. *a. F. N. B.* 120. *d.* 92. *m.* 3. That an Action lies (*b*) againſt the Ordinary or his Deputies or Committees at the Common Law if they will intermedle with the Goods, and not pay Debts. And the Stat. of *W.* 2. *cap.* 19. is but an Affirmance of the Law before, and therewith agree 9 *E.* 4. 33. *a.* 11 *H.* 7. 12. *b.* 24 *E.* 3. 54. *b. Vide* 22 *R.* 2. *Adminiſtrators* 21. *and* Tit. *Executors*, 17 *E.* 2. *Brief* 822. 11 *H.* 4. 73. *b.* 18 *H.* 6. 23. *b. Plow. Com.* 277. *b. Greisbrook's Caſe.* 8 *Eliz. Dyer* 247. But *Nota* Reader, an Action lay againſt the Deputies or Committees of the Ordinary, before the ſaid Act, by the Name of Executors, as appears by 38 *E.* 3. 26. & 42 *E.* 3. 2 & *a multo fortiori* an Action would lie by the Common Law againſt the Ordinary, who is the Principal, and from whom the Adminiſtrators derive their Authority.

(*a*) 19 E. 3. Fitz. Adminiſtrators 20.

* 11 H. 4. 73. b.

(*b*) 5 Co. 83. a Dy. 232. pl. 5. 247. pl. 73. 1 Rol 551. Cr. El. 409, 410. 2 Inſt. 397. Br. Ordinaries 21.

As to the ſecond Point, the Statute of (*c*) 31 *E.* 3. has made 6 Alterations, 3 as to the Ordinary, and 3 as to the Adminiſtrators: As to the Ordinary, 1. Whereas before the Stat. he was not compellable to grant Adminiſtration, now by the Act of Parliament he is commanded, and thereby compelled to (*d*) grant Adminiſtration; for the Words of the Act are, The Ordinaries ſhall make Deputies, &c. and the Refuſal to do it is a Contempt to the King, and an Injury to the Party, 2. The Ordinaries are reſtrained from granting Adminiſtration to whom they Pleaſe, becauſe now the Adminiſtrator by this Act has a more abſolute Intereſt in the Goods of the Inteſtate than the Ordinary had, and Ability to recover the Debts and other Things in Action due to the Teſtator, where no Remedy is given to the Ordinary himſelf, and therefore the Ordinary is bound by the Act to grant Adminiſtration to the next and moſt faithful Friends (the Ordinaries ſhall depute the next and moſt lawful Friends, *i.* the (*e*) next of Blood who are not attainted of Treaſon, Felony, or have other lawful Diſability, but are lawful Friends.) But the Stat. of (*f*) 21 *H.* 8. *cap.* 5. gives Power to the Ordinary to commit Adminiſtration to the Wife of the Inteſtate, or to the next of Blood, or to both, and ſo as to the Wife has altered the Act of 31 *E.* 3. 3. The Ordinary himſelf has not greater Intereſt in the Goods by this Act, but has greater (*g*) Power than he had before, in this only that he may appoint Adminiſtrators, who ſhall have by this Act greater

(*c*) 31 E. 3. c. 11. Antea 38. b. Lit. Rep. 21. Plowd. 278. a.

(*d*) Cr. Car. 62, 63.

(*e*) Cr. Car. 106. 2 Jones 175.

(*f*) Cro. Car. 62, 63.

(*g*) F. N. B. 120. d.

greater Intereſt and Ability than they had before the Act. And where the Statute ſays, That in Caſe a Man dies Inteſtate, it is to be known that a Man may die (*a*) Inteſtate two Ways, that is to ſay, either in fact, when he makes no Will; or in Law, when he makes a Will, and the Executors refuſe before the Ordinary, or all die Inteſtate, in this Caſe he is in Law dead Inteſtate, and the ſaid Act of 31 *E.* 3. extends to both the Inteſtates, as appears in *Plow. Com.* 279. *a. b.* and in 18 *H.* 6. 23. *a. b.* and in all the Books aforeſaid, which prove that in ſuch Caſe, The Ordinary may grant Adminiſtration; and the Reaſon why the Ordinary in ſuch Caſe may upon Refuſal of all, or Death of all inteſtate, grant Adminiſtration, is, becauſe now the Teſtator dies Inteſtate, and then the ſaid Act gives him Power to grant it according to the ſaid Act, which the Ordinary can't do when one refuſes, and the other proves. And ſo the ſecond Objection upon full and pregnant Reaſon and Authority is anſwered. And where the Stat. ſays, In Caſe a Man dies Inteſtate, that the Ordinary ſhall depute the next, *&c.* of the dead Inteſtate, this Word, (dead) is taken largely, for it extends as well to civil Death, *ſc.* entry into Religion, as to natural Death; and therewith agrees *Litt. lib.* 2. *cap. Villenage* 44. *a.* That if a Man enters into Religion and doth not make his (*c*) Executors, the Ordinary may commit Adminiſtration of his Goods to another Man, as if he was dead in Fact.

(*a*) 2 Inſt. 397. Dy. 236. pl. 27.

(*b*) 31 E. 3. c. 11.

(*c*) 1 Inſt. 132. a. 133. b. Sect. 200.

As to the Adminiſtrators, 1. They have now as abſolute a Property in the Goods and Chattels, as Executors have, which they had not before this Act. 2. They ſhall recover the (*d*) Debts, (and by Equity ſhall have an Action of Covenant, Actions upon the Caſe, and all other Actions which Executors may have) which they could not do at the Common Law. 3. They ſhall anſwer to Actions, *&c.* in the ſame Manner as Executors; and in this Point alſo the Common Law is altered; for at the Common Law they were charged by the Name of Executors, and now they ſhall be charged by the Name of Adminiſtrators, and yet there was a Doubt after the making of this Act by what Name they ſhould be charged. In 38 *E.* 3. *(e)* 20. Debt was brought againſt an Adminiſtrator, by the Name of Adminiſtrator; the Def. pleaded to the Writ, that he ought to be named Executor; for at the Common Law before the Stat. of 31 *E.* 3. a Man ſhould have an Action againſt an Adminiſtrator, and name him Executor, and that remains Law yet. *Thorp* Chief Juſtice, who gave the Rule,

(*d*) Plow. 278. b. F. N. B. 120. d.

(*e*) 38 E. 3 20. b. 21. a. 26.

Rule, in the Case; The Statute gives Actions against Administrators, and that they may have Actions against others, wherefore the Writ was awarded good. And yet afterwards this Point was called in Question, for in 41 *E.* 3. 2. *a. b.* an Action of Debt was brought against an Administrator, and the Defendant demanded Judgment of the Writ, for it should be brought against him as (*a*) Executor, for the Stat. gives an Action for Administrators, but an Action is maintain'd against them as Executors at the Common Law, and yet is. *Thorp*: The Statute gives Actions against Administrators, and afterwards the Writ was awarded good. So this Administrator constituted by the Ordinary (whom the Law has put *in* (*b*) *loco parentis*,) so advanced, enabled, and adorned, and in all (*c*) Points made equal to Executors constituted by the Party himself, is newly created by this Act; and no such Administrator was at the common Law. And therefore the Ordinary was constituted *in loco parentis*, to see that the Debts and Duties of the Intestate should be paid, and to grant Administration according to the said Act, for the Benefit of his Children or others of his Blood, with his goods, as has been said. But because it would be too great a Trouble for the Ordinary himself to take such Charge in such Multitude of Cases in his Diocese, for his Ease the said Act of (*d*) 31 *E.* 3. has adorned and endow'd his Deputies with greater Power than he himself had, to the Intent that the Administrators who might better intend it, should perform the Trust which was committed to them; and for this Reason the said Act has also provided, that Administrators to the said Intents and Purposes shall be hereafter accountable to Ordinaries, as Executors are.

(*a*) Fitz. Administrators 14. Br. Administrators 10.

(*b*) Swinb 351. Antea 39. a.

(*c*) Moor 44.

(*d*) 31 E 4 c. 11.

It is worth Observation for the Reason of the principal Case, how probate of Wills, and granting of Administrations shall be tried, if they are traversed or denied in the King's Court; and therefore, if Issue be joined in the King's Courts, That the Ordinary did not commit Administration to the Plaintiff, *&c.* or that the Will is not proved before the Ordinary, or that he, whose Will is proved before the Ordinary, died Intestate, or that he of whose Goods Administration is granted, as of one who died Intestate, made a Will, *&c.* in none of these Cases it shall be tried or certified by the Ordinary, as in Case of (*e*) Excommengement, but it shall be tried by (*f*) Jury, because these two Cases of probate of Wills, and constituting Administrators, originally did not belong to the Conusance of Eccleſiastical Judges, but were given them of later Times; and therefore nothing but the Probate, and granting of Administration, which were given them, belong to their

(*e*) Co. Lit. 74. a. Antea 31. b.

(*f*) Dyer. pl. 353. Antea 31. a.

Juriſdiction; but the Trial of them is not given them, but is left to the Trial of the Common Law; and therewith agrees (*a*) 21 *E.* 4. 50. *a.* Where it is held, That if Letters of Adminiſtration are denied, the Iſſue ſhall be, That the Ordinary did not commit to 'em Adminiſtration by his Letters, &c. For there it is ſaid, That Letters of Adminiſtration may be forged, 12 *E.* 4. 16. *a.* 35 *H.* 6. 31. *b.* 22 (*b*) *H.* 6. 52. *b.* 13 *El. Dy.* (*c*) 294. Iſſue was joined in the Common Pleas, *ſi Epiſcopus London' commiſit adminiſtrationem*, &c. and was tried by (*d*) Jury. *Vide* 34 *H.* 6. 14. *b.* & *in* 44 *E.* 3. 16. *a.* One brought *Debt* againſt one as Adminiſtrator; and declared that the Debtor died Inteſtate, and the Ordinary deputed the Defend. to be Adminiſtrator; and the Defend. ſaid that the deceaſed made his Will, and made the Defend. and another his Executors, &c. and demanded Judgment of the Writ, and ſhewed forth the Will proving his Plea, and the Plaintiff replied that he died Inteſtate; & *hoc*, &c. And the Def. ſaid, to that he ſhall not be received againſt the Will which is proved before the Ordinary, and is under the (*e*) Seal of the Ordinary; & *non allocatur*; wherefore the Plaint. had the Averment, and it was tried by the Country. *Vide* (*f*) 14 *H.* 6. 5. *a.* by *Paſton* and againſt the Opinion of *Herle*, 4 *E.* 3. *Executor* 98. *obiter*. And for as much as it is to be tried by Jury, and not by the Certificate of the Ordinary, the Will or the Adminiſtration need not be (*g*) ſhewed to enable the Plaintiff to his Action, proved or granted by the Ordinary himſelf, as in the Caſe of Excommengement, which is meerly in the Spiritualty, and originally belongs to the Juriſdiction of the Ordinary; but if the Will is proved, or Adminiſtration granted by the Official or Commiſſary of the Ordinary, or in ſome Caſes by the Archdeacon, or other inferior Judges Eccleſiaſtical who have lawful Authority, in ſuch Caſe, it is good and ſufficient in Law; and altho' the Statute of 31 *E.* 3. ſays, The Ordinary ſhall make Deputies, they are Ordinaries as to this Purpoſe within the ſame Act; and therewith agree (*h*) 11 *H.* 4. 64. *a.* 12 *E.* 4. 15. *b.* 7 *E.* 4. 14. *a.* 20 *H.* 6. 1. *a.* 3 *E.* 3. *Itin' North'* Tit' *Teſtament* 5. And ſo you have the Reaſons and Cauſes of the Judgment in the principal Caſe, and of many Judgments and Reſolutions before this Time in the ſame Point, with an anſwer to all the Objections made to the contrary, which I have done for 4 Reaſons: 1. That it ſhould be manifeſt that the Ordinaries

(*a*) Br. Monſtrans, &c. 125.

(*b*) Fitz. Exec. 17. Br. Record 28. Br. Teſtam. 4.

(*c*) Dyer 294. pl. 7.

(*d*) Ant. 31. a. Br. Averm. 48. Br. Eſtop. 36. Plow. 282 a. Fitz. Eſtop. 9.

(*e*) Doct. pl. 179.

(*f*) Fitz. Variance 10.

(*g*) 1 Sid. 98, 249. Hob. 38, 233. Cr. Jac. 299, 409, 412. 3 Buſtr. 223. Cr. El. 551, 592. 2 Sand. 402. 16 & 17 Car. 2. c. 8. 22 & 23 Car. 2. c. 4.

(*h*) Fitz. Adminiſtrator 12. Br. Adminiſtrator 18.

(againſt all Objections made by them who impugn their Authority) have lawful Juriſdiction to prove Wills, and to grant Adminiſtrations. 2. That they have their Juriſdiction derived in theſe Caſes from the Crown of *England*. 3. To reconcile all the Books and Authorities in the Law: And 4. To ſatisfy the ſaid Doubts and Queſtions clearly by our Books, Authorities of Law, and Judicial Records.

[*But Note*; *Wills may be proved, i. e. Recorded in any of the Courts of Common Law at* Weſtminſter, *and ſo likewiſe in the Courts of Equity, as the Chancery or Exchequer*; *ſo alſo in the Chamber of the City of* London, *and divers other Cities and Towns*; *and many Lordſhips and Manors have an original Right of proving Wills, &c.* (*Vide poſt.* 43 *a.* 48 *b.*) *And upon the whole it appears clearly, that the Claim and Practice of the Spiritual Courts in this Particular, was originally* a meer Uſurpation. *See Mr.* Selden's *Treatiſes of the* Original Juriſdiction of Teſtaments, and of Adminiſtration, *&c.*]

The

The Earl of Shrewsbury's *Caſe.*

Trin. 7 Jac. 1. *Rot.* 2612.

In the Common Pleas.

Brownlow,
Nott. ſſ. ROBERT *Spencer*, late of *Maunsfield* in the County aforeſ. *Eſq*; and *Thomas Woodward*, late of *Maunsfield* in the County aforeſ. *Gent.* were attached to anſwer to *Roger* Earl of *Rutland*, of a Plea; wherefore, whereas, the Lady *Elizabeth* late Queen of *England*, the 14th Day of *July* in the 42d Year of her Reign, at *Weſtm.* in the County of *Middleſex*, by her Letters Patents, ſealed with her Great Seal of *England*, had given and granted to the ſaid Earl from the Time of the full Age of the ſaid Earl of 21 Years, to the Term, and for and during the Term of the natural Life of the ſaid Earl, the Office of Steward of the Lordſhips or Manors of her, the late Queen, of *Maunsfield* in the County aforeſaid, and *Bolſover* and *Horſeley* in the County of *Derby*, with the Wages, Fees, *&c.* to the ſaid Office anciently due and accuſtomed, to have, and yearly to receive the ſaid Wages, Fees, *&c.* during the Term aforeſ. of the Iſſues, Profits, Farms, and Revenues of the aforeſ. Lordſhips or Manors, by the Hands of the Farmers, Receivers, or any other Occupiers thereof for the Time being, at the Feaſts of St. *Michael* the Archangel

and *Easter*, by equal Portions, together with all other Profits, Rights, Commodities, Jurisdictions, Privileges, Preheminences, and Emoluments to the said Offices arising, or in any ways belonging. And whereas the said Earl before the making of the said Letters Patent, that is to say, the 19th Day of *November* in the 42d Year of the Reign of the aforesaid late Queen, had attained unto his full Age of 21 Years, and by Virtue of the Letters Patent areforesaid, was seised of the aforesaid Office of Steward, and of the aforesaid Manor of *Maunsfield* as of Freehold, for the Term of his life; and the same Office from the aforesaid 14th Day of *June* in the 42*d* Year of the said Lady the Queen aforesaid for one whole Year then next after, well and faithfully had executed, and the Wages, Fees, and Profits to the aforesaid Office of Steward of the aforesaid Manor of *Maunsfield*, of old due and accustomed by that Time had had and received, the aforesaid *Robert* and *Thomas*, intending manifoldly to molest him the said Earl, and him the said Earl greatly to disturb from the Execution of the aforesaid Office of Steward of the aforesaid Manor of *Maunsfield*, and him the said Earl of the Wages, Fees, and Profits, which by Reason of the Execution of the said Office, which he could and ought of Right to have and receive, wholly to frustrate and hinder, of their own Wrong, without any Right or lawful Authority, without the leave of the said Earl, the 16th Day of *February* in the 44th Year of the Reign of the said late Queen at *Maunsfield* aforesaid, the aforesaid Office of Steward of the aforesaid Manor of *Maunsfield* aforesaid exercised, and from thence hitherto do exercise and occupy, and all and singular the Wages, Fees, Commodities, and Profits to the said Office due, and by Reason of the exercising of the Office aforesaid, within the Manor aforesaid, of right belonging, to their own proper Use had and received, and the said Earl to exercise the said Office within the Manor aforesaid, and the Wages, Fees, Commodities and Profits, to the said Office of right belonging, to have and receive, with Force and Arms then and there hindered, and yet do hinder, and other Harms to him did, to the great Damage of him the said Earl, and against the Peace of the said late Queen, and also against the Peace of the said Lord the now K. *&c.* And whereupon the said Earl by *John Muscot* his Attorn. complaineth, for that, whereas the aforesaid late Queen, the 4th Day of *June* in the 42d Year of the Reign abovesaid, at *Westminster* aforesaid, by her aforesaid Letters Patents, which the said Earl under the great Seal of her the said late Queen of *England* sealed, here in Court bringeth, whose Date is the same Day

Day and Year, had given and granted unto the ſaid Earl, from the Time of the full Age of the ſaid Earl of 21 Years, to the Term, and for and during the whole Term of the natural Life of him the ſaid Earl, the aforeſaid Offices of Steward of the aforeſaid Lordſhips or Manors of the aforeſaid late Queen of *Maunsfield*, *Bolſover* and *Horſley*, with the Wages and Fees to the ſaid Offices of old due and accuſtomed, to have and yearly to receive the ſaid Wages during the Term aforeſaid, of the Iſſues, Profits, Farms and Revenues of the ſaid Lordſhips or Manors, by the Hand of the Farmers, Receivers, or other Occupiers of the ſame for the Time being, at the aforeſaid Feaſts of Saint *Michael* the Arch-Angel, and *Eaſter*, by equal Portions, together with all other Profits, Rights, Commodities, Juriſdictions, Privileges, Preheminences and Emoluments to the ſaid Offices belonging, or any ways appertaining: And whereas the ſaid Earl before the making of the aforeſaid Letters Patent, that is to ſay, the 19th Day of *November* in the 42d Year of the Reign of the aforeſaid late Queen aforeſaid, had attained unto his full Age of 21 Years, and by Virtue of the Letters Patent aforeſaid, was ſeiſed of the aforeſaid Office of Steward of the aforeſaid Manor of *Maunsfield* as of his Free-hold for the Term of his Life, and that Office from the aforeſaid 14th Day of *June* in the 42d Year of the Reign of the aforeſaid late Queen aboveſaid, for one whole Year then next following, well and truly had exerciſed, and the Wages, Fees, and Profits to the aforeſaid Office of Steward of the aforeſaid Manor of *Maunsfield*, from of old due and accuſtomed, for that time had had and received, the aforeſaid *Robert* and *Thomas* endeavouring him the ſaid Earl from the exerciſing of the ſaid Office of Stew. of the aforeſaid Manor of *Maunsfield* greatly to diſturb, and the ſaid Earl of the Wages, Fees, and Profits, that is to ſay, of 100 Shillings, Yearly to be paid, for the exerciſing of the aforeſaid Office of Steward, and of the ancient Fees due for the entring of Plaints and Pleas, for Copies of Court-Rolls, for Replevins, for proving of Wills, for granting of Adminiſtrations of all Perſons whatſoever, dying within the aforeſaid Manor of *Maunsfield*, for the Entring of Surrenders, and Admiſſion of all Tenants whatſoever of the aforeſaid Manor of *Maunsfield*, for the Entry of the Fealty of all Tenants of the ſaid Manor of *Maunsfield*, which of right he ought or might have and receive, utterly to fruſtrate and hinder of his own wrong, without any right or lawful Authority, without the Leave of him the ſaid Earl, the aforeſaid 16th Day of *Feb.* in the 42d Year of the

Reign of the ſaid late Q. aboveſaid, at *Maunsfield* aforeſ. the aforeſ. Office of Steward of the ſaid Manor of *Maunſfield* exerciſed, and from thence hitherto do exerciſe and enjoy, and all and ſingular Wages, Fees, Commodities, Profits, to the ſaid Office due, and by reaſon of the exerciſing of the ſaid Office, within the Manor of *Maunsfield* aforeſ. of Right belonging, to their own Uſe had and took, and the ſaid Earl to exerciſe the ſaid Office within the aforeſ. Manor of *Maunsfield*, and the Wages, Fees, and Profits to the ſaid Office of Right belonging, and from the whole Time whereof the Memory of Man is not to the contrary, to have and take with Force and Arms, then and there hindred, and as yet doth hinder, and other Harms to him, &c. to the great Damage, &c. and againſt the Peace, &c. and whereupon he ſaith that he is the worſe, and hath Damage to the Value of 100 *l.* and thereof bringeth Suit, &c. And the aforeſ. *Robert* and *Thomas*, by *Will. Cragg* their Attorney, come and defend the Force and Injury when, &c. and ſay that they are not guilty of the Treſpaſs aforeſ. as the aforeſ. Earl above againſt them complaineth, and of this put themſelves upon the Country, and the aforeſ. Earl likewiſe: Therefore it is commanded to the Sheriff, that he cauſe to come here from the Day of the *Holy Trinity* in three Weeks, twelve, &c. by whom, &c. and who neither, &c. to recognize, &c. becauſe as well, &c. Afterwards the Day and Place within contained, before *Peter Warberton*, one of the Juſtices of the Lord the King of the Bench, and *Tho. Foſter*, another of the Juſt. of the ſaid Lord the King of the Bench, Juſtices of the ſaid Lord the K. to Aſſiſes, in the County of *Nottingham*, to be taken by form of the Stat. aſſigned, &c. come as well the within named *Roger* Earl of *Rutland*, as the within named *Rob. Spencer* and *Tho. Woodward* by their Attornies within contained. And the Jurors of the Jury whereof within is made mention being called, ſome of them, that is to ſay, *Edw. Bould* of *Halloughton* Eſq; *Edw. Coppinger* of *Farnefield* Eſq; *George Hutchinſon* of *Basford* Gent. *Fran. Hollingworth* of *Stapleford* Gent. *Will. Greſley* of the ſame, *Nicholas Hamond* of *Lounde* Gent. *Anthony Whitwell* of *Weyſton* Gent. *John Sturtevant* of *Calverton* Gent. *Rich. Griggs* of *Gringly* upon the Hill, and *John Seywell* of *Normanton* near *Plumtree* come and are ſworn Jurors of the Jury aforeſ. and becauſe the reſt of the Jurors of that Jury did not appear, therefore others of the Standers by, choſen by the Sheriff of the County aforeſ. at the Requeſt of *Roger* Earl of *Rutland*, and by the command of the Juſtices aforeſaid, of new are added, whoſe Names are filed to the Panel within written, according to the Form of the Stat. in ſuch Caſe made and provided, and the Jurors of new added, that is to ſay, *J. Hutton* and *Rich. Templeman* likewiſe come, who to ſay the Truth of the (Matters) within contained, with the other Jurors aforeſ. firſt impanelled,

panelled, choſen, tried and ſworn, ſay upon their Oath, That the Lady *Eliz.* late Queen of *Engl.* was ſeiſed in her Demeſne as of Fee, in right of her Crown of *Engl.* of and in the Manor of *Maunsfield* in the County of *Nottingham*, and of and in the Manor of *Bolſover* and *Horſley* in the County of *Derby*, and ſo thereof being ſeiſed the 14th Day of *June* in the 42d Year of her Reign, by her Letters Patent, under her Great Seal of *England* ſealed, and to the Jurors aforeſaid ſhewed in Evidence, granted to the aforeſaid Earl of *Rutland*, from the Time of the full Age of the ſaid Earl of 21 Years, to the Term, and for and during the whole Term of the natural Life of him the ſaid Earl, the Office of Steward of the Lordſhips or Manors aforeſ. with the Wages and Fees to the ſaid Office, of old due and accuſtomed, as in the ſaid Letters Patent is contained, the Tenor of which followeth in theſe Words: *Elizabeth* by the Grace of God, of *England*, *France* and *Ireland* Queen, Defender of the Faith, &c. To all to whom theſe preſent Letters ſhall come, Greeting: Know ye, that we of our ſpecial Grace, and of our certain Knowledge, and meer Motion, have given and granted, and by theſe Preſents for us, our Heirs and Succeſſors, do give and grant to our Well-beloved Couſin, *Roger* Earl of *Rutland*, the Office of Conſtable of our Caſtle of *Nottingham*, and Warder or Keeper of the Gates of the ſaid Caſtle, as alſo the Office of Steward, Keeper, Guardian, and Chief Juſtice of our Foreſt of *Sherwood*, and our Parks of *Billowe*, *Birkeland*, *Romwald*, *Owſeland*, *Folwood*, *Beskwood*, and *Clipſon*, with their Appurtenances in our County of *Nottingham*, and him the ſaid *Roger* Earl of *Rutland*, Conſtable of our Caſtle aforeſaid, and Warder or Keeper of the Gates of the ſaid Caſtle, as alſo Steward, Keeper, and Juſtice itinerate of the Foreſts and Parks aforeſ. we do make, ordain and conſtitute by theſe Preſents, giving and granting to the ſaid *Roger* Earl of *Rutland*, by the Tenor of theſe Preſents, full Power and Authority, all, and all Manner of Pleas, Quarrels, and Cauſes within the Foreſt and Parks aforeſ. or any of them ariſing, according to the Law and Cuſtom of the Foreſt to hear and determine; To have, enjoy, uſe and exerciſe the Offices aforeſ. and every of them, to the aforeſ. *Roger* Earl of *Rutland*, by him, or by his ſufficient Deputy or Deputies, from the Time of the full Age of 21 Years, of the ſame Earl, to the Term, and for and during the whole Term of the natural Life of the ſaid *Roger* Earl of *Rutland*, together with Power in the ſaid Offices to make and appoint all Officers of old due and accuſtomed, and for the exerciſing and occupation of the Office aforeſ. we give and grant by theſe Preſents to the aforeſ. *Roger* Earl of *Rutland*, the Wages and Fee of 40 Marks by the Year, from the Time of the full Age of 21 Years of the ſaid Earl, to the Term, and for and during the whole natural Life of the ſaid Earl of *Rutland*; as alſo an Annuity or yearly Rent of 9*l.* from the Time of the full Age of the ſaid Earl, to the Term, and for and during the whole Term of the natural Life of the ſame Earl of *Rutland*, for the Wages or Stipends of 9 Foreſters, aſſigned by him the ſaid Earl, to keep the Foreſt aforeſ. to be taken and yearly to be received, the ſaid Wages and Fee of 40 Marks, from the Treaſury of us, our Heirs and Succeſſors, at the Receipt of our Exchq. at *Weſtmin.* iſſuing by the Hands of our Treaſurer or Chamberlains, Verdict. Letters Patent.

or any other Hands for the Time being, at the Feaſt of St. *Michael* the *Archangel* and *Eaſter*, by even Portions; and alſo the ſaid Annuity or yearly Rent of 9 *l.* for the Wages or Stipend of the aforeſ. *Roger* Earl of *Rutland*, from the Time of the full Age of 21 Years of the ſaid Earl, to the Term, and for and during the whole Term of the natural Life of the ſame Earl of *Rutland*, from the Treaſury of us, our Heirs and Succeſſors, at the Receipt of our ſaid Excheq. iſſuing, by the Hands of our Treaſurer and Chamberlains, or any of them for the Time being, or from our Meadows near our Caſtle of *Nottington* aforeſ. called *the King's Meadows*, and of the Profits of Pannage and Herbage of our Park of *Beskwood*, as alſo of all the Rents and Profits of the Foreſt aforeſ. coming or growing, by the Hands of the Bailiffs, Keepers, Farmers, Receivers, or other Occupiers of the ſaid Meadows, out of the Rents and Profits aforeſ. or any of them for the Time being, at the Feaſts aforeſ. by equal Portions; we alſo give, and for us, our Heirs and Succeſſors, we grant to the ſaid *Roger* Earl of *Rutland*, from the Time of the full Age of 21 Years of the ſame Earl, to the Term, and for and during the whole Term of the natural Life of the ſame *Roger* Earl of *Rutland*, the Office of Steward of our Lordſhips or Manors of *Maunſfield*, *Bolſover* and *Horſeley*, with the Wages and Fees to the ſaid Offices, of old due and accuſtomed to be taken, To have and yearly to take the ſaid Wages during the Term aforeſ. of the Iſſues, Profits, Farms and Revenues of the ſaid our Lordſhips, or Manors of *Maunsfield*, *Bolſover* and *Horſley* aforeſ. or any of them, by the Hands of the Farmers, Receivers, or other Occupiers of the ſame, or any of them for the Time being, at the ſaid Feaſts of St. *Michael* the Archangel and *Eaſter*, by equal Portion, together with all other Profits, Rights, Commodities, Juriſdictions, Privileges, Preheminences, and Emoluments, to all and ſingular the ſaid Offices, with other the Premiſſes or any of them coming, or any ways belonging, and as fully, freely and wholly, and in as ample Manner and Form as *Tho. Manners* Knt. or *John Manners* Eſq; or *John* late Earl of *Rutland*, or before him *Edward* late Earl of *Rutland* deceaſed, or before them *Thomas* and *Henry*, late Earls of *Rutland* deceaſed, *Anthony Brown*, or *Richard Southwell* Knights, deceaſed, or any other, or other Officer or Officers aforeſ. or any of them, before this Time occupied, had and received, or ought to have had and received, in and for the ſame or any of them. And moreover, of our further Grace, certain Knowledge, and meer Motion, we have given and granted, and by theſe Preſents for us, our Heirs and Succeſſors, we give and grant to the aforeſ. *Reg.* E. of *Rutland*, the Office of Keeper of our Park of *Nottingham*, with all and ſingular Wages, Fees, Profits, Commodities, and Emoluments whatſoever, to the Office aforeſ. due and accuſtomed, or belonging, in as ample Manner and Form, as the aforeſaid

Tho.

Tho. Manners Knt. or *John Manners*, Eſq; or the aforeſ. *John* or *Edward*, late Earls of *Rutland* now deceaſed, or before them one *Rich. Manners*, or *Fran. Leak* Knt. now deceaſed, or any other or others, Officer or Officers aforeſ. exerciſed, had and took, To have, uſe and exerciſe the Office aforeſ. to the ſaid *Roger* Earl of *Rutland*, by him, or by his ſufficient Deputy or Deputies, from the Time of the full Age of 21 Years of the ſame Earl, to the Term, and for and during the whole Term of the natural Life of the ſaid *Roger* Earl of *Rutland*, together with the Wages, Fees, Profits, Commodities, Advantages and Emoluments whatſoever, to the ſaid Office of old due and accuſtomed, or belonging, or by reaſon thereof by any Perſon whatſoever, before taken and had, by the Hands of the Receivers, Farmers, Bailiffs, Stewards, Occupiers, or our Officers, for the Time being, of the Iſſues, Revenues and Profits of the ſame, at the Feaſts of *Eaſter* and St. *Michael* the Archangel, by equal Portions to be paid; which Offices and Fees, and all and ſingular the Premiſſes above by theſe Preſents, given and granted by our Letters Patents under our Great Seal of *Engl.* made, bearing Date at *Weſtm.* the 23d Day of *July* in the 23d Year of our Reign, to one *John Manners* Eſq; during the Minority of the aforeſ. *Roger* Earl of *Rutland*, lately were given and granted; which *Roger* Earl of *Rutland* is now of full Age, as we have certain Knowledge; willing, and alſo firmly enjoining and commanding by theſe Preſents to all and ſingular our Officers, Miniſters and Subjects, as well within Liberties as without, by the Tenor of theſe Preſents, That to the ſaid *Roger* Earl of *Rutland*, and to his Deputy or Deputies in all the Premiſſes to be done and executed, they be aiding and aſſiſting, and adviſing, as it ought to be, notwithſtanding that expreſs Mention of the true yearly Value, or of the Certainty of the Premiſſes, or any of them, or of other Gifts or Grants by us, or by any of our Progenitors, to the aforeſ. *Roger* Earl of *Rutland*, before this Time made, are not in being, or any other Stat. Act, Ordinance, Proviſion, or Reſtraint to the contrary thereof before this had, made, done, ordained, or provided, or any other Thing, Cauſe or Matter whatſoever, in any wiſe notwithſtanding. In witneſs whereof we have cauſed theſe our Letters to be made Patent. Witneſs my ſelf at *Weſtm.* the 14th Day of *June* in the 42d Year of our Reign. And that the ſaid *Roger* Earl of *Rutland*, before the making of the ſaid Letters Patent, that is to ſay, the 10th Day of *Novemb.* in the 40th Year of the Reign of the aforeſ. late Q. came unto his full Age of 21 Years. By Virtue of which Letters Patent aforeſ. he was ſeiſed of the aforeſ. Office of Steward of the Manor of *Maunsfield* aforeſ. in the Declaration above ſpecified, as of Freehold for the Term of his Life; and that the aforeſ. *Roger* Earl of *Rutland*, at the Time of the making of the ſaid Letters Patent, did exerciſe the Office of Steward of the aforeſ. Manor of *Maunsfield*, in

the Declaration aforeſ. mentioned, by his Deputies, and not by himſelf in his own Perſon. And that afterwards, that is to ſay, the 17th Day of *Decemb.* in the 44th Year of the Reign of the late Queen *Eliz.* the ſaid late Lady the Q. of the ſaid Manor of *Maunsfield*, ſo as before is ſaid being ſeiſed, by her Letters Patent under the Great Seal of *Engl.* ſealed, bearing Date the ſame Day and Year, and to the Jurors aforeſ. in Evidence ſhewed, had granted the aforeſaid Manor of *Maunsfield*, with the Appurtenances, amongſt other Things, to *Will. Hamond* and *Ralph Cotterell*; To have and to hold the aforeſ. Manor of *Maunsfield*, with the Appurt. to the aforeſ. *Will. Hamond* and *Ralph Cotterell*, their Heirs and Aſſigns for ever. By Virtue of which the aforeſ. *William Hamond* and *Ralph Cotterel*, into the aforeſaid Manor of *Maunsfield*, with the Appurtenances, entred and were thereof ſeiſed in their Demeſne as of Fee; and that the aforeſ. *Will. Hamond* and *Ralph Cotterell*, ſo thereof being ſeiſed, afterwards, that is to ſay, the 23d Day of *Jan.* in the 44th Year of the Reign of the Lady *Eliz.* late Queen of *Engl.* aboveſ. by their certain Indenture, bearing Date the ſame Day and Year; and afterwards, that is to ſay, the 27th Day of the ſame Month of *Jan.* in the 44th Year aforeſ. before the ſaid Lady the Q. in her Chancery of Record inrolled, for and in Conſideration of 10*s.* to the ſaid *William* and *Ralph*, by the Right Honourable *Gilbert* Earl of *Shrewsbury*, and *Mary* his Wife, paid, granted, aliened, bargained and ſold the aforeſ. Manor of *Maunsfield*, with the Appurtenances, to the aforeſ. Earl of *Shrewsbury* and *Mary* his Wife; To have and to hold the ſaid Manor, with the Appurtenances, to the aforeſ. Earl of *Shrewsbury*, and Counteſs, and to their Heirs and Aſſigns for ever. By Virtue of which, as alſo by force of an Act in Parliament of the Lord *Henry* late K. of *Engl.* the 8th, in the 27th Year of his Reign holden, made, the aforeſ. Earl of *Shrewsbury* and Counteſs were of the aforeſ. Manor of *Maunsfield*, with their Appurtenances, ſeiſed in their Demeſne as of Fee; and the Jurors further ſay upon their Oath aforeſ. That the aforeſ. Earl of *Shrewsbury* and Counteſs, ſo as before is ſaid, being ſeiſed, afterwards, that is to ſay, the 16th Day of *Feb.* in the 44th Year of the Reign of the ſaid late Q. in the Declaration written ſpecified, one *Simon Stern*, then being Deputy of the aforeſ. Earl of *Rutland*, for the exerciſing the ſaid Office of Steward of the aforeſ. Manor of *Maunsfield*, came to the Town of *Maunsfield*, to the uſual Place there, where the Court of the Manor of *Maunsfield* aforeſ. was commonly holden and kept, to keep the Court Baron of the ſaid Manor of *Maunsfield* aforeſ. And the aforeſ. *Tho. Woodward* then came thither to keep the Court of the ſaid Manor, as Steward for the aforeſ. *Gilbert* Earl of *Shrewsbury*, and that the aforeſ. *Tho. Woodward*, as Steward of the aforeſ. Earl of *Shrewsbury*, and the aforeſ. *S. Stern*,

as

as Deputy of the aforeſaid Earl of *Rutland*, to the Place aforeſaid, both together came; and the ſaid *Simon Sterne*, as Deputy of the ſaid Earl of *Rutland*, commanded the Bailiff of the ſame Manor to make Proclamation for the holding of the Court Baron of the ſaid Manor, by him the ſaid *Simon Sterne*, as Deputy of the aforeſaid Earl of *Rutland*, then to be holden; and the aforeſaid *Tho. Woodward*, as Steward of the aforeſaid Earl of *Shrewsbury*, likewiſe commanded the Bailiff of that Manor, that he make Proclamation for the holding of the Court Baron of the Manor aforeſaid, by him the ſaid *Thomas Woodward*, as Steward of the aforeſaid Earl of *Shrewsbury*; but no Court then was holden, but by the ſaid *Thomas Woodward* it was then adjourned; and from thence until the bringing of the aforeſaid original Writ, the aforeſaid *Thomas Woodward*, as Steward of the aforeſaid *Gilbert* Earl of *Shrewsbury*, kept the Courts of the Manor aforeſaid, and always from thence he the ſaid *Thomas Woodward* and the aforeſaid *Robert Spencer* received all the Fees belonging to the Steward there, as they became due; and if upon the whole Matter aforeſaid, by the Jurors aforeſaid, in Form aforeſaid found, it ſhall ſeem to the Court here, that the aforeſaid *Robert Spencer* and *Thomas Woodward* are guilty of the Treſpaſs within written; then the Jurors ſay upon their Oath aforeſaid, That the aforeſaid *Robert Spencer* and *Thomas Woodward* are guilty of the Treſpaſs within written, as the ſaid *Roger* Earl of *Rutland* within againſt them complaineth; and then they aſſeſs the Damages of the ſaid *Roger* Earl of *Rutland* by Occaſion of the Treſpaſs within written, above his Coſts and Charges by him about his ſuit in this Behalf expended, to forty Pounds, and for theſe his Coſt and Charges to twelve Pence; and if upon the whole Matter aforeſaid, by the Jurors aforeſaid, in Form aforeſaid found, It ſhall ſeem to the Court here, that the aforeſaid *Robert Spencer* and *Thomas Woodward* are not guilty of the Treſpaſs within written, then the Jurors ſay upon their Oath aforeſaid, That the aforeſaid *Robert Spencer* and *Thomas Woodward* are not guilty of the Treſpaſs within written, as the ſaid *Robert* and *Thomas* within have alledged: And becauſe, &c.

The

The Earl of Shrewsbury's *Caſe.*

Trin. 8 Jacobi. *in C. B.*

Yelv. 208. 4 Leon. 243. 2 Brownl. 380. The 1 Point. 2 Rol. 201.

AND upon the ſeveral Parts of this Record, the Defendant's Counſel moved many Exceptions to every Part of it. 1. Againſt the Patent and the Validity of the Grant *ab initio*; 2. Admitting the Grant, that the Office is forfeited; 3. Againſt the Writ and Declaration; 4. Againſt the *Giſt* of the Action; 5. Againſt the Verdict. As to the Firſt it was ſaid, That the Grant was utterly void for 3 Reaſons: 1. Becauſe the Grant is of the Office *Seneſchalli Dominiorum ſive Maneriorum noſtrorum de Maunsfield, Bolſover, & Horſley*, and no (*a*) County mentioned where they lie, and ſo in the King's Caſe incertain and void; for it was ſaid, It may be, and ſo the Truth is, That the King has divers Manors of the ſame Name in ſeveral Counties, and of ſeveral Values, and Iſſue can't be taken what Manor the King intended to grant, for his Intent ought to appear in his Grant, and not by collateral Averment: And ſo it appears in 21 *E.* 4. 48. *a. b.* the King's Patents ought to extend certainly to the Thing of which the Patentees will have Advantage. 2 *R.* 3. 7. *a.* If the King grants to me that I ſhall not be (*b*) Sheriff, without ſhewing of what County, it is void for the Incertainty, *quia Conceſſio per Regem oportet fieri de certitudine:* But if the Grant was, *quod non erit Vicecomes alicujus Comitat'*, there ſuch Grant is good, as it is there held. And in Acts of Parliament of Confirmation of Letters Patent, the uſual Purview is, that the Letters Patent ſhall be effectual, notwithſtanding the *Miſnaming*

(*a*) Doctrin. pl. 189, 191.

(*b*) Br. Patent 92. 1 Salk. 168.

or

or not true naming of the Counties where the Honours, Manors, &c. *lien or been:* Which proves (as 'twas urged) that if the County is omitted, the Grant is void. To which it was anſwered and reſolved *per totam Curiam*, That the ſaid Grant was certain enough altho' the (*a*) County was omitted: And many ancient Grants are without mentioning any County; and God forbid that all of them ſhould be now adjudged void. For *Maneria de M. B. & H.* import ſufficient Certainty, and ſuch Certainty of Name and Quality, that a Viſne (which requires Certainty) may come out of it. If the (*b*) King by his Letters Patent grants to another all Manors and Advowſons which were to the Prior of *A.* being a Prior Alien, or to *J. S.* who was attainted, *&c.* it is held in 30 *H.* 6. 20. *b.* 21. *a.* that the Grant is good, and yet it is not mentioned in what County the Manors, *&c.* or the Priory was, or in what County, the Manors, *&c.* were whereof *J. S.* was ſeiſed the Day of his Attainder; and the Reaſon is, *Quod (c) id certum eſt quod certum reddi poteſt, ſed id magis certum eſt quod de ſemet ipſo eſt certum:* And in this Caſe the Manors of *M. B.* and *H.* have more certainty in them than the ſaid general Grants. So if the K. grants to an Abbot and his Succeſſors, that the Monks during the Vacation ſhall have all the Temporalties of the Abbey, it is a good Grant without mentioning any County, as it is adjudged in 39 *E.* 3. 21. *a. b.* & (*d*) *F. N. B.* 33. *T.* And in 23 *E.* 3. 21. *b.* where the Caſe was, That a Barony eſcheated to the King, and the King granted to the (*e*) Queen all the Poſſeſſions of the Barony, till *John a Gaunt* could govern himſelf, and adjudged a good Grant, without mentioning in what County the Barony lay; and if the King has divers Manors of one and the ſame Name in divers Counties, yet there are many Clauſes in the Letters Patent themſelves to deſcribe what Manor the King intended to paſs, to diſtinguiſh it from the other, *ſ.* either by the Recital, or Reference in whoſe Tenure or Occupation it was, or by the Value of it, or of whoſe Poſſeſſion it was, or by the Clauſe that the Patentee ſhall have and enjoy it in ſuch ample Manner and Form as *J. S. &c.* or any other Owner of the ſame Manor had, or ſuch like, or by the Particular. But in (*f*) Pleading it ought to be alledged in what County the Manors lie (as in the Caſe at Bar the Pl. did): And if the other Party had pleaded *Non conceſſit*, upon the Trial of the Iſſue the Circumſtances aforeſ. might be given in Evidence, to prove what Manor was granted: But if the other Party had demanded Oyer of the Letters Patent, and had demurred in Law, it ſhould be adjudged againſt him, for it is Matter in Fact what Manor ſhall paſs, to be proved in Evidence, as is aforeſaid. And the Acts of Confirmations do not extend where the County is omitted, but where the County is miſnamed,

(*a*) Doct. pl. 189, 191.

(*b*) Br. Patent 87.

(*c*) Co. Lit. 45. b. 96. a. 142. a. 4 Co. 66. b. 2 Brownl. 336. Antea 30. a. 4 Co. 5. a. Lane 51. Hetl. 98.

(*d*) F. N. B. 33. V.

(*e*) Co. Lit. 3. a. 133. a. 4 Co. 23. b. Seld. Tit. of Honour 86. 20 E. 3. Non-ability 9. Seld. Epinom. 11. Epiſt. ad 6 Rep. 3. Plowd. 231. a.

(*f*) Doctrin. pl. 33, 87.

or not truly named. And alſo for avoiding of all Queſtions, divers Imperfections are ſaved by the Acts of Confirmations, which are not of Force to avoid the Grant.

2. It was objected againſt the Grant, that the Grant was, *a tempore plenæ ætat' 21. annorum ejuſd' comitis, pro & durante toto termino vitæ naturalis dicti Rogeri comitis Rutl' offic' Seneſchal' Dominiorum ſive Maner' noſtrorum de M. B. & H. cum vadiis & feod' eiſd' offic' ab antiquo debitis & conſuet' capiend'*: And therein the K. was deceived, for he can't grant the Office from the Day which was paſt before. To which it was anſwered, and reſolved by the Court, that the Intent of the Grant was, that the Patentee ſhould have the Fees from the Time of the Accompliſhment of his full Age; but without Queſtion, altho' the King can't grant the Office from a Day before, yet it ſhall be (*a*) good for the Life of the Patentee to begin by the Grant, and void for the Time paſt.

(*a*) Ley 73.

3. It was objected, 1. That by no Clauſe expreſt in the Patent the Patentee can make a (*b*) Deputy. 2. That by Law the Patentee without ſpecial Words can't make a Deputy. As to the firſt, it was obſerved, That the ſaid Let. Pat. conſiſts of 3 ſeveral Grants? 1. Of the Office of Conſtable, *&c.* Steward, *& capital' Juſtic' Foreſtæ, &c.* which Grant has an *Habendum*, and Power to make Deputies. 2. Of the Office of Stewardſhip of the ſaid 3 Manors, with Limitation of the Eſtate for Life, and with a Clauſe to receive the Fees, *&c.* but no Power to make a Deputy. 3. *Ac inſuper de uberiori gratia, &c. dedimus, &c. præf. R. com' cuſtod' Parci de Nott', &c. Habend', gaudend' & exercend' offic' præd'* (written by ſuch Contraction) *per ſe, vel ſufficient' deputat' ſuum ſeu deputat' ſuos ſufficient' a tempore plenæ ætat', &c. durante vita ipſius Rogeri comitis, cum vadiis, feod', &c. eidem officio, &c. pertin', aut ratione ejuſd', &c.* And it was ſtrongly urged, that this laſt *Habendum* ſhould have Relation only to the Premiſſes of the laſt Grant. 1. Becauſe there are, as is aforeſaid 3 ſeveral Grants of 3 ſeveral diſtinct Offices; 2. Every one has a diſtinct Limitation of Eſtate; 3. Every one has a diſtinct Grant of the Fees and Profits. And altho' the laſt *Habendum* is wrote *offic' præd'*, which, as 'twas urged, may be intended *officia prædicta*, and then it refers to all the ſeveral Grants, yet it can't be ſo intended, for the 3 Reaſons before; and alſo theſe Words in the ſame Sentence, *cum vadiis, feodis, &c. eidem officio* wrote at length; *aut ratione ejuſdem*, explain the ſaid Words wrote ſhort *offic' præd'* to be in the ſingular Number, *officium prædictum*; and the (*c*) Office of the Premiſſes is to expreſs the Certainty of the Thing given, and need not limit any Eſtate, and the Office of the (*d*) *Habendum* is to limit the Certainty of the Eſtate, and need not repeat the Thing

(*b*) Bridgm 31. Poſtea 48. b. Q. Carthew 353.

(*c*) 2 Rol. 65. Co. Lit. 6. a. 2 Co. 55. a. 10 Co. 107. b. Plow. 196. b.

(*d*) 2 Rol. 65. Co. Lit. 6. a. 2 Co. 55. a. Plow. 196. b.

Thing given again, and therewith agrees *Wroteſly* and *Adam's Caſe*, *Plow. Com.* 196. *b.* So in the Caſe at Bar the *Habend'* ſhall be, by Conſtruction of Law, referred to its proper Premiſſes; and of that Opinion was the whole Court. *Nota* Reader, for Abbreviations and incongruous (*a*) Writing in Grants, theſe Rules, *Falſa orthographia non vitiat conceſſionem*; Alſo, *falſa* (*b*) *Grammatica non vitiat conceſſionem*: *Item*, *ille numerus & ſenſus abbreviationum accipiendus eſt ut conceſſio non ſit inanis.* And therefore if the K. grants *tot' ill' maner' de* D. & C. if it is but one Manor in truth, then theſe Abbreviat. of *tot' ill' maner'* ſhall be taken in the ſingular Number *totum illud manerium*: And if they are in Truth 2 diſtinct Manors, then theſe Abbreviat. ſhall be taken in the plur. Numb. *tota illa maneria*, or otherwiſe the Grant will be void. *Vid.* 32 *E.* 3. *Brief* 293. A *Sci. fa.* recites, That a Fine was levied *de maneriis de B. & H.* and the Concluſion was, *Quare præd' (c) manerium de B. & H. ingreſſus eſt*: and good with Averment that in Truth *B. & H.* is but one Manor. And in 10 *H.* 4. *Brief* 497. Exception was taken to the Writ, becauſe it was wrote with Abbrevation *Matil'* where it ſhould be *Matild'*, and yet good, becauſe it was uſual to write this Name ſo, *quod nota*, in a Writ which ſhall abate for falſe *Latin*, for he may purchaſe a new Writ at his Pleaſure, but not a new Grant. *Vide* 17 *El. Dy.* 342. The 4 firſt Letters in the Name and Stile of K. *H.* 7. (*d*) *H. R. A. F.* were omitted in his Lett. Patent made to *Simon Digby*, yet adjudged a good Grant. And 38 *H.* 6. 33. a Declaration in which it was alledged that *W. T. reſignavit, &c. in manus J. Epiſcopi & loci illius Ordinarii*, and Exception was taken, becauſe it was not *in manus Johannis Epiſcopi*, for *litera J. nihil ſignificat*, and yet the Declaration adjudged good. And in 4 (*e*) *H.* 6. 16. *b.* between the D. of *York* and the E. of *Warw.* the Writ was *Henr' Dei gratia Rex Angl'*, *Rex (Dux) Hiber'*, where it ſhould be *Dominus*, and for this Incongruity the Writ ſhall abate; but a Grant by ſuch Name ſhall be good enough. So in the Conuſance of a Fine, falſe *Latin* or Incongruity ſhall not hurt the Fine, as in the Caſe before, where a Fine is levied *de maneriis de B. & H.* where it is but one Manor; and 9 *E.* 3. a Warranty was in the Fine, *eidem Galfrido & uxori ſuæ*, where it ſhould be *eiſdem*, and yet good; and 24 *E.* 3. 37. *a.* the Fine was *pro* (*f*) *omnibus ſervitiis, exactionibus, & dd'is pertinente*, where it ſhould be *pertinentibus*, and therefore challenged, and notwithſtanding allowed.

(*a*) Style 302.

(*b*) 11 Co. 3. b. Co. Lit. 146. b. 6 Co. 39. 6. 10 Co. 133. a.

(*c*) 8 Co. 155. a.

(*d*) Dy. 342. pl. 53. Godb. 415. Style 302. 2 Co. 17. a.

(*e*) Br Brief 212. Br. Office del Court 6.

(*f*) Fitz. Brief 406.

2. It was Objected, That by the Law without ſpecial Words a (*g*) Steward cannot make a Deputy, becauſe it is an Office of Knowledge, Fidelity, and Diſcretion;

(*g*) Co. Lit. 234. a. b. Lit. Sect. 379.

cretion; and therefore, *Fleta, lib. 2. cap.* 27. deſcribes what Perſon a Steward ought to be, (*a*) *Provideat tunc ſibi Dominus de Seneſcallo circumſpecto & fideli, viro provido, diſcreto & gratioſo, humili & pudico, & pacifico, & modeſto, qui in legibus conſuetudinibuſque Provinciæ, & officio Seneſcalciæ ſe cognoſcat, & jura domini ſui in omnibus tueri affectet, quique ſubballivos Domini in ſuis erroribus & ambiguis ſciat inſtruere, & docere, quique egenis parcere, & nec prece vel pretio velit a tramite juſtitiæ deviare, & perverſe judicare.* And therefore it was ſaid, that this Office is appropriate to the Pl. 1. To his Perſon, for it is granted to him only during his Life: 2. To his Qualities of his Mind, *ſ. Science, Fidelity*, and *Diligence*, which are ſo individually annexed to him that he can't make a Deputy, nor Aſſignee, and therewith agree Sir *Hen. Nevil's Caſe, Plow.Com.* * 384. (*b*) *Litt. lib.* 3. *cap. Condic.* 89. *Vide* 39 *H.* 6. 33. (*c*) 11 *E.* 4. 1. (*d*) 10 *E.* 4. 14. *b.* 17 *H.* 7. by *Frowick* (*e*) *Kelw.* 44. *b.* and nothing of that was denied by the Court, and yet it was reſolved and ſo adjudg'd, That the Pl. might (as this Caſe is) make a (*f*) Deputy. And it was obſerved, that this Word Steward is derived from 2 Words, *ſ.* (*g*) *Stede*, and *Ward*, and is as much as to ſay, my Place, or for me; and therefore he is commonly called a *Woodward*, who has the Cuſtody and Charge of Wood, and ſo *Hayward* of my Hedges & *ſic de ſimilibus.* And *Seneſcallus* in *Latin* has the ſame Signification, as appears in the Hiſt. of *Ingulphus* 463. *inter Conſuetudines Scaccarii*, where the Under-Sheriff, becauſe he exercifed the Place of the Sheriff himſelf, is called *Seneſchallus Vicecomitis*; and therefore a great Officer within this Realm is called, the High Steward, becauſe the King appoints him in divers Caſes to exerciſe his Place, &c. There is a great Difference betwixt a Deputy (*h*) and an Aſſignee of an Office; for an Aſſignee is a Perſon who has an Eſtate or Intereſt in the Office it ſelf, and doth all Things in his own Name, for whom his Grantor ſhall not anſwer, unleſs it is in ſpecial Caſes, but a Deputy has no Eſtate or Intereſt in the Office, but is but the Officer's Shadow, and doth all Things in the Name of the Officer himſelf, and nothing in his own Name, and for whom his Grantor ſhall (*i*) anſwer; and when an Officer has Power to make Aſſignees, he may *implicite* make Deputies, for (*k*) *cui licet quod majus eſt, non debet quod minus eſt non licere*; and by Conſequence, when an Office is granted to one and his Heirs, (*l*) thereby he may make an Aſſignee, and by Conſequence a Deputy. And in the Caſe at Bar, the principal Parts of the Office of Steward of a Manor is *intrare querelas, plac'*, Surrenders, Admittances, and Fealties, *probare teſtament'*, & *comitt' adminiſtrat' infra maner'*, &c. and the Suitors are

(*a*) Co. Lit. 61 b. Poſtea 50. a.

* Plow. 379.
(*b*) Co. Lit. 234. a. b. Lit. Sect. 379.
(*c*) Fitz. Grant de Roy 25. Br. Deputy 9. Br. Grant 108. Br. Patents 65, 66. Br. Officer 28. 2 Rol. 154. Poſtea 50. a.
(*d*) Br. Deputy 8. Br. Patents 64. Perk. Sect. 101.
(*e*) Kelw. 44. b.
(*f*) Bridg. 31. Antea 47 b. Fitzgib. 273. Lucas 288.
(*g*) Co. Lit. 61. a.
(*h*) Perk. Sect. 100.
(*i*) Cawley 148.
(*k*) 4 Co. 23. a. 5 Co. 7. 2. Cawdry's Caſe.
(*l*) Plow. 379. b.

are Judges of the Court-Baron, and the Steward for the moſt part is as Prothonotary or Regiſter to the (*a*) Suitors, &c. for which Manual labour in Writing, &c. the Steward takes ſmall Fees. Now when the Queen grants the Office of Steward of the ſaid Manors to the Plaintiff, who is an Earl, ſo that in reſpect of the Smallneſs of the Office in a baſe Court, and of the Dignity of the Perſon being an Earl, it is implied in Law for Conveniency that he may make a Deputy, for whom the Earl ought to anſwer, ſo that it can't be any Prejudice to the Queen; and his Deputy *exercebit officium laboris*, as in holding of the Court-Baron, and in entring of the Pleas, Surrenders, &c. and when need ſhall be in Caſes of Difficulty, or concerning the Profit of the Queen, the Earl *exercebit officium fiduciæ, ſcientiæ, & ingenii. Comites dicuntur a comitando, quia comitantur Regem. Bracton, lib.* 1. *cap.* 8. *Comites a comitatu, ſive a ſocietate nomen ſumpſerunt; qui etiam dici poſſunt Conſules, Reges enim tales ſibi aſſociant ad conſulendum.* And this was the moſt eminent and ſupreme Dignity from the Conqueſt, until 11 *E.* 3. when the Black Prince was created Duke of *Cornwall*, and thoſe who of ancient Times were created Earls were of the Blood Royal. And even to this Day, the King in all his Appellations ſtiles them, *per nomen Chariſſimi Conſanguinei noſtri*, and for theſe Reaſons the Law gives them high and great Privileges; and therefore their (*b*) Bodies ſhall not be arreſted for *Debt, Treſpaſs*, &c. becauſe the Law intends that they aſſiſt the King with their Counſel for the Commonwealth; and keep the Realm in Safety by their Proweſs and Valour. Alſo for the ſame Reaſon they ſhall not be put on (*c*) Juries, altho' it is for the Service of the Country. Alſo if Iſſue is taken, whether the Plaintiff or Defendant is an Earl or not, it ſhall not be tried by Jury, (*d*) but by the King's Writ. Alſo the Defendant ſhall not have Day of (*e*) Grace againſt a Lord of the Parliament, becauſe he is intended to attend the Publick: And all theſe and many other (*f*) appear in our Books, 48 *E.* 3. 30. *b. Regiſter* 179. *b. F. N. B.* 247. *c.* 48 *Aſſ. p.* 6. 22 *Aſſ. p.* 24. 32 *H.* 6. 27. 35 *H.* 6. 46. *a.* So that as when ſuch Office deſcends to an Infant, or a Man *Non compos mentis*, or Ideot, &c. they of Neceſſity ought to exerciſe it by Deputy, ſo an Earl for the Neceſſity which the Law intends, of his Attendance upon the King and the Publick, this Stewardſhip of a baſe Court ſhall be exerciſed by his Deputy; and therefore it was agreed, That if a Parkerſhip is granted to an Earl, without Words to make a Deputy, he may keep it by his Servants. And in many Caſes the Law allows

(*a*) 4 Co. 35. b. 6 Co. 11. b. 8 Co. 60. a. Godb 49. 1 Rol. 543. Cr. El. 792. Cro. Jac. 582. 4 Inſt. 266, 268. 7 E. 4. 23. a. 21 E. 4. 66. b. 1 Mod. Rep. 171. 12 H. 7. 16, 17. Co. Lit. 58.

(*b*) 6 Co. 52. b. Poſtea 60. a. 68. a. Cr. Argum. 106. 2 Leon. 174. Hob. 61. F. N. B. 427. c. Styl. 222.

(*c*) 6 Co. 53. a. 27 H. 8. 22. b. Br. Exempt. 3. Co. Lit. 156. e. F. N. B. 165. a. Moor 767. 2 Rol. 646. Dy. 314. pl. 98. Doct. & Stud. 15. a. b. 1 Jones 153. Br. Challenge 37, 209. 48 E. 3. 30. b. 48 Aſſ. pl. 6.

(*d*) 6 Co. 53. a. 12 Co. 70, 94. 95 Carthew 298, 299, &c. 2 Inſt. 50. 9 Co. 31. a. 2 Rol. 575. 24 Aſſ. pl. 24. Co. Lit. 16. b. Moor 767. 7 Co. 15. a. Calvin's Caſe. Br. Trial 119. 35 H. 6. 46. a. Fitz. Challenge 44 Br. Chall. 182.

(*e*) Co. Lit. 135. a. 27 H. 8. 22. b. Fitz. Jour 8, 12. 27 E. 3. 88. a. 42 E. 3. 31. a.

(*f*) Cr. Car. 206.

allows diverſe Acts for Conveniency in reſpect of the Dignity of the Perſon; as if Licence is given to a Duke to hunt in a Park, the Law for Conveniency gives him ſuch Attendants as are requiſite to the Dignity of his Eſtate. *Vide* (*a*) 12 *H.* 7. 25. *b.* & (*b*) 13 *H.* 7. 10. *b.* So when a Biſhop is riding, it is not convenient to his Eſtate and Degree to be forced to examine the Ability of a Clerk, but he ought to attend his convenient Leiſure, 14 *H.* 7. 21. 15 *H.* 7. 7. & 8. *a.* And of ancient Time the Earl was (*c*) *Præfectus, ſeu Præpoſitus Comitatus*, for ſo imports the *Saxon* Word, *ſ. Shire-reve, i.* the *Reve* of the Shire, which is as much as to ſay, *præpoſitus Comit'*, and had the Charge and Cuſtody of the County, and is called by the *Romans, Satrapas*, which Word they had from the *Perſians*, and was applied to thoſe who were *Præfecti Provinciæ*. And *Vicecomes eſt vicem gerens ſive vicarius Comitis*: And now the Sheriff has the whole Authority for Adminiſtration and Execution of Juſtice, which the Earl had. And now the K. by his Letters Pat. commits to the Sheriff (*d*) *Cuſtodiam Comitatus*, without expreſs Words to make a Deputy, and yet he who comes in lieu of the Earl may make one *Subvicecomes, i.* his Deputy, who in ancient Time, as appears before, was called *Seneſchall' Vicecom'*, and in the Stat. of *Weſtm.* 2. *c.* 39. he is called *Subvicecomes*, and in 11 *H.* 7. *c.* 15. he is called Shire-Clerk; and if (*e*) *Vicecomes qui gerit vicem comitis* may make a Deputy, *a fortiori* the Earl himſelf may do it; & *eo potius* in the Caſe at Bar, becauſe it concerns private Cauſes in a baſe Court. Alſo when before the Statute of *Quia Emptores terrarum* the King or other Lord, &c. have given Lands to a Knight to hold of him by Knight's Service, *ſ.* to go with his Lord (when the K. makes a Voyage Royal to ſubdue his Enemies) for 40 Days, well and conveniently array'd for the War, in this Caſe the Law had ſo much regard to the Dignity of Knighthood (which is the inferior Degree of Dignity) that he might find another able Perſon, &c. to go for him with the King to the War; and therewith agrees (*f*) 7 *E.* 3. 29. *a. b.* which two Caſes, one concerning the publick Adminiſtration and Execution of Juſtice in Time of Peace, and the other the publick Defence of the Realm in Time of War, were ſtronger Caſes than the Caſe at Bar. And it appears in the ſaid Letters Patent, that it was the Intent of the Queen, That the Earl ſhould make a Deputy by theſe Words, *Volentes & firmiter injungendo præcipientes per præſentes omnibus & ſingulis officiariis, miniſtris, & ſubditis noſtris, tam infra libertat' quam extra, tenore præſentium, quod eidem Rogero Comiti Rutland' & deputato, ſive deputatis ſuis in præmiſſis omnibus faciend' & exequend' ſint auxiliantes, aſſiſtentes, & conſulentes prout decet*: By which it appears that ſhe intended that the Earl

(*a*) Br. Treſp. 287. Br. Licence 10. (*b*) Br. Treſp. 431. (*c*) Co. Lit. 168 a. Poſtea 97. b. (*d*) Co Lit. 168. a. 4 Co. 33. a. (*e*) Co. Lit. 168. a. 4 Co. 64. 3 Caſes in Law, &c. 288, 289. (*f*) 8 Co. 105. a. Co. Lit. 70. a. Lit. Sect. 96.

Earl ſhould make a Deputy *in præmiſſis omnibus*: And her grant ought to be taken and expounded, in reſpect of the Dignity of the Perſon *ſecundum intention' ſuam.* And as to the Opinion of *Fleta*, (*a*) *ubi ſupra*, it is further ſaid, *cujus officium eſt curias tenere maner' & ſi per ſubſtitutum ſuum hoc plerunque fecerit, &c.* By which it ſeems, that then Stewards of Courts might make (*b*) Deputies.

(*a*) Ant. 48. b.

(*b*) Lit. Sect. 379, Co. Lit. 234. a. b. The 2d Point.

As to the 2. Admitting that the Pl. can make a Deputy, then it was objected, That the Non-uſer thereof is a Cauſe of Forfeiture, and to prove that, 2 *H.* 7. 11. *b.* in the Caſe of the Clerk of a (*c*) Market, *&c.* was cited. To which it was anſwered and reſolved, That by Non-uſer, the Office in the Caſe at Bar can't be forfeited. And for the better Underſtanding of the true Reaſon of it, It is to be known, That there are three (*d*) Cauſes of Forfeiture or Seiſure of Offices for Matter in Fact, as for abuſing, not uſing, or refuſing. Abuſing or Miſuſing, as if the Marſhal, or other Gaoler ſuffer voluntary Eſcapes, it is a Forfeiture of their Offices, 39 *H.* 6. 32. *b.* 5 *Ma. Dy.* (*e*) 151. *Vide in* 22 *Aſſ. p.* 34. (*f*) 11 *E.* 4. 1. (*g*) 8 *H.* 4. 18. 20 *E.* 4. 5. *b.* So if a Foreſter or (*h*) Parker fell and cut Wood, unleſs for neceſſary bruſh it is a Forfeiture of their Offices; for Deſtruction of Vert is (*i*) Deſtruction of Veniſon. As to Non-uſer, (which concerns the Caſe at Bar) there is a Difference when the (*k*) Office concerns the Adminiſtration of Juſtice or the Common-wealth, and the Officer *ex officio*, or of Neceſſity ought to attend without any Demand or Requeſt; there the Non-uſer or Non-attendance in Court is a Forfeiture, as the Office of (*l*) Chamberlain in the Exchequer, Prothonotary, Clerks of the Warrants, Exigenter, (*m*) Philizer, *&c.* in the Com. Pleas, *&c.* for the Attendance of theſe and the like Officers is of Neceſſity for the Adminiſtration of Juſtice; ſo the Attendance of the Clerk of the Market is of Neceſſity for the Com.-wealth. *Vide* (*n*) 2 *H.* 7. 11. *b.* So of holding the Sher.'s Torn, 1 *Ma. Dy.* 151. (*o*) But when the Officer ought not to attend or exerciſe his Office, but on Demand or Requeſt to be made by him to whom he is Officer, there Non-uſer or Non-attendance, is no Cauſe of Forfeiture without Demand or Requeſt made; as in the Caſe at Bar, he was not bound to hold any Courts, but upon Req. made, and ſo much is implied in his Grant, *ſ.* to hold his Courts when he ſhall be required; and ſo it was adjudged in *Walton*'s Caſe in the Com. Pleas, *an'* 10 *El.* & *an'* 20 *El.* in the ſame Court in *Rand. Hurleſton's* Caſe; as if a Man grants an Annuity *pro conſilio impendendo*, he is not bound to give Counſel but upon Requeſt made, 39 *H.* 6. 22. *a. John Bruin*'s Caſe, & 22 *El. Dy.* 369. (*p*) *Plummer*'s Caſe, 41 (*q*) *E.* 3. *Brendon*'s Caſe.

(*c*) Co. Lit. 233. a. Hardres 48.

(*d*) Sawyer's Argument in Quo Warranto 15.

(*e*) Kelw. 194. a. b. 195. a. b. &c. 2 Rol. 155. Poſtea 96. b. Dy. 151. pl. 4.

(*f*) 7 Co. 34. b. 2 Rol. 155.

(*g*) 8 H. 4. 18. a.

(*h*) Co. Lit. 233. a. b. 11 Co. 98. b. Moor 9, 10, 787.

(*i*) Cr. Car. 60.

(*k*) Co. Lit. 233. a. Cr. Car. 60, 492. Poſtea 99. a. 1 Anderſ. 20. 4 Leon. 110. N. Benl. 20. O. Benl. 16.

(*l*) 2 Rol 155.

(*m*) 2 Rol. 155. Dy. 114, 115. pl. 63, 64.

(*n*) Hardr. 48.

(*o*) Supra (*e*).

(*p*) Dy. 396. pl. 53.

(*q*) 41 E. 3. 19 b.

But when the Office concerns any Man's (*r*) private, and the Officer ought *ex Officio* to attend his Office without Requeſt, there the Non-uſer or Non-attend. is no cauſe of Forf. unleſs the Non-uſer or Non-attend. is cauſe of Prejudice or Damage to him, whoſe Officer he is, in ſomething which concerns his

(*r*) Palm. 533. Co. Lit. 233. a.

Charge: As if a Parker or *Cuſtos parci* does not attend one or two Days, and within theſe Days no Prejudice or Damage happens, it is no Forfeiture; but if by Reaſon of his Abſence Perſons unknown kill any Deer, it is a Forfeiture of his Office; and therewith agrees 5 *E.* 4 6.

As to Refuſal it is to be known, That in all Caſes when an Officer is bound upon (*a*) requeſt to exerciſe his Office, if he do it not upon Requeſt, it is a Forfeiture: As if the Steward of a Manor is requeſted by the Lord to hold a Court, which he doth not, it is a Forfeiture.

(*a*) Cr. Car. 56. Co. Lit. 233. b.

The 3 Point.

Againſt the Writ and Declarat. it was objected, that they were (*b*) *vi & arm'* (where an Action on the Caſe ought to be without *vi & arm'*) for the Writ and Declarat. are, that the Defendants *eund' Comit' ad exercend' dict' Offic' infra dict' maner' de M. & vadia, feoda, commoda, & profic' eid' offic. de jure pertinent' habere & percipere vi & arm' adtunc & ibid' impediverunt, & adhuc impediunt.* And the Books in (*c*) 43 *E.* 3. 33. *a.* & 17 *E.* 4. 2. were cited, and *F. N. B.* 86. *H.* that an Action on the Caſe ſhall be without *vi & arm'*. And as to that it was reſolved by the Court, that the Writ and Declarat. were good enough. And a Difference was taken betwixt Non-feaſance, and (*d*) Miſ-feaſance, for Non-feaſance, or Negligence, ſhall never be ſaid *vi & armis*, for that would be *oppoſitum in objecto*, neither for Negligence or * Non-feaſance ſhall the Writ ſay, *contra pacem*, (*e*) 12 *H.* 4. 3. *a.* (*f*) 45 *E.* 3. 17. *b.* 43 *E.* 3. 33. *a.* But ſome Writs ſhall be *contra pacem*, which ſhall not be *vi & armis*, as 9 *H.* 6. 1. *a.* (*g*) Recaption ſhall be *contra pacem*, and againſt the Law and the Statute, but ſhall not be *vi & armis*. So in all Actions for a Thing done againſt any Stat. the Writ ſhall be *contra pacem*; *vide* 17 *E.* 3. 1. *a.* altho' it is for Non-Feaſance. But when there are 2 Cauſes of an Action on the Caſe, the one *cauſa cauſans*, * and the other *cauſa cauſata*: *Cauſa cauſans* may be alledged to be *vi & arm'*, for that is not the immediate Cauſe or Point of the Action, but *cauſa cauſata*, as in 12 *H.* 4. 3. *a.* the (*h*) putting of Dung into the River is *cauſa cauſans*, and therefore it may be *vi & armis*, but *cauſa cauſata*, *ſ.* the Point of the Action on the Caſe is the Drowning of the Pl.'s Land: So in 8 *R.* 2. *Hoſteler* (2) 7. *Regiſter* 105. *a.* the Breaking of the Inn may be alledged *vi & armis*; for *defectus cuſtodiæ* is the Point of the Action on the Caſe againſt the Hoſtler, *M.* 29 *E.* 3. 18. *b.* The Abbot of *Eveſham* brought an Action on the Caſe againſt certain Perſons, and declared that he had a Fair in *S.* with all that belong'd to a Fair, and that the Def. with Force and Arms diſturb'd the People coming to the Fair (which was *cauſa cauſans*) by which the Pl. loſt his Toll (which was *cauſa cauſata*) the Point of the Action; and the Action held maintainable. *Vide* 16 *E.* 4. 7. *a. b. F. N. B.* 89. *m.* 19 *R.* 2. Tit. Action *ſur le Caſe*, 52. So in the Caſe at Bar, the Def.'s might (*i*) *vi & armis* hinder or interrupt the Plaintiff in exerciſing the Office, and that is *cauſa cauſans*, by which he loſes his Fees, &c. and that is *cauſa*

(*b*) 2 Rol. Rep. 139, 248. Cr. Car. 325. Hob. 180.

(*c*) Fitz. Action ſur le Caſe 33.

(*d*) Cr. Car. 325, 377, 378.

* Rayn. 72.

(*e*) 2 Rol. Rep. 139, 248. Fitz. Treſp 177. Br. Action ſur le Caſe 46.

(*f*) Fitz. Acti. ſur le Caſe 34. Br. Action ſur le Caſe 20. Regiſt. 100 a.

(*g*) Fitz. Recaption 1. Br. Recapt. 1.

(*h*) Supra (*e*)

(*i*) 2 Rol. Rep. 248.

cauſata the Point of the Action, and 7 *H.* 4. 44. *b.* If an Action on the Caſe has (*a*) ſufficient Matter, altho' it has Matter impertinent alſo, yet it ſhall be maintainable. (*a*) Br. Brief 114. Br. Action ſur le Caſe 37. B. Negation, &c. 9.

Againſt the Action it was objected, That no Action on the Caſe lies, becauſe it appears by his own ſhewing, that he may have (*b*) *Aſſiſe*, *Vide* 2 *H.* 4. 11. *a. b.* 13 *H.* 7. 26. *a. b.* and many other Books. But it was anſwered and reſolved by the Court, That of Things not manurable, *hæreditamenta incorporea*, as Common, Corody, Office, Rent, *&c.* he who is ſeiſed of them is in Election to have *Aſſiſe*, and admit himſelf to be out of Poſſeſſion; as if a Man ſeiſed of a Corody certain, is diſturbed thereof by another, by which he can't take his Corody; yet he may grant it over; otherwiſe it is of Land. And therewith agrees 17 *E.* 2. (*c*) *Nuper obiit* 12. So if another takes my Rent; yet I may grant it over, and therewith agree 24 *E.* 3. 4. 15 *E.* 4. 8. 1 *E.* 5. 5. *a.* 19 *R.* 2. *Action ſur le Caſe* 51. *J. F.* brought an Action on the Caſe againſt certain Perſons, and declared, That he is Bedel of the Hundred of *H.* and ought to have of every Brewer, who ſells 3 Gallons of the beſt (*c*) Beer for 7 *d.* certain Beer; and ſays that he, and thoſe whoſe Eſtate he has in the ſame Hundred have been ſeiſed thereof: And *Hankford* took 3 Exceptions to the Declaration, 1. That he has not ſhewed how he has his Eſtate; *& non allocatur.* 2. He claims by Preſcription of every of theſe Brewers Beer by Virtue of his Office; and he has joined ſundry Brewers in his Action, where he ought to have ſeveral Actions, *& non allocatur*, for all in Covin were acceſſary. 3. He has ſhewed he was diſturbed, in which Caſe he ought to have *Aſſiſe*; *& non allocatur.* But the Reaſon of the Rule of the Book is miſtaken by the Reporter; for there the Reaſon which is given is, becauſe peradventure he has nothing in the Office but for a Time, as a Clark has nothing but the Occupation, *&c.* the Contrary of which appears in the Declaration, where he preſcribes in the ſaid Office; but the true Reaſon is, That it is in his Election, as is aforeſaid. (*b*) Cr. El. 198, 199, 466, 520, 845. Noy 37. 2 Leon. 184. 3 Leon. 13, 263. 4 Leon. 167, 168, 224. Dy 250. pl. 88. N. Benl. 224. (*c*) 1 Rol. 106. 6 Co. 61. a. See Rep. Q. A. pag. 214.

Againſt the Verdict 5 Exceptions were taken. 1. That there was no Diſturbance found, and if any Diſturbance is found, the Diſturbance alledged in the Declaration is not found: Firſt the ſaid (*d*) Words which paſſed betwixt them, was no Diſturbance nor Interruption of the Plaintiff, as in 16 *E.* 4. 10. *b. &* 11. *a. David Malpas* was bound to another, that he ſhould not interrupt him in exerciſing the Office of Parker, *&c.* and they met in *London*, and *Malpas* ſaid to the Parker, that if he would be ſo hardy to come to the ſaid Park, and uſe the Office aforeſaid, that he would beat him; and it is there held that this verbal Threatning is not The 5th Point. (*d*) 8 Co. 91 a b. 1 Rol. 430. 1 Jones 169. 1 Anderſ. 173.

any Interruption. 2. There is no Disturbance found *vi & arm'*, which is alledg'd in the Declarat. To which it was answered and resolved by the Court; that there was an expres's Disturb. found, *s.* the holding of Courts, and the Taking of Fees; for *impedire est pedem imponere, & impediment' est quo quis impeditur ut non perficiat qd' ad se pertinet*; and altho' the Disturbance with all the Circumstanc. be not found, which is alledged in the Declarat. yet if any Disturb. is found which is there alledg'd, it is sufficient, and that without Quest. is directly found. 3. The Verdict is, *Qd' quid'* Si. Sterne *adtunc exist'ens deputat' præd' Comit'* Rutland' *pro exercitio præd Officii Seneschalli præd' Maner' de M.* and it is not found that he made the said *Sterne* his Deputy by his Deed, as it ought to be, as it is agreed in 28 *H.*8. (*a*) *Deputy* 17. for this Reason the Verdict was insufficient. To which it was answered and resolved, that it is true, that he who makes a Deputy ought to make him by Writing: But when the Jury find that *S. Sterne* was his Deputy, all necessary Incidents are thereby also found; and therefore upon the Matter they have found that it was by Deed. 4. The Verdict is, *Qd'* (*b*) *accessit ad villam de M. & ad usualem locum ibid' ubi Curia Maner' de M. communiter tent' & custodit' fuit*, and it is not found that he came to any Part of the Manor, but only *ad villam de M.* and therefore it is insufficient; for the Court ought to be held either upon (*c*) Part of the Manor, or at least upon some Part of that which is holden of it, but it may well be that some Part of the Town is not within the Manor, but held of some other Manor; *& non allocatur.* 1. Because it shall be intended *prima facie* in this special Verdict, that the Manor includes the whole Town. 2. The other Words, *s. ad usualem locum ubi Cur' Maner', &c.* make in a special Verd. the Matter clear, that it shall be intended in some Place within the Manor, for such precise Form is not by Law requir'd in special (*d*) Verdicts, which are the finding of Lay People, as in Pleading, which is made by Men learned in the Law. Lastly it was objected, That the Verdict has found, that *semper abinde*, (*s.* from 16 Day of *Feb. &c.*) *iidem* Th. Woodward & Rob. Spencer *receperunt omnia feoda pertinen'* Seneschal' *ibid'*, which ought to be intended till the Finding of the Verdict, and because they have given Damages entirely for all, whereas it ought to be only for the Taking of the Fees before the Original, for this Cause the Verd. was insuffic. To which it was answ. and resolved by the Court; 1. that the Beginning of this Sentence is, and (*e*) *abinde usque impetrationem prædict' brevis original'*, *&c.* which Words in this special Verdict shall guide and limit the 2d *abinde* also. 2. The Jurors, if, *&c.* find them guilty *de transgress. infrascript'*, which was alledged in the Writ and Declaration from the 16th of *February, &c. hucusque*, which, taking all the Words together, ought to be intended *usque ad impetrationem brevis.* And afterwards in the End of this Term a Writ of Enquiry of

(*a*) Br. Deputy 17 in Fine. Fitzgib. 184.

(*b*) Hob. 56.

(*c*) Co. Lit. 58. a. 4 Co. 27. a. Owen 35.

(*d*) Cr. Jac. 64, 146. Yelv. 61. Cr. El. 167, 669. Lit. Rep. 200.

(*e*) Hard. 347.

Damages was awarded by the Court, and upon the Return thereof Judgment was given for the Plaintiff. And the Ch. Juſtice in his Argument ſaid, That in the ſaid Letters Patent, there is a general Clauſe which refers to the Grant of the ſaid Office of Steward laſt named, and the other Offices which were before granted, *ſ. una cum omnibus aliis profic', juribus, commodit', & emolument' dict' omnibus & ſingulis officiis cum cæteris præmiſſis provenient' ſeu aliquo modo ſpectant' & adeo plene & integre, & in tam amplis modo & forma, prout* Tho. Manners, *Miles, &c. aut aliquis alius, ſive aliqui alii offic' præd' vel eorum aliquis ante hæc tempora occupans ſive occupantes, habuit & percepit, habuerunt ſive perceperunt, &c.* And if in any former Patent of the ſaid Office of Stewardſhip, the Patentee had expreſs Power to make a Deputy, that then by theſe general Words *de omnibus juribus, &c. adeo plene, & integre, &c. prout aliquis, &c.* being applied to a particular Charter which has ſuch expreſs Authority, the Plaintiff may make a Deputy, and to this purpoſe 43 *E.* 3. 22. 18 *Eliz. Dyer* (*a*) 351. & *Hill.* 40 *Eliz.* (*b*) *Ameredith's* Caſe in the Exchequer were cited.

(*a*) Dy. 351. pl. 22.
(*b*) Ant. 29. b. 2 Rol. Rep 156. 1 Ventr. 409, 412. 2 Brownl. 341. Hard. 456. Palm. 81.

HICKMOT's *Caſe.*

Mich. 8 Jacobi Regis.

In Communi Banco.

IN an Action of Debt brought by *Will. Hickmot* againſt *Thom. Oxenbridge* on a Bond of 40 *l.* 1 *Jan.* 5 *Jac.* the Def. pleaded in Bar, That after the Making of the ſaid Bond, *ſc.* 10 *Julii* 1608. the Plaintiff releaſed unto him, and pleaded Part of the Releaſe, the Plaintiff demanded *Oyer* of the Releaſe, which was read to him in theſe Words, *July the* 13 *Day in anno* 1608. *It is concluded and agreed, upon the Day and Year above written, between* Wm. Hickmot *of the one Party*, and Tho. Oxenbridge *of the other Party, That upon good Conſiderations, drawing the Parties thereunto, The ſaid* Will. Hickmot *doth acknowledge himſelf fully ſatisfied and diſcharged of all Bonds, Debts or Demands whatſoever, from the Beginning of the World until this preſent Day, by the ſaid* Tho. Oxenbridge. *And that he the ſaid* Will. Hickmot *is to deliver all ſuch Bonds as he hath yet undelivered to* Tho. Oxenbridge, *except one Bond of* 40 *l. yet unforfeit, which is for the Payment of* 22 *l. wherein the ſaid* Tho. Oxenbridge, *and* Rog. Oxenbridge, *his Brother, ſtandeth bound to the ſaid* Will. Hickmot. *In Witneſs whereof, &c.* And the Plaintiff ſaid that he ought not to be barred of his Action, for he ſaid that the Bond of 40 *l.* ſo excepted, and the ſaid Bond *Cur' hic prolat'* are one and the ſame Bond, *&c.* upon which the Defendant demurred in Law. And in this Caſe three Points were reſolved. 1. That the ſaid Acknowledgment by his Deed to be ſatisfied and diſcharged of all Bonds, is in Judgment of Law a Releaſe or Diſcharge of the Bonds, for none ought to be ſatisfied but once, although the word Diſcharged is not properly ſaid of the Part of the Obligee, but of the Obligor, for the Obligor is to be diſcharged; yet when the Obligee confeſſes himſelf to be diſcharged

Winch 29.

diſcharged of all Bonds by the ſaid *Tho. Oxenbridge*, it amounts to as much as the Bonds themſelves ſhall be diſcharged: So that as well this Word Diſcharged, as this Word Satisfied, is ſufficient in Law to bar the Plaintiff of all Benefit of the ſaid Bonds; For by what Words a Debt by a Deed may be created, by the contrary Words it may be diſcharged. *Vide* (*a*) 22 *E.* 4. 22. *a.* (*b*) 8 *E.* 4. 5. *a.* 37 *H.* 6. 9. *a.* what ſhall be good Words (*c*) Obligatory: *Et bis idem exigi bona fides non patitur, & in ſatisfactionibus non permittitur amplius fieri quam ſemel factum eſt.*

2. It was reſolved, That the ſaid Exception ſhall (*d*) extend to all the Premiſſes, and not only to the Clauſe of Delivery, for 3 Reaſons; 1. Becauſe it is a Rule, *Quod* (*e*) *exceptio ſemper ultimò ponenda eſt. Vide Regiſt.* 1. *b.* 2. All the Words before make but one entire Sentence, and one depending upon the other, for it was Reaſon, when Bonds are ſatisfied and diſcharged, that they ſhould be delivered. 3. There was Reaſon, that this Bond of 40 *l.* ſhould be excepted, for it was not then due.

The 3 Point, That now it (*f*) appears by the Plaintiff's Confeſſion in his Replication, That he can't have an Action againſt the Defendant only, but ought to have brought it againſt him and *Roger Oxenbridge*, for the Bond of 40 *l.* excepted was a joint Bond; and the Plaintiff avers in his Replication, that is the Bond upon which he has conceived this Action, and therefore he has abated his own Writ. But the Court gave Day to another Term, at which Day the Plaintiff was Nonſuit.

(*a*) Fitz. Oblig. 10
Br. Oblig. 63.
Wentw. 167.
2 Rol. 146, 147.
(*b*) Fitz. Oblig. 9. Br. Oblig. 5.
(*c*) Dyer 22. pl. 139, 140. 19 R. 2. Det. 166. Kelw. 34. b. 37 H. 6. 9. a. 40 E. 3. 2. a. Fitz. Oblig. 14. Br. Oblig. 8. Strath. Oblig. 1.
2 Rol. 146, 147.
(*d*) Lit. Rep. 209, 210.
(*e*) Lit. Rep. 63.
(*f*) 1 Jones 304. 3 Co. 52. b. Hob. 14, 199. Style 354. 8 Co. 133. b.

[*Joinder of Defendants. See 6. Mod.* 158.]

BA-

BATEN's *Caſe*.

Mich. 8 Jacobi.

In Communi Banco.

See 6 Mod. 245. 1 Salk. 16, &c. Carthew 261, 454, 455.

HEnry Baten, and *Elizabeth* his Wife brought a *quod permittat* againſt *George Sampſon*, to proſtrate a Houſe in the Pariſh of St. *Clements Danes* without *Temple Bar*, *London*, which the ſaid *George* wrongfully, and without Judgment had built *ad nocumentum liberi tenementi nuper* Johannis Pleader, *& modo præd'* Henrici & Eliz. *in jure ipſius* Eliz. *&c.* And declared that the ſaid *John Pleader* was ſeiſed of a Meſſuage in the *Strand* in the ſaid Pariſh in Fee, and ſo ſeiſed the ſaid *George*, *ult' Octob. anno* 41 *Eliz.* wrongfully, and without Judgment (*a*) erected upon his Freehold a Houſe, ſo near the ſaid Meſſuage *nuper præd'* Johannis Pleader *& modo ipſorum* Henrici & Eliz. *ſic quod Orientalis pars ejuſdem domus ipſius* Georgii (*b*) *ſuperpendet*, *Anglice*, *doth jut over* the ſaid Meſſuage late of the ſaid *John Pleader*, and now of the ſaid *Henry* and *Elizabeth in latitudine* 17 Inches, and *in longitudine* 17 Feet, *ad nocumentum liberi tenementi ipſorum* Henrici & Eliz. *in eadem*, *&c.* to their Damage of 100 *l.* upon which the Defendant demurred in Law. And in this Caſe 3 Points were reſolved. 1. That it was not neceſſary to (*c*) ſhew how the Plaintiffs had the Eſtate of *John Pleader* in the ſaid Houſe to which the Nuſance is done, for ſo have always been the Forms of Actions upon the Caſe, and the Declarations upon them in ſuch Caſes: And ſo was it adjudged and affirmed in a Writ of *Error*, as appears by the Record (which agrees with this Caſe) in *Penruddock's Caſe in the 5th Part of my Reports*, *f.* 100. *b.* 2. It was objected, That there was Variance between the Writ and the Declaration in this Caſe, becauſe the Writ was (*d*) *levavit*, *&c. ad nocumentum liberi tenementi nuper* Johan. Pleader, *& modo præd'*

(*a*) 3 Inſt. 201, 202. Godb. 233.

(*b*) 1 Brownl. 4.

(*c*) 1 Brownl. 4. Doctrin. pl. 87. 1 Rol. Rep. 394.

(*d*) Godb. 233. 2 Inſt. 406.

præd' Hen. & Eliz. &c. and the Declaration was *levavit*, &c. *domum*, &c. *tam prope Meſſuag. præd'* Hen. & Eliz. *ſic qd' Orientalis pars*, &c. *ſuperpendet*, *Anglice*, *doth jut over*, *præd' meſſuag' nup' præd'* Johan. Pleader, & *modo ipſarum* Hen. & Eliz. &c. *ad nocumentum liberi tenementi ipſorum* Hen. & Eliz. *in eadem*, ſo that the Writ is, *ad nocumentum liberi tenementi nup'* Joh. Pleader, & *modo* of the Pls. and the Declaration is, *ad nocument' liberi tenementi ipſorum* Hen. & Eliz. and ſo Variance; & *non allocatur*, for the Pls. ſhew in their Declaration (*a*) that the Erection was in the Time of *J. Pleader*, &c. which agrees with the Writ, becauſe the Erection was *ad nocumentum Joh. Pleader*, and the Concluſion *ad nocumentum* of the Pls. is neceſſary; for otherwiſe they can't maintain an Action, nor demand Damages. 3. It was objected, That the Pls. have declared generally, *ad nocumentum*, and have not aſſigned any Nuſance in certain, *ſc.* That the (*b*) Rain fell from the ſaid Houſe newly built, upon the Pl.'s Houſe, or that the Windows are ſtopped, by which he loſes the Light, &c. as in (*c*) 4 *Aſſ.* 3 & 4 *E.* 3. 36. *a. b.* (*d*) *Richard de Dalby's Caſe*, the Pl. in the *quod permittat* ſhewed the Manner of the Nuſance, *ſ.* when the Smoke entred into the ſaid Houſes, ſo that no Man could live there. So in 18 *E.* 3. 22. *b.* (*e*) A Man brought a Writ of Nuſance of a Houſe levied to his Freehold, and declared that where he had a Houſe, and under his Houſe had a Place which contained ſo much in length, and ſo much in breadth, by which the Water uſed to deſcend from his Houſe and paſs, there the Def. had built a Houſe above the Spout, ſo that the Water and Drops of Rain could not fall as they ought, but fell upon the Walls of his Houſe, whereby the Timber of his Houſe periſhed. So in 32 *Aſſ.* 2. In *Aſſiſe of Nuſance quare divertit* (*f*) *curſum aquæ*, &c. and aſſigned that he made a Trench croſs a River which came to the Pl.'s Mill, ſo that it was misturned, inſomuch that where the Mill uſed to grind three Quarters, &c. in a Day and Night it could now grind but a Buſhel, and alſo that the ſaid Water did drown fifteen Acres of the Plaintiff's Meadow, adjoining to the ſame Mill; ſo as where he uſed to have forty Loads of Hay in them, he could now have but ſeven, &c. *Vide* 30 *E.* 3. 3. *a.* & 26. *a. b.* 17 *E.* 3. * 39. 2 (*g*) *H.* 4. 13. *a. b.* and ſo it was in the ſaid Caſe of *Penruddock*. But it was reſolved, that the Plaintiffs need not in this Caſe aſſign any (*h*) ſpecial Nuſance; for here it appears to the Court, that it is to the Plaintiff's Nuſance; For this Caſe differs from all the ſaid Caſes; for in this Caſe the Defendant has built a new Houſe, which overhangs Part of the Plaintiff's Houſe (which was not in any of the other Caſes) ſo that of (*i*) Neceſſity the Rain which falls from the new Houſe muſt fall upon the Plaintiff's Houſe. Alſo

(*a*) Doctrin. pl. 96, 384.

(*b*) 2 Roll. 140, 141.

(*c*) Doctrin. placit. 86. Br. Nuſance 16. Br. Travers, &c. 167.

(*d*) 4 E. 3. 36. a. b.

(*e*) 2 Rol. 140. Fitz. Nuſance 1.

(*f*) Firz. Aſſiſe 309.

* 17 E. 3. 9. b. 2 Rol. 142.

(*g*) Fitz. Quod permittat 2. Br. Quod permittat 3. Br. Brief 523.

(*h*) Doctrin. placit. 86.

(*i*) 2 Roll. 140, 141.

(*a*) *Cujus*

(*a*) 2 Rol. 141. Co. Lit. 4. a. Cr. El. 118. (*a*) *Cujus eſt ſolum, ejus eſt uſque ad Cœlum.* And therewith agree 13 *H.* 8. 1. And by the Overbuilding upon Part of the Houſe of the Plaintiffs, he has deprived them of the Air; (*b*) 2 Rol. 141. alſo he has (*b*) prevented them from building their Houſe higher; (*c*) Co. Lit. 303. b. and that which appears (*c*) to the Court need not be averred; for (*d*) *Lex non requirit verificare quod apparet Cur'*, *Plow. Com.* 87. *b. in Patridge's Caſe.* 13 *H.* 4. (*d*) Doct. pl. 86. 17. if (*e*) an Infant brings an Aſſize of Mortdanceſtor, he (*e*) Doct. pl. 86. need not aver, that it is within the Time of Limitation, 8 Co. 126. b. for it appears by the Plaintiff's Infancy, 46 *E.* 3. in Treſ-(*f*) 8 Co. 126. b. 46 E. 3. 16 b. paſs for taking (*f*) of Money, the Value need not be ſhewed, becauſe it appears. *Vide* 33 *H.* 6. 54. 26 *H.* 6. *Gard.* Doct. pl. 86. 48. 35 *H.* 6. 30. *a. Bracton* 254. and this is according to the Fitz. Brief 602. old Verſe, *Quod* (*g*) *conſtat clare non debet verificare.* And Br. Faux Latin 8. Form 13. in *Penruddock's Caſe*, the Pl. did not aſſign any ſpecial Nu-(*g*) Doct. pl. 86. Hard. 81. ſance before the Writ brought; but that *ſuperpendet* 3 *pedes curtilagii, &c. per qd' aquæ pluviales de eadem domo deſcendentes, ſolum ejuſd' meſuagii conterunt, ac magnopere indies magis magiſq; conſumunt & devaſtant, & ea ratione curtilagium præd' quolibet pluviali tempore humectatum & inundatum exiſtit:* So that all the Words in the ſaid Declaration being in the preſent Tenſe, and ſo after the Writ brought, and no Aſſignment of any ſuch particular Nuſance before the Writ brought, it appears thereby that the Court, as of a Thing apparent, took Notice thereof without Averment. For *Nunc pluit, & toto nunc Jupiter æthere fulget*, and that (*b*) Doct. pl. 86. every one knows: And the Book in 3 *E.* 3. *Aſſiſe* 362. (*h*) was cited where in Aſſiſe of Nuſance *de foſſo levato ad nocum' liberi ten' ſui*; and made his Plaint that there where the Water of *S.* held Courſe directly from *S.* to the Water of *Idele*, the Def. had made a Ditch croſs the Water ſo that the Water was ſtopt and roſe, ſo that his Land lying near the ſaid Ditch is drowned *ad dampnum, &c.* and Exception was taken to it, becauſe he doth not ſay how much Land is drowned, ſo that the Plea is uncertain (and Note he doth not (*i*) 32 Aſſ. 2. Antea 54. a. ſhew, as in (*i*) 32 *Aſſ.* before the particular Nuſance upon the drowning, *ſc.* that where he uſed to have ſo many Loads of Hay, that now he has but ſo many;) alſo it might have been ſaid, that by ſome Manner of drowning, the Meadow would be the better, but there *ad damnum* implies the Con-(*k*) 3 E. 3. Aſſize 362. Supra h. trary, but it was anſwered in the Caſe of (*k*) 3 *E.* 3. that the Aſſiſe ſhall ſay in certain, becauſe ſometimes more may be drowned, and ſometimes leſs, wherefore the ſaid Plaint was adjudged good. So in the Caſe at Bar, the Jury ſhall enquire of the Certainty and Quantity of the Damage which happened to the Pl. by the ſaid Nuſance. *Nota* Reader, there are (*l*) 1 Jones 222. 2 (*l*) Ways to redreſs a Nuſance, one by Action, and in that he ſhall recover Damages, and have Judgment that the Nuſance ſhall be removed, caſt down, or abated, as the Caſe requires; or

the Party grieved may (*a*) enter and abate the Nuſance himſelf, as appears by 17 *E.* 3. 44. 9 *E.* 4. 35. and in *Penruddock's Caſe*, but then he ſhall not have an Action, nor recover Damages, for in an *Aſſiſe of Nuſance*, or *Quod permittat proſternere, &c.* it is a good Plea, that the Plaintiff himſelf either before the Writ brought, or pending the Writ, has abated the Nuſance: For in an *Aſſiſe* or *Quod permittat*, he ſhall have Judgment of 2 Things, *ſc.* to have the Nuſance abated, and to recover Damages, and he has diſabled himſelf by his own Act to have Judgment for one of them, *ſ.* to have a Nuſance abated, and therefore the Action doth not lie; and therewith agree 50 *E.* 3. 11. *a. b.* The Abbey of *Buckfaſt's Caſe*, and 2 *H.* 4. 1. 11. 46 *E.* 3. 24. *a.* 29 *Aſſ.* 2. 52. *Vide* the Stat. of *W.* 2. *c.* 24. *In* (*b*) *Caſibus in quibus conceditur breve de Cancell' de facto alicujus, de cætero non recedant querentes a Curia Regis ſine remedio, pro eo quod Ten'tum transfertur de uno in alium. Et in Regiſtro de Cancellaria non eſt inventum aliquod breve in iſto caſu ſpeciali, ſicuti de muro, domo, mercato, conceditur breve ſuper eum qui levavit ad nocumentum, & ſi* (*c*) *transferatur domus, murus, & hiis ſimilia, in aliam perſonam, breve non denegetur, ſed de cætero cum in uno caſu conceditur breve in conſimili caſu ſimili remedio indigente ſicut prius fiat breve.* And the Reaſon, that at the Common Law Aſſiſe of Nuſance lay not againſt him who levy'd the Nuſance, and him to whom the Tenement was transferred, was becauſe there was not found any Writ of Aſſiſe of Nuſance in the *Regiſter*, but which ſuppoſed, that the Tenants in the Aſſiſe *levaverunt*; and that can't be ſaid when the Tenement is transferred to another; for he did not levy the Nuſance, but only the other; and now this Stat. gives a Writ of Aſſiſe in ſuch Caſe: *ſc. Queſtus eſt nobis A. quod B.* (who levied the Nuſance) & *C.* (to whom the Tenement is transferred) *levaverunt*, and this Statute extends only to Aſſiſe of Nuſance againſt him who made the Nuſance and his Alienee, 30 *E.* 3. 26. *a. b.* 46 *E.* 3. 23. *b.* 24. *a.* 50 *E.* 3. 11. *a. b.* and afterwards the Plaintiffs in the *Quod permittat* had Judgment.

(*a*) 1 Rol. Rep. 394. 3 Bulſt. 197. Cr. El. 296. 1 Jones 222. 2 Rol. 144, 145, 565. 5 Co. 101. b. Cr. Jac. 555. Cr. Car. 185. 9 E. 4. 35. b. 6 Mod. 245. poſt. 59.

(*b*) 2 Inſt. 405, &c.

(*c*) 5 Co. 101. a.

2 Inſt. 435.

[*Vide* Aldred's *Caſe*, *poſt.* 58.]

THE

THE

Poulterers Caſe.

See 6 Mod. 100. Lucas 146.

MICH. 8 *Jac. Regis*, The Caſe between (*a*) *Stone* Plaintiff, and *Ralph Waters*, *Henry Bate*, *J. Woodbridge*, and many other Poulterers of *London* Defendants, for a Combination, (*b*) Confederacy, and Agreement betwixt them falſly and maliciouſly to charge the Plaintiff (who had married the Widow of a Poulterer in *Gracechurch-ſtreet*) with the Robbery of the ſaid *Ralph Waters*, ſuppoſed to be committed in the County of *Eſſex*, and to procure him to be indicted, arraigned, adjudged, and hanged, and in Execution of this falſe Conſpiracy, they procured divers Warrants of Juſtices of Peace, by Force, whereof *Stone* was apprehended, examined, and bound to appear at the Aſſizes in *Eſſex*; at which Aſſizes the Defendant did appear, and preferred a Bill of Indictment of Robbery againſt the ſaid Plaintiff; and the Juſtices of Aſſize hearing the Evidence to the Grand Jury openly in Court, they perceived great Malice in the Defendants in the Proſecution of the Cauſe; and upon the whole Matter it appeared, That the Pl. the whole Day that *Waters* was robbed, was in *London*, ſo that it was impoſſible that he committed the Robbery, and thereupon the Grand Inqueſt found (*c*) *Ignoramus*. And it was moved and ſtrongly urged by the Defs. Counſel, That admitting this Combination, Confederacy and Agreement between them to indict the Pl. to be falſe, and malicious, that yet no Action lies for it in this Court, or elſewhere, for divers Reaſons. 1. Becauſe no Writ of *Conſpiracy* for the Party grieved, or Indictment or other Suit for the K. lies, but where the Party grieved is indicted, and *legitimo modo acquietatus*,

(*a*) Moor 813, 814.

(*b*) Cr. Car. 15, 16. 3 Inſt. 143. 2 Rol. Rep. 258. 2 Bulſt. 271. 1 Jones 93. Latch 79, 80. Hut. 49. O Bendl. 124. Palm. 315. 1 Rol. 110, 111, 112. Hard. 196. 2 Inſt. 561, 562.

(*c*) 1 Jones 94.

acquietatus, as the Books are, (*a*) *F.N.B.* 114. *b.* 6 *E.* 3. 41. *a.* 24 *E.* 3. 34. *b.* 43 *E.* 3. *Conſpiracy* 11. 27 *Aſſ. p.* 59. 19 *H.* 6. 28. 21 *H.* 6. 26. 9 *E.* 4. 12. *&c.* 2. Every one who knows himſelf guilty, may to cover their Offences, and to terrify or diſcourage thoſe who would proſecute the Cauſe againſt them, ſurmiſe a Confederacy, Combination, or Agreement betwixt them, and by ſuch Means notorious Offenders will eſcape unpuniſhed, or at the leaſt, Juſtice will be in danger of being perverted, and great Offences ſmothered, and therefore they ſaid, that there was no Precedent or Warrant in Law to maintain ſuch a Bill as this is. But upon good Conſideration, it was reſolved that the Bill was maintainable; and in this Caſe divers Points were reſolved.

(*a*) F. N. B. 114. d.

1. That at the Com. Law, (which not only favours the Life, but alſo the Liberty of a Man, and Freedom from Impriſonment,) when a Man was impriſoned *pro morte hominis, &c.* where *prima facie* by the Law he was not bailable, and *ne detineatur diu in priſona, ſc.* till the Coming of the Juſtices in Eire, as appears by the Stat. *W.* 1. *cap.* 11. the Priſoner in ſuch Caſe might have a Writ *de* (*b*) *Odio & atia*, directed to the Sheriff, *quod* (*c*) *aſſumptis tecum cuſtodibus placitorum coronæ in pleno comitatu per Sacrament' probo-rum & legalium hominum, &c. inquiras utrum A. captus & detentus in priſona, &c. pro morte W. unde rettatus* (*i. accuſatus*) *eſt, rettatus ſit odio & atia, an eo quod inde culpabilis ſit, & ſi odio & atia, tunc quo odio & atia, &c. niſi indictatus vel appellatus fuerit coram Juſtic' noſtris ultimo itinerantibus in partibus illis, & pro hoc captus & impriſonatus, &c.* by which it appears, that if the Priſoner be indicted or appealed, and by Force thereof impriſoned, the ſaid Writ being but a Surmiſe lay not againſt the ſaid Matter of Record.

(*b*) 2 Inſt. 42, 43. 5 H. 7. 5. a. Stamf. Pl. Cor. 77. b.

(*c*) 2 Inſt. 42. Vide Regiſt. f. 133. b.

2. It is to be obſerved, That if upon the ſaid Writ *de odio & atia*, the Jury found him Not guilty, yet the Sheriff, with the Coroners, or any of them, could not bail him; but then ſhould iſſue forth a Writ *de ponendo in ballivum* to the Sheriff, which Writ recites the Inquiſition, by which the Priſoner is found Not guilty, or that he did it *ſe defendendo, & non per feloniam, ex malitia præcogitata, vel per infortunium, tibi præcipimus, quod ſi præd' A. invenerit tibi* 12 *probos & legales homines de comit' tuo, &c. qui eum manucapiant habere coram Juſticiariis noſtris ad primam Aſſiſam, &c. ad ſtandum, &c. tunc ipſum A. &c. præd'* 12 *interim tradas in ballivum.* By which it appears, that in ſuch Caſe the Sheriff without a Writ could not bail him, nor bail by Writ under the Number of 12 Perſons who wou'd bail him.

Vide Magna Charta, cap. 16. 26. *W.* 1. *c.* 11. *Glouc', c.* 9. *W.* 2.
2 Inſt. 43. *c.* 29. But now this Writ *de odio & atia* is taken away by the Stat. of 28 *E.* 3. *c.* 9. *Vide Regiſtr' ubi ſupra Stamf. Pl. Cor.* 77. *g. Vide Bracton, lib.* 3. 121. *b.*

3. It is to be obſerved, That there was Means by the Com. Law before Indictment to protect the Innocent againſt falſe Accuſation, and to deliver him out of Priſon: And as *Odium* in the ſaid Writ ſignifies *Hatred*, ſo *Acia* or *Atia* ſignifies *Malice*, becauſe *malitia eſt acida, i. eager, Sharp* and *Cruel.*

Moor 814. Cr. Jac. 8. W. Jon. 94. 1 Saik. Lucas 219, &c. ib. And it is true, That a Writ of *Conſpiracy* lies not, unleſs the Party is indicted, and *legitimo modo acquietatus*, for ſo are the Words of the Writ; but that a falſe Conſpiracy betwixt divers Perſons ſhall be puniſhed, altho' nothing be put in Execution, is full and manifeſt in our Books; and therefore in 27 *Aſſ. p.* 44. in the Articles of the Charge of Enquiry by the Enqueſt in the King's Bench, there is a *Nota*, That two were indicted of Confederacy, each of them to maintain the other, whether their Matter be true, or falſe, and notwithſtanding that nothing was ſuppoſed to be put in Execution, the Parties were forced to anſwer to it, becauſe the Thing is forbidden by the Law, which are the very Words of the Book; which proves that ſuch falſe Confederacy is forbidden by the Law, altho it was not put in ure or executed. So there in the next Article in the ſame Book, Inquiry ſhall be of Conſpirators and Confederates, who agree amongſt themſelves, *&c.* falſly to indict, or acquit, *&c.* the Manner of Agreement and betwixt whom, which proves alſo, That Confederacy to indict or acquit, altho' nothing is executed, is puniſhable by Law: And there is another Article concerning Conſpiracy betwixt Merchants, and in theſe Caſes the Conſpiracy or Confederacy is puniſhable, altho' the Conſpiracy or Confederacy be not executed; and it is held in 19 *R.* 2. *Brief* 926. A Man ſhall have a Writ of *Conſpiracy*, altho' they do nothing but
1 Jones 94. conſpire together, and he ſhall recover Damages, and they may be alſo indicted thereof. Alſo the uſual Commiſſion of *Oyer* and *Terminer* gives Power to the Commiſſioners to enquire, *&c. de omnibus coadunationibus confœderationi-*
Moor 814. *bus, & falſis alligantiis*; and *Coadunatio* is a Uniting of themſelves together, *Confœderatio* is a Combination amongſt them, and *falſa alligantia* is a falſe Binding each to the other, by Bond or Promiſe, to execute ſome unlawful Act: In theſe Caſes before the unlawful Act executed the Law puniſhes the Coadunation, Confederacy or falſe Alliance,

to

to the End to prevent the unlawful Act, *quia* (*a*) *quando aliquid prohibetur, prohibetur & id per quod pervenitur ad illud: Et affectus punitur licet non ſequatur effectus*; and in theſe Caſes the Common Law is a Law of Mercy, for it prevents the Malignant from doing Miſchief, and the Innocent from ſuffering it. *Hill.* 37 *H.* 8. in the Star-chamber, a Prieſt was ſtigmatized with *F.* (*b*) and *A.* in his Forehead, and ſet upon the Pillory in *Cheapſide*, with a written Paper, *for falſe Accuſation. M.* 3 & 4 *Ph. & Ma.* one alſo for the like Cauſe *fuit Stigmaticus* with *F. & A.* in the Cheek, with ſuch Superſcription as is aforeſaid. *Vide Proverb'* 1. *Si te lactaverint peccatores & dixerint, Veni nobiſcum ut inſidiemur ſanguini, abſcondamus tendiculas contra inſontem fruſtra, &c. omnem pretioſam ſubſtantiam reperiemus & implebimus domus noſtras ſpoliis, &c. Fili mi ne ambules cum eis, &c. pedes enim eorum ad malum currunt & feſtinant ut effundant ſanguinem.* And afterwards upon the Hearing of the Caſe, and upon pregnant Proofs, the Defendants were ſentenced for the ſaid falſe Confederacy by Fine and Impriſonment. *Nota* Reader, Theſe Confederacies, puniſhable by Law, before they are executed, ought to have four Incidents: 1. It ought to be declared by ſome manner of Proſecution, as in this Caſe it was, either by making of Bonds, or Promiſes one to the other: 2. It ought to be malicious, as for unjuſt Revenge, *&c.* 3. It ought to be falſe againſt an Innocent: 4. It ought to be out of Court voluntarily.

(*a*) 2 Inſt. 48. Hardr. 146.

(*b*) Moor 814.

I WIL-

WILLIAM ALDRED's *Case.*

Mich. 8. Jacobi *Regis.*

2 Rol. 141.

William Aldred brought an Action on the Case against *Thomas Benton*, which began *Trin.* 7. *Jacobi, Rot.* 2802. *in Banco*, that whereas the Plaintiff, 29 *Septemb' anno* 6 *Jac.* was seised of an House, and a Parcel of Land in Length 31 Feet, and in Breadth 2 Feet and a half, next to the Hall and Parlour of the Plaintiff of his House aforesaid in *Harleston* in the County of *Norfolk* in Fee; and whereas the Def. was possessed of a small Orchard on the East Part of the said Parcel of Land, *præd' Thomas malitiose machinans & intendens ipsum Willielmum de easiamento & proficuo messuag' & parcell' terræ suorum præd' impedire & deprivare*, the said 29th Day of *Septemb. anno* 6 *Jacobi quoddam magnum lignile in dicto horto ipsius Thomæ construxit & erexit, ac illud adeo exaltavit, &c. quod per lignile illud, &c. tam omnia fenestr' & luminaria ipsius Willielmi aulæ & Camerarum suarum, quam ostium ipsius Willielmi aulæ suæ prædict' penitus obstupat' fuer', &c. & præd' Thomas ulterius machinans & malitiose intendens ipsum Willielmum multipliciter prægavare, & ipsum de toto commodo, easiamento & proficuo totius messuagii sui præd' penitus deprivare, præd' 29 die Sept. an. 6 suprad' quodd' ædificium pro suibus (a) & porcis suis in horto suo præd' tam prope aulam & conclave ipsius Willielmi prædict' erexit, ac sues & porcos suos in ædificio in horto illo posuit, & ill' ibidem per magnum tempus custodivit, itaquod per fætidos*

(a) Hutt. 136. 2 Rol. 141.

tidos & inſalubres odores ſordidorum prædict' ſuum & porcorum præd' Thomæ in aulam & conclave præd' ac alias partes præd' Meſſuagii ipſius Willielmi penetran' & influent' idem Willielmus & famuli ſui, ac aliæ perſonæ in meſſuagio ſuo præd' converſantes & exiſten', abſque periculo infectionis in aula & conclavi præd' ac aliis locis meſſuagii præd' continuare ſeu remanere non potuerunt: Prætextu cujus idem Willielmus totum commodum, uſum, eaſiamentum, & proficuum maximæ partis meſſuagii ſui præd' per totum temp'us præd' totaliter perdidit & amiſit ad damnum ipſius Willielmi 40 *l. &c.* And the Defendant pleaded Not guilty, and at the Aſſiſes in *Norfolk* he was found guilty of both the ſaid Nuſances, and Damages aſſeſſed. And now it was moved in arreſt of Judgment, That the Building of the Houſe for Hogs was neceſſary for the Suſtenance of Man; and one ought not to have ſo delicate a Noſe, that he can't bear the ſmell of Hogs; for *Lex non favet delicatorum votis:* But it was reſolved, That the Action for it is (as this Caſe is) well maintainable; for in a Houſe 4 Things are deſired, *habitatio hominis, delectatio inhabitantis, neceſſitas luminis, & ſalubritas aeris,* and for Nuſance done to 3 of them an Action lies, *ſc.* 1. to the Habitation of a Man, for that is the principal End of a Houſe, 2. For Hindrance of the Light, for the ancient Form of an Action on the Caſe was ſignificant, *ſc. quod Meſſuagium horrida tenebritate obſcuratum fuit,* therewith agree 7 *E.* 3. 50. *b.* 22 *H.* 6. 14. (*a*) by *Markham,* 11 *H.* 4. 47. and as to this there was a Caſe adjudged in the King's Bench, *Trin.* 29 *El. Tho.* (*b*) *Bland* brought an Action on the Caſe againſt *Thomas Moſeley,* and declared how that *James Bland* was ſeiſed in Fee of an ancient Houſe in *Netherouſegate* in the Pariſh of St. *Michael* in the County of the City of *York*; and that the ſaid *James,* and all thoſe whoſe Eſtate he had in the ſaid Houſe, from Time whereof, *&c.* have had and have uſed to have for them and their Tenants, for Life, Years, and at Will in the Weſt ſide of the ſaid Houſe ſeven Windows or Lights againſt a Piece of Land containing half a Rood, in the Pariſh aforeſaid, adjoining to the ſaid Houſe, which Piece of Land from Time whereof, was without any building, until the 28 Day of *Septemb. anno* 28 *El.* and ſhewed the Length and Breadth of the ſaid Windows for all the Time aforeſaid, by Force of which Windows the ſaid *James,* and all thoſe whoſe Eſtates he had in the ſaid Houſe from Time whereof, *&c.* have uſed to have for them and their Tenants aforeſaid divers wholeſome and neceſſary Eaſements and Commodities, by reaſon of the open Air and Light, *&c.* And that the ſaid *James* the 20 *Sep. an.* 28. *El.* demiſed to the Pl. the ſaid Houſe for 3 (*c*) Years; and that the Def. malicioufly intending

(*a*) 22 H. 6. 15. *a.* 2 Rol. 140.

(*b*) Hut 136. 1 Rol. 107, 558. Yelv. 216. 1 Bulſtr. 115, 116. Godb. 183.

(*c*) F. N. B. 184. *g.*

tending to deprive him of the ſaid Eaſements, & *obſcurare Meſſuagium præd' horrida tenebritate*, &c. 20 *Nov. ann.* 29 *Eliz.* had erected a new (*a*) Building on the ſaid Piece of Land, ſo near, &c. that the ſaid 7 Windows were ſtopped, whereby the Pl. loſt the ſaid Eaſements, &c. *Et maxima pars Meſſuagii prædict' horrida tenebritate obſcurata fuit*, &c. In Bar of which Action the Defendant pleaded, *quod infra prædict' civitatem Ebor' talis habetur*, & *a toto tempore cujus contrarii memoria non exiſtit, habebatur conſuetudo, videl't, quod ſi quis habuerit feneſtras & viſum per eaſdem verſus terram vicini ſui, vicinus ille viſum illarum feneſtrarum obſtruere ſuper terram illam ſolebat & poſſet, ſicut melius viderit ſibi expedire.* By Force of which Cuſtom he juſtified the Stopping of the ſaid Windows; and upon that the Pl. demurred in Law; and it was adjudged by Sir *Chr. Wray* Ch. Juſtice, and the whole Court of K.'s Bench, That the Bar was inſufficient in Law (*b*) to bar the Pl. of his Action, for two Reaſons: 1. When a Man has a lawful Eaſement or Profit, by Preſcription from Time whereof, &c. another Cuſtom, which is alſo from Time whereof, &c. can't take it away, for the one Cuſtom is as ancient as the other: As if one has a Way over the Land of *A.* to his Freehold by Preſcription from Time whereof, &c. *A.* can't alledge a Preſcription or Cuſtom to ſtop the ſaid Way. 2. It may be that before Time of Memory, the Owner of the ſaid Piece of Land has granted to the Owner of the ſaid Houſe to have the ſaid Windows, without any ſtopping of them, and ſo the Preſcription may have a lawful Beginning: And *Wray* Ch. Juſtice then ſaid, That for ſtopping as well of the wholeſome Air (*c*) as of Light an Action lies, and Damages ſhall be recovered for them, for both are neceſſary, for it is ſaid, & *veſcitur aura ætherea*; and the ſaid Words *horrida tenebritate*, &c. are ſignificant, and imply the Benefit of the Light. But he ſaid, That for (*d*) Proſpect, which is a Matter only of Delight, and not of Neceſſity, no Action lies for ſtopping thereof, and yet it is a great Commendation of an Houſe if it has a long and large Proſpect, *unde dicitur, Laudaturque domus longos qui proſpicit agros.* But the Law don't give an Action for ſuch Things of Delight. And *Solomon* ſays, *Eccleſiaſt.* 11. 7. *Dulce lumen eſt & delectabile oculis videre ſolem. Et olim (ut Plutarchus in Conv. 7. Sap. refert.) Rex Æthiopum interrogatus quid optimum? reſpondebat lucem; quis enim natura Duce tenebras non exhorreſcit?* and if the Stopping of the wholeſome Air, &c. gives Cauſe of Action, *a fortiori* an Action lies in the Caſe at Bar, for infecting and corrupting the Air. And the Building of a

(*a*) 3 Inſt. 201, 202.

(*b*) Yelv. 216. Godb. 183.

Vide ante 53.

(*c*) 2 Rol. 141.

(*d*) 2 Rol. 141.

(*a*) Lime-

(*a*) Lime-kiln is good and profitable; but if it be built ſo near an Houſe, that when it burns the Smoke thereof enters into the Houſe, ſo that none can dwell there, an Action lies for it. So if a Man has a Watercourſe running in a Ditch from the River to his Houſe, for his neceſſary Uſe; if a * Glover ſets up a (*b*) Lime-pit for Calve skins, and Sheep-skins, ſo near the ſaid Watercourſe, that the Corruption of the Lime-pit has corrupted it, for which Cauſe his Tenants leave the ſaid Houſe, an Action on the Caſe lies for it, as it is adjudged in 13 (*c*) *H.* 7. 26. *b.* and this ſtands with the Rule of Law and Reaſon, *ſc. Prohibetur ne quis faciat in ſuo quod nocere poſſit alieno: Et ſic* (*d*) *utere tuo ut alienum non lædas. Vide* in the Book of *Entries* Tit. *Nuſance* 406. *b.* he who has a ſeveral Piſcary in a Water ſhall have an Action on the Caſe againſt him who erects a (*e*) Dyhouſe, *ac fimos, fœditates, & alia ſordida extra domum præd' decurrentia in piſcariam præd' decurrere fecit, per quod idem proficuum piſcariæ ſuæ præd' totaliter amiſit, &c.* And there is another Precedent againſt a *Dyer, &c. quod idem* Henricus *in manſione ſua præd' ob metum infectionis per horridum fœtorem fumi, fœditatis, & aliorum ſordidorum, &c. per magnum tempus morari non audebat.* So in the Caſe at Bar, foraſmuch as the Declaration is, That the Defendant maliciouſly intending to deprive the Plaintiff of the Uſe and Profit of his Houſe, erected a (*f*) Swine-Sty *tam prope aulam & conclave ipſius* Will'i, *ac ſues & porcos ſuos in ædificio illo poſuit, & ill' ibid' per magnum tempus cuſtodivit, ita quod fœtidi & inſalubres odores ſordidorum præd' ſuum & porcorum præd'* Thomæ *in aulam, &c. penetran' & influen', idem* Will'us *ac famuli ſui, &c. in meſuag' prædict' converſantes exiſten' abſq; periculo infectionis in aula, &c. continuare ſeu remanere non potuerunt, prætextu cujus idem* Will' *totum commodum, &c. maximæ partis præd' meſſuag' per totum tempus præd' totaliter perdidit.* To which Declaration the Defendant pleaded Not guilty, and was found guilty of the Matter in the Declaration: It was adjudged that the Plaintiff ſhould recover.

(*a*) 2 Rol. 141. 6 Mod. 245. Ante 55.

* Palm. 533.

(*b*) 2 Rol 141. Br. Action ſur le Caſe 123.

(*c*) Ant. 51. a. Palm. 536.

(*d*) Palm. 536.

(*e*) 2 Rol 141. Palm. 536.

(*f*) 2 Rol. 141. Hut. 136. Palm. 536.

Libells.

JOHN LAMB's *Caſe.*

Mich. 8. Jacobi 1.

In the Star-Chamber.

Moor 813.

John Lamb Proctor of the Eccleſiaſtical Court exhibited a Bill in the Star-Chamber againſt *William Marche*, *Rob. Harriſon*, and many others of the Town of *Northampton*, and againſt *Shucburgh* and others, for publiſhing two Libels. It was reſolved, That every one who ſhall be convicted in the ſaid Caſe, either ought to be a Contriver of the Libel, or a Procurer of the Contriving of it, or a malicious Publiſher of it, knowing it to be a Libel; for if one reads a Libel, that is no Publication of it; or if he hears it read, it is no Publication of it, for before he reads or hears it, he can't know it to be a Libel; or if he hears or reads it, and laughs at it, it is no Publication of it; but if after he has read or heard it, he repeats it, or any Part of it in the Hearing of others, or after that he knows it to be a Libel, he reads it to others, that is an unlawful Publication of it; or if he writes a Copy of it, and does not publiſh it to others, it is no Publication of the Libel; for every one who ſhall be convicted ought to be Contriver, Procurer or Publiſher of it, knowing it to be a Libel. But it is great Evidence that he publiſhed it, when he, knowing it to be a Libel, writes a Copy of it; unleſs afterwards he can prove that he deliver'd it to a Magiſtrate to examine it; for then the Act ſubſequent explains his Intention precedent. *Vide* Reader, *Bract. lib.* 3. *tract. de Corona*

Moor 813.
3 Inſt. 174.
5 Co. 125. b.

Moor 813.

5 Co. 125. b.

Corona, cap. 36. *fo.* 155. *Fiat autem injuria, cum quis pugno percuſſus fuerit, verberatus, vulneratus ſeu fuſtibus cæſus; verum etiam cum ei convitium dictum fuerit; vel de eo factum carmen famoſum.*

[*See for Libels, &c.* 2 Salk. 417, 418, *&c.* Carthew 405.]

ROBERT BRADSHAW's *Case.*

Trin. 10 Jacobi 1.

Cr. Jac. 304. Hob. 114. Dyer. pl. 61.

John Salmond brought an Action of Covenant againſt *Robert Bradſhaw* in the King's Bench, which began *Hill.* 8 *Jac. Regis, rot.* 520. and declared that *Bradſhaw* by his Indenture 3 *Aug. anno* 7 *Jac. Regis*, demiſed to the ſaid *John Salmond* divers Lands and Tenements in *Stanford*, in the County of *Leiceſter* for ſix Years, if *Robert Reyns*, Son and Heir apparent of *Nicholas Reyns* ſhould ſo long live; and covenanted by the ſame Indenture with *Salmond*, That the ſaid *Bradſhaw* then had full Power and lawful Authority to demiſe the Premiſſes according to the Form and Effect of the ſaid Indenture. *Salmond* for Breach of the ſaid Covenant in Fact ſaid, That *Bradſhaw* at the Time of the Making of the ſaid Indenture had not full Power and lawful Authority to demiſe the Premiſſes, according to the Form and Effect of the ſaid Indenture, *& ſic præd'* Rob'us *conventionem ſuam præd' cum eodem* Johan' *in hac parte non tenuit, ſed illam penitus infregit & illam, &c.* to the Damages of *Salmond* 200 *l. Bradſhaw* pleaded, that after the Making of the ſaid Indenture, there was a Concord betwixt him and *Salmond*, That *Bradſhaw* ſhould pay to *Salmond* in full Satiſfaction and Diſcharge of the ſaid Covenant, and of all other Covenants in the ſaid Indenture, 12 *l.* which Sum *Bradſhaw* paid, and *Salmond* accepted accordingly: *Salmond* denied the Concord upon which they were at Iſſue, and found for the Plaintiff, and Damages aſſeſſed 133 *l.* 6 *s.* 8 *d.* and Coſts, *&c.* whereupon *Salmond* had Judgm. for Damages and Coſts *in toto* to 145 *l.* 7 *s.* 8. *d.* upon which Judgment *Bradſhaw* brought a Writ of Error *in Camerâ Scaccarii*, and aſſigned two Errors for the Inſufficiency of the Declaration; one that the Plaintiff *Salmond* had not averred, that *Robert Reyns* was alive at

2 Rol. Rep. 110, 111.

the

the Time of the Beginning of the ſaid Leaſe, nor at the Time of the Action brought; & *non allocatur*; for the Covenant refers to the Time of the Leaſe made, and then be *Reyns* alive or dead the Action lies; for if he be dead before the Leaſe, then the Leaſe is abſolute, and if he died after the Leaſe, and before the Action brought, yet the Action lies, and Conſideration ſhall be had thereof in Damages. The other Error which was aſſigned was, That *Salmond* in his Declaration had not ſhewed what Perſon had Right, Title, Eſtate or Intereſt in the Lands and Tenements demiſed at the Time of the Making of the ſaid Indenture, by which it might appear to the Court, that *Bradſhaw* had not full Power and lawful Authority to demiſe the Premiſſes, and ſo enable himſelf to an Action, and to charge the Defendant to anſwer him Damages for the Breach of the ſaid Covenant. But upon Conference and Debate amongſt the Juſtices, it was reſolved, That the Aſſignment of the Breach of Covenant was good, for he has followed the Words of the Covenant *negative*, and it lies more properly in the Knowledge of the Leſſor what Eſtate he himſelf has in the Land which he demiſes, than the Leſſee who is a Stranger to it; and therefore the Defendant ought to ſhew what Eſtate he had in the Land at the Time of the Demiſe made, by which it might appear to the Court, that he had full Power and lawful Authority to demiſe it. *Nota*, this Point adjudged by both Courts.

Cr. Jac. 304. 370. Doctrin. pl. 61. Co. Lit. 303. b. Mod Rep. 292. Cr. Jac. 312. Yelv. 228.

[*See* Fitzgib. 62.]

MAC-

Indictment of Murder.

MACKALLEY's *Caſe.*

On a Special Verdict at the Seſſions of Gaol-Delivery held for Newgate, *in the 8th Year of King* James I. *viz.*

Cro. Jac. 279.

AT the Seſſions of Gaol-Delivery for *Newgate*, holden for the City of *London* at the Juſtice-Hall in the *Old Baily*, in the Pariſh of St. *Sepulchre* without *Newgate*, in the Suburbs of the ſaid City, upon *Wedneſday* the fifth Day of *December*, in the Year of the Reign of the Lord *James*, by the Grace of God of *England*, *France*, and *Ireland* King, Defender of the Faith the 8th, and of *Scotland* the 44th, before *William Craven* Knt. Mayor of the City aforeſaid, *Tho. Fleming* Knt. Ch. Juſt. of the ſaid Lord the King, to Pleas before the King himſelf to be holden aſſigned, *George Snigg* Knt. one of the Barons of the Exchequer of the ſaid Lord the King, *John Croke* Knt. one of the Juſtices of the ſaid Lord the King, of the Bench (at *Weſtminſter*,) *Edw. Bromley* Knt. one of the Barons of the ſaid Lord the King, of his Exchequer aforeſaid, *John Sotherton* another Baron of the Exchequer aforeſaid, *Henry Montague* Knt. Recorder of the ſaid City of *London*, and others his Companions, Juſtices of the ſaid Lord the K. by Letters Patent of the ſaid Lord the K. to them and others, or to any four or more of them thereof made; To enquire by the Oaths of good and lawful Men of the ſaid City of *London*, as well within Liberties as without, by whom the Truth of the Matter might beſt be known, of whatſoever Treaſons, Miſpriſions of Treaſons, Inſurrections, Rebellions, and of whatſoever Murders, Felonies, Manſlaughters, Killings, Burglaries, Miſdeeds, Offences and Injuries whatſoever, within the aforeſaid City committed, as in the ſaid Letters Patent is ſpecified; and to the ſaid Treaſons and other the Premiſſes according to Law and the Cuſtom of the Kingdom of the ſaid Lord the King of *England*, *To*

To hear and determine; as alſo the Juſtices of the ſaid Lord the King to the Gaol-Delivery of Priſoners there being aſſign'd, by the Oaths of *Ralph Edmunds*, *Leonard Harwood*, *John Froſt*, *Edward Davies*, *John Lyſſant*, *Francis Barton*, *Edward Parnell*, *Thomas Hyet*, *Henry Kent*, *Edward Motley*, *Humphrey Lee*, *Richard Weſtcot*, *William Fairbrother*, *Edward Fawcet*, and *Thomas Smith*, good and lawful Men of the City aforeſaid, it is preſented, That whereas upon *Saturday* the 17th Day of *November* in the 8th Year of the Reign of our Lord *James*, by the Grace of God of *England*, *France* and *Ireland* King, Defender of the Faith, &c. and of *Scotland* the 44th, in the Court of the Lord the King, before *Richard Pyot* Alderman, then, and as yet one of the Sheriffs of the City of *London* aforeſaid, in his Compter, ſituate in the Pariſh of St. *Michael* in *Woodſtreet*, *London*, aforeſaid, according to the Cuſtom of the City aforeſaid then holden, one *Robert Radford* had levied a certain Plaint upon a Plea of a Debt upon Demand of five hundred Pounds againſt one *John Murray* of *London*, Eſq; the Tenor of which Plaint followeth in theſe Words, that is to ſay, *John Murray*, Eſq; was ſummoned againſt *Robert Radford*, Salter, in a Plea of Debt upon Demand of five hundred Pounds; and thereupon the aforeſaid *Robert Radford* then and there demanded Proceſs againſt the ſaid *John Murray*, according to the Cuſtom of the City aforeſaid to be ſerved: Upon which, at the Requeſt of the ſaid *Robert Radford*, in this Sort, in the ſame Court it was proceeded. That the aforeſaid *Rich. Pyot* then, and yet one of the Sheriffs of the City aforeſ. to one *Richard Fells*, then one of the Sergeants at Mace of the Sheriff, and Miniſter of the Court aforeſaid, by Word of Mouth, according to the Cuſtom of the City aforeſaid, commanded that he the ſaid Sergeant at Mace ſhould take and arreſt the aforeſaid *John Murray* by his Body, if he ſhould be found within the Liberties of the City aforeſaid, ſo as he have the Body of the ſaid *John Murray* at the next Court of the ſaid Lord the King, at the *Guild-hall* of the City aforeſaid, ſituate in the Pariſh of St. *Lawrence* in the *Old Jury*, in the Ward of *Cheap*, *London*, aforeſaid, upon *Wedneſday* the 21ſt Day of *Novemb.* in the 8th and 44th Years aforeſaid to be holden, to anſwer the aforeſaid *Rob. Radford* in the Plea of his Plaint aforeſaid: By Virtue of which Command, the ſaid *Rich. Fells* the ſaid *John Murray* afterwards, that is to ſay, the 18th Day of the ſaid Month of *Novemb.* in the ſaid Years of the Lord the now King aboveſaid, between the Hours of 5 and 6 in the Afternoon of the ſame Day at *London* aforeſaid, that is to ſay, in the Pariſh of St. *Martin Bowyer Row*, in the Ward of *Farrington* within *London* aforeſaid, in the common King's Highway there, by his Body took and arreſted,

arreſted, and then and there had in his Cuſtody; and the aforeſaid *John Murray*, ſo under the Cuſtody of the ſaid *Richard Fells*, by Virtue of the Command aforeſaid, then and there (as before is ſaid) being, it ſo then and there happened, that the ſaid *John Murray* late of *London*, Eſq; otherwiſe called *John Murray* of *London*, Eſq; one *John Mackall*, late of *London*, Yeoman, otherwiſe called *John Mackally*, late of *London*, Yeoman, one *John Engles*, late of *London*, Yeoman, otherwiſe called *John Engliſh*, late of *London*, Yeoman, and one *Archibald Miller*, late of *London*, Yeoman, not having the Fear of God before their Eyes, but moved and ſeduced by the Inſtigation of the Devil, with Force and Arms, that is to ſay, with Swords, *&c.* to the Intent him the ſaid *John Murray* from his arreſt aforeſ. then and there to reſcous, in and upon the aforeſ. *Rich. Fells*, then and there made an Aſſault and Affray, in which ſaid Affray the aforeſ. *John Mackall*, otherwiſe called *John Mackalley*, with a Sword called a Rapier, made of Iron and Steel, of the Value of 12 *d.* which he the ſaid *John Mackall*, otherwiſe called *John Mackalley*, in his Right Hand then and there had and held, the ſaid *Richard Fells* in and upon the left Part of his Body, under the left Shoulder-blade of the ſaid *Richard*, felonioufly, voluntarily, and of Malice forethought, then and there ſtruck and thruſt in, giving to the ſaid *Richard Fells* then and there with the Sword aforeſaid, called a Rapier, in and upon the left Part of his Body, under the left Shoulder, one Blow and Mortal Wound, of the length of half an Inch, and of breadth of half an Inch, and of depth 6 Inches, of which ſaid Stroke and mortal Wound aforeſaid the aforeſaid *Richard Fells* then and there, that is to ſay, in the Pariſh and Ward laſt aforeſaid, preſently died. And further the Jurors aforeſaid preſent, That the aforeſaid *John Murray*, late of *London*, Eſq; otherwiſe called *John Murry*, late of *London*, Eſq; the aforeſaid *John Engles*, late of *London*, Yeoman, otherwiſe called *John Engliſh*, late of *London*, Yeoman, and the aforeſaid *Archibald Miller*, late of *London*, Yeoman, the ſaid 18th Day of *November* in the Years 8th and 44th aboveſaid, between the Hours aforeſaid, in the Pariſh, Ward, and Place laſt aforeſaid, felonioufly, voluntarily, and of their forethought Malice were preſent, fighting, procuring, helping, abetting and comforting the aforeſaid *John Mackall*, late of *London*, Yeoman, otherwiſe called *John Mackalley*, late of *London*, Yeoman, to the aforeſaid *Richard Fells* in Manner and Form aforeſaid to be killed and murdered;

dered: And ſo the Jurors aforeſ. ſay, that the aforeſ. *John Mackall*, late of *London*, Yeoman, otherwiſe called *John Mackalley*, late of *London*, Yeoman, *John Murray*, late of *London*, Eſq; otherwiſe called *John Murry*, late of *London*, Eſq; *John Engles*, late of *London*, Yeoman, otherwiſe called *John Engliſh*, late of *London*, Yeoman, and *Archibald Miller*, late of *London*, Yeoman, the aforeſaid *Rich. Fells* at *London* aforeſ. that is to ſay, in the Pariſh and Ward laſt aforeſ. felonioufly, voluntarily, and of their forethought Malice, in Manner and Form aforeſaid, killed and murdered, againſt the Peace of the Lord the now King, his Crown and Dignity, &c. And upon this, at the ſelf ſame Seſſions before the aforeſ. Juſtices, the aforeſaid *John Murray*, otherwiſe *Murry*, *John Mackall*, otherwiſe *Mackalley*, *John Engles*, otherwiſe *Engliſh*, and *Archibald Miller*, in the Cuſtody of the ſaid *Richard Pyot*, and *Francis Jones*, Sheriffs of the City aforeſaid, being in the Gaol of *Newgate* aforeſaid, to the Bar there brought, in their proper Perſons came, and ſeverally being asked, how of the Felony and Murder aforeſ. they would acquit themſelves? Every one of them for himſelf ſeverally ſaid, that he is not thereof Guilty; and thereof for good and ill ſeverally put himſelf upon the Country; and *Richard Langley*, Eſq; who in this behalf followeth for the Lord the King likewiſe; Therefore immediately came a Jury thereof, and the Jurors of that Jury, by the Sheriffs aforeſ. of the City aforeſ. impanelled being called, that is to ſay, *Will. Morgan*, *Tho. Dalbie*, *Tho. Evans*, *Tho. Auſtin*, *Solomon Green*, *Will. Chewn*, *Will. Ellil*, *Metcalf Allington*, *John Drake*, *Will. Taylor*, *Owen Davies*, and *Tho. Damport* appeared, who to ſpeak the Truth of and upon the Premiſſes being choſen, tried, and ſworn, ſay upon their Oath, That the City of *London* is, and all the Time whereof the Memory of Man is not to the contrary, was an antient City; and that within the City aforeſ. all the Time aforeſ. there was a Court of Record holden in the Compter, ſituate in the Pariſh of St. *Michael* in *Woodſtreet* aforeſ. before one of the Sheriffs of the City aforeſ. for the Time being; and that within the City aforeſ. there is ſuch, and from the whole Time aforeſaid, there was ſuch a Cuſtom, that in the aforeſ. Court, all and ſingular Perſons from the whole Time aforeſ. were uſed to levy Plaints of Pleas of Debt, amounting to whatſoever Sum againſt any Perſon whomſoever, and to cauſe the ſame Plaints to be entred in a Book of the Porter of the Compter aforeſaid, and that from the whole Time aforeſaid there was, and is a Porter of the Compter aforeſ. which Porter of the Compter aforeſaid for the Time being, from the whole Time aforeſaid, was an Officer of one of the Sheriffs of the City aforeſaid, to enter Plaints in

in Form aforeſaid levied in the Book of the Porter of the Compter aforeſ. againſt any Perſon whatſoever, at the Suit of any Perſon whatſoever, in Pleas of Debt, amounting to what Sum ſoever, in a certain ſhort and ſummary Manner. And that the Plaints aforeſ. in the Book of the Porter aforeſ. entred, from the whole Time aforeſaid, uſed to be tranſferred and entred of Record, in the Rolls of the Court aforeſ. in due Form of Law, within reaſonable and convenient Time after the Entry of the ſame in the Book of the Porter aforeſaid; and that in the City aforeſaid, there is, and for the whole Time aforeſ. there was a Cuſtom, That any Perſon being a Sergeant at Mace of the ſaid Sheriff, and Miniſter of the Court aforeſaid, at the Requeſt of the Party, whoſe Plaints ſo are levied of Office, it was uſed after the Entry of the ſame Plaints, in the Book of the Porter aforeſaid, as well before the Entry of the ſame Plaints, in the Rolls of the Court aforeſaid, as after the Entry thereof in the Rolls of the Court aforeſaid, to take and arreſt by his Body, any ſuch Perſon againſt whom ſuch Plaints were levied, to anſwer to the Plaint of ſuch Perſon, without any other Command by Word of Mouth, or otherwiſe to ſuch Sergeant at Mace, and Miniſter of the Court aforeſ. in that behalf directed, or to be directed. And the Jurors aforeſ. ſay upon their Oath aforeſ. that the aforeſ. *Saturday* the 17th Day of *Nov.* in the Year of our Lord 1610, the aforeſ. *Rob. Radford*, Citizen of *London*, requeſted the aforeſ. *Rich. Fells*, then one of the Serjeants at Mace of the ſaid *Rich. Pyot*, then one of the Sheriffs of the City aforeſ. That he the ſaid *Rich. Fells* would cauſe to be levied a Plaint of Debt of 500 *l.* in the Compter aforeſaid, at the Suit of the ſaid *Rob. Radford*, againſt the aforeſ. *John Murray*, Eſq; and thereupon would arreſt the aforeſ. *John Murray*, to anſwer to the aforeſaid *Robert Radford*, in the Plaint aforeſaid; and the ſaid *Rich. Fells* thereupon was at the ſaid Compter in the Pariſh of St. *Michael* in *Woodſtreet* aforeſaid, and there the ſaid 17th Day of *Nov.* in the 8th and 44th Years aforeſ. cauſed to be levied a Plaint of Debt of 500 *l.* againſt the aforeſ. *John Murray*, at the Suit of the aforeſ. *Rob. Radford*, which Plaint then was entred in the Porter's Book of the Compter aforeſ. as in the like Caſes uſually it is, and according to the Cuſtom aforeſ. in theſe Words. *Ff. John Murray*, Eſq; againſt *Robert Radford*, Salter, Debt 500 *l.* Pledges *Fleat Streat*, by *Robert Fells* Serjeant: Which Plaint afterwards was entred of Record in the Rolls of the Court of the Compter aforeſ. in theſe Words. *Ff. Saturday* the 17th Day of *Nov.* in the Year of the Reign of King *James*, of *England*, *France*, and *Ireland* the 8th, and of *Scotland* the 44th, *John Murray* Eſq; *S.* againſt *Rob. Radford*, Salter, in a Plea of Debt upon Demand

Demand 500 *l.* Pledges of following the Suit, *John Fleat* and *Richard Streat*, by *Fells* Serjeant, *&c.* But the Jurors aforeſ. upon their Oath ſay, That the Entry aforſaid, in the Rolls of the Court aforeſ. made, was upon *Monday* the 19th Day of *Nov.* in the 8th and 44th Years aforeſ. and not before. And that the ſaid *Rich. Fells* upon *Sunday* the ſaid 18th Day of *Novemb.* with 3 other Officers in his Company, ſtayed about the Gate called *Ludgate*, within the Liberties of the City aforeſ. by virtue of the Plaint aforeſ. to arreſt the aforeſaid *John Murray* as he ſhould paſs by: And afterwards when the ſaid *John Murray*, between the Hours of 5 and 6 in the Afternoon of the ſaid 18th Day of *Nov.* walked and paſſed by and through *Ludgate* aforeſ. in the common King's High-way, with 6 other Perſons in his Company, (the ſaid Perſons being armed,) the ſaid *Rich. Fells*, then being one of the Serjeants at Mace of the ſaid *Rich. Pyot*, then one of the Sheriffs of the City aforeſ. ſworn and known, and Miniſter of the Court aforeſ. near *Ludgate*, in the ſaid common King's Highway, in the aforeſaid Pariſh of St. *Martin Bowyer Row*, in the aforeſ. Ward of *Farrington* within *London* aforeſ. came to the ſaid *John Murray*, and him the ſaid *John* then and there within the Arms of the ſaid *Richard*, by virtue of the Premiſſes, took and held, and to the ſaid *John Murray* as in the Words following preſently ſaid: I, him the ſaid *Richard Fells* meaning, arreſt you, meaning the ſaid *John Murray*, in the King's Name, at the Suit of Mr. *Radford*, the ſaid *R. Radford*, in the Plaint aforeſaid named, meaning. But the ſaid Jurors ſay, that the aforeſ. *Rich. Fells*, at the Time of the Arreſt aforeſ. did not ſhew to the ſaid *John Murray* any Warrant, or his Mace, but ſay, That the aforeſ. *Rich. Fells* then carried and had at the Back of the ſaid *Richard* his Mace, and that none of the Officers aforeſ. who came in the Company of the ſaid *Rich. Fells*, any Weapen then had; and the ſaid *John Murray* looking about him, and ſtriving with the ſaid *Richard Fells*, then and there ſaid to thoſe Perſons, who came in the Company of the ſaid *John Murray*, in theſe *Engliſh* Words; Draw, Draw, Rogues; upon which the ſaid *John Mackal*, otherwiſe *Mackalley*, and *John Engles*, otherwiſe *Engliſh*, then and there being in the Company of the ſaid *John Murray*, drew their Rapiers; and the ſaid *Rich. Fells* and *John Murray* then being fallen upon the Ground, and the ſaid *Rich. Fells* lying uppermoſt, the ſaid *John Mackall*, otherwiſe *Mackalley*, with his Rapier drawn, run to the ſaid *Richard Fells*, then and there to reſcue the ſaid *Murray* from the Arreſt aforeſaid, and with his Sword aforeſaid the ſaid *Richard Fells* ſtruck, and thruſt in, giving unto the ſaid *Richard Fells* in and upon the left Part of his

Body,

Body under the left Shoulder-blade of the ſaid *Richard*, the Stroke and mortal Wound in the Indictment aforeſ. mentioned, of which Wound the ſaid *Rich. Fells* then and there, that is to ſay, in the Pariſh and Ward laſt aforeſ. inſtantly died. And further the Jurors aforeſ. ſay, that at the Time of the Killing of the aforeſ. *R. Fells*, in Manner and Form aforeſ. the ſaid *John Murray*, and *John Engles*, otherwiſe *Engliſh*, were preſent, and aiding to the ſaid *John Mackall*, otherwiſe *Mackalley*, to him the ſaid *Richard Fells* in manner aforeſ. to be killed; but whether upon the whole Matter aforeſ. by the Jurors aforeſ. in Form aforeſ. found, the killing aforeſ. of the ſaid *Rich. Fells* in Form aforeſaid done, be Murder or not, the Jurors aforeſaid do not know; and thereof demand the Advice of the Juſtices and Court here; and if upon the whole Matter aforeſ. it ſhall ſeem to the Juſtices and Court here, that the aforeſ. killing of the aforeſ. *Rich. Fells* be Murder, then the Jurors aforeſ. ſay upon their Oath aforeſ. that the aforeſ. *J. Murray*, *J. Mackally*, and *J. Engliſh*, are guilty, and every one of them is guilty of the Murder of the ſaid *Richard Fells*, in Manner and Form as by the Indictm. aforeſ. againſt them it is ſuppoſed; and that they at the Time of the Murder aforeſ. in Form aforeſ. committed, had no Goods or Chattels, Lands or Tenements to the Knowledge of the Jurors aforeſaid. And if upon the whole Matter aforeſ. in Form aforeſ. found, it ſhall ſeem to the Juſtices and Court here, that the aforeſ. killing of the aforeſ. *Rich. Fells*, in Form aforeſ. committed, be not Murder; then the Jurors aforeſ. ſay upon their Oath aforeſ. that the aforeſ. *John Murray*, *John Mackall*, and *John Engles* are not guilty, nor any of them is guilty of the Murder of the aforeſ. *Rich. Fells*, as they have alledged, nor for that Occaſion ever withdrew themſelves, or any of them withdrew himſelf: And if upon the whole Matter aforeſ. in Form aforeſ. found, it ſhall ſeem to the Juſtices and Court here, that the killing of the aforeſ. *Rich. Fells* in Form aforeſ. done, be Felony or Man-ſlaughter; then the Jurors aforeſ. ſay upon their Oath aforeſ. that the aforeſ. *John Murray*, *John Mackall*, and *John Engles* are guilty, and every of them is guilty of the Felony and Man-ſlaughter aforeſ. and that they have no Goods nor Chattels, Lands or Tenements, *&c.* And further, the Jurors aforeſ. ſay upon their Oath aforeſ. that the aforeſ. *Archibald Miller* in the ſaid Indictment named, of the Felony and Murder aforeſaid is not guilty, nor for that Occaſion ever withdrew himſelf. Therefore it is conſidered by the Court, that the aforeſ. *Archibald Miller* go thereof acquitted without Day, *&c.* And becauſe the Court here, of giving their Judg. of and upon the Premiſſes, concerning the aforeſaid *John Murray*, *John Mackall*,

and *John Engles* are not yet adviſed, Day is given to the aforeſaid *John Murray*, *John Mackall*, and *John Engles*, until the next Seſſions of Gaol-Delivery aforeſaid, for the aforeſaid City to be holden, they under the Cuſtody of the aforeſ. Sheriffs in the mean while committed ſafely to be kept, for to hear their Judgment thereof, &c. And becauſe the Juſtices aforeſaid are not yet, &c.

See Rep. Q. A. 249. & 4 Co. 40.

Mackalley's *Caſe, in killing of a Serjeant of* London.

Paſch. 9 Jacobi 1.

1 Jones 198. Jenk. Cent 291. Br. Jac. 279. 3 Bulſtr. 206. Poph. 208.

BY the King's Command all the Judges of *England* were ordered to meet together to reſolve what the Law was, upon the ſaid Record; and accordingly all the Judges of *England*, and Barons of the Exchequer met together the Beginning of *Hillary Term* now laſt paſt, and heard Counſel learned upon this ſpecial Verdict, as well of the Priſoners, as of the King; that is to ſay, Serjeant *Harris* the younger, *Anthony Diot* and *Randall Crewe* of Counſel with the Priſoners; and *Yelverton*, *Walters* and *Coventry* for the King. And the Matter was very well argued by Counſel learned on both Sides at two ſeveral Days in the ſame Term; and divers Exceptions were taken to the Indictm. and to the Verdict alſo. Firſt, againſt the Indictment five Exceptions were moved. 1. Becauſe it appears, That the Arreſt was tortious, and by Conſeq. the Killing of the Serjeant could not be Murder, but Manſlaughter, and they argued that the Arreſt alledged in the Indictment was tortious, becauſe it was made in the Night, that is to ſay, 18 *diem Nov. inter horas quintam & ſextam poſt meridiem*, which appears to the Court to be in the Night, and the Night is a Time of reſt and repoſe, and not to arreſt any by his Body, for thereof would enſue (as *in hoc caſu accidit*) Bloodſhed; for the Officer and Miniſter of Juſtice can't have ſuch Aſſiſtance, nor can the Peace be ſo well kept in the Night, that is to ſay, *in tenebris*, as in the Day, *in aperta luce:* And the Priſoner can't know the Officer or Miniſter of Juſtice in the Night; nor can the Priſoner ſo ſoon find Surities for his Appearance in

Cr. Car. 280. Jenk. Cent. 291

in the Night, and thereby avoid his Impriſonment, as he may in the Day: And they cited 11 *H.* 7. 5. *a.* that the Lord ſhall not diſtrain for his Rent or Services in the (*a*) Night. But it was anſwer'd by the Counſel with the K. and in the End reſolved by all the Judges and Barons of the Exchequ. that the Arreſt (*b*) in the (*c*) Night is lawful, as well at the Suit of a Subject as at the K.'s Suit; for the Officer or Miniſter of Juſtice ought to arreſt him when he can find him; for otherwiſe perhaps he will never arreſt him, (*quia* (*d*) *qui male agit odit lucem*;) and if the Officer does not arreſt him when he finds him, and may arreſt him, the Pl. ſhall have an Action upon his Caſe, and recover all his Loſs in Damages; and it is like the Caſe of Diſtreſs for Damage (*e*) Feaſant, for which one may diſtrain in the Night; for otherwiſe perhaps he will never diſtrain them, for they may be taken or eſcape out, and then they can't be diſtrained; but in Caſe of Rent Service it is otherwiſe; for the Law intends that the Tenant will be all the Day attendant upon the Land to pay his Rent, but he is not compellable to attend in the Night. *Vide* 11 *H.* 7. 5. *a.* 10 *E.* 3. 21. *b.* (*f*) 12 *E.* 3. *Diſtreſs* 17. and no Inconvenience will enſue upon it; for altho' he can't ſee the Officer, yet when he hears him ſay, I arreſt you in the K.'s Name, &c. he ought to obey him, and if the Officer has not a lawful Warrant, he ſhall have his Action of falſe (*g*) Impriſonment. And as to the finding of Sureties, the Law is, That he ought to remain in Priſon till he finds Sureties, be it in the Day, or in the Night. But great Inconvenience will enſue on the other Side, if thoſe who are indebted to others ſhall go at their Pleaſure in the Night without danger of arreſt, for then they will become Night-walkers, and turn the Day into Night in deſpight of their Creditors, and as the Officer or Miniſter of Juſtice may, by Force of a Warrant directed to him, arreſt any at the K.'s Suit either for Felony or other Crime in the Night, ſo may he do at a Subject's Suit; for the K. has no more Prerogative as to the Time to make an Arreſt, than a Subject; for the Arreſt is to no other Intent than to bring the Party to Juſtice: And it appears by the Opinion of the Court in the King's Bench in *Semaigne's Caſe in the 5 Part of my Reports*, That the Sheriffs may arreſt in the (*h*) Night, as well at the Suit of a Subject, as at the K.'s Suit. And in *Heydon's Caſe in the 4th Part of my Reports* it is reſolved, That if one kills a (*i*) Watchman in Execution of his Office, it is Murder, and yet that is done in the Night; and if an Affray be made in the Night, and the Conſtable, or any other, who comes to (*k*) Aid him to keep the Peace, be killed, it is Murder; for when the Conſtable commands them in the King's Name to keep

(*a*) 1 Rol. 672. Fitz. Avowry 137. Br. Diſtr. 101. Doct. & Stud. 75. a. Co. Lit. 142. a. 7 Co. 7. a. Milborn's Caſe.
(*b*) Cr Jac. 280. Jenk. Cent. 291. Hale's Pl. Cor. 45.
(*c*) Owen 63.
(*d*) 8 Co. 37. b.
(*e*) Co. Lit. 142. a. Doct. & Stud. 75. a. 7 Co. 7. a. Milborn's Caſe. 1 Rol. 672. Fitz. Avowry 137 Br. Diſtr. 101.
(*f*) 7 Co. 7. a. Milborn's Caſe.
(*g*) Poſt. 69. b.
(*b*) 5 Co. 92 b.
(*i*) Hale's Pl. Cor 45. Cr Jac 280. 4 Co 44. a. Yong's Caſe, Poſt. 68. b. 3 Inſt 52.
(*k*) Jenk. Cent. 291. Cr. Jac. 280. Hale's Pl. Cor. 345. Inſt. 52.

Q. the Peace, altho' they can't diſcern or know him to be a Conſtable, yet at their Peril they ought to obey him.

It was alſo reſolved, That altho' in Truth between 5 and 6 of the Clock in *Novemb.* is Part of the Night, yet the (*a*) Court is not bound *ex Officio* to take Conuſance of it, no more than in the Caſe of (*b*) Burglary, without theſe Words, *in nocte ejuſdem diei*, or *Noctanter*.

(*a*) 1 Rol. 524.

(*b*) 1 Rol. 524.

2. It was objected, That *Sunday* is not *dies juridicus*, and therefore no arreſt can be made thereon, but it is the Sabbath, and therefore thereon every one ought to abſtain from ſecular Affairs for the better Worſhip and Service of God in Spirit and Truth. As to that it was anſwered and reſolved, That no judicial Act ought to be done on that Day, but miniſterial Acts may be lawfully executed on the (*c*) *Sunday*; for otherwiſe peradventure they can never be executed; and God permits Things of Neceſſity to be done that Day; and Chriſt ſays in the Goſpel, *Bonum eſt benefacere in Sabbatho.*

(*c*) Cr. Jac. 80, 496. Jenk. Cent. 291. 5 Co. 83. b. 1 Jones 156, 157. Cawley 78. 8 Co. 127. a. Dy. 168. pl. 17. Hale's Pl. Cor. 45.

3. Another Exception was taken, becauſe it is ſaid in the Beginning of the Indictment, *in Curia dicti Dom' Reg' in computatorio ſuo, ſcituat' in parochia Sancti* Michaelis in *Woodſtreet, London*, and doth not ſhew in what Ward the ſaid Pariſh was; & *non allocatur*; for it is held in 7 *H.* 6. 36. *b.* every (*d*) Ward in *London* is as an Hundred in a County, and every Pariſh in *London* is as a Town in an Hundred, and it is not neceſſary to declare in what Hundred a Town is, no more than in what Ward a Pariſh is; but the ſame is commonly added, becauſe there are divers Pariſh. in *Lond.* of one and the ſame Name, and the Ward is added to make a Diſtinction of one Pariſh from another; wherefore it was reſolved, That in the Caſe at Bar the Indictment was ſufficient, notwithſtanding the Omiſſion (*e*) of the Ward, for it doth not appear to us that there is any other Pariſh of that Name, and this Pariſh is particularly deſcribed, *viz. in Parochia Sancti Michael'* in *Woodſtreet London:* And therewith agrees the Rule of the Book in 7 *H.* 6. 36. *b.* for a Bill was awarded good *in Parochia Sancti Laurentii in Judaiſmo*, omitting the Ward.

(*d*) Cr. El. 732.

(*e*) Jenk. Cent. 291.

The 4. Exception was, becauſe it doth not appear in what Pariſh the Sheriff commanded *Fells* the Serjeant to arreſt the Defendant; and that was diſallowed by all the Juſtices; for the Words of the Indictment are, *taliter in eadem Curia proceſſ. fuit, &c.* and *eadem Curia* fully demonſtrates that the Warrant was made at the ſame Court mentioned before; and that was expreſly alledged to be held *in Parochia Sancti Michaelis, &c.*

5. It

5. It was excepted againſt the Indictment, *viz.* That the Precept was to arreſt the Defendant, *ſi inventus foret infra libertates Civitatis præd'*, and the Indictment is *quod in Parochia S. Martini Bowyer Rowe in warda de Farringdon infra Londinum præd'* the Serjeant arreſted him, and ſo he has not purſued the Precept, for the Precept is, *infra libertates London*, and notwithſtanding that, the Indictment was reſolved to be good, for the ſaid Pariſh and Ward in *London* ſhall be intended to be within the Liberties of *London*, for theſe Words *(a)* Liberties of *London* are more ſpacious than *London*, and include in them the City of *London* it ſelf.

(a) Jenk. Cent. 291.

And 9 Exceptions were taken to the Verdict. 1. That there is a material Variance betwixt the Indictment and the Verdict; for the Indictment ſuppoſes that *Piot* Sheriff of *London*, upon a Plaint entered, made a Precept to the ſaid *Fells*, Serjeant at Mace, to arreſt the ſaid *Murray* the Defendant; and by the Verdict it appears that there was not any ſuch Precept made, but that by the Cuſtom of *London*, after the Plaint entered, any Serjeant *(b) ex officio* at the Requeſt of the Plaintiff may arreſt the Defendant *abſque aliquo præcepto ore tenus, vel aliter*, ſo that the Indictment being ſpecial, to make this Offence Murder by Conſtruction of Law upon the ſpecial Matter without any Malice prepenſe, ought to be purſued, and proved in Evidence, which is not done in this Caſe, for the Jury have not found the ſaid ſpecial Matter, but the contrary; and becauſe the Jurors have not found the ſpecial Matter contained in the Indictment, but other Matter, Judgment can't be given againſt the Priſoners upon this Indictment. To which it was anſwered, and in the End reſolved, That there was ſufficient Matter in the Verdict purſuant to the Matter contained in the Indictment, upon which the Court ought to give Judgment of Death againſt the Priſoners, notwithſtanding the ſaid Variance, and that for two Reaſons.

The Exceptions againſt the Verdict.

(b) 1 Rol. 555.

1. Becauſe the Warrant which the Serjeant had to arreſt the Defendant was but *(c)* Circumſtance, which is not neceſſary to be preciſely purſued in Evidence to be found by the Jury; but it is ſufficient if the Subſtance of the Matter be found without any ſuch preciſe Regard to Circumſtance: And therefore, if a Man is indicted, that he with a Dagger gave another a mortal Wound, upon which he died, and in *(d)* Evidence it is proved that he gave the Wound with a Sword, Rapier, Staff, or Bill, in that Caſe the *Offender* ought to be found guilty, for the Subſtance of the Matter is, That the Party indicted has given him a mortal Wound, whereof he died, and

(c) Poſt. 112. a. 1 9 a. 3 Inſt. 50.

(d) 2 Inſt. 319. 3 Inſt. 135. Hale's P. C. 265.

the Circumſtance of the Manner of the Weapon is not material in caſe of Indictments; and yet ſuch Circumſtance ought not to be omitted, but ſome Weapon ought to be mentioned in the Indictment. So if *A. B.* and *C.* are indicted for killing *J. S.* (*a*) and that *A.* ſtruck him, and that the others were preſent, procuring, abetting, &c. and upon the Evidence it appears that *B.* ſtruck, and that *A.* and *C.* were preſent, &c. in this Caſe the Indictment is not purſued in the Circumſtance; and yet it is ſufficient to maintain the Indictment, for the Evidence agrees with the Effect of the Indictment, and ſo the Variance from the Circumſtance of the Indictment is not material; for it ſhall be adjudged in Law the Wound (Stroke) of (*b*) every one of them, and is as ſtrongly the Act of the others, as if they all three had held the Weapon, &c. and had all together ſtruck the Deceaſed, and therewith agrees *Plow. Com.* 98. *a.* So if one is indicted of the Murder of another upon Malice prepenſe, and he is found guilty of Manſlaughter, he ſhall have Judgment upon this Verdict, for the Killing is the Subſtance, and the Malice prepenſe the Manner of it; and when the Matter is found, Judgment ſhall be given thereupon, altho' the Manner is not preciſely purſued; and therewith agrees *Plow. Com.* 101. *b.* where it is ſaid, *when the Subſtance of the Fact, and the Manner of the Fact, are put in Iſſue together, if the Jury find the Subſtance and not the Manner, Judgment ſhall be given for the Subſtance.* And I moved all the Judges and Barons, if in this Caſe of Killing of a Miniſter of (*c*) Juſtice in the Execution of his Office, the Indictment might have been (*d*) general, *ſc.* that the Priſoners *felonice, voluntarie, & ex malitia ſua præcogitata, &c. percuſſer', &c.* without alledging any ſpecial Matter; and I conceived that it might well be, for the Evidence would well maintain the Indictment, for as much as in this Caſe the Law implies Malice prepenſe. As if a (*e*) Thief, who offers to rob a true Man, kills him in reſiſting the Thief, it is Murder of Malice prepenſe: Or if one kills another without (*f*) Provocation, and without any Malice prepenſe, which can be proved, the Law adjudges it Murder, and implies Malice; for by the Law of God every one ought to be in Love and Charity with all Men, and therefore when he kills one without Provocation, the Law implies Malice: And in both theſe Caſes they may be indicted generally, that they killed of Malice prepenſe, for Malice implied by Law, given in Evidence, is ſufficient to maintain the general Indictment. So in the Caſe at Bar, in this Caſe of the Serjeant, the Indictment might have been (*g*) general, That he felonioufly and of his Malice prepenſe killed the ſaid *Fells*; and the ſpecial Matter might well have been given in Evidence;

(*a*) Poſt. 112. a.

(*b*) 4 Co. 42. b. 11 Co. 5. b. 3 Inſt. 138. 34 H. 8. Br. Coron. 172. 3 Rol. Rep. 31.

(*c*) Jenk. Cent. 291. 3 Inſt. 52. Hale's Pl. Cor. 45. Cr. Jac. 280. Poſtea 68. a. Cr. Car. 183, 372, 538.

(*d*) Cr. Jac. 280. 12 Co. 17.

(*e*) Jenk. Cent. 291. Hale's Pl. Cor. 46. 3 Inſt. 52. Cr. Car. 183.

(*f*) Jenk. Cent. 291. 3 Inſt. 52. Hale's Pl. Cor. 45.

(*g*) Cr. Jac. 280. 12 Co. 17.

dence; *quod fuit conceſſum* by all the other Judges and Barons of the Exchequer. The 2d Reaſon was, becauſe it is expreſly alledged in the Indictment, That the ſaid *John Mackalley, &c. eundem Rich'um Fells, &c. felonice, voluntarie, & ex malitia ſua præcogitata, &c. percuſſit & inforavit, &c.* So that beſide the ſpecial Matter which implies Malice, it is expreſly contained in the Indictment, that he feloniouſly and *ex malitia præcogitata* killed the ſaid *Fells*, and then altho' the ſpecial Matter given in Evidence had varied in Subſtance from the ſpecial Matter contained in the Indictment, yet for as much as it was reſolved that the Indictment in this Caſe might be general, for this Cauſe the Evidence, altho' it doth not agree with the ſpecial Matter, yet it proves, that the Priſoners killed the ſaid *Fells* of their Malice prepenſe: And ſo well maintains the Indictment. And that in the End was the Opinion of *all the Juſtices and Barons of the Exchequer.*

2. Exception was taken to the Verdict, That the Cuſtom found by the Jury, That after a Plaint entered, the Defend. might be arreſted by his Body, was againſt Law, becauſe the Def. ought to be firſt ſummoned before the Precept in Nature of a *Capias* can iſſue, for his Body ſhall not be arreſted if he has ſufficient, *&c. & non allocatur*; for it appears by the Book in * 21 *E.* 4. 66. *b.* and by common Experience always daily uſed, that after a (*a*) Plaint entred, by the Cuſtom of *London*, (which is eſtabliſhed and confirmed by Parliament) the Defendant may be arreſted. And in this Caſe three Points were reſolved *by all the Juſtices and Barons of the Exchequer.* 1. That altho' the Proceſs be apparently (*b*) erroneous, that yet if the Miniſter of Juſtice in the Execution thereof be killed, it is Murder, for the Miniſter is not bound to diſpute the Authority of the Court, which awards the Proceſs; but his Office is to execute the Proceſs: And therefore, if a (*c*) *Capias* in an Action of Debt be awarded againſt a Baron, or other Peer of the Realm, which is erroneous (becauſe their (*d*) Body by Law is privileged in ſuch Caſe); yet if the Officer be killed in Execution thereof, it is Murder. So if a *Capias* be awarded where a Diſtreſs ought to iſſue, and in Execution thereof the Officer is killed, it is Murder; for as the Sheriff, *&c.* when he is charged with an Eſcape ſhall not take Advantage of any Error in the Proceeding; ſo the Defendant when he kills the Sheriff, *&c.* ſhall not take Advantage of Error in the Proceſs. 2. It was reſolved, That if any Magiſtrate or Miniſter of Juſtice, in Execution of his Office, or in keeping of the Peace according to the Duty of his Office be killed, it is Murder, for their Contempt and Diſobedience to the King, and to the Law, for it is *contra poteſtatem Regis & legis*, and therefore, if a Sheriff, Juſtice of Peace, chief Conſtable, Petit Conſta-

* Poſtea 68. b.
(*a*) 1 Rol. 555. Cro. Jac. 473. 8 Co. 126. a. Jenk. Cent. 291.
(*b*) Cr. Jac. 280. Cr. Car. 371. Jenk. Cent. 291.
(*c*) 6 Co. 54. a. 16 Co. 76. b. Larch 223. 2 Rol. Rep. 493, 494. Hal. Pl. Cro. 46. Jenk. Cent. 291. Cr. Jac. 280. Cr. Jac. 3. Moor 767. 2 Bulſtr. 65.
(*d*) 6 Co. 52. b. 9 Co. 49. a. 60. a. Cr. Argum. 106. Style 222. 2 Leon. 174. Hob. 61.
(*e*) 8 Co. 142. a. Poſtea 119. a. Cr. Jac. 3. Moor 275, 276. 2 Bulſtr. 64, 65. Godb. 403. Savil 63. Cr. El. 164, 165. 2 Leon. 85. Jenk. Cent. 291. Hal. Pl. Cor. 45. 3 Inſt. 52. Cr. Jac. 280. Cr. Car. 183, 372, 538. 1 Jones 346. Ant. 67. b.

Q. Rep. Q. A. 249, &c.

Conſtable, Watchman, or any other Miniſter of the King, or any who comes in their Aid be killed in doing of their Office, it is Murder for the Cauſe aforeſaid: For when the Officer or King's Miniſter by Proceſs of Law (be it erroneous or not) arreſts one in the King's Name, or requires the Breakers of the Peace to keep the Peace in the King's Name, and they notwithſtanding diſobey the Arreſt or Command in the King's Name, and kill the Officer, or the King's Miniſter, Reaſon requires that this killing and ſlaying ſhall be an Offence in the higheſt Degree of any Offence of this Nature; and that is voluntary, felonious, and Murder of Malice prepenſe. And a Watchman by the Law may arreſt a Nightwalker, 4 *H.* 7. 2. *a.* and if a (*a*) Watchman arreſts ſuch a one, and he kills him, it is Murder. *Vide Heydon's Caſe in the 4th Part of my Reports, f.* 40 & 41. *a.* And it is true, That the Life of a Man is much favoured in Law, but the Life of the Law it ſelf (which protects all in Peace and Safety) ought to be more favoured, and the Execution of the Proceſs of Law and of the Offices of Conſervators of the Peace, is the Soul and Life of the Law, and the Means by which Juſtice is adminiſtred, and the Peace of the Realm kept. *Vide* 2 *R.* 3. 21. *b.* If the (*b*) Principal be erroneouſly attainted, the Acceſſory ſhall be put to anſwer, and ſhall not take Benefit for the Saving of his Life of the erroneous Proceeding againſt the Principal. 3. It was reſolved, That the Officer or Miniſter of the Law in the Execution of his Office, if he be reſiſted or aſſaulted, is not bound to (*c*) fly to the Wall, &c. (as other Subjects are) for *Legis miniſter non tenetur in executione officii fugere, ſeu retrocedere.*

(*a*) Ant. 66. a. 4 Co. 41. a. Young's Caſe. 3 Inſt. 52. Cr. Jac. 280. Hal. Pl. Cor. 45.

(*b*) Poſt. 119. a. b.

(*c*) Jenk. Cent. 291. Hal. Pl. Cor. 41. 3 Inſt. 56.

3. It was objected, That the Def. ought not to have been arreſted before the Plaint was entred of Record in the Court before the Sheriff, for this is in Truth the Court of Record where the Declaration and Pleading ſhall be. To that it was anſwered and reſolved *by all*, That after the (*d*) Plaint entred in the Porter's Book, and before the Entry thereof in the Court before the Sheriff, (*e*) the Def. may be arreſted by the Cuſtom of *London*; and therewith agrees the Book in (*f*) 21 *E.* 4. 66. *b.* in the Point. *Vide* 9 *E.* 4. 48. *b.*

(*d*) Jenk. Cent. 291. 1 Rol. 555. Cr. Jac. 473.

(*e*) 8 Co. 126. a. (*f*) Ant. 68. a.

4. It was objected, That the ſaid Arreſt found by the Verdict was not lawful, for the Serjeant in this Caſe ought to have, when he arreſted him, (*g*) ſhewed at whoſe Suit, out of what Court, for what Cauſe he made the Arreſt, and in what Court it is returnable, to the Intent, that if it be for any Execution, he might pay the Money, and free his Body; and if it be upon mean Proceſs, either to agree with the Party to put in Bail according to the Law, and to know when he ſhall appear, as it is reſolved in the Counteſs of *Rutland's*

(*g*) Hal. Pl. Cor. 45, 46. Cr. Jac. 485, 486. 2 Rol. 279. 6 Co. 54. a. Jenk. Cent. 291.

Caſe,

Caſe, in the *6th Part of my Reports*, *f.* 55. But in the Caſe at Bar the Serjeant ſaid nothing but *I arreſt you in the King's Name, at the Suit of Mr.* Radford, and ſo the arreſt not lawful, and by Conſequence the Offence is not Murder. As to that it was anſwered and reſolved, That it is true that it is held in the Counteſs of *Rutland's* Caſe, That the Sheriff, *&c.* or Serjeant ought upon the Arreſt to ſhew at whoſe Suit, *&c.* But that is to be intended when the Party arreſted ſubmits himſelf to the Arreſt, and not when the Party (as in this Caſe *Murray* did) makes Reſiſtance and interrupts him, and before he could ſpeak all his Words, he was by them mortally wounded and murdered, in which Caſe, the Priſoners ſhall not take Advantage of their own Wrong. It was alſo reſolved, That if one knows that the Sheriff, *&c.* has Proceſs to arreſt him, and the Sheriff, *&c.* coming to arreſt him, the Defendant to prevent the Sheriff's arreſting him, kills him with a Gun, or any other Engine, or Weapon, before any Arreſt made, it is Murder; *a fortiori*, in the Caſe at Bar, when he knew by the ſaid Words, that the Serjeant came to arreſt him.

6 Co. 54. a.

Cr. Jac. 485, 486.

5. Exception was taken, becauſe it was not found by the Verdict, That the ſaid *Mackalley felonice percuſſit*, *&c.* but *percuſſit* only, *& quod iidem Johan' Murray, & Johan' Engliſh fuerunt præſentes, auxiliantes*, *&c.* and doth not ſay *felonice*; *& non allocatur*; for the Office of the Jury is to ſhew the Truth of the Fact, and to leave the Judgment of the Law to the Court; but they have well concluded, And if *ſuper tota' materia' præd' videbitur Juſtic' & Cur' hic quod præd' interfectio dict' Rich' Fells ſit murdrum, tunc Jurat' præd' dic' ſuper ſacramentum ſuum quod præd' Johan' Murray, Johan' Mackalley, & Johan' Engliſh ſunt culpabiles, & quilibet eorum eſt culpabilis de murdro præd' Ric' Fells, modo & forma prout per Indictamentum præd' ſupponit'*, *&c.* And becauſe the Judges and the Court have reſolved upon the ſpecial Matter, that it is Murder, the Jury have found him guilty of the Murder contained in the Indictment.

Jenk. Cent. 291.

6. It was objected, That the Serjeant at the Time, nor before the Arreſt, ſhewed the Priſoner his Mace; for thereby he is known to be the Miniſter of the Law, and from thence he has his Name, *ſc. ſerviens ad clavam*; *Et non allocatur* for two Cauſes. 1. Becauſe the Jury have found, That he was *ſerviens ad clavam dicti Vicecomitis, & juratus, & cognitus, & miniſter Cur'*; And a Bailiff ſworn and known need not (altho' the Party demands it) ſhew his

Jenk. Cent. 291. Hale's Pl. Cor. 46.

his Warrant; nor any other ſpecial Bailiff is not bound to ſhew his Warrant; without demand of it, 8 *E.* 4. 14. *a.* 14 *H.* 7. 9. *b.* 21 *H.* 7. 23. *a.* and where the Books ſpeak of a known Bailiff, it is not requiſite that he be known to the Party who is to be arreſted, but if he be commonly known it is ſufficient. 2. If Notice was requiſite, he gave ſufficient Notice when he ſaid, *I (a) arreſt you in the King's Name*, &c. and the Party at his Peril ought to obey him; and if he has no lawful Warrant, he may have his Action of (*b*) falſe Impriſonment. So that in this Caſe without Queſtion the Serjeant need not ſhew his Mace; and if they ſhould be obliged to ſhew their Mace, it would be a Warning for the Party to be arreſted to flie.

(*a*) Jenk. Cent. 291.

(*b*) Antea 66. a.

7. Another Exception was taken to the Verdict, becauſe the Cuſtom which gave the Serjeant Warrant to arreſt, was not purſued; for the Cuſtom is *Quod aliqua perſona exiſtens Serviens ad clavam ad requiſitionem partis hujuſmodi querelam ſic levantis, &c. uſa fuit arreſtare*, which ought to be taken that the Plaint ought to be entred before the Requeſt; but afterwards it is found that the Requeſt was before the Plaint, and ſo the Cuſtom not purſued; & *non allocatur*. For by the Cuſtom it is not proved, but that the Requeſt may be as well before as after the Plaint entred; and ſo is the common Uſage and Experience.

8. It was objected, That the Verdict was repugnant in it ſelf, for firſt they find, that the Plaint was entered *de Recordo in Rot' Cur' computator' in his verbis, Die Sabbathi* 17 *die Novemb.* and afterwards they find, *quod intratio præd' in Rot' Cur' præd' facta fuit die Lunæ* 19 *die Nov. &c.* And the (*c*) Jury can't find any thing againſt the Record it ſelf. *Vide* 11 *H.* 6. 42. *a.* 9 *H.* 6. 37. 28 *Aſſ.* 34. 47 *E.* 3. 19. 11 *H.* 4. 26. 9 *H.* 7. 3. 13 *H.* 7. 14. 33 *E.* 3. *Judgment* 255. *Dyer* 32 *Eliz.* 147, *&c.* And all this was affirmed for good Law. But that makes the Caſe ſtronger againſt the Priſoners, for now the Judges ought to judge upon a Plaint entred of Record *in Cur' Computator'*, the *Saturday* the 17th of *Novemb.* which was before the Arreſt.

(*c*) 2 Co. 4. b. 5 Co. 30. b. Dyer 32. pl. 7. 2 Rol. 691. Jenk. Cent. 291. 1 Rol. 555.

9. Exception was taken to the Verdict, that the Entry of the Plaint was without Form, and ſo ſhort and obſcure, *quod opus eſt interprete*; & *non allocatur*. For it was found that it was according to the Cuſtom of *London*; and is but a Remembrance to draw the Declaration at length afterwards in the Court of Pleas, which notwithſtanding is by Cuſtom ſufficient to have the Def. arreſted. And afterwards at the Seſſions of *Newgate* held the 5 Day of *May* after this Term, the 2 Chief Juſt. openly declared the Reſolution of all the

the Juſtices and Barons of the Exchequer, to the great Satisfaction and Contentment of all there preſent. And accordingly Judgment of Death was given againſt the ſaid three Priſoners by the Recorder of *London*, in the Preſence of the ſaid two Chief Juſtices. And the ſaid *Mackalley* was executed with other Priſoners at *Tyburn*.

[*See* 3 Salk. 45, 46.]

RICHARD

RICHARD PEACOCK's *Caſe.*

Trin. 9 Jacobi 1.

In the Star-Chamber.

NOTA, This Term in the Star-Chamber in the Caſe between Sir *George Reynel* Plaintiff, and *Richard Peacock* and other Defendants, where *J. H.* and another were Commiſſioners to examine *Peacock*, upon Interrogatories drawn by the Plaintiff; and *Peacock* being examined would have declared the whole Truth, which *J. H.* being a Commiſſioner choſen by the Plaintiff, would not ſuffer him to do, but held him ſtrictly to the Interrogatories, ſo that the Truth could not appear. And that was held by the *Lord Chancellor, the two Chief Juſtices, Chief Baron, and the whole Court of Star-Chamber*, a great Miſdemeanor, for it is a murthering of the Truth and Right, as the Statute of *Exeter* ſpeaks, *& per quod Juſtitia & veritas ſuffocantur*, as it is ſaid *in capite itineris.* And Commiſſioners to examine ought to be *(a)* indifferent, and by all Means to expreſs the Truth, and they are not *(b)* ſtrictly tied to the Words of the Interrogatories, but to every Thing alſo which neceſſarily ariſeth thereupon for the Manifeſtation of the whole Truth concerning the Matter in Queſtion. Alſo the ſaid *J. H.* when he was in Examination went out of the Place to the Plaintiff, who was in another Room near to him, and had ſecret Conference with him. And it was held *per totam Curiam*, That a Commiſſioner ought not before Publication of the Witneſſes *(c)* to diſcover to any of the Parties the Matter which any Witneſs has depoſed, nor after he beginneth to examine upon the Interrogatories, to confer with the Party to take new Inſtructions to examine further than he knew before; and if he ſhall ſo do, theſe are great Miſdemeanors, puniſhable by

(a) 4 Inſt. 278.

(b) 4 Inſt. 278.

(c) 4 Inſt. 278.

by *(a)* Fine and Impriſonment. For if theſe ſhall be permitted, Perjury would in theſe Days abound; and for as much as in the Star-Chamber and Exchequer-Chamber the Courts proceed upon Examination of Witneſſes, if the Truth ſhould be by ſuch Means ſuppreſſed, and Falſity certified in the Examinations, ſo the Innocent would be oftentimes puniſhed, or the Guilty eſcape Puniſhment, and Juſtice and Right would be utterly ſubverted; for, as it is commonly ſaid, The Suppreſſion of Truth, is the Oppreſſion of the Innocent. And the Lord Chancellor ſaid, That he heard in the Common Pleas, in the Time of Sir *James Dyer*, then Chief Juſtice of the Common Pleas, That it was reſolved by the Court, that it was not a principal *(b)* Challenge to ſay, That one returned of a Jury was choſen Commiſſioner (*b*) by the other Party for Examination of Witneſſes in the Court of Chancery; for every Commiſſioner is made and conſtituted by the (*c*) King, who is the Head of Juſtice, by his Commiſſion under the Great Seal; and therefore he being Commiſſioner upon Record, is preſumed in Law to be indifferent. But otherwiſe it is of an *(d)* Arbitrator, for he is created only by the Submiſſion of the Parties themſelves in the Country; and therefore it is a principal Challenge to ſay, That ſuch a one returned of the Jury was an Arbitrator for the other Party; and therewith agree 7 *H.* 7. 10. *b.* 9 *E.* 4. 46. 15 *E.* 4. 24. 3 *H.* 6. 24. *b.* And the Court had ſo great Diſlike of the Proceedings of the ſaid *J. H.* that the Attorney General was ordered to prefer an Information againſt him for the ſaid Miſdemeanors, and in the mean Time he was put out of the Commiſſion of Peace.

(*a*) Cr. Jac. 65.

(*b*) Co. Lit. 157. b. 2 Rol. 656.

(*c*) Cr. Jac. 65. Yelv. 62. Quære.

(*d*) Co. Lit. 156. a. 157. b. 2 Rol. 655, 656. Br. Challenge 7, 88, 156. 3 H. 6. 24. b. 9 E. 4. 47. a. Fitz. Challenge 16, 57.

Doctor

Doctor HUSSEY's *Caſe.*

Trin. 9 Jac. 1.

Co. Ent. 568. nu. 7. 2 Brownl. 59, 91. 3 Bulſt. 275. Cr. Car. 594. Hob. 93. 1 Rol. Rep. 445. Cr. Jac. 413.

IN a Raviſhment of Ward brought by *Francis Moor*, Eſq; according to the Stat. of *W.* 2. *cap.* 35. againſt *James Huſſey*, Eſq; and *Katharine* his Wife, *Robert Wakeman* Clerk, *John Woodford*, and *Cutbert Clifford*, of the Raviſhment of *John Horniold*, Son and Heir of *Ralph Horniold*, Eſq; being within Age: The Defendants pleaded Not guilty, which Iſſue was tried at the Bar, *Mich.* 8 *Jac.* And the Plea began *Trinit.* 7 *Jac. Rot.* 759. and was tried *in abſentia Walmſley propter ægritudinem*, and of *Coke* Chief Juſtice, then being in the Star-Chamber. And the Jury found that the ſaid *Katharina, Robertus & Johannes Woodford fuer' culpabiles de raptu & abductione præd' Johannis Horniold, prout præd' Franciſcus ſuperius verſ. eos queritur, & aſſident damna, &c.* 10 *l. & cuſtag'* 10 *s. Et ulterius Juratores præd' dicunt ſuper ſacramentum ſuum, quod præd' Johannes Horniold maritatus exiſtit, quodq; idem Johannes tempore Maritagii illius fuit ætatis ſexdecim annorum & amplius, & infra ætatem viginti & unius annorum, quodq; Maritagium præd' Johannis Horniold valet juxta verum valorem ejuſdem* 800 *l.* and that the ſaid *James* (the Huſband of the ſaid *Katharine*) and *Cutbert* were Not guilty. And in Arreſt of Judgment divers Points were moved and argued by the Serjeants at Bar in the Terms of St. *Mich. Hill.* and *Paſch.* And the principal Point which was argued by the Serjeants was, if a Feme Covert was within the Statute of *W.* 2. *cap.* 35. or not. And now this Term it was argued by the Juſtices; And it was argued

by *Foſter* and *Warburton*, that Judgment ought to be given as well againſt the Feme *(a)* Covert, as againſt the others who were found guilty; and their principal Reaſon was, becauſe at the *(b)* Com. Law a Feme Covert was puniſhable for Raviſhm. of a Ward, and ſhall be fined and impriſon'd for it, and Damages ſhall be recovered againſt her, and levied upon her Husband, and after his Death upon the Wife herſelf; and the Stat. of *W.* 2. *c. (c)* 35. adds but a greater Penalty to the Value of the Marriage, Damages and Coſts, and Impriſonment for 2 Years, and if the Defendants are not ſufficient, *abjurent regnum vel habeant perpetuam priſonam:* So that it never was the Meaning of the Makers of the Act to exclude a Feme Covert out of the Purview thereof, who was puniſhable by Action of Treſpaſs at the *(d)* Com. Law, for which Offence alſo her Body at the Com. Law ſhall be impriſoned: And therefore they ſtrongly held, that a Feme Covert was within the Stat. of * *Merton*, *c.* 6. and within the Stat. of *W.* 1. *c.* 20. *de malefact. (e) in parcis.* For a Feme Covert for theſe Offences was puniſhable by the Com. Law, and theſe Statutes add greater Puniſhment, and in another Manner than it was at the Com. Law. And they ſaid, That a Feme Covert was within the Words of the Act; and it would be a great Miſchief if any Conſtruction ſhould exempt her out of the Penalty of this Stat. (in ſuch odious Caſes as Raviſhm. of Wards are.) And an Action upon the Stat. of forcible Entry upon the Stat. of *(f)* 8 *H.* 6. lies againſt a Feme Covert, as the Book is in 36 *H.*6. 22, 23. So Waſte lies againſt the Husb. and Wife, as it is held in 3 *E.*3. 76. So if a Feme Covert commits *(g)* Rediſſeiſin, ſhe ſhall be puniſhed in a *Rediſſeiſin*, 9 *H.* 4. 5. *b. F.N.B.* 188. So *Ceſſavit* lies againſt Husb. and Wife, 4 *E.* 2. *Cui in vita* 22. And many other Caſes were put upon this Ground, wherefore they concluded that Judgm. ſhould be given againſt all for the Value, Damages and Coſts, and that the Defs. *Capiantur.* And it was argued by the Chief Juſt. and *Walmeſly* to the contrary, that the Pls. ſhall have *(h)* Judgm. upon this Record againſt none of the Defs. And their Argument was divided into 4 Parts. 1. What Alteration the Stat. of *W.* 2. *cap.* 35. has made. 2. If a Feme Covert be within the ſaid Stat. 3. If the Verdict be ſufficient or not againſt any of the Defs. 4. If Damages beſides the Value are to be recovered in an Action of *Raviſhment* grounded upon this Stat. As to the firſt, it was reſolved by all, that at the Com. Law for Raviſhm. of Ward, the Guardian might have had an Action of *Treſp.* in which the Pl. ſhould recover Damages, and the Defs. ſhould pay a Fine to the K. and ſhould be impriſoned, until, *&c.* and that ſuch Action lay againſt a *(i)* Feme Covert, as well as againſt a Feme Sole; and therefore where ſome Books ſay, that no Writ of *Raviſhm. of Ward* lay at the Com. Law, it is true, if it be meant of ſuch *Raviſhment of Ward*, which is in *Regiſt.* and in *F.N.B.* for it is grounded and

(a) Cr. Jac. 413. 2 Brownl. 60, 91, 93. 1 Rol. Rep. 445. 2 Bulſt. 322. 3 Bulſt. 87. Hob. 93, 101.
(b) Hob. 93.
(c) 2 Inſt. 437, 438.
(d) Hob. 93.
* 2 Inſt. 90, 91.
(e) Hob. 95. 2 Inſt. 198, 199.
(f) Hob. 95. 8 H. 6. c. 9.
(g) Hob. 96. Co. Lit. 154. b. Moor 373. Fitz. Rediſſeiſin 1. Br. Rediſſeiſin 1.
(h) Hob. 101.
(i) Hob. 93.

and formed by the Stat. of *W.* 2. *c.* 35. but that in ſuch Caſe the Guardian might have an Action of (*a*) *Treſpaſs* is manifeſt in our Books, 29 *Aſſ. p.* 35. 29 *E.* 3. 24. *a. b.* 3 *E.* 3. 3. 8 *E.* 3. 52. *a. b.* 22 *R.* 2. *Damages* 130. 12 *H.* 7. *Kelw.* 20. *b.* 21. *a. F. N. B.* 90. *H.* 140. Then came the Stat. of *Merton*, *c.* 6. by which it is enacted, (and greater Puniſhment than the Common Law inflicted) *de hæredibus, &c. contra pacem vi abductis vel detentis ſeu maritatis, ita provis' eſt qd' quicunq; laicus inde convict' fuerit qd' puerum aliquem ſic detinuerit, abduxerit ſeu maritaverit, reddat perdenti valorem Maritagii, & pro delicto corpus ejus capiatur ut impriſonetur, &c. Et hoc de hærede infra quatuordecim annos exiſtente.* And by the Stat. of *W.* 2. *c.* 35. it is provided, *de pueris maſculis ſeu femellis, quorum maritagium ad aliquem pertineat, raptis & abductis, ſi ille qui rapuit non habens Jus in maritagio, licet poſtmodum reſtituat puerum non maritatum, vel de maritagio ſatisfecerit, puniatur tamen pro tranſgreſſione per priſonam duorum annorum, & ſi non reſtituerit, vel Hæredem poſt annos nubiles maritaverit, & de maritagio ſatisfacere non potuerit, abjuret regnum vel habeat perpetuam priſonam.*

(*a*) Co Lit. 137. a. Br. Treſp. 252. 3 E. 3. 2. b. 2 Inſt. 50. Hob. 94.

(*b*) 2 Inſt. 90. And this Stat. of *W.* 2. *c.* 35. has made 7 (*b*) Alterations. 1. The ſaid Stat. of *Merton* did not extend to Heirs Females, for before the Age of (*c*) 14 Years the Male could not aſſent to Marriage, but the Heir Female at 12; and therefore it was taken that the Stat. of *Merton* did not (*d*) extend to an Heir Female: And therewith agrees the Book in 35 *H.* 6. 53. *a. b.* and the Act of *W.* 2. by expreſs Words extends to both; for the Words are, *de pueris maſculis ſeu femellis.* 2. The Stat. of *Merton* doth not extend to any of the Clergy; for the Words are, *quicunq, laicus inde convictus fuerit, &c.* but the Stat. of *W.* 2. extends to all, (*e*) for the Words are, *ſi ille qui rapuerit jus non habens, without any Reſtraint.* 3. The Stat. of *Merton* doth not extend as appears before, but when the Heir was raviſh'd within 14 Years, within which Time the Heir Male can't conſent to Marriage: But now the Stat. of *W.* 2. extends to a Raviſhment *poſt annos nubiles.* 4. The Words of the Stat. of *Merton* are, *vi abductis vel detentis*, the Words of the Stat. of *W.* 2. are, *raptis ſeu detentis.* 5. The Action given by the Stat. of *Merton* is the ancient Writ of *Right of Ward*, as it is held in 18 *E.* 3. 52. *a. b.* But the Stat. of *W.* 2. *dat actionem formatam in verbis (f) conceptis*, a new Action, the Form of which was not at the Common Law, the Form of which appears ſpecially by the Act. 6. In Proceſs, for in a Writ of *Right* upon the Stat. of *Merton*, he ſhall have but the ancient Proceſs at the Common Law: But the Stat. of *W.* 2. gives a more ſpeedy Proceſs, and that the Death of the Plaintiff or Defendant (*g*) ſhall not abate the Writ. 7. The Stat. of *W.* gives greater

(*c*) 2 Inſt. 90. Co. Lit. 78. b.

(*d*) 2 Inſt. 439. Hob. 94, 95.

(*e*) 2 Inſt. 439.

* Poſt. 73. b. 74. b.

(*f*) Co. Lit. 136. b.

(*g*) 2 Brownl. 91, 94.

Puniſhment than the Stat. of *Merton* doth, as appeareth by the Purview of both Acts. And theſe are the moſt material Alterations that the Statute of *W.* 2. has made.

As to the 2 Point; If a Feme Covert be within the Purview of the Statute of *W.* 2. (*a*) The Parts thereof were conſidered, which as to this Purpoſe ſtand upon four Parts. 1. *Si reſtituat puerum non maritatum, puniatur tamen pro tranſgreſſione per priſonam duorum annorum.* 2. If he marries the Infant, & *de maritagio ſatisfecerit, puniatur tamen, per priſonam ut ſupra.* 3. *Si non reſtituerit, & ſatisfacere non potuerit, abjuret regnum, vel habeat priſonam imperpetuum.* 4. *Si Hæredem poſt annos nubiles maritaverit & de maritagio ſatisfacere non potuerit abjuret regnum, &c. ut ſupra.* And this Caſe is within the laſt Clauſe, *ſc.* That the (*b*) Feme Covert has married the Infant, and is not able to (*c*) ſatisfy, for a Feme-Covert has nothing during the Coverture wherewith ſhe can ſatisfy, but is diſabled by the Law to ſatisfy; and foraſmuch as the Law has diſabled a Feme-Covert to ſatisfy, the Law will not for this Diſability inflict ſo great a Puniſhment as perpetual Baniſhment, or perpetual Impriſonment, *id eſt, perdere ſive patriam, ſive libertatem: Et* (*d*) *lex non cogit ad impoſſibilia; ſed* (*e*) *impotentia excuſat legem.* 22 *E.* 3. *Coron.* 279. If an Appeal be brought againſt a (*f*) Feme-Covert, or a Monk, and they are acquitted, the Feme-Covert or Monk ſhall never have a Writ to enquire of the Abettors; for by general Words the Law will never enable any for his Benefit, whom the Law has diſabled; *a fortiori* the general Law will never puniſh any ſo ſeverely for not doing of that which the Law it ſelf has diſabled him to do. So upon the Statute of *Marlebridge, Non liceat hujuſmodi feoffatos expellere*; If the Lord's (*g*) Villain be infeoffed, the Lord ſhall expel him, for the general Law will not do wrong, *ſc.* to enable the Villain againſt the Lord. And divers other Caſes were put to the ſame Effect; as the Caſe of Eccleſiaſtical Perſons, in the *4th Part of my Reports, f.* 15. and others. And (*h*) 7 *E.* 3. 11. *a. b.* was cited by the Ch. Juſtice, *ſc.* That *W.* brought a Writ of *Raviſhment of Ward* againſt the Maſter of the Hoſpital of *Burton S. Lazer*, and *Robert de Lee*, & *Richard de la Foſſe*, Confreres of the ſame Hoſpital, and there *Trew* Serjeant for the Defendant ſaid; Sir, This Writ is given by Statute, and of a certain Form, and it ought to be when the Parties againſt whom the Writ is brought are ſuch, who by the Law may have Right to have the Ward; but when the Writ it ſelf ſuppoſes any named in the Writ to be ſuch, That they can't have Right in the Ward, *&c.* wherefore this Writ can't be maintained.

(*a*) Weſtm. 2. cap. 35. 2 Browni. 60, 91, 93. Cr. Jac. 413. 1 Rol. Rep. 445. 2 Bulſtr. 322. Hob. 93. 101. 3 Bulſtr. 87. 2 Inſt. 437, 438, 439.

(*b*) Hob. 93, 101. Cr. Jac. 413.

(*c*) Cr. Jac. 440.

(*d*) Hob. 96. Co. Lit. 92. a; 231. b.

Hardr. 387.

(*e*) Hard. 387.

1 Co. 98. a. 4 Co. 11. a. 5 Co. 22. a. 6 Co. 21. b. 68. a. 10 Co. 139. b. Co. Lit. 29. a.

(*f*) Hob. 98.

(*g*) 2 Inſt. 385. 11 Co. 71. b. 52 H. 3 c. 6. 2 Inſt. 111.

(*h*) Hob. 97.

To which Sir *William Herle* Ch. Juſtice of *C. B.* anſwered, If the Freres in Aid of the Guardian took the Infant in ſaving the Right of the Hoſpital, the Freres have *quodam modo* Right, becauſe they are of the Hoſpital; wherefore anſwer; out of which Caſe two things were obſerved: 1. That every Man ſhall be intended ſufficient to ſatisfy the Plaintiff, if the Plaintiff does not pray that the Jury may enquire of his ſufficiency; and therewith agree *(a)* 8 *E.* 3. 52. *a.b.* 22 *R.* 2. *(b) Damag.* 130. But when it appears by the Writ it ſelf, that any Def. is not able (having Diſability by Law) to ſatisfy, there the Difference appears, becauſe in the one Caſe it is apparent to the Court, and in the other not; and therefore this Caſe is ſpecial, and differs from the Reaſon of all the Caſes which have been put: For Example, from the Caſe *de Malefactoribus in parcis*; for there the Purview is general; but the ſaid Act is not ſo preciſely penned as the Stat. of *W.* 2 is: For in Effect this Act has provided, that none ſhall be puniſhed by this Act, but who by Poſſibility may ſatisfy at the Time of the Judgment, (for the Words are, *& de maritagio ſatisfacere non potuerit,*) and not to puniſh him by the Law for the Diſability which the Law it ſelf has made. And in *(c)* 8 *E.* 3. 52. *a. b.* 22 *R.* 2. *Damages* 130, *&c.* The Pl. prayed that the Jury might enquire of the Defendant's ſufficiency, which would be to no purpoſe in this Caſe; becauſe it appears to the Court, That a Feme-covert at the Time of the Judgm. is diſabled by the Law: And therefore ſuch Rule is to be given in this Caſe as Sir *Wm. Herle* gave in the like Caſe in 7 *E.* 3. 41. in a Writ of *(d) Meſne* brought againſt the Husband and Wife, they made Default at the grand *Diſtreſs*, upon which the Pl. ſued Proclamation; and now at this Day the Proclamat. was teſtified, and the Husband and Wife were demanded, and appeared not; for which the Pl. prayed they might be forejudged: *Herle*; There is no Reaſon that the Wife ſhould be forejudged of her Seigniory for the Default of her Huſband, and eſpecially by your Suit which you have brought, which is given by Statute, where you might have your Suit at the Common Law: And ſo in this Caſe the Plaintiff might have his Remedy at the Common Law, either by Action of *Treſpaſs* againſt all who raviſhed, or a Writ *de valore Maritagii* againſt the Heir himſelf, and not upon this Statute, for the Goods or Lands of the Husband who is innocent, are not to be liable by this Act, for the Act has expreſly provided, That for the Inſufficiency of the Defendant he ſhall be exiled, *&c.* And therefore the Statute doth not charge the Husband in this Caſe; for the Statute is penal and perſonal to the Defen-

(a) Hob. 98, 99. Ant. 72. b. 74. b.
(b) 2 Brownl. 92, 93. Hob. 94, 98.
(c) Hob 98, 99. Ant. 72. b. 74. b.
(d) Co. Lit. 100. a.

Defendant himſelf. And ſo for the Raviſhment made by a Monk, his Soveraign ſhall not anſwer by Force of this Act. As to the Objection which was made, That he may have Judgment at the Common Law, *ſc.* of Damages and Impriſonment, and then the Husband ſhall be charged with the Damages; that was utterly denied for two Reaſons; the one that this Action is grounded upon the Stat. of *W.* 2. *c.* 35. and ſuch Writ in this Caſe is brought, and is there formed; and therefore he ought to have Judgment according to his original, which is the Foundation of the Suit; and not to ground his Writ upon the Statute, and to have Judgment at the Common Law, *nec e converſo*, (*a*) 30 *E.* 3. 11. *b.* The King brought a *Prohibition* againſt the Prior of *Woburne*, That where the King had recovered in a *Quare Impedit*, the Defendant ſent his Frere to *Rome* with an Appeal, and ſued there to avoid the Judgment, according to the Stat. of *Præmunire*, and upon Not guilty pleaded, all this was found againſt the Def. and there for the King Judgment was prayed upon the Stat. newly made, *ſc.* 27 *E.* 3. *c.* 1. in caſe of *Præmunire*, and it was adjudged he ſhould not have it, becauſe the (*b*) Judgment ought to be conformable to the Original; and this Suit was not brought according to the Stat. but by a Writ of *Prohibition* at the Com. Law. And in 47 *E.* 3. 10. *b.* in a (*c*) general Action of *Treſpaſs* againſt Malefactors in Parks, the Defendants were found guilty, and the Pl. prayed Judgment of double Damages, three Years Impriſonment, and to find Sureties never more to offend; and if they did not find Sureties, that they might abjure the Realm. And altho' the Stat. gave no formed Action, yet foraſmuch as the Action was brought generally at the Com. Law, he could not have Judgment upon the Stat. and therewith agree 10 *H.* 6. 2. a. and many other Books.

(*a*) 11 Co. 34. b.

(*b*) Doctrin. pl. 333.

(*c*) Br. Treſpaſs 38. Br. Action ſur le Statute 10. Fitz. Action ſur le Stat. 13.

As to the 3 Point, It was held by the Chief Juſtice, and *Walmeſley*, that the (*d*) Verdict was inſufficient; for this Action being founded upon the ſaid Stat. and the Statute extends only when the Raviſher marries the Infant, for the Words are (*hæredem poſt annos nubiles maritaverit*) ſo that inaſmuch as the Statute is ſo penal, it ſhall not be extended but only when the Raviſher marries him. And if after the Raviſhment, the Infant of his own Head *poſt annos nubiles* marries himſelf, without the Procurement or Aſſent of the Raviſher, or if a Stranger afterwards marries him, in theſe Caſes the firſt Raviſher (*e*) ſhall not be puniſhed by this Statute. And in this Caſe the Jury have found generally *quod prædict'* Johannes Horniold *maritatus exiſtit, quodque idem* Johannes *tempore maritagii illius fuit ætatis ſexdecim annorum & amplius, & infra ætatem vigint & unius annorum*, which Ver-

(*d*) 3 Co. 9. a. Cr. Jac. 413. Hob. 93. 2 Brownl. 59. 92.

(*e*) Hob. 99.

dict is not only uncertain who procured him to be married, *ſc.* the Raviſher, or any Stranger, or the Plaintiff himſelf, or if the Ward of his own Head married himſelf, but is alſo uncertain in the Time when he was married, *ſc.* before the Raviſhment or after, and therefore in the Book of Entries 368. *p.* 11 & 12. 369. *p.* 17. A. *rapuit, & idem* A. *maritavit, &c. contra voluntatem* of the Plaintiff. *Vide* 27 *H.* 6. *Gard* 118. 8 *E.* 3. 52. *a. b.* 33 *E.* 3. *Judgment* 251, *&c. acc.* And therefore it is well ſaid in 30 *E.* 3. (23) 29. *b.* a Verdict ought to be ſuch, that the Judges ought clearly to go to Judgment, and therefore Verdicts ambiguous and doubtful are inſufficient and void, as in 40 *E.* 3. 15. *a.* in Debt (*a*) againſt Executors they plead fully adminiſtred, and ſo nothing in their Hands: The Jury find that they have Aſſets in their Hands, and do not ſay to what Value; and for this Uncertainty the Verdict was held inſufficient and void.

(*a*) Co. Lit. 227 a. Br. Enqueſt 4.

As to the 4th Point, altho' 16 *E.* 3. *Damages* 80. and ſome other Books are againſt it, That no (*b*) Damages ſhall be recovered; yet foraſmuch as it is held in 17 *E.* 3. 57. *b.* 21 *E.* 3. 44. 24 *E.* 3. 46. 22 *R.* 2. *Damages* 130. 8 *E.* 3. 52. 27 *H.* 6. *Gard.* 118. *Paſch.* 27 *H.* 6. *Rot.* 123. *in the Book of Entries. f.* 368. and diverſe other Books with which common Experience agrees, It was reſolved Accordingly. And the Chief Juſtice vouched an ancient Reading upon the Statute of *W.* 2. *c.* 35. That where the Statute ſays (*c*) *abjuret regnum vel habeat perpetuam priſonam* in the Disjunctive, that the Election ſhall be in the Court to give Judgment upon which of the ſaid two Points the Judges will: And great Reaſon, for it may be, the Diſpoſition and Quality of the Defendant being conſidered, it would be dangerous to the State to baniſh him into foreign Countries.

(*b*) Cr. Jac. 413.

(*c*) 2 Inſt. 439.

COMBES's *Caſe.*

Trin. 11 Jacobi 1.

IN *Replevin* by *William Atlee*, againſt *Daniel Banks* and *Tho. Osborn* of taking of his Cattle at *Harmonſworth*, in a Place called *Walnut-tree Cloſe*, in the County of *Middleſex*, &c. Which Plea began *Trin.* 8 *Jac. Reg. Rot.* 330. Upon the Pleading, and Iſſue joined, and ſpecial Verdict given, the Caſe was ſuch. *Thomas Combes* Copyholder in Fee of ten Acres of Paſture in *H.* of the Manor of *Harmonſworth* in the County of *Middleſex*, by his Deed 22 *Novemb.* 5 *E.* 6. conſtituted and ordained *William Combes* and *Stephen Erlie* two Copyhold Tenants of the ſame Manor his lawful Attornies, to ſurrender *vice & nomine ſuo* to the Lord of the ſaid Manor, the ſaid ten Acres of Paſture to the Uſe of *John Nicholas* and his Heirs, and afterwards at a Court held of the ſaid Manor 8 *Julii anno* 6 *E.* 6. the ſaid Attornies *tunc tenentes Dom' per copiam Rot' Cur' in eadem Cur' oſtenderunt ſcriptum præd' gerens dat' prædict'* 22 *Nov' anno* 5. *ſupradicto, & iidem Willielmus & Stephanus authoritate eis per præd' literam Attornatus dat' in plena cur' ſurſum reddiderunt in manus Dom' præd' decem Acras paſturæ ad opus & uſum præd' Johannis Nicholas hæredum & aſſignatorum ſuorum*, who was at the ſame Court admitted accordingly: And that within the ſaid Manor there was not any Cuſtom * to ſurrender Copyhold Lands, &c. by Letter of Attorney, either in Court or out of Court. And if the ſaid Surrender by Letter of Attorney of the ſaid Lands held by Copy, &c. was good or not, was the Doubt which the Jury referred to the Con-

Co. Ent. 575. a.

* See Carthew 270.

(*a*) 2 Rol. Rep. 323, 393, 394. Herl. 24. Godb. 389. 1 Rol. 500. 1 Leon. 36. (*b*) Co. Lit. 59. a. 1 Rol. 500. (*c*) 2 Bulſt. 252. Doct pl. 104. (*d*) Co. Lit. 110. b. 2 Bulſtr. 186, 252. 253. (*e*) 2 Bulſt. 186. B. N. C. 255. Br. Cuſt. 59. Dy. 54. pl. 19. (*f*) Doct. pl. 104, 105. 1 Rol. 846. 2 Bulſtr. 252. 4 Co. 26. a. Cr. El. 103, 224, 225. 1 Leon. 328. Poph. 188. Owen 18. Hutt 101. Lit. Rep. 233. 1 Jones 249. Cr. Car. 233. Moor 272. (*g*) 2 Rol. Rep. 329, 393. 1 Rol. 330. (*h*) 1 Anderſ. 28, 29. 1 Rol. 330. O Benl. 15. pl. 63. Godb. 314, 389. 2 Rol. 330. Dy. 283. pl. 30. Benl. in Kelw. 207 a. Benl. in Aſh pl 2. N. Benl. 12. pl. 10. 1 Leon. 265. 2 Rol. Rep. 323, 394. (*i*) 1 R. 3 c. 1. (*k*) 27 H. 8. c. 10. Br. Feoffm. 43. (*l*) 9 H. 7. 26. a. Godb. 314. Br. Feoffment al uſe 28. 2 Rol. Rep. 294 (*m*) Co. Lit. 52. b.

ſideration of the Court. And this Caſe was argued at the Bar, in *Michaelmas*, *Hillary*, and *Eaſter Terms*, and in this Term, and in this it was alſo argued by the Juſtices at the Bench; and in this Caſe two Points were moved, 1. If a Surrender could be made by Force of the Letter of Attorney. 2. If the Attornies had purſued their Authority.

As to the firſt it was unanimouſly agreed by all the Judges in their ſeveral Arguments, that the Surrender in the Caſe at Bar made by Letter of (*a*) Attorney, was good; and their Reaſon was, becauſe every (*b*) Copyholder having a cuſtomary Eſtate of Inheritance, may *de communi jure*, without any particular Cuſtom, ſurrender his Lands held by Copy in full Court, and therefore in pleading the Copyholder need not (*c*) alledge a Cuſtom within the Manor to ſurrender in Court; for that which is the Uſage *per totam Angliam*, is the (*d*) Common Law, as it is held in 34 *H.* 8. *Br. Cuſtom* 59 & 34 *H.* 8. *Dy.* 54. *quod habetur* (*e*) *conſuetudo inter Mercatores per totam Angliam, &c.* is no good Manner of alledging a Cuſtom, for that is the Com. Law; and in the *Book of Entries*, Tit. *Treſp. Diviſione Copyhold* 1. *f.* 568. no Cuſtom is alledged to enable a Copyholder to ſurrender in full Court, no more than that a Copyholder may make a (*f*) Leaſe for one Year; becauſe that he may do by the general Cuſtom of the Realm, which is the Common Law. *Vide Bracton*, *lib.* 2. *c.* 8. Then if a Copyholder may ſurrender his Eſtate in Court by the general Cuſtom of the Realm, which is the Common Law, from thence it follows that he may do it by Attorney, as a Thing incident by the Common Law: And that will more clearly appear if the Reaſon of ſuch Things which a Man can't do by Attorney be well conſidered. And therefore if a Man has a bare Authority coupled with a Truſt, as (*g*) Executors have to ſell Land, they can't ſell by Attorney; but if a Man has Authority, as abſolute Owner of the Land, there he may do it by Attorney, as *Ceſtuy que uſe* might after the Statute of (*i*) 1 *R.* 3. and before the Statute of (*k*) 27 *H.* 8. for *Ceſtuy que uſe* had an abſolute Authority to diſpoſe of the Land at his Will, without any Confidence repoſed in him, as appears in 11 *Eliz. Dyer* 283. and there a Judgment is cited in 25 *H.* 8. accordingly, againſt the Opinion of ſome Judges in 9 *H.* 7. (*l*) 24. But in the Caſe at Bar, the Copyholder has a Cuſtomary Eſtate of Inheritance, and not an Authority or Power only. Alſo there is a (*m*) Difference betwixt a general abſolute Power and Authority as Owner of the Land, as aforeſaid, and a particular Power and Authority (by him who has but a particular Intereſt)

to

to make Leaſes for Life or Years. And therefore if (a) *A.* be Tenant for Life, the Remainder in Tail, &c. and *A.* has Power to make Leaſes for 21 Years rendring the ancient Rent, &c. he can't make a Leaſe by Letter of Attorney by Force of his Power, becauſe he has but a particular Power which is perſonal to him: And ſo was it reſolved in the Caſe of the Lady *Greſham* at the Aſſiſes in *Suffolk* in *Quadrageſim'* 24 *El.* by *Wray* and *Anderſon* Chief Juſtices, Juſtices of Aſſiſe there. Alſo there are ſome Things perſonal, and ſo inſeparably annexed to the Perſon of a Man, that he can't do them by another, as doing of (d) Homage and Fealty: So it is held in 33 *E.* 3. *Treſpaſs* 253. the Lord may beat his Villain for Cauſe, or without Cauſe, and the Villain ſhall not have any Remedy? but if the Lord commands another to beat his Villain without Cauſe, he ſhall have an Action of battery againſt him who beats him in ſuch Caſe. So if the Lord diſtrains the Cattle of his Tenant, altho' nothing be behind, * the Tenant for the Reſpect and Duty which belong to the Lord, ſhall not have (c) *Treſpaſs vi & armis* againſt him; but if the Lord (d) commands his Bailiff or Servant in ſuch Caſe to diſtrain where nothing is behind, the Tenant ſhall have an Action of *Treſpaſs vi & armis* againſt the Bailiff or Servant. 2 *H.* 4. 4. *a.* 11 *H.* 4. 78. *b.* 1 *H.* 6. 6. *a.* 9 *H.* 7. 14. *a.*

Littleton in his Chapter of *Burgage* holds, That where in a Borough he who is ſeiſed of Lands in Fee may deviſe by Cuſtom, there the Owner of ſuch Land may deviſe that his (e) Executors ſhall ſell, which they ſhall do as Attornies to him. 3 *E.* 3. *Coron.* 310. by the Cuſtom of a Manor a Freehold will paſs from one to another by Surrender in Court, againſt the (f) Will of the Lord, and where the Cuſtom is ſuch, the Tenant may do it by Attorney. *Vide* 14 *H.* 4. 1. *a.* by *Hankford*, & *vide* 19 *Aſſ. p.* 9.

And it was ſaid, (g) as he to whoſe Uſe a Surrender is made may be admitted by Attorney, ſo a Copyholder may ſurrender by Attorney in full Court: And the Caſe of him to whoſe Uſe ſeems the ſtronger Caſe, becauſe he who is to be admitted is to do Fealty, (h) which none can do Fealty but he who ſhall be admitted, and therefore in ſuch Caſe the Lord may refuſe to admit him by Attorney; but (i) if he admits him by Attorney, it is good enough.

But, *Hill.* 28 *Eliz.* in (k) *Chapman*'s Caſe it was held in the King's Bench, That where the Cuſtom of a Manor is, That the Copyholder out of Court may ſurrender into the Hands of the Lord of the Manor by the Hands of two cuſtomary Tenants, who in Effect are but Inſtruments or (l) Attornies of the Copyholder to take his Surrender, that in ſuch Caſe the Copyholder by his Attorney

(a) 2 Rol. Rep. 393. 1 Rol. 330. Palm. 436.

(b) 2 Rol. Rep. 393. Co. Lit. 66. b. 68. a.

* Finche's Law l. 3 c. 6. See Rep. Q. A. 209.

(c) 10 E. 4. 7. a. Fitz. Office del Court 7. Brook Office del Court 29. 11 H. 4. 78. b. 4 Co. 11. b. 2 Inſt. 105. Co. Lit. 127. a. Stat. de Marleb. c. 3. Plow. 66. b. 84 b 85. a.

(d) 2 Inſt 105. Br. Treſpaſs 98.

(e) Fit. Sect. 169. Co. Fit. 112. b.

(f) Co. Lit. 59. b. 1 Rol. 562.

(g) 1 Rol. 505.

(h) Co Lit. 68 a.

(i) 1 Rol. 505

(k) 1 Rol. 500, 501.

(l) Sty. 423.

can't ſurrender into the Hands of the Lord by the Hands of two Copyhold Ten'ts; for in as much as the Surrend. in ſuch Caſe ought to be warranted by the Cuſtom, the Surrender without ſpecial Cuſtom to warrant it by Attorney will not be good. Alſo that was upon the Matter by Attorney to make a Surrender by others who are but Attornies, for that is not warranted by the *(a)* particular Cuſtom of the Manor to make a Surrender out of Court. But in the Caſe at Bar the Common Law, and no particular Cuſtom warrants the Surrender, and therefore it may well be made according to the Rule and Reaſon of the Com. Law by Attorney. But it was reſolv'd, That the Attorney ought to *(b)* purſue the Manner and Form of the Surrender in all Points according to the Cuſtom, as the Copyholder himſelf ought to have done; as if the Surrender by the Cuſtom ought to be by the Rod, or by any other Thing, or in any other Manner, the Attorney ought to purſue it. And the Ch. Juſt. ſaid, that the Stile of a Copyholder imports 3 Things: 1. *Nomen*, his Name: 2. *Originem*, his Commencement: 3. *Titul'* his Aſſurance: His Name is Tenant by Copy of Court-Roll, for his *(c)* Name is not Tenant by Court-Roll, but by Copy of Court-Roll, who is the ſole Ten't in Law that holds by Copy of any Record, Charter, Deed, or any other Thing. 2. his Commencement, *ad voluntatem domini*; for at the Beginning he was but Ten't at the Will of the Lord. 3. His Title or Aſſurance, *ſecundum conſuetudinem Manerii*, for the Cuſtom of the Manor has *(d)* fixed his Eſtate, and aſſured the Land to him ſo long as he doth his Services and Duties, and performs the Cuſtoms of the Manor. And therefore *(e)* *Danby* ſaith in 7 *E.* 4. 19. *a.* That by the Cuſtom he is as well inheritable to have the Land, as Ten't to hold his Freehold by the Com. Law. And it was reſolved that this Caſe was ſtronger, becauſe the Let. of Attorn. was made to thoſe who were Tenants by Copy *&c.* of the ſaid Manor. But it was agreed, that where an Infant at the Age of 15 Years may make a Feoffm. that he can't do it by *(g)* Attorney, becauſe a Cuſtom which enables a Perſon diſabled by the Law, ought to be purſued, and an Infant can do nothing to paſs any Thing out of him by Attorney: *Vide* 11 *H.* 4. 33. *a.* and it would be hard, if Men in *(h)* Priſon, or Sick, or beyond the Sea, could not make Surrenders of their Lands held by Copy for Paym. of their Debts, or Preferment and Advancement of their Wives and Children, *&c.* *Note* Reader, this is the firſt Caſe that I have known which was adjudged in this Point.

(a) Co. Lit. 59. a. 1 Rol. 500.
(b) 1 Rol. 501.
(c) Lit. Sect. 75. Co. Lit. 60. a.
(d) Hetl. 7.
(e) Lit. Sect. 77. Co. Lit. 61. a. 4 Co. 22. a.
(f) Doct. and Stud. 21. a. 1 Rol. 567. 5 H. 7. 31. a. 41. a. 11 H. 4. 33. a. Fitz. Cuſt. 9. 11 Br. Cuſtom 15.
(g) 8 Co 45. a.
(h) 1 Leon. 36.

2. It was reſolv'd, that when any has Authority, as Attorney, to do any Act, he ought to do it in his (*i*) Name who gives the Authority; for he appoints the Attorney to be in his Place, and to repreſent his Perſon; and therefore the Attorn. can't do it in his own Name, nor as his proper Act, but in the Name, and as the Act of him who gives the Authority.

(i) 1 Rol. 330, 501. Godb. 389. Moor 70, 71.

And

And where it was objected, That in the Caſe at Bar, That the Attornies have made the Surrender in their own Names; for the Entry is *Quod iidem Willielmus & Stephanus, &c. ſurſum reddiderunt, &c.* It was anſwered and reſolved *per totam curiam*, that they have well purſued their Authority; for firſt they ſhewed their Letter of Attorney, and then they (*a*) *authoritate eis per præd' Literam Attornat' dat' ſurſum reddiderunt, &c.* which is as much as to ſay, as if they had ſaid, We as Attornies of *Thomas Combes* ſurrender, *&c.* and both theſe Ways are ſufficient; as he who has a Letter of Attorney to deliver Seiſin ſaith, I as Attorney to *J. S.* deliver you Seiſin; Or I by Force of a (this) Letter of Attorney deliver you Seiſin; and all that is well done, and a good Purſuance of his Authority: But if Attornies have Power by Writing to make Leaſes by Indenture for Years, *&c.* they can't make Indentures in their own Names, but in the Name of him who gives them Warrant. But if a Man by his Will in Writing deviſes that his Executors ſhall ſell his Land, and dies, there the Executors in their own (*b*) Name may ſell the Land for Neceſſity, becauſe he who gives them Authority by his Will (which takes Effect after his Death) is dead; and yet in ſuch Caſe the Vendee is in by the Deviſor.

(*a*) 1 Rol. 501.

(*b*) 1 Rol. 330. Dy. 251. pl. 89.

HENRY

Q. 1 Salk. 254.

HENRY PEYTOE's *Caſe.*

Mich. 9 Jacobi 1.

In the Common Pleas.

1 Brownl. 133. 2 Brownl. 128. Palm. 111. Godb. 149.

HEnry Peytoe brought *Ejectione firmæ* againſt *Robert Chitty* and *Agnes* his Wife, and *Alice Derbyſhire*, of a Houſe and a Garden in *Godalming* in the County of *Surry*, on a Demiſe made by *Anne Hook*, 7 *Aprilis* 8 *Jac.* for 5 Years, and that the Defendants the 10th Day of *April* in the ſame Year ejected him, *&c.* And the Defendants pleaded, That after the Treſpaſs and Ejectment, *ſc.* 10 *Maii anno* 8 *ſupradicto apud Godalming præd' talis inter Robertum & præfat' Henricum, tam de tranſgreſſione & ejectione præd' quam de omnibus aliis querelis, debitis, & debatis inter eos ante tunc habit' factis, ſive perpetratis, &c. habebatur concordia*; that in Satisfaction of them the ſaid *Robert* one of the Defendants ſhould pay to the Plaintiff 6 *l.* 10 *s.* at the Feaſt of St. *Michael* the Archangel then next following; and that for the true Payment thereof he ſhould become bound in a (*a*) Bond of 13 *l.* and pleaded the Performance thereof, and the Receipt of the ſaid Sum at the ſaid Feaſt accordingly; and thereupon the Plaintiff demurred in Law; and this Caſe was argued at the Bar by the Serjeants; and it was objected, That this Action of *Ejectione firmæ* is in the Realty, and therein the Poſſeſſion ſhall be recovered by *Habere facias poſſeſſionem*, and thereby the Poſſeſſion and Inheritance ſhall be reveſted in the Leſſor; and the Entry of the Plaintiff pending the Writ ſhall (*b*) abate his Writ, as it is adjudged in 6 *Eliz. Dyer* 226. for in this Action the Term is to be recovered. So in *Ejectione firmæ*, (*c*) ancient Demeſne is a good Plea, as it is adjudged in *Alden's Caſe in the 5th Part of my Rep. f.* 105. *a.* becauſe it taſtes of the Realty: And

(*a*) Raym. 203.

(*b*) 2 Brownl. 131. Dy. 226. pl. 40.

(*c*) Doctrin. pl. 51. Cr. Jac. 559. Cr. El. 826. 2 Rol. Rep. 181. 2 Anderſ. 178. 2 Brownl. 129, 130, 133.

And in Actions concerning the *(a)* Realty, altho' it be but a Chattel real, Accord is no Plea; and therefore it is adjudged *(b)* 11 *H.* 7. 13. *b.* That in an Action of Waſte againſt Leſſee for Years, an Accord executed is no Plea, becauſe it is mixt with the Realty; *pari ratione in Ejectione firmæ*. Alſo they rely'd much upon two Rules put in the Caſe in 7 *E.* 6. between *Andrew* and *Boughey*, *Dyer* 75. one, that in all Caſes where nothing but *(c)* Amends are to be recovered in Damages, there a Concord with an Execution thereof is a good Plea; but in this Caſe of *Ejectione firmæ*, *aliquid amplius & magis dignum* ſhall be recovered than Damages, *ſc.* the *(d)* Term: The other Rule there put, is, In all Actions grounded upon a Wrong, as *Treſpaſs*, *Conſpiracy*, *Maintenance*, and *hujuſmodi*, where nothing in Certainty is demanded, nor to be recovered, but *(e)* Damages, Concord is a good Plea; but in this Caſe the Action is brought for the Recovery of the Poſſeſſion of the Houſe and Land demiſed in certain. But it was granted, That if the Term incurs pending the Writ, there accord is a good Plea, becauſe nothing ſhall be recovered but Damages: So in an Action of Waſte againſt Leſſee for Years in the *(f)* *tenuit*: And Queſtion was made *arguendo* amongſt the Serjeants, what ſhould be the Reaſon why when a Man is bound to deliver a Horſe, *&c.* or to do any collateral Act, *(g)* the Obligor can't by Accord betwixt them, give Money or other valuable Thing in Satisfaction thereof, as well as where he is bound to pay Money, there he may give an Horſe, or any other valuable Thing in Satisfaction thereof.

(a) 6 Co. 43. b. 2 Brownl. 129.
(b) 6 Co. 43. b. Br. Accord 13. Poſtea 78. b. 2 Brownl. 128, 129.
Cro. El. 357.
(c) Dy. 75 pl 25. Doctrin. pl. 19. 2 Brownl. 131.
(d) Cr. Car. 88. Poſtea 78. b. 5 Co. 105. a.
(e) Dy. 75. pl. 27. 6 Co. 44. a.
(f) 1 Rol. 266. 6 Co. 44. a. Doctr. pl. 17.
(g) Co. Lit. 212. b. Poſtea 79. a. 1 Rol. 455, 456.

And firſt it was unanimouſly reſolved *per tot' cur'*, that the Accord in this *(h)* Caſe was a good Plea: For in all Actions which ſuppoſe the Wrong to be done *(i)* *vi & armis*, (where *Capias* and *Exigent* lie at the Com. Law, as appears in 40 *E.* 3. 25. *a.* 35 *H.* 6. 6. *a. b.* 22 *E.* 4. 11. *b.* *Plow. Com. in the Lord Berkley's Caſe*) there Accord is a good Plea, for the Redemption of his Body from Impriſonment, ſo that Men may do their Buſineſs, which is good for the Commonwealth. And it was obſerved that this Action of *Ejectione firmæ* includes in it ſelf an Action of *(k)* *Treſpaſs*, as appears by the Commencement, the Body, and the Concluſion of the Writ; for this Writ begins *Si A. fecerit te ſecurum de clamore ſuo proſequend' pone*, *&c.* and in the like Manner begins the Writ of Treſpaſs; the Body of the Writ of *Ejectione firmæ*, *Quare vi & armis unum meſſuag'*, *&c.* *intravit*, *&c.* and the Writ of the Treſpaſs is, *Quare unum meſſuagium fregit*, *& (l)* *intravit*, *&c.* and all the Addition in the *Ejectione firmæ* is, *Et ipſum a firma ſua inde ejecit*: The Concluſion of both is, *Et alia enormia intulit ad grave damnum*; And therefore the *Treſpaſs*,

(h) Doctrin. pl. 18. 1 Rol. 266, 267. 2 Rol. Rep. 181. 1 Brownl. 133. 2 Brownl. 128, 129, 131, 132, 133. Godb. 149.
(i) 1 Brownl. 134. 2 Brownl. 132.
(k) Cr. El. 622.
(l) F. N. B. 86. L.

Treſpaſs is a great Part of the Action of *Ejectione firmæ*, and the Treſpaſs and Ejectment are ſo woven and mixt together, that they can't be ſevered. And without Queſtion in (*a*) *Treſpaſs* Accord is a good Plea, and by Conſequence in (*b*) *Ejectione firmæ*. And the Entry in an *Ejectione firmæ* is, *In placito tranſg' & ejectionis firmæ*. And in 7 *H.* 4. 6. *b.* it is held, That by Force of the Act of 4 *E.* 3. *cap.* 6. (*c*) which gives an Action of *Treſpaſs de bonis aſportatis in vita teſtatoris*, That the (*d*) Executors ſhall have *Ejectione firmæ* of Ejectment *in vita teſtatoris*, becauſe that is an Action of Treſpaſs. And in 44 *E.* 3. 22. the Action of *Ejectione firmæ* is called Action of (*e*) *Treſpaſs*. And in * 6 *R.* 2. *Ejectione firmæ* 2. that it is an Action of Treſpaſs in its Nature: *Trin.* 26 *H.* 6. *Rot.* 27. *coram Rege*, In an *Appeal of* (*f*) *Maihem*, the Writ is *felonice*, yet for as much as it includes *Treſpaſs*, Accord is adjudged to be a good Plea. And it was alſo reſolved, that in (*g*) *Raviſhment of Ward*, Accord is a good Plea; becauſe in the Action at the Common Law Proceſs of Outlawry lay; and ſo upon the Stat. of *W.* 2. *c.* 35. And therefore it appears, that this Caſe is not like an Action of Waſte againſt Leſſee for Years, nor to the Writ of (*h*) *Quare ejecit infra term'*, which is, *Quare ei deforceat, &c.* and without *vi & armis*: And yet, for as much as in theſe alſo but a Chattel ſhall be recovered, Accord is a good Plea. And therefore as to the Caſe of Action of Waſte, in (*i*) 11 *H.* 7. 13. *b.* It was anſwered that the Caſe is ill printed; for 1. If it had been really adjudged in 11 *H.* 7. the ſame Caſe would never have been argued again by the Serjeants and Judges in 13 *H.* 7. 2. And in (*k*) 16 *H.* 7. *Garr.* 97. in *Fitz.* it was held, that in an Action of (*l*) Waſte, againſt Leſſee for Years, Accord is a good Plea; which the ſame Judges would not have done, if they themſelves had adjudged the ſame Caſe to the contrary in ſo ſhort Time before. Alſo diligent Search by the Prothonotaries has been made for the Record of the ſaid Caſe of 11 *H.* 7. and none can be found. And in *Hill.* 6 *E.* 6. reported by Serjeant *Bendloes* it was held *per totam curiam in C. B.* That in an Action of (*m*) Waſte againſt Leſſee for Years, Accord is a good Plea. And it was reſolved, that the ſaid Rule in 7 *E.* 6. was conſonant to Law, *ſc.* That where nothing but Amends is to be recovered in Damages, there an Accord is a good Plea, but that doth not impugn, That altho' a Chattel real or perſonal is alſo to be recovered, that Accord ſhall be no Plea; for in *Detinue of* (*n*) *Charters* concerning the Freehold and Inheritance of Land, the Charters themſelves ſhall be recovered, and yet in ſuch Caſe Accord is a good Plea, as it is held in 7 *E.* 4. 23. *b.* The ſame Law of *Detinue* of an Horſe, or other perſonal Goods: And the other Rule is alſo true, but,

(*a*) Doct. pl. 17.
(*b*) Doctrin. pl. 18.
Antea 78. a.
Godb. 149.
1 Rol. 266, 267.
2 Rol. Rep. 181.
1 Brownl. 133.
2 Brownl. 128, 129, 131, 132, 133.
(*c*) 4 E. 3. c. 7.
(*d*) Br. Quare ejecit infra, &c. 4.
Br. Execut. 45.
Fitz. Execut. 53.
4 E. 4. 8. a.
2 Brownl. 129, 130, 131. 133.
(*e*) 2 Brownl. 133.
* Poſtea 80. a.
(*f*) 2 Brownl. 133.
Doct. pl. 17, 18.
6 Co. 44. a.
(*g*) 2 Brownl. 128, 129, 130.
Doct. pl. 18.
6 Co. 43. b.
(*h*) 2 Brownl. 128, 129.
Poſtea 80.
(*i*) 6 Co. 43. b.
Antea 78. a.
Br. Accord. 13.
2 Brownl. 128, 129, 132.
Cr. El. 357.
(*k*) 2 Brownl. 132.
2 Inſt. 307.
(*l*) 2 Brownl. 128, 129, 130, 132.
Cr. Jac. 100.
Cr. El. 357.
6 Co. 44. a.
1 Rol. 266.
Doct. pl. 17, 19.
(*m*) O. Benlow 4. N. Benlow 35. Moor 6.
(*n*) Fitz. Acc. 2.
Doct. pl. 16, 19.
2 Brownl. 131.

as

as to the first, it does not imply the Negative; for where Certainty is to be recovered, Accord also is a good Plea, as in the Case of (*a*) Detinue of Charters: In an Action of (*b*) *Debt* on a Lease for Years, there is a certain Demand, and yet Accord is a good Plea, as it is held in 47 *E.* 3. 24. *a. b.* & 10 *H.* 7. 24. *a.* 2 *R.* 3. *Det.* 100.

(*a*) Antea 78. b.
(*b*) Br. Accord 11.
2 Brownl. 102.

And in this Case, to satisfy the said Question moved amongst the Serjeants, a Difference was taken between a Condition in a Deed to do a (*c*) collateral Act, as to be bound in a Statute to make a Feoffment, to yield a true Account, & *similia*, for there Accord with Execution for Money or other Thing, is no Satisfaction to save the Forfeiture of the Condition; for the Contract being made by Writing to do such collateral Act, can't without Writing in such Case be altered, as it is held in 12 *E.* 4. 23. *a. b.* 9 *H.* 7. 4. 4 *H.* 8. *Dyer* 1. &c. But when the Condition in a Deed by the original Contract of the Parties is to pay Money, there by Accord amongst the Parties, any other Thing may be given in Satisfaction of the Money; for as the Philosopher saith, (*d*) *Nummus est mensura rerum commutandarum*, which agrees with a Rule in Law, *Res per pecuniam æstimatur*, & *non pecunia per res*, and in this Sense it is true *quod pecuniæ obediunt omnia*: But so is not any other Thing, and it is not material, whether the Money mentioned in the Condition be a collateral Sum, or be Parcel of the Bond or not; for if a Man be bound by Bond in 200 (*e*) Quarters of Wheat, upon Condition to pay 20 *l.* the Obligor may, by Accord betwixt them, give him an Horse, or a gold Ring, &c. in Satisfaction of the Money, altho' the Money in such Case is collateral, to the Bond: And therefore if a Man (*f*) enfeoffs another by Deed, upon Condition that the Feoffor shall pay a Sum of Money, &c. the Feoffor may by Accord betwixt them give the Feoffee an Horse, or a gold Ring, &c. in Satisfaction; and yet the Money in such Case is (*g*) collateral having Regard to the Land; for if Tender be made and Refusal, he shall never pay the Money; *Ergo* it is a meer Collateral, *quia reprobata pecunia in hoc casu liberat solventem*; and therewith agrees *Lit. cap. Conditions*, 79. *b.* So if a Man by Bond be bound in 100 (*h*) Quarters of Wheat, upon Condition to pay 50 Quarters, he can't give Money or other Thing in Satisfaction thereof, because the Contract originally was not for Money, but for a collateral Thing: And in such Case if the Obligor tenders it at the Day, and the other refuse, he shall plead it, without saying it is (*i*) yet ready, because Corn is *bonum perituru*, and it is a Charge to the Obligor to keep it; and

(*c*) 1 Rol. 455, 456.
2 Brownl. 131.
Antea 78. a.
1 Rol. Rep. 296, 297.
Cr. El. 46, 193, 304, 458.
3 Bulst. 148, 149.
Co. Lit. 112 b.
Perk. 145. b. 146. a.
Hob. 178.
Palmer 550.
(*d*) 2 Brownl. 131.
3 Bulstr. 149.
(*e*) 1 Rol 456.
(*f*) 1 Rol. 456.
(*g*) Co. Lit. 207. a.
6 Mod. 35.
(*h*) Co. Lit. 207. a.
1 Rol. 456.
(*i*) 1 Rol. 472.
Co. Lit. 207. a.
Dy. 25. pl. 154.
Doct. pl. 390.

and ſo it was held in 28 *H.* 8. in the Com. Pleas, as *Carrel* has reported. So if a Man be bound in a Stat. Recogniſance, or Bond; and afterwards a Defeaſance is made to pay a leſs Sum, now this Sum in the Defeaſance is collateral; and therefore if the Obligor (*a*) tenders it at the Day, and it is refuſed, the Obligee loſes it for ever, as it is held in (*b*) 33 *H.* 6. 2. *a. b.* and yet in ſuch Caſe the Obligor by Accord betwixt them, may give an Horſe, *&c.* in Satisfaction of the Money in the Defeaſance, for the Contract was originally for Money. But if a Man by Contract, or *Aſſumpſit* (without (*c*) Deed) be to deliver an Horſe, or to build an Houſe, or to do any other collateral Thing, there Money may be paid by Accord in Satisfaction of ſuch Contract: For as a Contract upon Conſideration may commence by Word, ſo by Agreement by Word for any valuable Conſideration, it may be diſſolved; and ſo you will better underſtand the Reaſon of your Books, in 12 *H.* 4. 23. *a. b.* 33 *H.* 6. 2. *a. b.* 22 *H.* 6. 58. 7 *E.* 4. 4. *b.* 20 *E.* 4. 1. *b.* (3) 13 *H.* 7. 4. *b.* 9 *H.* 7. 4. 18. *a.* 16 *H.* 7. 13. *b.* 4 *H.* 8. *Dyer* 1. 9 *H.* 8. 12. 22 *E.* 3. 5. *a.* 26 *E.* 3. *Annuity* 45. But it was reſolved that a Right or Title of (*d*) Freehold can't be barr'd by any Accord with collateral Satisfaction, altho' the Satisfaction is of as high a Nature as the Right or Freehold, as appears in *Vernon's Caſe in the 4th Part of my Reports*, *f.* 1. *a. b.* *Long* 5 *E.* 4. 22. & 1 *Mar.* *Dyer* 91.

(*a*) 1 Rol. 472 Cr. El. 755. Co. Lit. 207. a. Doct. pl. 390, 391.

(*b*) Fitz. Det 55 Br. touts temps priſt. 4.

(*c*) 1 Rol. 456.

(*d*) 2 Brownl. 132. 1 Rol. Rep. 297. Doct pl. 17. Co. Lit. 36. b. Dy. 91. pl. 12.

And every Accord ought to be full, (*e*) perfect and compleat: For if divers Things are to be performed by the Accord, the Performance of Part is not ſufficient, but all ought to be performed; and therewith agree 17 *E.* 4. 2. *b.* 6 *H.* 7. 10. *a.* *Plow. Com.* 5. *a.* Alſo if the Thing be to be performed at a Day to come, Tender and Refuſal is not ſufficient without actual Satisfaction and Acceptance.

(*e*) Doct. pl. 15. 1 Rol. 129. 2 Jon. 6, 158. Raym. 450.

And Accords are favoured in Law, becauſe *Expedit Reipublicæ ut ſit (f) finis litium: Et concordia parvæ res creſcunt, diſcordia maximæ dilabuntur.* *Vide* 30 *E.* 3. 4. 22 *E.* 4. 25. The Biſhop of *Bath's Caſe*. 11 *R.* 2. *barr.* 243. 15 *E.* 4. 11. 19 *Eliz.* *Dyer* 356. And in a Writ of *Covenant* for want of Reparations altho' the Action is founded on a Deed, yet it is mixt with Wrong, for which Damages ſhall be recovered, it was adjudged *Paſch.* 3 *Jac. Rot.* 1033. between *Eden* (*g*) and *Blake*, that Accord with Satisfaction was a good Plea in Bar.

(*f*) 6 Co. 7. a. 9. a. 45. a. 11 Co. 60. a. Hard. 128. Godb. 242. 3 Bulſtr. 98.

(*g*) 6 Co. 43. b. Cr. Jac. 99, 100. Noy 110. 2 Rol. Rep. 188.

And it was reſolved in the Caſe at Bar, that the Accord and Satisfaction by one ſhould diſcharge all the Ejectors and Treſpaſſors, *Vide* 13 *E.* 4. 1. *b.* 35 *H.* 6. 6. *a. b.* 6 *H.* 7. (*h*) 26 *H.* 6. *Barr F.* And that of ancient Time the Term was recover'd in *Eject' firm'*, as appears by *Bract. lib.* 4. *c.* 36. *f.* 220. *in tract' de Aſſiſa novæ diſſeiſinæ. Dict' eſt ſupra qualit' quis reſtituat' cum*

(*h*) Fitz. Bar. 37. 5 Co. 117. b. Dall. 49.

fuerit ejectus de libero tenemento ſuo. Nunc dicendum eſt ſi quis ejiciatur de uſufructu, vel uſu & habitatione alicujus tenementi quod tenuit ad terminum annorum, ante terminum ſuum: And there againſt the Leſſor he ſaith that the Leſſee ſhall have a Writ *de Conventione*, againſt his Vendee he ſhall have a *Quare ejecit infra terminum*, and as well againſt the Leſſor as *verſus extraneum Ejectione firmæ:* And there a little after he ſaith, *Non magis poterit aliquis firmarium ejicere de firma ſua, quam tenentem aliquem de libero tenemento ſuo, & unde ſi ille ejecerit qui tradidit ſeiſinam, i. poſſeſſionem, reſtituat. cum damnis: Si autem alius quam qui tradidit ejecerit, ſi hoc cum authoritate & voluntate tradentis; uterque tenetur hoc judicio, unus propter factum, alius propter authoritatem. Si autem ſine voluntate, tunc tenetur ejector utriq; tam Dom. proprietatis quam firmario, firmario per iſtud breve, Domino proprietatis per Aſſiſam novæ diſſeiſinæ, & unus rehabeat terminum cum damnis, & alius liberum tenementum ſuum ſine damnis.* By which it appears how the Law was taken in the Reign of *H.* 3. in which Time *Bracton* wrote. In 3 *E.* 1. *Quare ejecit infra terminum*, 4. it was adjudged, That the Plaintiff in that Action ſhould recover his Term and Damages: And the like Judgments are given in 18 *E.* 2. and 20 *E.* 2. *ibid. pl.* 5 & 6. which agree with *Bracton*, and with him *F. N. B.* (*a*) 197. And in 38 *Aſſ. p.* 9. and 12 *H.* 4. 10. *b.* in *Ejectione cuſtodiæ* the Term ſhall be recovered, *pari ratione* in *Ejectione firm'*. *Vide* 44 *E.* 3. 22. in *Oyer and Terminer*. And it is held in 11 *H.* 6. 6. *b.* that altho' the Term incurs pending the Writ of *Eject' firm'* the Writ ſhall abate, 7 *H.* 4. 16. 12 *H.* 6. 8. 33 *H.* 6. 42. 38 *H.* 6. 27. 7 *E.* 4. 6. 21 *E.* 4. 30. & 13 *H.* 7. 21. that the Term ſhall be recovered in *Eject' firm'*. And 14 *H.* 7. in *Eject' firm'* brought againſt a Stranger in the Com. Pleas, the Plaintiff had Judgment to recover his Term, and thereupon the Defendant brought a Writ of *Error*, and the Judgment was affirmed, and Execution awarded to the Plaintiff. And in *Anno* 17 *H.* 8. ſuch Judgment was given in the Com. Pleas, that the Plaintiff in *Eject' firm'* ſhould recover his Term and Damages, as *Fitzh.* Juſtice reports in his *N. B.* 220. *b.* and the Book in 6 *R.* 2. *Eject' firm'* is ill reported, for it ſeems that the Court agreed only to the Saying of *Belknap*, that if the Leſſee be ouſted by the Leſſor, that he might recover his Term in a Writ of Covenant: And afterwards in the ſame Caſe *Belknap* ſaith, that at the Com. Law, if the Leſſee be ouſted by a Stranger *Eject' firm'* lies, and to what purpoſe was this Writ inſtituted, if thereby the Term ſhall not be recover'd, for he ſhall not recover Damages but for the Ejectment only. *Vide* 12 (19) *H.* 6. 56. 37 *H.* 6. 8.

(*a*) F. N. B. 197. g.

Fitz. Ejectione firmæ 2.

And it was reſolv'd, in a Writ of *Quare ejecit infra termin'*, Accord is a good Plea. Afterw'ds in the principal Caſe Judgm. was given

2 Brownl. 128, 129.

Antea 78. a.

given againſt the Plaintiff. *Nota* Reader, the beſt and moſt
(*a*) Doct. pl. 19. ſecure (*a*) Form of pleading of an Accord, is to plead it by Way of Satisfaction, and not by Way of Accord; for if he pleads it by Way of Accord, he ought to plead the preciſe Execution thereof in the Whole, and if he fails of any Part thereof, his Plea is inſufficient; but by Way of Satisfaction he ſhall plead no more, than that the Defendant paid the Plaintiff 6 *l.* 10 *s.* in full Satisfaction of the ſame Action, which the Plaintiff received, &c. Judgment if Action? And this is well approved by the Book in 19 *H.* 6. 29. *b.* in a
(*b*) Doct. pl. 16. Fitz. Bar 26. Br. Bar. 22. Writ of (*b*) *Forger of falſe Deeds*; *Markham* Serjeant for the Defendant, by Proteſtation that he did not forge, for Plea ſaid, that the Defendant gave the Plaintiff a Gallon of Wine in Satisfaction of the Action, which Gallon of Wine the Plaintiff accepted, &c. Judgment if Action? and there *Forteſcue* Serjeant of Counſel with the Plaintiff, It is no Plea, unleſs you ſay, that there was an Accord betwixt the Plaintiff and Defendant, &c. *Newton* the Chief Juſtice who gave the Rule in the Caſe, It is the beſt Pleading as *Markham* has pleaded in my Opinion, and ſubſtantial enough; for if he has given the Plaintiff a Gallon of Wine for the ſame Treſpaſs, which the Plaintiff has received, what would you then? &c. And afterwards *Forteſcue* denied the Receipt of the Gallon of Wine in Satisfaction of that Treſpaſs.

[*See* Carthew 348. *And Note, the Plea muſt be, that it was given in* Satisfaction, *and alſo that the Plaintiff received it in* Satisfaction.]

AGNES

AGNES GORE's *Caſe.*

Mich. 9 Jacobi 1.

BEfore *Fleming* Chief Juſtice, and *Tanfield* Chief Baron, Juſtices of Aſſiſe, this Caſe happened in their Weſtern Circuit. *Agnes* the Daughter of *Roper* married one *Gore*, *Gore* fell ſick, *Roper* the Father in good Will to the ſaid *Gore* his Son in Law, went to one Doctor *Gray* a Phyſician for his Advice, who made a Receipt directed to one *Martin* his Apothecary, for an Electuary to be made, which the ſaid *Martin* did, and ſent it to the ſaid *Gore*; *Agnes* the Wife of *Gore* ſecretly mixed Ratsbane with the Electuary, to the Intent therewith to poiſon her Husband; and afterward 18 *Maii* ſhe gave Part of it to her Husband, who eat thereof and immediately became grievous ſick; The ſame Day *Roper* the Father eat of it, and immediately alſo became ſick, 19 *Maii C.* eat Part of it, and he likewiſe fell ſick; but they all recovered and yet are alive. The ſaid *Roper* obſerving the Operation of the ſaid Electuary, carried the ſaid Box with the ſaid Electuary 21 *Maii* to the ſaid *Gray* the Phyſician, and informed him of the ſaid Accidents, who ſent for the ſaid *Martin* the Apothecary, and asked him if he had made the ſaid Electuary according to his Direction, who anſwered that he had, in all Things but in one, which he had not in his Shop, but put in another Thing of the ſame Operation, which the ſaid Dr. *Gray* well approved of; whereupon *Martin* the Apothecary ſaid, To the End you may know that I have not put any Thing in it, which I my ſelf will not eat, I will here before you eat Part of it, and thereupon *Martin* took the Box, and with his Knife Jenk. Cent. 290.

Knife mingled and ſtirred together the ſaid Electuary, and took and eat Part of it of which he died the 22d Day of *May* following. The Queſtion was, if upon all this Matter *Agnes* had committed Murder. And this Caſe was deliver'd in Writing to all the Judges of *Engl.* to have their Opinions in the Caſe. And the Doubt was, Becauſe *Martin* himſelf of his own Head, without Incitation or Procurement of any, not only eat of the ſaid Electuary, but he himſelf mingled and ſtirred it together, which mixing and ſtirring had ſo incorporated the Poiſon with the Electuary, that it made the Operation more forcible than the Mixture which the ſaid *Agnes* had made; for notwithſtanding the Mixture which *Agnes* had made, thoſe who eat of it were ſick, but yet live, but the Mixture which *Martin* has made by mingling and ſtirring of it with his Knife, made the Operation of the Poiſon more forcible, and was the Occaſion of his Death. And if this Circumſtance would make a Difference between this Caſe and *Saunders*'s Caſe in *Plo. Com.* 474. was the Queſt.

And it was reſolved by all the Judges that the ſaid *Agnes* was guilty of the (*a*) Murder of the ſaid *Martin*, for the Law conjoins the murderous Intention of *Agnes* in putting the Poiſon into the Electuary to kill her Husband, with the Event which thence enſued; *ſc.* the Death of the ſaid *Martin*; for the putting of the Poiſon into the Electuary is the Occaſion and Cauſe; and the Poiſoning and Death of the ſaid *Martin* is the Event, *quia eventus eſt qui ex cauſa ſequitur, & dicuntur Eventus quia ex cauſis eveniunt*, and the Stirring of the Electuary by *Martin* with his Knife without the putting in of the Poiſon by *Agnes* could not have been the Cauſe of his Death.

(*a*) Hale's Pl. Cor. 50. 3 Inſt 138. Jenk. Cent. 290.

And it was alſo reſolved, That if *A.* puts Poiſon into a Pot of Wine, *&c.* to the Intent to Poiſon *B.* and ſets it in a Place where he ſuppoſes *B.* will come and drink of it, and by (*b*) Accident *C.* (to whom *A.* has no Malice) comes, and of his own Head takes the Pot and drinks of it, of which Poiſon he dies, it is Murder in *A.* for the Law couples the Event with the Intention, and the End with the Cauſe; And in the ſame Caſe if *C.* thinking that Sugar is in the Wine, ſtirs it with a Knife, and drinks of it, it will not alter the Caſe; for the King by reaſon of the Putting in of the Poiſon with a murderous Intent, has loſt a (*c*) Subject; and therefore in Law he who ſo put in the Poiſon with an ill and felonious Intent, ſhall anſwer for it. But if one prepares Ratsbane to kill (*d*) Rats and Mice, or other Vermine, and leaves it in certain Places to that Purpoſe, and with no ill Intent, and one finding it eats of it, it is not Felony, becauſe he who prepares the Poiſon has no ill or felonious Intent; but when one prepares Poiſon, with a felonious Intent to kill (*e*) any reaſonable Creature,

(*b*) Pl. Com. 474. b.

(*c*) Pl. Com. 474. b.

(*d*) Pl. Com. 474. b. Hale's Pl. Cor. 50.

(*e*) 3 Inſt. 51. Moor 87.

ture, whatſoever reaſonable Creature is thereby killed, he who has the ill and felonious Intent ſhall be puniſhed for it, for he is as great an Offender, as if his Intent againſt the other Perſon had taken Effect. And if the Law ſhould not be ſuch, this horrible and heinous Offence would be unpuniſhed; which would be miſchievous, and a great Defect in the Law.

HENRY CONNY's *Caſe.*

Trin. 6 Jac. 1. *in C. B. Rot.* 1611.

Brownlow. Replevin.

BArtholomew Colepit was ſummoned to anſwer to *John Crane* of a Plea, wherefore he took the Cattle of the ſaid *John* and them detained againſt Gages and Pledges; and whereupon the ſaid *John* by *Tho. Ganton* his Attorney complaineth, That the aforeſ. *Bartholomew* the 19th Day of *October* in the 5th Year of the Reign of the Lord the now King, at *Tidde St. Giles*, in a certain Place there, containing in it 2 Acres of Paſture, the Cattle, that is to ſay, 3 Steers of the ſaid *John* took, and them unjuſtly detained againſt Gages and Pledges, until, &c. Whereupon he ſaith he is the worſe, and hath Damage to the Value of 20 *l.* and thereof he bringeth Suit, &c. And the aforeſaid *Bartholomew*, by *Will. Davy* his Attorney, cometh and defendeth the Force and Injury, &c. and as Bailiff to *J. Welby*, Eſq; doth well acknowledge the taking of the Cattle aforeſaid, in the Place in which, &c. and juſtly, &c. Becauſe he ſaith, that the ſaid Place in which it is ſuppoſed the taking of the Cattle aforeſaid to be done, doth contain, and at the aforeſaid Time in which it is ſuppoſed the aforeſaid taking to be done, did contain in it ſelf, two Acres of Paſture with the Appurtenances in *Tidde St. Giles* aforeſaid, lying there in a certain Field called *Southgraſt-field*, near the Lands Foot of *Richard Welby*, Gent. ſometimes *Richard Delaland*, on the Part of the North, and the *Kirkland* on the Part of the Weſt; and that one *Henry Conny*, Eſq; before the Time in which, was ſeiſed of the aforeſaid 2 Acres of Paſture with the Appurtenances in which, &c in his Demeſn as of Fee, and held the ſame of one *William Stermin*, Eſq; as of his Manor of *Richards* with the Appurtenances in *Tidde St. Giles* aforeſaid, by Fealty, and the Rent of 13 Pence Yearly, at the Feaſt of St. *Michael* the Archangel to be paid, as alſo by the Service of doing Suit at the Court of the ſaid *William Stermin* of his Manor aforeſ.

from

from three Weeks to three Weeks, upon reaſonable Warning at the Manor aforeſaid to be holden: Of which Services the ſaid *William Stermin* was ſeiſed by the Hands of the aforeſ. *Hen. Conny*, as by the Hands of his very Tenant, that is to ſay, of the Fealty and Suit of Court aforeſ. as of Fee and Right, and of the Rent aforeſ. in his Demeſn as of Fee; of which Manor with the Appurtenances the aforeſ. *William Stermin* was ſeiſed in his Demeſn as of Fee, and ſo thereof being ſeiſed, the aforeſ. *Will. Stermin* before the Time in which, &c. of the aforeſaid Manor with the Appurtenances the aforeſaid *John Welby* enfeoffed, to have and to hold to the ſaid *John Welby*, his Heirs and Aſſigns for ever. To which Feoffm. by the aforeſ. *W. Stermin* to the aforeſ. *John Welby* in Form aforeſ. made, the aforeſ. *Henry Conny* afterwards, and before the Time in which, &c. that is to ſay, the firſt Day of *November* in the firſt Year of the Reign of the Lord the now King, then of the aforeſaid two Acres of Lands with the Appurtenances in Form aforeſaid being ſeiſed at *Tidde St. Giles* aforeſaid, attorned: By Colour of which Feoffment and Attornment aforeſaid, the ſaid *John Welby* was and yet is ſeiſed of the Manor aforeſaid, with the Appurtenances in his Demeſn as of Fee; and becauſe 4 *s.* and 4 *d.* of the Rent aforeſaid, for 4 whole Years, was at the Feaſt of St. *Michael* the *Archangel*, in the 5th Year of the Reign of the Lord the now King, and after the Attornment aforeſaid, in Form aforeſaid had, to the aforeſaid *John Welby*, the aforeſaid Time in which, &c. being behind, not paid, the ſaid *Bartholomew* as Bailiff of the aforeſaid *John Welby* doth well acknowledge the taking of the Cattle aforeſaid, in the aforeſaid Place in which, for the aforeſaid 4 Shillings and 4 Pence of the Rent aforeſaid ſo being behind, and juſtly, &c. as within his Fee and Lordſhip. And the aforeſaid *John Crane* ſaith, that the aforeſaid *Bartholomew*, as Bailiff of the ſaid *John Welby*, for the Cauſe above alledged, the taking of the Cattle aforeſaid in the aforeſaid Place in which, ought not avow to be juſt, becauſe by Proteſtation that the aforeſaid *Henry Conny* held not the aforeſaid two Acres of Lands with the Appurtenances, of the aforeſaid *William Stermin* as of his Manor of *Richards* aforeſaid, by Fealty and the Rent of 13 Pence, for every Year at the Feaſt of Saint *Michael* to be paid; as alſo by the Service of doing Suit at the Court of the ſaid *William Stermin* of his Manor aforeſaid, from three Weeks to three Works, upon reaſonable Warning, at that Manor to be holden, as the ſaid *Bartholomew* above hath alledged, For Plea he ſaith, That the aforeſaid *Henry*, before the Time of the taking aforeſaid done, and at the Time of the taking, &c. was and yet is ſeiſed of the aforeſaid two Acres of Paſture with their Appurtenances in his Demeſne as of Fee, and held the ſame of *Martin*, by Divine Providence then Biſhop of *Ely*, as of his Manor of *Tidde St. Giles*, with the Appurtenances, in *Tidde St. Giles* aforeſaid, by Fealty only for all Services; without that, that the aforeſaid *Henry*, at *Tidde St. Giles* aforeſaid, to the aforeſaid *John Welby* attorned Tenant, in Manner and Form as the ſaid *Bartholomew* above hath alledged. And this he is ready to aver. Wherefore foraſmuch as the aforeſaid *Bartholomew* the taking of the Cattle aforeſaid, in the aforeſ. Place in which, &c.

above acknowledgeth, the ſaid *John* demandeth Judgment and his Damages, by the Occaſion of taking of the ſaid Cattle to be to him adjudged, &c. And the aforeſaid *Bartholomew*, as at firſt ſaith, that the ſaid *Henry* did attorn Tenant to the aforeſaid *John Welby*, in Manner and Form as the ſaid *Bartholomew* above hath alledged; and of this puts himſelf upon the Country; and the ſaid *John* likewiſe; therefore it is commanded to the Sheriff, that he cauſe to come here from the Day of the *Holy Trinity* in three Weeks twelve, &c. by whom, &c. and who neither, &c. becauſe as well, &c. And afterwards, the Day and Place within contained, before *Edward Coke*, Knight, Chief Juſtice of the Lord the King of the Bench, and *Nicholas Herne*, Eſq; to the ſame *Edward Coke*, and *William Daniel*, Knt. one of the Juſtices of the Lord the King of the Bench aforeſaid, Juſtices of the ſaid Lord the King to Aſſiſes, in the County of *Cambridge* to be taken aſſigned, by the Form of the Statute, &c. this Turn aſſociated, (the Preſence of the aforeſ. *William Daniel* not expected,) by Virtue of the Writ of the ſaid Lord the King of *ſi non omnes*, &c. came as well the within named *John Crane*, as the within written *Bartholomew Colepit*, by their Attornies within contained: And the Jurors of the Jury, whereof within mention is made being called, come, who to ſay the Truth of the within contained, being choſen, tried, and ſworn, ſay upon their Oath, that the within named *Henry Conney*, before the Time within written, in which, &c. was ſeiſed of the within written two Acres of Paſture with the Appurtenances, in which, &c. in his Demeſn as of Fee, by Diſcent from his Father; and that the ſaid *Henry* the ſaid two Acres of Paſture with the Appurtenances, held of the within named *William Stermin*, as of his Manor of *Richards* within the Appurtenances in *Tidde St. Giles* within written, by Fealty, and the Rent of thirteen Pence yearly, at the Feaſt of St. *Michael* the Archangel to be paid; as alſo by the Service of doing Suit at the Court of him the ſaid *William Stermin* of his Manor aforeſaid, from three Weeks to three Weeks, upon reaſonable Warning, at the Manor aforeſaid yearly to be holden; and that of the Services aforeſaid, the ſaid *William Stermin* was ſeiſed by the Hands of the aforeſaid *Henry Conny*, as by the Hands of his very Tenant, that is to ſay, of the Fealty and Suit of the Court aforeſ. as of Fee and Right, and of the Rent aforeſ. in his Demeſn as of Fee, as the aforeſ. *Barthol.* within hath alledged. And further, the Jurors aforeſ. ſay upon their Oath aforeſ. that the aforeſ. *William Stermin*, of the Manor aforeſ. with the Appurten. was ſeiſed in his Demeſn as of Fee, and ſo thereof being ſeiſed, the ſaid *Will. Stermin*, before the within written Time in which, &c. of the ſaid Manor with the Appurt. enfeoffed the within named *John Welby*, to have and to hold to the ſaid *John Welby*, his Heirs and Aſſigns for ever; and that the aforeſ. *Henr. Conny*, being of the Age of 20, and within the Age of 21 Years at the Time of the aforeſ. Feoffm. by the ſaid *Will. Stermin*, to the aforeſ. *John Welby* in Form aforeſ. made, of the aforeſaid two Acres of Paſture with the Appurt. in Form aforeſ. being ſeiſed at *Tidde St. Giles* aforeſaid agreed, and the Payment of the Rent to the ſaid *John Welby* (then and there) promiſed; and if upon the whole

Matter

Matter aforeſ. in Form as aforeſ. found, it ſhall ſeem to the Court here, that the Agreement of the aforeſaid *H. Conny*, to the Feoffment aforeſaid and his Promiſe of the Payment of the Rent aforeſ. ſo as before is ſaid, by him the ſaid *H. Conny*, he being within the Age of 21 Years, are an Attornment; then the Jurors aforeſaid ſay upon their Oath aforeſaid, that the aforeſaid *Henry* did attorn Ten't to the aforeſaid *John Welby* in Manner and Form as the aforeſaid *Bartholomew Colepit* hath within alledged; and if upon the whole Matter aforeſaid by the Jurors in Form aforeſaid found, it ſhall ſeem to the Court here, that the agreement of the ſaid *Henry Conny* to the Feoffm. aforeſaid and his Promiſe aforeſ. of Payment of the Rent aforeſ. ſo as before is ſaid by him the ſaid *Henry*, being within the Age of 21 Years, be not an Attornment; then the Jurors ſay upon their Oath aforeſaid, that the ſaid *Henry Conny* did not attorn Ten't to the aforeſ. *John Welby*, as the aforeſaid *John Crane* in Pleading hath alledged; and then they aſſeſs the Damages of the ſaid *John* by occaſion, *&c.* within written, beſides his Coſts and Charges by him about his Suit expended to 12 *d.* and for his Coſts and Charges to 5 *s.* Therefore, *&c.*

CONNY's *Case.*

Mich. 9 Jacobi 1.

In the Common Pleas.

1 Brownl. 47. 2 Brownl. 84.

IN *Replevin* between *John Crane* Plaintiff, and *Bartholomew Colpit* Defendant, which began *Trin.* 6 *Jacobi Rot.* 1611. *in Banco*, the Case was such, *Henry Conny*, Esq; was seised of two Acres of Land in *Tidde Saint Giles* in the County of *Cambridge*, by Descent from his Father, in his Demesne as of Fee, and held them of *William Stermin*, Esq; as of his Manor of *Richerds*, by Fealty, and 13 *d.* Rent, and Suit to the Court of the said Manor, &c. *William Stermin* enfeoffed *John Welby*, Gent. of the said Manor in Fee, to which Feoffment the said *Henry Conny* then being within the Age of 21 Years, *sc.* of the Age of 20 Years attorned, and if this Attornment was good or not to bind the said *Henry Conny* to the Payment of the said Services, or not, upon a special Verdict thereof found at the Assises in the County of *Cambridge*, was the Question. And it was objected, That this Attornment should not bind the Infant, because if it should be good, it would turn to his Prejudice, and the Law protects Infants from such Prejudices during their Minority, *quia fere in omnibus minori ætati & uxori sub potestate viri succurritur*; and when an Infant has the Tenancy by Descent he shall have his Age in a *Per quæ servitia*; and in such Case when the Infant at full Age attorns, the Lord shall lose the Arrearages during the Minority, as it was collected upon the Opinion of *Thorp* in 26 *E.* 3. 63. *a.* Then if the Infant shall not be compelled by the King's Writ to attorn during

2 Brownl. 84. Co. Lit. 315. Post. 85. a. 1 Rol. 138, 296. Fitz. Age 33, 80.

during his minority, (which trenches to his benefit to discharge him of the arrearages incurred during his minority;) *a fortiori* his attornm. in *pais* ſhall not prejudice him, nor bar him of the privilege and immunity which the law gives him during his minority in ſuch caſe; but they conceiv'd, that if the infant had the tenancy by purchaſe, in ſuch Caſe he ſhould be compelled to attorn, becauſe in caſe of his own purchaſe he ſhall not have his age; and in the caſe at bar, for as much as the ſaid *H. Conny* had the ten'cy by deſcent, and was within age, his attornm. ſhall not bind him to charge him with the arrearages during his minority. It was alſo objected, that if an infant who has a tenancy by deſcent ſhould be compell'd in a *per quæ ſervitia* to attorn, yet for as much as in the caſe at bar he has taken his Eſtate by feoffment in *pais* of the manor, &c. and has not taken his eſtate by fine, upon which he might have a *per quæ ſervitia*, his attornm. in *pais* ſhall not bind him, for as much as in this caſe he is not compellable to attorn. As to that it was anſwered and reſolved *per totam cur'*, *ſc. Coke* Ch. Juſt. *Walmſley*, *Warburton*, and *F. ſter*, juſtices, that in the caſe at bar the attornm. (*a*) was good, and ſhould bind the infant. And firſt they reſolv'd, that in a *per*(*b*) *quæ ſervitia* againſt an infant who has the ten'cy by deſcent, that he ſhould not have his age, and the reaſon is, becauſe the lord at firſt departed with the land, in conſiderat. that the ten't ſhould hold of him, and ſhould do him ſervices, and ſhould pay him a yearly rent; and the ten't is in law called ten't peravail, becauſe the law preſumes he has benefit and avail above the ſervices which he doth, and the rent which he pays to the lord; and therefore it would be againſt reaſon and the purpoſe of the creation of the ten'cy, that when the heir has the ten'cy peravail by deſcent that he ſhould not pay the yearly rent, &c. which was reſerved upon the creation of the ten'cy; and that is the reaſon that the heir of the ten't, who hath the ten'cy by deſcent, may be diſtrained for the rent, &c. arrear during his minority, and therefore he ſhall not have his age, *vide* 4 *Mar. Dyer* 137. & *vide* 21 *E.* 3. *Age* 85. *and in Avowry, and* 7 *E.* 2. *Age* 140. in a writ of (*c*) *Meſne* the parol ſhall not demur for the nonage of the Pl. becauſe it is not reaſon that the infant ſhould be diſtrained for the ſervices of the meſne during his nonage, and ſhould not have any remedy till his full age; but foraſmuch as his nonage ſhall not privilege him from the payment of the rent during his nonage, the law alſo will give him remedy during his nonage, but in a writ of (*d*) *Cuſtoms and Services* (which is a writ of *Right* in its nature, and in which final judgm. ſhall be given) againſt an infant who is in by deſcent, the book in 6 *H.* 3. *Age* 148. is adjudg'd that he ſhall have his age. So in (*e*) *Ceſſavit* againſt an infant who has the ten'cy by deſcent, he ſhall have his age, altho' it be on his own ceſſer; becauſe he can't know what arrearages to tender before judgm. and this is a writ of *Right*

(*a*) 1 Brownl. 47. 2 Brownl. 84.
(*b*) Co. Lit. 315. a. Antea 84. b. Fitz Age 33, 80. 1 Rol 138, 296. Poſtea 85. b. 2 Brownl. 84.
(*c*) 1 Ro'. 138, 139. 142. 6 Co. 3. b.
(*d*) 1 Rol. 141.
(*e*) 1 Rol. 138, 141. 2 Inſt. 401. 8 Co. 44 b. Dy. 137. pl. 25. Raym 118 28 E. 3. 99. a. b.

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in its nature, and if he does not make a true tender, he ſhall loſe his land, and ſo it is adjudged in 28 *E.* 3. 99. *a. b. Vide* 9 *E.* 3. 50. 14 *E.* 3. *Age* 88. 31 *E.* 3. *Age* 54. 2 *E.* 2. *Age* 132. But altho' an infant attorns in a (*a*) *per quæ ſervitia*, it can be no miſchief to him; for notwithſtanding his attornment within age, he may at full age *diſclaim to hold of him, either to ſay that he does not hold of him, or acknowledge that he holds of him but by leſs or other Services, and therewith ſeem to agree 26 *E.* 3. 63. 32 *E.* 3. *per quæ ſervitia* 9. & tit. *Age* 33. *Vide* 2 *E.* 2. *Age* 77, & 78. 37 *H.* 8. *Br.* (*b*) *attorn.* And *Coke* ch. juſt. cited the book in 43 *E.* 3. 5. *a.* Where in a *quid juris clamat* brought by an infant within age againſt one who ſaid that he held the land for term of life, of the leaſe of the infant's anceſtor, who granted by deed, that he ſhould not be impeach'd of (*d*) waſte, which he ſhewed forth in court, and ſaid that he was ready to attorn, ſaving to him the advantage by the deed; and becauſe the Pl. was within age, he could not confeſs the deed during his nonage; it was adjudg'd, he ſhould attend till his full age; and further he ſaid, that he had ſeen an ancient report in writing, in 32 *E.* 3. in which in the ſame caſe the infant when he comes to his full age, and the Def. attorn'd by judgm. of the court, that it ſhould not turn the infant to any prejudice; for altho' the attornm. be after his full age; yet foraſmuch as no lacheſs was in the infant; but that he brought his writ of *quid juris clamat* to compel the ten't to attorn, the delay which is made till his full age (which the law provides for his benefit) ſhall not turn to his prejudice, and therefore by judgm. of law (which doth wrong to none) he ſhall have as much advantage as well for the arrearages of the rent, or for waſte committed as if the ten't had attorned at the time of his plea pleaded. 2. It was reſolved, that altho' the (*e*) infant in the caſe at bar was not compellable to attorn, becauſe the manor was not convey'd by fine; yet, becauſe by a (*f*) mean he was compellable to attorn, *ſc.* if a fine had been levied, the attornm. was good: And ſo it is held in 9 *E.* 3. 58. *b.* in waſte; that tho' the husband out of court does a thing which he and his wife may be compelled to do by law, the thing ſhall be eſtabliſh'd, and therewith agree 8 *E.* 4. 4. *b.* 11 *R.* 2. *Waſte* 98. and therefore (*g*) equal partition in ſuch caſe ſhall bind; the ſame law, if the husband (*h*) attorns in *pais* to a grant by deed, it ſhall bind the wife, and therewith agree 15 *E.* 3. *Attornm.* 11. 3 *E.* 3. 42. *b.* Sir *J. Boſvil's Caſe*, 44 *E.* 3. *Fine* 37. ¶ 3. Attornm. gives no (*i*) intereſt, but is only a bare aſſent, and therefore 11 *H.* 7. 13. *b.* it is no * infranchiſem. to a villein, and it can't be upon (*k*) condit. as it is reſolved in *Tooker's Caſe*, *in the* 2 *Part of my Repſ.* 66. ¶ 4. The end of an attornment is to (*l*) perfect a grant, and the law favours the conſummation and perfection of things; for the end is all, & *finis coronat opus*. And with this reſolution agree the books in 12 *E.* 4. 3. *b.* & 4. *a.* where it

(*a*) Co. Lit. 315. a. Antea 85. a. * Doct. pl. 132

(*b*) Br. Attornment 41.

(*c*) 6 Co. 4. a. Co. Lit. 315. a. 320. b. 1 Rol. 138. 3 Bulſtr. 137.

(*d*) 2 Co. 67. a. Co. Lit. 320. b.

(*e*) 1 Rol. 295, 296. Co. Lit. 315 a

(*f*) 5 Co. Lit. 172. a.

(*g*) Fitz. Partition 4. Br. Partition 28.

(*h*) 2 Brownl. 84. 1 Rol. 295. Fitz. Attornment 11.

(*i*) 1 Brownl. 47. 2 Brownl. 84. 2 Co. 67. a. *Co. Lit. 138. a. Br. Villenag. 75.

(*k*) 1 Rol. 412. 2 Brownl. 84. Co. Lit. 274. b. 297. a. 300. b. 2 Co. 68 a. 5 Co. 81. a. b.

(*l*) 1 Brown 47. 2 Brownl. 84.

it is held, That Tenant in Tail, an Infant, or a Feme Covert may be bound by an Attornm. *gratis* in *pais*, and in 18 *H.* 6. 2. *a.* *Forteſcue* holds, That if one grants the Services of his Tenant who is within Age, who within Age attorns, ſhall he be afterwards in an Advowry admitted to ſay that he was within Age at the Time of the Attornment? I ſay not; for he did but that which he ought to do; *ergo* his Attornment is good. And afterward Judgment was entred for the Avowant accordingly.

PINCHON's

PINCHON's *Caſe.*

Mich. 9 Jac. 1. *in B. R.*

2 Browl. 137. Co. Ent. nu. 1. Cr Jac 293, 294. Jenk. Cent. 29c.

TErmino Trin. 7 Jac. Regis, Rot. 533. in the King's Bench, *Edward Pinchon*, and *Richard Weſton*, Knights Executors of *Jerom Weſton*, Knight, Executor of *Roſe Pinchon* were Plaintiffs againſt *Tho. Legate*, Eſq; Executor of *John Legate* Defendant, in an Action upon the Caſe, and declared that whereas the ſaid *Roſe 7 Feb. anno Dom'* 1595. *mutuo dediſſet & accommodaſſet præf. Johanni Legate* 200 *l. legalis monetæ Angliæ, idem Johannes in conſideratione inde adtunc & ibid. ſuper ſe aſſumpſit, & præf' Roſæ in vita ſua fideliter promiſit, quod ipſe idem Johannes Legate* 200 *l. legalis monetæ Angl' eidem Roſæ, executoribus, vel adminiſtratoribus ſuis, cum inde requiſitus eſſet, bene & fideliter ſolvere & contentare vellet, &c. ac licet bona & catalla quæ fuerunt præd' Johannis Legate tempore mortis ſuæ ad manus præd' Thomæ poſt ipſius Johannis mortem, &c. devenerunt, & adhuc in manibus ipſius Thomæ exiſtunt ſufficientia, tam ad ſolvend' & exonerand' omnia debita & funeralia expenſ. ejuſdem Johannis quam ad ſatisfaciend' prædict' Edwardo & Richardo, de præd' ducentis libris, non ſolver', &c.* The Defendant pleaded *Non aſſumpſit, &c.* and it was found for the Plaintiffs, and upon the Verdict Judgment given for the Plaintiffs: Upon which Judgment a Writ of (*a*) *Error* was brought: And in this Caſe the principal Error which was aſſigned was, That no *Action upon the Caſe upon Aſſumpſit*, for Payment of the ſaid Debt lies againſt Executors. And it was argued for the Plaintiff in the Writ of *Error*, That the Action did not lie; for it is a Maxim in Law, That Executors ſhall not be charged with a ſimple Contract, and that for

(*a*) Cr. Jac. 293, 294.

for two Reaſons; one becauſe by the Preſumption of Law they can't have Knowledge either of the Beginning of the Debt, being made by Word without Writing, or of the Continuance of it, becauſe the Teſtator might pay it privately betwixt themſelves, and therefore it is adjudged in (*a*) 15 *E.* 4. 16. *a.* That an Action of *Debt* lies not againſt Executors for the Teſtator's Diet, (altho' it be of Neceſſity, and for which an (*b*) Infant ſhall be bound by his Contract; as it is held in 18 *E.* 4. 2. *a.* & 21 *H.* 6. 31. *b.*) *Vide* 41 *E.* 3. 23. 25 *E.* 3. 40. So no Action of *Debt* lies againſt the Executors of the Lord for the Surpluſage (*c*) on Account before Auditors, for the Reaſons and Cauſes aforeſaid; and theſe are ſtronger Caſes than the Caſe at the Bar: And if an Action *on the Caſe* ſhould lie againſt Executors, it would impugn the ſaid Maxim of the Com. Law; for every Contract executory implies an (*d*) *Aſſumpſit* in Law, and by Conſequence the Executors ſhould be charged with every Contract executory, which would be directly againſt the ſaid Maxim. Another Reaſon was added, That this *Action on the Caſe on Aſſumpſit*, is (*e*) *actio perſonalis quæ moritur cum perſona*, for the Entry in this Caſe is *in placito tranſgreſſionis ſuper Caſum*, and therefore lies not againſt Executors no more than if a Gaoler ſuffers one who is in Execution to eſcape, the Pl. might have an *Action on the Caſe* at the Com. Law againſt the Gaoler; but after the Death of the Gaoler no Action lies againſt his (*f*) Executors, for that was grounded upon a Wrong, which *moritur cum perſona*. *Vide* 41 *Aſſ. p.* 15. & 40 *E.* 3. *Executors* 74.

And this Caſe depended in Conſideration divers Terms, and after many Arguments on both Sides, and Conferences had amongſt the Judges, *viz. Coke* Chief Juſt. of the Com. Pleas, *Tanfield* Chief Baron, *Warburton* Juſt. Baron *Snigge*, Baron *Altham*, *Foſter* Juſtice, and Baron *Bromley*, It was reſolved by them all *una voce*, *nullo contradicente*, That the (*g*) *Action on the Caſe* in the Caſe at Bar did well lie againſt the Executors, and that not only without impugning any Rule or Reaſon of Law, or any Book reſolved in the Point, but alſo well warranted and confirmed by diverſe Authorities in Law, Judgments, and Reſolutions late and antient.

And as to the Objections which have been made (for the Confuting of them is a Confirmation that the Action doth well lie) to the firſt it was anſwered, That the ſaid Book in (*h*) 15 *E.* 4. is, That *Debt* lies not againſt Executors upon a Contract for the Teſtator's Diet, but the Reaſon thereof is not, (as hath been urg'd) becauſe the Executor can't have Knowledge of the Contract, nor of

(*a*) Br. Executor 79. Br. Ley gager 55. 1 Rol. 924.
(*b*) 1 Rol. 18. 729. 2 Rol. Rep. 45, 144, 271. Co. Lit. 172. a. Cr. El. 126, 920. 1 Leon. 113, 114. 2 Leon. 105. Owen 94. Poph. 151. 152. Cr. Jac. 494, 560, 561. Latch 21, 22, 156, 157, 169. Cart. 215, 216. Noy 85, 87. 1 Sid 112. March 40. Palm. 528, 529. 1 Jones 146. Moor 679. Godb. 219, 364. 10 H. 6. 24. a. Perk. 4. a. Plow 364. b. Dr. & Stud. 113. a.
(*c*) Co. Lit. 295.
(*d*) 4 Co. 94. a. Moor 667. Yelv. 20.
(*e*) 3 Bulſt 231. 4 Inſt 315. 1 Keb. 86. Poſtea 89. a.
(*f*) Dy. 271. pl. 25. 322. pl. 25. 3 Keb. 592. 1 Sand. 218. Cro. Car. 539. March 13. 1 Rol. 921.
(*g*) Cr. Jac. 273, 293, 294, 404. Jenk. Cent. 290. 2 Bulſt. 92, 236. 3 Bulſt. 235, 236, 237. Cr El. 121, 454, 459. Golds. 154. Poſt. 93. 10 Co. 77. a. b. 1 Roll. 924. 2 Brownl. 137, 236. Godb. 176. Swinb. 327. 2 Rol. Rep. 433, 434. Golds. 154. Moor 691. 1 Leon. 165. Yelv. 20, 56, 196.
(*h*) 15 E. 4. 16. a. Supra a.

of the Continuance thereof, becauſe the Teſtator might have privately paid it: But the Reaſon of the Law which is given in the Book in the ſame Caſe is, becauſe the Teſtator might have (*a*) waged his Law, it was awarded that the Pl. ſhould take nothing by his Writ. And the like Judgment is in the ſame Year, *fol.* 25. *a.* That an Action of *Debt* lieth not againſt the Executors, (and the Reaſon of the Judgment is; for know That a Man ſhall never have an Action againſt Executors (*b*) where the Teſtator in his Life-time might have waged his Law) and the Reaſon thereof is becauſe the (*c*) Executors ſhall be deprived of the Benefit of waging Law, if an Action will lie againſt them; which Reaſon ſtrongly proveth, that in the Caſe at Bar the Action will lie againſt the Executors, becauſe the Teſtator, in an *Action on the Caſe* on this *Aſſumpſit*, could not wage his Law; and therefore his Executors ſhall not be deprived of it. But if a (*d*) Priſoner in the Tower for Treaſon hath Meat and Drink from the Lieutenant, and dieth, the Lieutenant ſhall have an Action of *Debt* againſt his Executors for the Meat and Drink of the Teſtator, and the Reaſon is, becauſe in ſuch Caſe the Teſtator could not (*e*) wage his Law, as it is adjudged in (*f*) 27 *H.* 6. 4. *b.* in *Thomas Bodulgat's Caſe*, and the Reaſon why no Wager of Law lieth in ſuch Caſe is, becauſe every Gaoler ought to keep his Priſoner *in ſalva & arcta cuſtodia*, ſo that ſuch Priſoner by the Com. Law ſhall avoid a (*g*) Deſcent caſt, and a Fine levied during his Impriſonment, becauſe the Law preſumeth that he, in reſpect of his ſtrict keeping can't have (*h*) Knowledge of a Diſſeiſin or a Fine to command an Entry, or Claim to be made, and therefore the Gaoler is in a Manner * compellable to find Victuals for his Priſoners, and therefore the Priſoner ſhall not wage his Law in ſuch Caſe. But if *A.* agreeth with *B.* for his (*i*) Commons by the Week or Month, *&c.* there in *Debt* brought againſt *A.* he ſhall have his Law; as the Books are adjudged in 22 *H.* 6. 13. *b.* 9 *E.* 4. 1. *b.* *Vide* 39 *H.* 6. 18. *b.* If a Victualer or common Hoſtler bringeth an Action of *Debt* for the Victuals delivered to his Gueſt, the Gueſt may wage his Law; for a Victualer or Hoſtler is not compellable to deliver Victuals till he be paid for them in * Hand. And therewith agrees 19 *H.* 7. 8. *a.*

In (4) 14 *H.* 6. 19. *b.* *R. G.* brought an Action of *Debt* of ten Marks againſt *Thomas Timberhull*, and other Executors of *William Webbe*, and declared that the Teſtator had retained the Plaintiff to be with him for a Year, in the Art of (*k*) Limning of Books, paying *per Annum* ten Marks; and there *Martin* held that the Action was not

(*a*) Dy. 23. a. pl. 144.
(*b*) Dy. 23. pl. 144. 1 Rol. 924.
(*c*) Co. Lit. 295. a.
(*d*) Co. Lit. 295. a. Poph. 127.
(*e*) Co. Lit. 295 a. 1 Rol. Rep. 338 Poph. 627.
(*f*) 27 H 8. 4 b Br. Ley Gager 8 Firz. Ley 15. 22.
(*g*) Co. Lit. 25. a
(*h*) 8 Co. 100. b.
* Plow. 68. a.
(*i*) Cr. El. 818. 2 Rol. 107. Co. Lit. 395. a. Br. Ley Gager 50, 58, 70. Firz. Ley 25.
* 39 H. 6. 19. a.
(*k*) 1 Rol. 924.

not maintainable againſt the Executors, and took a Difference between that Caſe of a Book-Limner and of a common * Labourer; for he ſhall be forced to labour againſt his Will, and his Salary is certain by the Stat. which is no Reaſon for the Servant to loſe by the Death of his Maſter, where he was bound by the Law to ſerve, which ſhall not be ſaid his Default, but the Act of the Law; but in the Caſe of a Book-Limner he was not (*a*) forced by the Law to ſerve, and ſo when he made the Contract it was his own Act and Folly, and not the Act of the Law; and he might have taken a Specialty: And the Opinion of *Martin* in that Caſe is good Law; but the true Reaſon of his Difference is, becauſe in this Caſe of a common Labourer, the Teſtator could not have waged his Law, as he might have done in the Caſe of the Book-Limner, and that appeareth in (*b*) 11 *H.* 6. 48. *a. b.* where the Warden of the Freres Minors of *Coventry* brought an Action of Debt againſt *J. Burton* of *Coventry*, Executor of *John Goot*, and declared how the ſaid *John Goot* retained at *Coventry* Frere *John Bredon*, Confrere of the ſaid Warden in the ſaid Houſe, by Licenſe of the Warden to ſing for him Maſſes for a whole Year; and alſo did retain him to ſay St. *Gregory*'s Trental in the next Year after, and ſhewed in certain on what Services St. *Gregory*'s Trental did conſiſt, taking for the ſame 40 *s. per Ann.* and within four Days after *John Goot* died, and made the Defendant his Executor, and the ſaid *John Burton* granted to the ſaid Frere, and gave Surety to pay him the ſaid Sum for doing the ſaid divine Services according to the Retainer of the Teſtator; which divine Services he had done according to the ſaid Retainer; and that the whole Salary was behind. And there a good Difference is taken. A Labourer may have an Action of *Debt* againſt Executors, without a Specialty, becauſe he ſhall be forced to ſerve, if he be required, by the Statute, and the Teſtator ſhall not wage his Law in ſuch Caſe, becauſe the Labourer ſhall be bound to ſerve him: But here a Prieſt or a Frere is bound to ſerve by no Law in ſinging Maſſes, if he will not agree to it; and therefore the Teſtator might have waged his Law, and in every Caſe where the Teſtator might have (*c*) waged his Law, the Action ſhall not be maintainable againſt his Executors, without a Specialty; for the Executors cannot wage their Law of another's Contract. And that is the Reaſon that a (*d*) *Quo minus* lieth in the Exchequer againſt Executors for the Debt of the Teſtator by ſimple Contract, becauſe the Teſtator himſelf could not in ſuch Caſe wage his Law; and yet it may be ſaid, that the Executor can't by preſumption of Law have Knowledge

* 6 Mod. 204.

(*a*) Co. Lit. 295. a. 2 Rol. 107.

(*b*) 2 Rol. 107. Br. Det. 188. Br. Execut. 163.

See 2 Salk. 684.

(*c*) Co. Lit. 295. a. 2 Rol. 107. Br. Det. 188. Br. Execut. 163.

(*d*) 4 Co. 95. b. Co. Lit. 295. a. Godb. 291. 8 H. 5. Fitz. Ley 66. 20 E. 3. Fitz. Ley 52. 32 H. 6. 24. a. Br. Ley Gager. 102.

of the Beginning or Continuance of it; but these are not material, for the Wager of Law is the true Reason and Cause allowed by the Law. And therewith agree 8 *H.* 5. Tit. (*a*) *Ley* 62. (*b*) 32 *H.* 6. 24. *a.*

(*a*) 4 Co. 95. b
(*b*) Br. Ley Gager 102.
(*c*) Fitz. Execut 53. B. Execut. 41 Br. Dett. 53. Br. Labourers 44.

In (*c*) 2 *H.* 4. 14. *b.* *Lawrence* St. *Martin* retained one for Term of his Life in Time of Peace and War, for 100 *s. per Ann.* which Service he as his Servant did for 2 Years; for which he brought his Action of Debt against *John Belton* and others Executors of the said *Lawrence* St. *Martin*, and Judgment was given against the Pl. for the Reason, and upon the same Difference as is aforesaid. *Vide* (*d*) 39 *H.* 6. 18. *b.* And therefore the Judgment in *Slade's Case* (which was resolved by the Advice of all the Judges in the Exchequer-chamber in 44 *El.* as appears *in the* (*e*) 4 *Part of my Reports*, *f.* 92.) in Effect over-rules this Point. For if an *Action on the Case* on *Assumpsit* lies upon every Contract executory, thence it follows, that forasmuch as the Testator could not wage his Law, that the Action shall lie against his Executors: And therefore also it is true, That an Action *on the* (*f*) *Assumpsit* made by the Testator, will lie against Executors, because in such Action the Testator could not (*g*) wage his Law; as in the same Case, an Action of Debt lies not against Executors, because in such Action the Testator might have waged his Law. So no Birth-right or Privilege of the Subject is taken away by this Resolution, but thereby Justice and Right is advanced, for as much as the Creditor shall be paid his just and true Debt. And the Executors who in Truth have the Goods in another Right, *&c.* to pay the Debts, *&c.* of the Testator, shall not convert them to their private Use, without paying the just and true Debts of the Testator; for that would be against Justice and Right, and against the Office of Executors, who are but Ministers and Dispensers of the Goods of the Dead; and notwithstanding the Testator's Death, yet the Debt remains, for Death is no Discharge of the Debt; and it would be a great Defect in the Law, that no Remedy should be given for it, (*h*) *Curia domini Regis deficere non debet conquerentibus in justitia perquirenda. W.* 2. *cap.* 24. *Vide Doctor & Student*, *lib.* 2. *c.* 10 & 11. Debts due by Bond shall be paid by Executors before Debts by simple Contract, and Debts by * simple Contract before Legacies; which proves that the Debt by simple Contract remains due and payable after the Testator's Death, and that it shall be paid before Legacies, for which Remedy is given in the Ecclesiastical Court. And therewith agrees 21 *E.* 4. 21. *b.* and Debts by (*i*) simple Contract shall be paid before the reasonable Part of the Wife and Children. *Vide* 2 *E.* 4. 13. *b.* 2 *H.* 6. 16. *a.*

(*c*) 4 Co. 94. a. b.
(*d*) Fitz. Ley 22 Br. Ley Gager 70.
(*e*) Cr. Jac. 204 Plow. 182. b.
(*f*) Co. Lit. 295. a.
(*g*) 7 Co 4. a. Bulwer's Case 9 Co 111. a. 11 Co. 39. b. 2 Inst. 408. Co Lit. 74. a. * Post. 90. b.
(*h*) Swinb. 154.

As

As to the other Objection, That this perſonal Action of *Treſpaſs* on the Caſe (*a*) *moritur cum perſona*; altho' it is term'd *Treſpaſs*, in reſpect that the Breach of Promiſe is alledged to be mixed with Fraud and Deceit to the ſpecial Prejudice of the Pl. and for that Reaſon it is called *Treſpaſs* on the Caſe; yet that doth not make the Action ſo annexed to the Perſons of the Parties, that it ſhall die with the Perſons; for then if he to whom the Promiſe is made dies, his Executors ſhould not have any Action, which no Man will affirm. And an Action *ſur Aſſumpſit* upon good Conſideration, without Specialty to do a Thing, is no more perſonal, *i.* annexed to the Perſon, than a Covenant by Specialty to do the ſame Thing.

(*a*) Ant. 87. a. 4 Inſt 315. 1 Keb. 86. 12 H. 8. 11. b. 3 Bulſtr. 281.

Now for Authorities in Law, Judgments and Reſolutions. 1. The Caſe in 3 *E.* 3. *Itinere North.* cited in *Norwood's* Caſe in *Plo. Com.* 183. *a.* in Caſe of Debt, the Caſe in (*b*) 12 *H.* 8. 11. *a. b.* which is entred *Term. Mich.* 12 *H.* 8. *Rot.* 40. Between *Oliver* (*c*) *Cleymond* Pl. and *Rob. Vincent*, and *Thomaſin* his Wife, Executors of the Teſtament of *Rob. Penſon* Defendants; the Record of which Caſe I have ſeen, and there the Pl. declares, That whereas Communication was had between one *Roger Penſon* and the ſaid *Oliver* for ſix Barrels of Salt Salmon from the Houſe of the ſaid *Oliver* to the Value of 6 *l.* to be bought by the ſaid *Roger* of the ſaid *Oliver*, the ſaid *Rob. Penſon* deſired and requeſted the ſaid *Oliver* to ſell and deliver to the ſaid *Roger* the ſaid 6 Barrels, and aſſumed and promiſed for himſelf, his Exec's, &c. to the ſaid *Oliver*, *qd' ipſe executores ſeu aſſignati ſui dictas ſex libras pro barrellis & piſcibus præd' præfato* Olivero *infra unum annum extunc proxime ſequen' bene & fideliter ſolvere & contentare debuiſſent, idemq;* Oliverus *dictis aſſumptioni & promiſſioni præd'* Rob' Penſon *fidem adhibens, bona & mercimonia ſua præd' præfat'* Rogero *ad deſiderium & requiſition' dicti* Rob' Penſon, *ei ut præmittitur fact' pro prædict' 6 libris ſibi ut præfertur ſolvend' adtunc & ibid' vendidit, tradidit & deliberavit*, and declared that the ſaid *Rob. Penſon* in his Life, nor the Defendants after his Death did not pay the ſaid 6 *l.* &c. and alledged in the Declaration, *quod bona & catalla ipſius* Roberti *ſufficien' ad ſolvend' eaſd' ſex libr' & omnia alia debita ejuſdem* Roberti *ſolvend', in manus præd'* Ro' Vincent & Thomaſinæ *exiſt'*, &c. which Goods they had converted to their own Uſe, *ad damnum* 20 *l.* the Defend. *proteſtando qd' præd' billa minus ſufficiens eſt in lege ad quam iid'* Rob' Vincent & Thomaſina *neceſſe non habent nec per legem terræ tenentur reſpondere* for Plea ſay, That the ſaid *Rob. Penſon* did not aſſume and promiſe to the ſaid *Oliver*, &c. *modo & forma*, &c. upon which Iſſue was joined and tried before Sir *J. Fineux* Chief Juſtice of the King's Bench, by *Niſi prius*, and found for the Plaintiff,

(*b*) Plow. 182. a. Br. Action ſur le Caſe 106. Fitz. Executors 171.

(*c*) Plowd. 182. a. b. Rolle a 90. a.

and Damages assessed to 9 *l.* upon which Verdict the Court took advice till *Hillary* Term, and then the Judgm. is entred, *Et super hoc visis & per Cur' Dom' Regis hic diligenter inspect' omnibus & singulis præmissis, maturaq; deliberatione superinde habita, consideratum est, qd' præd'* Oliverus *recuperet versus præfat'* Rob'um Vincent *damna sua præd' per Juratores in forma præd' assessa, &c.* Which I have reported out of the Record it self at length, to the Intent the Reader may be assured of the Truth of the said Case: Which Judgment being given in the King's Bench with so great Deliberation by Sir *Jo. Fineux*, *Conisby*, and other his Companions, Judges of profound Knowledge, and remaining yet of Record in full Force, ought not to be discredited or disgraced by the bare Saying of a Judge, upon a sudden Motion at the Bar, and it is to be observed in the same Case of 27 *H.* 8. 23. *a.* That *Knightley* gave the true Reason why no Writ of *Debt* would lie against Executors, *sc.* because the Testator might have waged his Law, and the Executors can't do it, and therefore they are not chargeable in an Action of *Debt*. And *Knightley* further saith, in the Exchequer it is a common Course, That the King's Debtors shall have a (*a*) *Quo minus* against the Executors of their Debtors, who were indebted to them by simple Contract; to which the same Judge answereth, it is not so, and there is no such Course in the Exchequer, and the Law is quite otherwise; which is apparent by that which hath been said before, that the Judge denied (upon the sudden) the Law in this Point, and that which is the common Course of the Exchequer. Which Judgment so given was a leading Case to many others, not only in the King's Bench, where the Judgment was given, but also in the Common Pleas; and therefore *Hill.* 15. *H.*8. *Rot.* 306. *in Banco*, an Action *on the Case upon Assumpsit* of the Testator for Debt, was brought against Executors, who pleaded fully administred, and in the *Book of Entries*, Tit. *Action sur le Case*, *Division*, *Debt*, *pl.* 2. Action *on the Case* in the King's Bench against Executors, upon *Assumpsit* made by the Testator 5 *Martii* 28 *H.* 8. upon Sale of Corn to him. And *ibid. pl.* 3. another Action on the Case in the King's Bench against Administrators, upon *Assumpsit* by the Intestate, 28 *Martii* 31 *H.* 8. upon a Contract for Carpenters Wares: And *ibid. in the Division*, *Payment*, *pl.* 2. the like Action in the King's Bench by Executors against Exec'ors, upon *Assumsit* for Repaym. of Money which was before deliver'd, if a Marriage should not take Effect. And the like Actions you may see in the Court of Com. Pleas, *Mich.* 15 & 16 *El. Rot.* 1959. in the Time of Sir *Ja. Dyer*, Chief Just. of the Com. Pleas, an Action on the Case by *H.*(*b*) *Beecher* and

See Carthew 218.

27 H. 8. 23. a.

(*a*) Co. Lit. 295. a.

(*b*) Co Ent. 2. 0. pl. 3.

and others, Executors of *Hen. Beecher*, againſt *Anne Mountjoy*, Adminiſtratrix of *Joh. Bonham*, Kt. upon *Aſſumpſit* of the Adminiſtratix, in Conſiderat. that Adminiſtration was committed to her, and that ſhe had Aſſets to pay, *&c. aſſumpſit ſuper ſe ad ſolvend.* 59 *l.* in which Sir *John* the Inteſtate was indebted to the ſaid *H. Beecher* the Teſtat. The Def. pleaded *Non aſſumpſit*, and found againſt her, and Judgment was given (*a*) generally, *& non de bonis defuncti.* Which Judgment proves, that the Debt did not periſh by Death, and that the Adminiſtratrix was chargeable to pay it, otherwiſe there was not any Conſiderat. *Paſc.* 24 *El. Rot.* 1530. in the Time of Sir *Edmund Anderſon*, Ch. Juſt. of the Bench, in an Action *on the Caſe* by *Johan Michel*, Executrix of *Ralph Michel*, againſt *Wm. Vial* and others, Executors of *John Arundel*, Eſq; *ſuper aſſumptionem factam per præd' Johan' Arundel*; in Conſideration that the ſaid *Ral. Michel in vita ſua vendidiſſet & deliberaſſet eidem Johanni diverſa mercimonia, &c. ſuper ſe aſſumſit*, to pay, *&c.* The Defendant pleaded, *Non aſſumpſit*; and Judgment was given *De bonis Teſtat. Trinit.* 27 *El. Rot.* 107. in an Action on the Caſe by *Horne* againſt *Brough* Executor of *Brough*, upon a Promiſe made by the Teſtator in Conſiderat. that the Pl. had ſold the Teſtator *bona & catalla, &c. aſſumpſit ad ſolvend', &c.* and upon *Non ſum Informatus* pleaded, Judgm. was given for the Pl. And a Multitude of Judgments have been given in the K.'s Bench in the like Caſes; and the Juſtices relied much upon the Caſe in *Hill.* 4 & 5 *Ph. & Ma.* in the King's Bench, between *Norwood* and *Read*, *Plow. Com.* 181. where it appears that upon a Demurrer in Law upon the Declarat. it was adjudged, That the Action upon *Aſſumpſit* made by the Teſtator, was maintainable againſt the Executors, upon a Contract for Wheat: In which Caſe the Judgm. given in 12 *H.* 8. in (*b*) *Cleymond*'s Caſe, is approved. So that upon all theſe Authorities, Judgments and Reſolutions, and for the Reaſons aforeſaid being in Number three, 1. That the Teſtator could not wage his Law: 2. That after the Death of the Debtor the Debt remains, and that it would be a Defect in the Law, if no Remedy ſhould be provided for it: 3. It is more conſonant to Juſtice and Com. Right, that the juſt Debt ſhould be paid, than the Executors, who have the Goods in another's Right, ſhould convert the Goods to their private Uſe, without paying the Teſtator's Debts, It was unanimouſly upon long and mature Deliberation adjudged, That the Judgment given in the King's Bench ſhould be affirmed. And you who make Payment or other Satisfaction of Debts, take Acquittances, or ſufficient Proof of the Payment or Satisfaction thereof, or otherwiſe you or your Executors or Adminiſtrators will be in Danger of paying it again.

(*a*) 3 Rol. 930. Poſtea 94 a.

(*b*) 12 H. 8. 11. a. b. Ant. 89. a. Plow. 122. a. b.

Note.

Laſtly, It was reſolved in this Caſe, That 'twas not neceſſary to *(a)* aver that the Defendants had Aſſets to pay Legacies; as it was alſo reſolved in the ſaid Caſe between *Norwood* and *Read*, for Debts upon *(b)* ſimple Contract are to be paid before Legacies. And the Report of the ſaid Caſe of *(c)* 12 *H.*8. as to the Averment for Payment of Legacies is not warranted by the Record; for in the Record the Averment is only taken that the Executor had Aſſets to pay all Debts. And in *Mich.* 29 & 30 *El.* in an Action *on the Caſe* brought by *Codington* (*d*) againſt *Hulet*, as Executor, &c. upon an *Aſſumpſit*, made by the Teſtator for Payment of a Debt, the Defendant pleaded *Non aſſumpſit*, and it was found againſt him; and in arreſt of Judgment it was moved, that the Declaration was inſufficient, becauſe the Plaintiff had not averred that the Defendant had Aſſets to ſatisfy the Teſtator's Debts. And it was adjudged by Sir *Chriſtopher Wray*, Sir *Thom. Gaudy*, and the whole Court, that the Declaration was good enough; and that it ſhould come in on the Defendant's Part; as in an Action of *Debt* againſt Executors, (*e*) or againſt the Heir, no Averment is taken in the Declaration that they have Aſſets, and the Law intends that every Man will in Diſcharge of his Conſcience leave Aſſets to pay all the Debts, which he ought to pay to any.

(a) 2 B owul. [illegible] o Rea 94. a. [illegible] 921 Cr. Jac 47, [illegible] 224. [illegible]d. 81. a. [illegible]oft. and [illegible] 75. b. 78 [illegible]Kol. 527. [illegible] 12 H. 8. 11. [illegible] [illegible].89. a. 90.a [illegible]wd 182. b. (d) Cr El 59 [illegible]Kol. 921.

(e) Doct. pl. 88 [illegible]18. [illegible]o Rea 94. a.

WIL-

WILLIAM BANE's *Caſe*.

Hill. 8 Jacobi 1. *in B. R. Rot.* 1112.

MEmorandum, That at another Time, that is to ſay, in the Term of St. *Michael* laſt paſt, before the King at *Weſtminſter*, cometh *William Banes* by *Tho. Ferrer* his Attorney, and brought here into Court before the ſaid Lord the now King, his Bill againſt *Edward Paine* and *Mary* his Wife, in Cuſtody of the Marſhal, &c. of a Plea of Treſpaſs upon the Caſe, and there are Pledges of Suit, to wit, *John Doe* and *Richard Roe*, which Bill followeth in theſe Words: *ff. William Banes* complaineth of *Edward Paine* and *Mary* his Wife, in the Cuſtody of the Marſhal of the Marſhalſea of the Lord the King, before the King himſelf being, for that, that is to ſay, That whereas one *William Havert*, the late Husband of the ſaid *Mary*, in his Life-time, that is to ſay, the 1ſt Day of *March* in the 6th Year of the Reign of the Lord *James*, now King of *England*, &c. at *London*, that is to ſay, in the Pariſh of the bleſſed *Mary of the Bows*, in the Ward of *Cheap*, *London*, was indebted to the ſaid *William Banes* in 77 Pounds of lawful Money of *England*, for divers Sums of Money to him the ſaid *William Havert* by the aforeſaid *William Banes* delivered to Loan and Lent. And the ſaid *William Havert* being ſo indebted,

afterwards, that is to ſay, the 6th Day of *April* in the 7th Year of the Reign of the Lord the now King of *England*, &c. in the Pariſh and Ward aforeſaid, lying ſick, at *London*, earneſtly required the ſaid *Mary*, then his Wife, to pay the ſaid *Wm. Banes* after the Death of the ſaid *Wm. Havert* the ſaid 77 *l.* And then and there the ſaid *William Havert* made his Teſtament and laſt Will, and made and conſtituted the ſaid *Mary* Executrix of his ſaid laſt Will, and then there died; after whoſe Death the ſaid *Mary* took upon her the Burthen of the Execution of the Teſtament aforeſaid. And whereas the foreſaid *Mary* after the Death of the ſaid *Wm. Havert*, by Colour of the laſt Will aforeſaid, was poſſeſſed of the Intereſt of a Term for divers Years then and yet to come, of and in certain Gardens and a Bowling-Alley, ſituate and being in *Moorfield*, that is to ſay, in the Pariſh of St. *Leonard*, *Shoreditch*, in the County of *Middleſex*; and the ſaid *Mary*, when ſhe was ſingle after her ſaid Husband's Death, perceiving that the aforeſ. *Wm. Banes* intended to trouble and ſue her the ſaid *Mary* for the ſaid 77 *l.* (becauſe that ſhe the ſaid *Mary* the ſaid 77 *l.* to the ſaid *Wm. Banes*, after the Death of the foreſaid *William Havert* her Husband deceaſed, had not paid) ſhe the ſaid *Mary* whileſt ſhe was ſingle, afterwards, that is to ſay, the 25th Day of *June* in the ſaid 7th Year of the Reign of the Lord the now King aforeſaid, at *London* aforeſaid, in the Pariſh and Ward aforeſaid, in conſideration that the ſaid *Wm. Banes*, at the Inſtance and ſpecial Requeſt of the ſaid *Mary*, ſhould not trouble or ſue the ſaid *Mary* for the ſaid 77 *l.* but would forbear the Payment thereof until the next Quarter, that is to ſay, until the Feaſt of St. *Michael* the Archangel then next following, did aſſume on himſelf and unto the ſaid *Wm. Banes* then and there faithfully promiſed, that ſhe the ſaid *Mary*, the aforeſaid 77 *l.* to the ſaid *Wm. Banes* then at that next Quarter, that is to ſay, at the Feaſt of St. *Michael* the Archangel then next following, the Promiſe aforeſaid, in the 7th Year aforeſaid, well and truly would pay and content, or otherwiſe the ſaid *Mary*, then and there would aſſign and ſet over to the ſaid *Wm. Banes* for his Security in that behalf, for the Payment of the aforeſaid 77 *l.* all the Intereſt of the Term of Years, which ſhe the ſaid *Mary* then had to come of and in the Gardens,

and

and Bowling-Alley aforeſaid, if the ſaid *Mary* the ſaid 77 *l.* to the ſaid *Wm. Banes*, according to her Aſſumption and Promiſe aforeſ. ſhould not pay. And the ſaid *W. Banes* in Fact ſaith, that he the ſaid *Wm. Banes* giving Faith to the Promiſe and Undertaking of the ſaid *Mary*, did not trouble or ſue the ſaid *Mary* for the ſaid 77 *l.* but did forbear (to demand) the Paym. thereof from the Time of the Promiſe aforeſ. until the next Quarter, *viz.* the Feaſt of St. *Michael* the Archangel next following the Promiſe aforeſ. in the 7th Year aforeſ. And the ſaid *W. Banes* further ſaith, that after the Promiſe aforeſ. in Form aforeſ. that is to ſay, the 10th Day of *Nov.* in the 7th Year aforeſ. at *London* aforeſ. in the Pariſh and Ward aforeſ. the ſaid *Mary* took to Husband the aforeſ. *Edward Paine*, yet the aforeſ. *Mary* whilſt ſhe was ſingle, or the ſaid *Edw.* and *Mary* after the Marriage between them ſolemniſed, the Undertaking and promiſe of the ſaid *Mary* whileſt ſhe was ſingle little regarding, but contriving, and fraudulently intending the ſaid *W. Banes* of the aforeſ. 77 *l.* craftily and ſubtilly to deceive and defraud of the ſaid 77 *l.* nor the ſaid *Mary* whilſt ſhe her ſelf was ſingle to the ſaid *W. Banes* at the aforeſ. next Quarter, that is to ſay, at the Feaſt of St. *Mich.* the Archangel next following, the Promiſe aforeſ. in the 7th Year aforeſ. according to the Promiſe and Undertaking aforeſ. in this behalf paid, or any way for the ſame contented; or otherwiſe then and there at that Feaſt did not aſſign to the ſaid *Wm. Banes* all the Intereſt of the Term of Years, which ſhe the ſaid *Mary* then had to come of and in the Gardens and Bowling-Alley aforeſaid; nor the ſaid *Edw.* and *Mary*, after the Marriage betwixt them celebrated, at any time after hitherto the aforeſ. 77 *l.* to the ſaid *Wm. Banes* according to the Promiſe and Undertaking of the ſaid *Mary* aforeſ. have hitherto paid, or any ways for the ſame have contented him, or all the Intereſt aforeſ. of the Term of Years, of the ſaid *Edw.* and *Mary*, of and in the Gardens and Bowling-Alley aforeſ. according to the Promiſe and Undertaking of the ſaid *Mary* to the ſaid *W. Banes* for his Security in that Behalf hitherto have aſſigned; altho' this to do, by the ſaid *W. Banes* the ſaid *Mary* whilſt ſhe was ſingle, and the ſaid *Edw.* and *Mary* after the Marriage betwixt them celebrated, that is to ſay, the laſt Day of *Septemb.* in the 8th Year of the Reign of the ſaid Lord the King of *England* that now is, at *London* aforeſ. in the Pariſh and Ward aforeſ. often were required; by which the ſaid *W. Banes* all the Gain, Commodity and Profit, which he with the aforeſ. 77 *l.* in buying, ſelling, and lawfully bargaining could have had or gained, if the ſaid *Mary* her Promiſe and Undertaking aforeſ. in Form aforeſaid, had performed, utterly

wanted and loſt; whereupon the ſaid *William Banes* ſaith that he is worſe, and hath Damage to the Value of 100 *l.* and thereof he bringeth Suit, &c. And now at this Day, that is to ſay, *Wedneſday* next after eight Days of St. *Hillary*, in this ſame Term, until which Day the ſaid *Edw.* and *Mary* had Licenſe to the Bill aforeſ. to imparl, and then to anſwer, &c. before the Lord the King at *Weſtminſter* cometh as well the aforeſ. *W. Banes* by his Attorney aforeſ. as the ſaid *Edward* and *Mary* by *Iſham Novel* their Attorney; and the ſaid *Edward* and *Mary* defend the Force and Injury, when, &c. and ſay, that the ſaid *Mary* did not take upon her in Manner and Form as the aforeſ. *Will. Banes* above againſt them hath declared; and of this they put themſelves upon the Country, and the aforeſ. *Will. Banes* likewiſe, &c.

Therefore a Jury thereof was to come before the Lord the King at *Weſtminſt.* upon *Monday* next after 15 Days of St. *Hillary*, and who neither, &c. becauſe as well, &c. the ſame Day is given to the Parties aforeſaid here, &c. Afterwards the Proceſs was continued between the Parties aforeſ. of the Plea aforeſ. by Jurors thereof put between them, in reſpite before the Lord the King at *Weſtminſter*, until *Tueſday* next after eight Days of the Purification of the bleſſed *Mary* then next following, unleſs the beloved and faithful of the Lord the King *Tho. Fleming*, Knt. Chief Juſtice of the Lord the King of Pleas, in the Court of the ſaid Lord the King, before the King himſelf to be holden, aſſigned, firſt upon *Monday* next after the aforeſ. 8 Days of the Purification of the bleſſed *Mary*, at the *Guild-hall*, *London*, by Form of the Stat. &c. ſhall come, for Default of Jurors, &c. At which Day before the Lord the King at *Weſtm.* cometh the aforeſ. *W. Banes* by his Attorney aforeſ. and the aforeſ. Chief Juſt. before whom, &c. ſent here his Record before him had, in theſe Words. Afterwards, the Day and Place within contained, before the beloved and faithful of the ſaid Lord the King, *Tho. Fleming*, Knt. Ch. Juſt. within written, aſſociating to himſelf *Will. Price*, according to the Form of the Stat. came as well the within named *Wm. Banes*, as the within written *Edw. Paine* and *Mary* his Wife, by their Attornies within contained; and the Jurors of the Jury, whereof within mention is made, likewiſe came, and to ſpeak the Truth of the Matter within contained being elected, tried, and ſworn, ſay upon their Oath, That the within named *Mary* took upon her in Manner and Form as the within written *Wm. Banes* within againſt them hath declared, and they aſſeſs the Damages of the ſaid *William*, by Occaſion of not performing the Promiſe and Undertakings within written, beſides the Charges and Coſts by him about his Suit in this behalf expended to 80 *l.* and for his Charges and Coſts to 53 *s.* and 4 *d.* Therefore it is granted,

that the aforeſaid *William Banes* ſhall recover againſt the ſaid *Edward Paine* and *Mary* his Wife, the Damages aforeſaid, in Form aforeſaid aſſeſſed, as alſo 5 *l.* 6 *s.* 8 *d.* for his Charges and Coſts aforeſ. to the ſaid *William*, by the Court of the ſaid L. the K. here with his Aſſent of Encreaſe adjudged. Which Damages in the whole do amount to 88 *l.* and the ſaid *Edward Paine* and *Mary* his Wife are in Mercy, *&c.*

WILLIAM

WILLIAM BANES's *Caſe*.

Hill. 9 Jacobi 1.

Cr.Jac. 47,273. Jenk.Cent.290. Moor 853, 854. 1Rol. Rep.379. Yelv. 55, 56.

T'Ermin' Hillar' 8 *Jac. Regis Rot.* 1112. *in Banco Regis Will. Banes* brought an *Action on the Caſe* upon an *Aſſump'* againſt *Edw. Paine* and *Mary* his Wife, and declar'd, That whereas *William Havert* was indebted to the Plaintiff in 77 *l.* which the Plaintiff had lent him; and that the ſaid *William Havert* made his Will, and thereof made the ſaid *Mary* Executrix, and died, and that the ſaid *Mary* took upon her the Charge of the ſaid Will; and that ſhe being poſſeſſed as Exec'x of an Intereſt of a Term for divers Years yet to come of certain Gardens, and of a Bowling Alley in *Moor-fields* in the Pariſh of St. *Leonards* in *Shoreditch*, in the County of *Middleſex*, the ſaid *Mary* 28 *Junii anno* 7 *Jac.* perceiving that the ſaid *William Banes* would ſue her for Non-payment of the ſaid Debt, in Conſideration that the ſaid *William Banes*, at the Requeſt of the ſaid *Mary*, *non moleſtaret aut ſectaret eandem Mariam pro præd'* 77 *l. ſed deferre vellet ſolutionem inde uſq; feſtum Sti. Michaelis tunc proxim' ſequen'*, aſſumed to pay the ſaid Debt at the ſaid Feaſt of St. *Mich.* or otherwiſe *eadem Maria adtunc & ibidem aſſignare vellet eidem Willielmo Banes pro ſecuritate ſua in ea parte pro ſolutione præd'* 77 *l. totum intereſſe termini annorum præd'*, *&c.* in Default of Payment of the ſaid 77 *l.* and averr'd, that the Pl. did not moleſt or ſue her, *&c.* and that at the ſaid Feaſt the Defendant did

did not pay nor make Aſſignm. of the ſaid Intereſt; and afterwards the ſaid *Mary* married the ſaid *Ed. Paine:* The Defendants pleaded *non Aſſump'*, and it was found againſt them to the Damages of 80 *l. &c.* Upon which a (*a*) general Judgm. was given againſt *E. Paine* and his Wife, *ſc.* that the Pl. ſhould recover againſt them his Damages: Upon which Judgm. the Defs. brought a Writ of Error in the Exchequer-chamb. by the Stat. of 27 *El. c.* 8. And the principal Error aſſign'd was, becauſe the Pl. had not averr'd, That the Executrix had Aſſets in her Hands at the Time of the *Aſſump'* made of the Goods of the Deceaſed amounting to the Value of the ſaid Debt; and if ſhe had not Aſſets, then it is *nudum pactum*, for there is no Conſideration to charge her, nor to bind her to her Promiſe; and *eo potius*, becauſe ſhe ſhall by this Promiſe be charged generally, and not only of the Goods of the Deceaſed; and therefore, in Regard the *Aſſumpſit* charges her ſelf, and transfers the Charge of her as Executr. in another Right to her ſelf as for her proper Debt, in Reſpect of her Promiſe Reaſon requires that there ought to be ſome good Conſideration thereof, which can't be if ſhe has not Aſſets.

(*a*) 1 Rol. 930. Antea 90. a. Cr. El. 91.

But it was reſolv'd by all the Juſt. of the Com. Pleas and Barons of the Excheq. that the Declarat. was good enough, for it ſhall be intended *prima facie*, that ſhe had (*b*) Aſſets; and therefore in *Debt* againſt Execut. or againſt the Heir, the Pl. ſhall never aver in his Declarat. that they have Aſſets, for the Law preſumes that *prima facie*; for the Law preſumes that the Teſtat. or the Anceſtor would not leave a greater Charge upon his Execut. or Heir, than he leaves Benefit to diſcharge it. And the Conſideration in the Caſe at Bar is good; for it is as much as if a (*c*) Stranger had ſaid to the Pl. forbear your Debt, and do not ſue the Def. till *Mich.* and at the ſaid Feaſt I will pay you your Debt, that is a good Conſideration, altho' it can't be any Benefit to him who makes the Promiſe; yet becauſe it is a Damage to the Creditor to forbear his Suit and Duty, it is a good Conſideration: and as in the ſame Caſe he who makes the Promiſe for another ſhall be charged generally upon his own Promiſe; ſo when one is Execut. and makes ſuch a Promiſe, the Debt is due by him in Right of his Executorſhip, and the Promiſe is made in his own Right; and therefore without Queſtion he ſhall be charged in an Action brought upon his Promiſe (*d*) generally, and yet the Money which he pays in Satisfact. of the Debt of the Teſtator, ſhall be allowed him as Parcel of his Account as Executor; for his Promiſe extends to pay the Debt with which he was chargeable as Executor; But I conceive, If the Truth of the Caſe be that in the Caſe at Bar there had not been (*e*) any Debt, or if there had been a Debt, and the Executrix had

(*b*) Hutt. 28, 108. 1 Rol. 921. Antea 90. b. Plowd. 182. b. 2 Brownl. 138. Cr. Jac. 47, 293, 294. Cr. El. 59. Doct. pl. 88, 168. Cr Jac. 273, 604. 2 Bulſt. 92.

(*c*) Cr. El. 881. Yelv. 1. 2. Heil. 1.

(*d*) Cr. El. 91, 406. Cr. Jac 273.

(*e*) 2 Rol. 684. Hutt. 28. Doct. pl. 201. Palm. 185, 522. 1 Vent. 121.

(a) 1 Vent. 121. Palm. 185, 522. had (a) nothing in her Hands at the Time of the Promiſe, ſhe might have given it in Evidence, and thereupon have been helped, for then in Truth there was not any Conſideration, for to forbear the Debt where none was, or with which ſhe was not chargeable, is not any Benefit to the Defendant, nor Damage to the Plaintiff. Alſo the Caſe at Bar was ſtronger, becauſe the Defendant promiſed either to pay the Money, or to aſſign the Intereſt of the Leaſe which ſhe had as Executrix, for it was in her Election to do which of them ſhe would. And ſo Note the principal Point reſolved by both Courts.

Sir

Sir GEORGE REYNEL's *Caſe.*

Hill. 9 Jacobi 1.

A Caſe in Chancery.

JOVIS quarto decimo die Novembris Anno Regni Regis Jacobi Angl', &c. nono, inter dictum Dominum Regem Quer', & Georgium Reynel militem Defend'. Cum dies datus fuit præfato Defendenti uſq; dodecimum diem inſtantis Novembris ad oſtendendam cauſam, quare officium Mareſcal' Mareſcalciæ coram ipſo Rege tanquam forisfact' in manus dicti Domini Regis ſeiſiri non deberet, iſto quartodecimo die Novembris Magiſter Richardſon e conſilio cum præfato Defendente diverſas Cauſas in ea parte allegavit, quod breve de Scire facias verſus præfatum Defendentem proſequi debeat, antequam offic' præd' in Manus dicti Dom' Reg' ſeiſiri debeat. Sed quia Curia hic in præmiſſis ulterius adviſare vult, Ideo dies datus eſt per eandem Curiam uſque diem Lunæ, ſ. viceſimum quintum diem inſtantis Novembris, quo die Dominus Cancellarius Angl' (aſſociatis ſibi Edward Coke milite capitali Juſtic' de Banco Laurentio Tanfield milite capital' Barone Scaccarii Petro Warburton milite uno Juſtic' de Banco & Jacobo Altham milite uno Baronum Scaccarii) quid per conſilium ex utraq; parte dici poterit, utrum officium præd' in manus dicti domini Regis ſeiſiri poterit ſine brevi de Scire fac' prius lato, necne, audire proponit. At which Day, in *Mich.* Term now laſt paſt, the Caſe was argued before the Lord Chancellor and the ſaid four Judges by *Richardſon* for Sir *George Reynel*, and by *Dampert* for the King: And the Caſe was ſuch, *Ed. Peacock habuit & tenuit offic' Mareſchalli Mareſ-*

chalc'

chalc' coram domino Rege for the Term of his Life; and the K. that now is 2 *Sept. anno primo Regni ſui*, granted the ſaid Office to Sir *James Elphinſtone*, now Lord *Balerinoth*, and to his Aſſigns, for 31 Years in Reverſion, who 26 *Jan. anno* 2 *Reg' Jac'* by Deed aſſigned it to *Hen. Spiller*, *Ed. Peacock* died 7 *Dec. an'* 3 *Reg'* who deputed Sir *Geo. Reynol* by Word to exerciſe the ſaid Office as his Deputy at Will: And afterwards in *Jan.* following *Hen. Spiller* by his Deed aſſign'd the ſaid Office to Sir *G. Reynel.* And it was found by Office by force of a Commiſſion under the Great Seal, and returned in the Chancery, that Sir *G. Reynel* had committed divers Forfeitures of the ſaid Office by ſuffering voluntary Eſcapes of Priſoners, *&c.* And the only Queſt. which was argued at the Bar in the Chancery by the ſaid Order of the Court was, If upon this Office the K. might ſeiſe without a *Sci. fa.* (for no Queſt. was made upon the Validity of the Office;) But after the Arguments I moved, If ſuch Office might be granted for Years, or not. And then the Lord Chancellor conceived it could not, but deſired us to conſider of theſe 2 Points, *ſ.* 1. If the K. might ſeiſe without a *Sci' fa'*; and 2. If ſuch Office might be granted for Years. And we pray'd Time to adviſe till this Term; and in the Vacation we 4 ſeverally conſider'd of thoſe 2 Points, and in the Beginning of this Term we met and conferred together. And as to the firſt, we are reſolv'd, that the K. might ſeiſe without ſuing a (*a*) *Sci. fa.* for the Reaſons and Cauſes which *Coke* Ch. Juſt. in the Preſence of the others in the Chancery this Term openly deliver'd in the Chancery. And becauſe divers Authorities were cited at the Bar, and ſome ſeem to contradict the others, he made the Report in this Manner. 1. In ſome Caſes the King ſhall be in Poſſeſſion by Seiſure without Office, as in 21 (*b*) *H.* 7. and (*c*) *Stamford* in the Caſe of the Temporalties of a Bp. and of Priors aliens, becauſe the Certainty of them appears in the Excheq. & (*d*) *fruſtra fit per plura, qd' fieri poteſt per pauciora.* 2. In ſome Caſes the K. ſhall be in Poſſeſſion by Office without Seiſure, as of Lands, Tenem. Offices, *&c.* which are local, or whereof continual Profit may be taken: As where it is found by Office that a Condit. is broke, or that a Perſon attainted of Felony is ſeiſed of Land, *&c.* or in the Caſe of Wardſhip of Land, *&c.* in all theſe Caſes the K. immediately by Office is in Poſſeſſ. before any Seiſure. *Vide* (*e*) 2 *H.* 7. 8. *b.* 9 (*f*) *H.* 7. 2. *b.* 12 *H.* 7. (1.) 21. *b.* & 19. *a.* 14 *H.* 7. 21. *b.* 15 *H.* 7. 6. *b.* 21 *H.* 7. 7. *a. b.* 18. *a. Stamf.* 55, 56, *&c. Vide Trin.* 30 *El. Dowrie's Caſe in the* 3 *Part of my Rep. f.* 10, 11. & *Trin.* 26 *El. the Comp. of Sadlers Caſe in the* 4 *Part of my Rep. f.* 54, 55. 3. In ſome Caſe the K. ſhall be in Poſſeſſ. by Office and Seiſure, as in Caſe of (*g*) Advowſ. *&c.* the right Patr. ſhall not be ouſted by ſuch falſe Office found thereof, till the K. preſents, and his Clerk is admitted and inſtituted; for if the K.'s Clerk is refuſed and the K. brings his

Quare

(*a*) Dy. 198. pl. 50, 211. pl. 29. 2 Rol. 191. 1 Sid 81. Kelw. 33. b. 3 Co. 11. a. 1 Leon. 21. 2 Rol. Rep. 497. Hob. 243, 244.

(*b*) 2. H. 7. 83 a. Stamf. Prærog. 55. a. b.

(*c*) Stamf Prærogat. 55, 56

(*d*) 8 Co. 167 a. Co. Lit. 362 b 3 Bulſtr. 170. Noy 164. 1 Rol. Rep. 85. Hard. 113.

(*e*) Fitz. Prærog. 10. Br. Prærog. 101. Br. Entry congeable 88. Br. Office devant Eſcheat. 30. Br. Patents 46. Br. Condit. 125

(*f*) Br. Office devant Eſchea-tor 34. Br. Prærog. 91. Br. Eſch. 25, 33. 3 Co. 10. b. 3 Leon. 187. Poſtea 96. a. Plowd. 229. b. Moor 293. 4 Co. 58. b. Stamf. Prærog. 54. a.

(*g*) Kelw. 42. b. 43. a.

Quare Imped. he may traverſe the K.'s Title found by the Office, in the ſame Action, and is not put firſt to traverſe the Office as he is put in the Caſes beforeſaid of Inheritance manual, where by the Office the K. is in Poſſeſſ.; for there he ought firſt to avoid the Office by traverſe, &c. and till the Office is avoided, the K. ſhall be in Poſſeſſion, *(a)* 17 *E.* 3. 10. *b.* 20 *E.* 4. *(b)* 10. & 14. 21 *E.* 4. 1. *and Dowty's Caſe* aforeſ. as if the Manor of *Dale* held of the K. is aliened in Mortmain by one who has nothing in it; and it is found falſly by Office, that he who aliened was ſeiſed in Fee and aliened in Mortmain, by this Office the K. is in Poſſeſſion immediately, and in any Suit or Information commenced for the King for the Profits thereof, the right Owner ſhall not traverſe the K.'s Title found by the Office, but firſt he ought to avoid the Office by traverſe, &c. *Vide* 9 *H.* 7. 2. But if one aliens an Advowſ. in Mortmain, in which he has nothing, and it is found falſly that he was ſeiſed in Fee, and aliened in Mortmain, the K. thereby is not in Poſſeſſion of the Advowſ. until he preſents, and his Clerk is admitted and inſtituted; and if in ſuch Caſe his Clerk is refuſed, and the K. brings a *Quare Imp.* the right Patron may traverſe the K.'s Title in the *Qu. Imp.* before he avoids the Office by traverſe, &c. becauſe the Advowſ. is not manual, but *hæreditas incorporea*, and *eo potius*, becauſe the Right to preſent, when it falls, is caſual and not continual. 4. In ſome Caſe the K. ſhall be in Seiſin, without any Office or Seiſure; As where the K.'s Tenant dies without Heir, &c. the Law caſts the Seiſin upon the King, without Office or Seiſure, as in *(c)* 9 *H.* 7. 2. *b. Vide the ſaid Caſes of (d) Dowty*, and of the *Company of (e) Sadlers.* 5. When 2 diſtinct Matters of Rec'd amount to an Office, there ought to be a *Sci. fa.* before the K. ſeiſes, altho' a Common Perſon in ſuch Caſe may enter or ſeiſe, unleſs it is in ſpecial Caſes; As if it be found by Office, that the Manor of *D.* is held of the K. and it appears by Fine of Record that the Manor of *D.* is aliened in Mortmain, there ought to be a *Sci. fa.* in which it ſhall appear by Averment that all is one and the ſame Manor, for there may be divers of one and the ſame Name, and that he who aliened was ſeiſed, for both without ſuch Averment ſhall not put the Party to anſwer, but when there is Indentity of a Thing, and it appears to the Court that they can't be divers, there 2 Matters of Record ſhall amount to an Office: As in the Caſe of Sir *J. Savage*, who was *(f)* Sheriff of the County of *Worceſter* for Life by Let. Patent under the Great Seal, he was indicted of 2 voluntary Eſcapes of Felons, and it was held *per cur' in Banco Regis* that thoſe Records amounted to an Office, and that the King might ſeiſe without a *Sci. fa'*; and the Reaſon was, that it appear'd to the Court, that there could be but one Sheriff in a County, and therefore no *Sci. fa.* was neceſſary

(a) 3 Co. 11. a. Stamf. Prærog. 55. a.
(b) 20 E. 4. 11. a. 3 Co. 11. a. Br. Quare Imp. 138. Br. Travers de Office 40. Br. Office dev. Eſcheat 45. Stamf. Prærog. 54. a.
(c) Br. Office devant, &c. 34. Br. Prærog. 91. Br. Eſcheat 25, 33. 3 Co. 10. b. 3 Leon. 187. Antea 95. b. 4 Co. 58. b. Plowd. 229. b. Moor 239. Stamf. Prærog. 54. a.
(d) 3 Co. 10, 11.
(e) 4 Co. 58.
(f) Dyer 151. pl. 4. Kelw. 194, 195, 196. 2 Rol. 155. Antea 50. a.

in ſuch Caſe: *Mich.* 8 *H.* 8. *Rot.* 21. reported by (*a*) *Dy.* 4 & 5 *Phil. & Mar.* 151. *b. Nota* good Difference. *Vide* 16 *E.* 3. *Brief* 651. 21 *Aſſ.* 36. 40 *Aſſ.* 46. 50 *Aſſ.* 2. 2 *E.* 3. 10 (13) *b.* 4 *El.* (*b*) *Dyer* 211. 30 *Eliz.* 41. 6. In all (*c*) Caſes when a common Perſon is put to his Action; there upon an Office found the K. is put to his *Sci. fa.* as in Caſe of * *Waſte*, *Ceſſavit*, &c. But when a common Perſon may enter or ſeiſe, there an Office without a *Sci. fa.* ſhall ſuffice for the King, 12 *H.* 7. 21. *b.* 14 (*d*) *H.* 7. 2. 15 *H.* 7. 6. *b. Stamf.* (*e*) 54. *Vide* (*f*) *Dowty's Caſe* aforeſaid; and by theſe Differences apparent in our Books, all the Books are well reconciled and agreed. And for Authorities in Law in Caſes of Offices, 8 *H.* 4. 18. *a.* The Abbot of St. (*g*) *Albans* had a Gaol, and detained Priſoners, becauſe he would not be at the Charge to ſue forth a Commiſſion for their Delivery, the K. has Cauſe to ſeiſe the Franchiſe into his Hands, 20 *E.* 4. 5. *b.* The Abbot of (*h*) *Crowland* had a Gaol in which the Priſoners were impriſoned, and becauſe once he kept Men who were acquitted of Felony, and alſo had paid their Fees, the K. reſeiſed the Gaol for ever, and that was for Miſuſer of his Franchiſe. 5 *E.* 4. 3. *a. b.* The Duke of (*i*) *Norfolk*, being Marſhal of *England*, granted the Office of the Marſhal of the Marſhalſea of the King's Bench by his Deed to one *John Bouchier* for Term of his Life, with Warranty, who was admitted accordingly of Record, and afterw. the Duke died, his Heir within Age; and it was found by Office that the Duke died ſeiſed of an Eſtate-Tail in the ſaid Office, and that it deſcended to his Heir within Age; And there it is held, by this Office *Bouchier* is out of Poſſeſſion, and the King is in Poſſeſſion till he has avoided the Office by Traverſe, &c. And *Coke* Chief Juſtice cited a Record in *Trin.* 21 *E.* 1. *Rot.* 33. *Cant'*, *coram Rege Fulco de Valebus attornat'*, *ſive vicegerens Rogeri Bigot com' Norff. & Mareſchal' Angl'*, *quia permiſit Alanum Oſmund qui utlegatus fuit pro morte Henrici Hagam qui fuit ſub cuſtod' ſua ſicut nullo crimine rectatum, & miſſas in duabus excleſiis audire, & per plateas, vicos, & tabernas, ſine compedibus ambulare & vagari, forisfecit officium ſuum mareſchal' una cum virga, quæ capiuntur in manibus Regis, & committitur Vicecom' Cantiæ.* And the ſaid Caſe of Sir *John* (*k*) *Savage* was cited again to this Purpoſe; Wherefore it was concluded, that in the Caſe at Bar the King might ſeiſe without any *Sci' fac'*; and all this was agreed by the Lord Chancellor of *England*.

As to the other Queſtion, it was reſolved by the *Chief Juſtice*, *Chief Baron*, and *Warburton* Juſtice, that the ſaid Grant for (*l*) Years of the ſaid Office was void. 1. Becauſe this Office is an Office of great Truſt annexed to the Perſon, and concerns the Adminiſtration

of

(*a*) Dy. 151. pl. 4. Kelw. 194, 195, 196. 2 Rol. 155. Ant. 50. a. 96. a.
(*b*) Dy. 211. pl. 29.
(*c*) Stamf. Prærog. 55. a. b. * 4 Co. 56. b.
(*d*) 14 H. 7. 21. b.
(*e*) Stamf. Prærog. 54, 55, 56.
(*f*) 3 Co. 10, 11.
(*g*) Finch's Argument in Quo Warranto 12. Fitz. Franch. 2. Br. Forfeit 93. Br. Franchiſe 5.
(*h*) Finch's Argument in Quo Warranto 12.
(*i*) Br. Offic. devant Eſcheat. 39. 2 Rol. 153. Br. Patent 59.
(*k*) Antea 96. a. Dyer 151. pl. 4 Kelw. 194, 195, 196. 2 Rol. 155 Antea 50. a.
(*l*) 2 Rol. 153. 1 Rol. 847. 1 Jones 463. Cr. Car. 587. Hard. 49, 352. 355. 2 Jones 127.

of Juſtice, and the Life of the Law, which is to keep thoſe who are in Execution *in* **ſalva & arcta Cuſtodia*, to the End they may the ſooner pay their Debts, &c. and this Truſt is individual and perſonal, and ſhall not be extended to his (*a*) Executors or Adminiſtrators. For the Law will not repoſe Confidence in Matters concerning the Adminiſtration of Juſtice in Perſons unknown. 2. This Office requires continual Attendance in Court, and perhaps the Leſſee may die (*b*) Inteſtate, and then who ſhall be Officer till the Adminiſtration is granted? Shall the Ordinary, or who elſe? And if the Officer dies in Debt, and none will prove the Will, or take Adminiſtration, who then ſhall be Officer? &c. 3. Every ſuch Officer ought to be admitted and allowed by the Court, and ſworn there; but if ſuch Officer is admitted for Years, then the Executors or Adminiſtrators will be Officers without Allowance or Admittance, which will be inconvenient. 4. This is an ancient Office, and has always been granted for Life, or at Will, ſo that the Perſon to whom, &c. was certainly known, and before theſe Days never was granted for Years, and in theſe Caſes Innovations are dangerous. 5. If it may be granted for Years, it may be demanded if it ſhall be forfeited by Utlary, or ſhall be Aſſets to his Executors, and many other Queſt. will ariſe upon it. *M.* 16 *H.* 6. **rot.* 63. in the K.'s Bench, this Office granted to one for Life. (*c*) 39 *H.* 6. 32. *b.* granted to *Brandon* for Life. (*d*) 5 *E.* 4. 3. *a. b.* this Office was granted to *Bourchier* for Life, *M.* 10 & 11 *Eliz.* to † *Gawdy* for Life, and in no Book or Record can it be found before this Time, that this Office has been granted for Years. But yet, by an Act in Law, a Term, which is but a Chattel, may be in ſuch Office, as it appears in 5 *E.* 4. 3. *a. b.* The Duke of (*e*) *Norfolk* had an Eſtate-Tail in the Office held of the King *in Capite*, and died, his Heir within Age, and that found by Office, in that Caſe the King has a Chattel in the Office, *ſc.* during the Minority, and if the King dies, it would deſcend to the next King, and would not go to his Executors or Adminiſtrators, ſo an Act in Law doth not introduce any Inconvenience. But there it is put, That if the King grants the Office for Life, or during the Minority, there ought to be a *Sci. fa.* againſt the Patentee; and without Queſtion the Grant for Life in ſuch Caſe, (*f*) the King having but a Chattel, is void. And ſo for the Reaſons aforeſaid it ſeems alſo the Grant thereof, during the Minority; for if the Grantee ſhould die, his Executors or Adminiſtrators would have it, which would be inconvenient. And the principal Caſe of 5 *E.* 4. 3. *a. b.* The King having the Office in Ward granted it to *Wingfield* at (*g*) Will, which without Queſtion ſtood good in Law. And where the Chief Baron in 39 *H.* 6. 34. *a.* ſaith, If a Man grants an Office to another for Life or for Years, and he will not (*h*) execute his Office, or otherwiſe miſdoth his Office,

* Ant. 87. b.

(*a*) 1 Rol. 847. 2 Rol. 153. 2 Jones 127.

(*b*) Cr. Car. 587.

* Dy. 275. pl. 47.

(*c*) Br. Office 18. Br. Deputy 7. Br. Forfeiture, &c. 27. 39 H. 6. 32. b. 33. a. b 34. a.

(*d*) Ant. 96. b. † Dy 278. pl. 5.

(*e*) 3 Keb. 591. Cr. Car. 556. 2 Rol. 153. Ant. 96. b. Br. Office devant Eſcheator 39. Br. Patent 59.

(*f*) 2 Rol. 155. Skinner 139.

(*g*) 2 Rol. 155.

(*h*) Co. Lit. 233. a. Poſtea 99. a.

fice, the Grantor ſhall ſeiſe his Office: Firſt it doth not appear what manner of Office he means, *ſc.* of great Truſt, or concerning the Adminiſtrat. of Juſtice. 2. It is but a ſudden Opinion not pertinent to the principal Caſe: And there neither *Priſot*, nor any other of the Juſtices affirm, That the ſaid Office of Marſhal may be granted for Years. And where it was objected, That the K. may grant the Cuſtody of a (*a*) Gaol to another in Fee; and alſo to be (*b*) Sheriff of ſuch County to one and his Heirs, which Eſtate in Fee-ſimple includes all other Eſtates, and the Heir in ſuch Caſe is as well unknown at the Time of the Grant, as the Executors or Adminiſtrators in Caſe of a Grant for Years. To that it was anſwered, That it is true, That ſuch grants may be made by Law, but they differ from this Caſe at the Bar for divers Reaſons. 1. There can't be any ſuch Intermiſſion, for immediately by the Anceſtor's Death the Office deſcends to the Heir. 2. Such Eſtate can't be forfeited by Outlawry. 3. In ancient Times *Comes* had the Cuſtody of the County, and was called (*c*) *Præpoſitus Comitatus*, Shire-reeve, *i.* Reeve of the Shire, which is as much as to ſay *Præpoſitus Comitatus*; and afterwards it was transferred to the Sheriff, who is (*d*) *Vicecomes*, *i. in Vice Comitis*; but as the King can't grant to one, that he and his Executors or Adminiſtrators ſhall be Counts or Earls for (*e*) Years, for then his Executors or Adminiſtrators, one being appointed by himſelf, the other by the Ordinary, would be Earls: So without Queſtion the King may create an Earl for Life, in Tail, or in Fee. 4. This Office of Marſhal, *&c.* ought to come in by Admittance or Allowance of the Court, ſo does not the Sheriff or Gaoler. 5. Grants of ſuch Offices in Fee, or for Life have been allowed and approved, but ſuch Grants for Years were never allowed or approved; *& periculoſum exiſtimo quod bonorum virorum non comprobatur exemplo.* And if this, and ſuch Offices may be granted for Years, then the Offices of *Cuſtos Brevium*, of the Chirographer, or of the K.'s Silver, *&c.* may be demiſed in Poſſeſſion or Reverſion for 1000 Years or more; ſo of the Clerk of the Pipe, and of the K.'s Remembrancer, *&c.* in the Exchequer; and ſo of the Office of Clerk of the Crown in this Court, and of other Offices in other Courts, upon which the Subverſion of Juſtice, by reaſon of Ignorance in the Officers, would enſue, for good Clerks would be deterr'd from applying themſelves to get Knowledge and Experience, when ſuch Offices ſhall be ſaleable, and transferred from one to another for lucre and gain; upon which alſo would enſue Corruption in the Officers, and Extortion from the Subjects, and other great Inconveniencies. And the Lord Chanc. hearing theſe Reaſons, agreed clearly with this Reſolut. and ſaid, That ſo was the Opinion of Sir *John Popham* late Chief Juſtice of *England*, in all ſuch

(*a*) 2 Rol. 155.
(*b*) 2 Rol. 155.
(*c*) Co. Lit. 168 a. Antea 49. b.
(*d*) Co. Lit. 168. a.
(*e*) Co. Lit. 16. b.

ſuch Caſes; as he had often affirmed to the ſaid Ld. Chancellor, and to me alſo when I was Attorney General. And it was alſo reſolved, That for as much as the Office was found by Force of a Commiſſion under the Gr. Seal, and returned in this Court, that (altho' the Office be to be executed in another Court) yet the Award of the Seiſ. ſhall be in this Court, where the Office is returned, and in this Court the Party ſhall have his traverſe, or *Monſtrans de droit*, as his Caſe is, to avoid the Office, and when ſuch award ſhall be made, the Cuſtody of the Priſoners is to be committed to another, to avoid the Eſcapes of thoſe who are in the ſaid Priſon, and ſo has it always been uſed; but the Admittance and Allowance of ſuch Perſon, to whom the Cuſtody ſhall be newly in the Interim committed, belongs to the Court of King's Bench. Then the L. Chancellor aſked, how this ſeiſure ſhould be made? And I anſwered, That by the Office and the Award of the Seiſure, the K. is in Poſſeſſ. without any Writ or Commiſſion awarded for that purpoſe; but that there ſhould be a Writ of Diſcharge directed to Sir *G. Reynel*, according to the Effect of the Writ in the *Regiſter* 295. when an Eſcheator is remov'd. *Et* (*a*) *mandatum eſt nuper Eſcheatori R. in Com' præd' qd' eid' J. rotulos, brevia, & omnia alia Offic' illud tangentia quæ in Cuſtodia ſua exiſtunt per Indenturas inde inter eos debite conficiend' liberet, &c.* and the like Writ ſhould be directed to Sir *G. Reynel*, to deliver by Indent. all the Priſoners, *&c.* which are in his Cuſtody; and as when the K. is falſly entitled by Office, and upon Petition, Traverſe, or *Monſtrans de droit*, Judgm. is given, *quod manus Dom. Reg.* (*b*) *amoveantur*, that without other Writ the Hands are removed, as it is held in 10 *Aſſ. p.* 2. 10 *E.* 3. 2. Tit. *Aſſ.* 156. 5 *E.* 3. *Qu. Im.* 34. *Stamf. prærog.* 78. and ſo it was adjudged *in Communi Banco* between *Brown* and (*c*) *Terry*, *Hill.* 37 *El. rot.* 620. and yet in ſuch Caſe the Uſe is, to have a Writ of *Amoveas manum*: So when an Office is found forfeited, preſently by the Law the Party is out of Poſſeſſion, and the K. is in Poſſeſſion, and yet the Uſe is, and to good purpoſe, to have ſuch Writ of Diſcharge as is aforeſaid; and yet till he is actually removed he ſhall anſwer for all Eſcapes. For he who occupies or has the Cuſtody of a Gaol * by right or wrong, ſhall be charged for Eſcapes of Priſoners, 11 *H.* 4. 73. *a.* and he who has the Cuſtody of a Gaol in Fee, and ſubſtitutes another at Will, or for Life, under him, the Action upon the Eſcape will lie againſt him who has the actual Poſſeſſion of the Office, 13 *E.* 3. *Bar.* 253. The Abbot of *Weſtminſter*'s Caſe againſt a Gaoler at Will, 10 *Eliz.* 278, 279. *Dyer*, *Gaudy* Under-Marſhal for Life; but if they are not ſufficient, *reſpondeat* (*d*) *ſuperior, ſo.* he who granted at Will, or for Life, as appears in 39 *H.* 6. 32. *b.* for

(*a*) 3 Co. 72. a.

(*b*) Cr. El. 523. Moor 346.

(*c*) Cr. El. 523.

*Hale's Pl. Cor. 114.

(*d*) Dy. 278, 279. pl. 5. 3 Keb. 591, 593, 657. Noy 27. 2 Inſt. 382. Hale's Pl. Cor. 113.

(*a*) 2 Bulſtr 58. for the Inſufficiency of *John* (*a*) *Brandon* who had the Marſhalſea for Life, the D. of *Norfolk* who had the Inheritance was charged for Eſcapes of Priſoners. And the Caſe was cited, which began in this Court *Paſc.* 21 *Reginæ El. Rot.* 1. *inter placita Reginæ*, the Record of which begins in this Manner, *Midd' Conſtat qd' Dom. Philip & Domina Maria nuper Rex & Regin' Angl', ſoror Dom' Reginæ nunc præchariſſimæ, pro ſe hæredibus & ſucceſſor' dict' Reginæ Mariæ, per eorundem nuper Regis & Reginæ Philippi & Mariæ literas patentes ſub magno ſigillo ſuo Angliæ confect' geren' Dat' apud Weſt.* 23. *die Sept. annis eorund' nuper Regis & Regi-*

(*b*) 2 Rol. 154 Moor 193. 1 Sid. 436. Cr. El. 424. *næ* 3 & 4 *Dederunt & Conceſſerunt Marco* (*b*) *Steward generoſo officium Servien' eorund' nuper Regis & Reginæ Mariæ ad arma, attendend' ſuper Cancell' Angliæ pro tempore exiſten', ac ipſum Marcum Servientem ſuum ad arma fecer' ordinaverunt, & conſtituerunt per eaſd' literas patentes, habend' & gaudend' offic' illud pro termino vitæ ſuæ*, with all Fees, and a certain Fee of 12 *d. per diem:* By Force whereof the ſaid *Mark* was ſeiſed of the ſaid Office for Term of his Life; and it was found by Office 24 *Junii an.* 19 *El.* by Force of a Commiſſion, &c. directed to *Randal Hurleſton, John Nuthal*, Eſqrs; and others, and returned in the Chancery, *quod præd' Marcus non deſervivit in officio Servientis ad arma præd' juxta effectum & tenorem præd' literarum patent' ſibi confect', de* 8 *die Octob' an' regni dict' Dom' Reginæ nunc* 12 *uſque* 1 *diem Feb' tunc ult' præterit' ante caption' inquiſit', præd' ſed per totum idem tempus ab eodem officio ſe abſentavit. Et modo ad hunc diem*, ſc. 7 *dicm Maii, anno reg' dict' Dom' Reginæ nunc* 21 *venit hic præfat' Marcus Steward, & queritur ſe ratione & colore inquiſit' præd' ab exercitio officii ſui prædict' amotum eſſe, & hoc minus juſte*, (by which it appears that immediately by the Inquiſition he was in Law removed from the ſaid Office, which alſo appears by the Judgment) *pro monſtratione recti ſive juris ſui in hac parte, idem Marcus dicit, quod domina regina nunc*, ſc. *ult. die Nov' an' regni ſui* 11 *apud Weſtm' in Com' Midd' dedit eidem Marco licentiam ad ſe abſentand' ab exercitio officii ſui præd' durante beneplacito ipſius Marci, donec per ipſam Dom. Reginam ei præciperetur ad deſerviend' in officio ſuo præd'.* And that from the Time of the Licence till this Day, the Q. has not commanded him to exerciſe the ſaid Office, &c. *Gerrard* the Q.'s Attorney Gen. took Iſſue, *Qd' ead' Domina Regina non dedit eid' Marco licentiam ad ſe abſentand' ab exercitio officii ſui præd' durante beneplacito ipſius Marci, donec per ipſam Dom' Reg' nunc ei præciperetur ad deſerviend' in officio ſuo prædict' modo & forma, &c. Et hoc idem Attornat', &c. pet' qd' inquiratur per*

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patriam, & prad' Marcus ſimiliter: Ideo dies datus eſt coram eadem Domina Regina in craſtino Aſcenſion' Dom' ubicunq; tunc fuerit in Anglia ad faciend & recipiend' qd' juſte fuerit in præmiſſis, & Venire facias awarded to the Sher. of *Midd'* returnable in the K.'s Bench at the ſame Day. And Sir *Th. Bromley*, Knt. (*a*) Chanc. of *Engl. die Lunæ poſt Craſtin' aſcenſion' Dom' Term' Paſc'* 21 *El. Reg' per manus ſuas propri-as deliberavit record' prad' cor' ipſa Reg' in Cancell' ſua habit' in Cur' coram Dom' Reg'*, (*ſ.* the Court of K.'s B.) *and in craſtino Aſcenſionis* a Jury was return'd who appear'd and gave a ſpecial Verd. they found the ſaid Let. Pat. of the K. and Q. *P. & M.* to the ſaid *Mark Steward* of the ſaid Offi. which are entred *in hæc verba.* And further found, that at the humble Petit. of the E. of *Leiceſter*, and Dr. *Huit*, *Dom' Regina prad' ult' Nov' an' regni dict' Dom' Reg' nunc* 11. *Conceſſit qd' id' Marcus ſeipſum abſentaret ab exercitio dict' officii ſui durante beneplito ipſius Marci quouſq; ead' Dom' Reg' ipſum præciperet deſervire in offic' ſuo prad'*, and that *Auguſt. Steward* Brother of *M. Steward*, 6 *Marcii an.* 11 *Reg' per dict' Dom' Regin' admiſſus fuit ad attendend' loco & vice ipſius Marci fratris ſui ſuper* N. Bacon *militem adtunc Dom' Cuſtod' magni ſigilli*, and then in the Preſence of the Queen was ſworn, *&c.* by Force whereof the ſaid *Auguſtine* exerciſed the ſaid Office, *uſq;* 20 *Jun. an.* 18 *El. Sed utrum dict' Dom' Regin' per verba, tantum abſq; ſcript' ſigil' poteſt ſufficient' in lege licentiam dare eid'* Marco *ad ſeipſum abſentand' ab exercitio officii ſui prad' Jur' prædict' penitus ignorant; & inde pet' auxil' & adviſament' Cur' in præmiſſ.* And this Caſe was argued at the Bar and Bench, and depended in Adviſement till *Michaelmas-Term*, and then it was reſolved by (*b*) Sir *Ch. Wray*, Ch. Juſt. and *totam Curiam*, That the Licence by (*c*) Word was good enough, and becauſe all Pleas in the Chancery, according to the Ordinary Power are *coram Dom' Regin' in Cancell'*, and the Keeper of the Great Seal or Chancellor of *Engl.* is but the Q.'s Deputy during her Pleaſure, and therefore the Service of the Serjeant at Arms done to the Q.'s Deputy, is in Law done to the Q. her ſelf. And that well appears by the Let. Pat. themſelv. for K. and Q. *P. & M. conceſſerunt, &c. officium ſervient' eorund' nuper Regis & Reginæ ad arma attendend' ſuper Cancellar' Angliæ, &c.* ſo that he is the K. and Q.'s Serjeant at Arms, and therefore Q. *El.* might well licenſe him to abſent himſelf, *&c.* which in a Manner is a Refuſal of his Service for the Time, for it is at her Pleaſure whether ſhe will accept his Service or not; another Reaſon was given, that the Q. did not depart with any Intereſt in this Caſe, but ſuſpended the Service of a Serjeant for a Time, and therefore ſuch Licenſe by Word was good enough. Alſo it was reſolved that it is true, That (*d*) Non-attendance upon the ſaid Office is a Cauſe of Forfeiture, but it ought to be a voluntary

1. Nota, coram Domina Regin' generally is meant B. R. the Entry of Pleas in Chancery is, coram Dom' Reg' in Cancell'.
2. Day given in Chancery to appear in B. R. for Trial of the Iſſue.
3. Ven' fac' awarded in Canc' return' in B. R.
4. The Delivery of the Record in B. R. per Manus Cancellar. Vide 10 E. 3.
5. Spec. Verd. on a collateral Iſſue.

(*a*) 2 Sand. 27. 1 Sid. 436. 4 Inſt. 80. 1 Mod. Rep. 29

(*b*) 2 Sand. 27. 1 Sid. 436. 4 Inſt. 8. 1 Mod. Rep. 29.

(*c*) 2 Rol. 154. Cr. El. 424. Moor 193.

(*d*) Co. Lit. 233. a. Ant. 50. a. 97. a

luntary Negligence, and not when he has the Q.'s Aſſent, who is to take Advantage of the Forfeiture for the Non-attendance. And afterwards (*a*) Judgment was entred in this Manner, *Super quo viſis & per Curiam hic intellectis omnibus & ſingulis præmiſſis maturaque deliberatione inde habita, Servient' dictæ Dom' Regin' ad legem ac ipſius Reginæ attornat' ad hoc convocat' & præſent', conſideratum eſt, quod dictum officium dicti ſervientis ad arma in manibus Dominæ Reginæ retent' eidem reſtituatur, & quod prad' Marcus ad exercitium officii ſui prad' a quo amotus fuit, una cum vadiis & feodis inde eidem officio debitis & pertinen', a dicto tempore amotionis ſuæ, ab exercitio officii ſui prad' hucuſque percept' & detent' reſtituatur, ſalvo ſemper jure Reginæ ſi quod, &c.* Which Record at large (being worthy Obſervation) is as follows.

(*a*) 2 Sand. 27. 1 Sid. 436. 4 Inſt. 80. 1 Mod. Rep. 29. Lucas 108.

The Record of Mark Steward's *Caſe, vouched in Sir* Geo. Reynel's *Caſe.*

Term. Paſ. 21 Eliz. *in B. R. Rot.* 1. *inter placita Reginæ.*

A Record out of Chancery.

Memorandum, That *Tho. Bromley*, Knt. Chancellor of the L. the now Q. on *Monday* next after the Morrow of the Lord's Aſcenſion in this ſame Term, before the L. the Q. at *Weſt.* by his own proper Hands deliver'd here into Court, a certain Record, had (made) before the ſaid L. the Q. in her Chancery at *Weſtm.* in theſe Words; Pleas before the L. the Q. at *Weſt.* in the Term of *Eaſter* in the 21ſt Year of the Reign of *Eliz.* by the Grace of God Q. of *Engl. Fr.* and *Irel.* Defender of the Faith, *&c. Middleſ. ſſ.* It is manifeſt (to us) that the Lord *Philip* and the Lady *Mary*, the moſt dear Siſter of the L. the now Q. late K. and Q. of *Engl.* did for them and the Heirs and Succeſſ. of the ſaid Q. *Mary*, by the Letters Pat. of them the ſaid late K. *Ph.* and Q. *Mary*, made (paſſed) under their Gr. Seal of *Engl.* bearing Date at *Weſtm.* the 23d Day of *Sept.* in the 3d and 4th Year of the ſaid late K. *Ph.* and Q. *Mary*, gave and granted to one *Mark Steward*, Gent. the Office of Serj at Arms of them the ſaid late K. *Phil.* and Q. *Mary*, to be attending upon their Chancellor of *Engl.* for the Time being; and him the ſaid *Mark*, their Serj. at Arms, did ordain and conſtitute by the ſame Letters Patent, to have and enjoy the ſaid Office to the ſaid *Mark* for the Term of his Life, and that they the ſaid late King *Philip* and Queen *Mary*, for them and the Heirs and Succeſſors of the ſaid Queen *Mary*, did by the ſame Letters Patent give and grant to the ſaid *Mark*, for the Exerciſe and Occupying of the foreſaid Office, the Wages and Fee of 12 Pence a Day, to have, enjoy and receive Yearly

yearly the ſaid Wages and Fee of 12 *d.* a Day to the ſaid *Mark*, for the Term of his Life, out of the Iſſues and Profits of the *Hanaper* of them the late K. *Phil.* and Q. *Mary*, by the Hands of the Clerk or Keeper of the aforeſ. *Hanaper* for the Time being, yearly to be paid, as by the ſaid Letters Patent among other Things it more fully and plainly appeareth. And alſo, whereas it is found by a certain Inquiſition indented, taken at *Weſtm.* in the County of *Middleſ.* on the 24th Day of *June* in the 19th Year of the Reign of the ſaid Lady the now Queen before *Ralph Hurleſtone*, Eſq; *John Muthall*, Eſq; *Francis Folyat*, Eſq; and *John Statham*, Gent. by Virtue of a Commiſſion of the ſaid L. the now Q. to them, and to one *John Goodman* directed, by the Oaths of 12, *&c.* that the ſaid *Mark* did not ſerve in the foreſaid Office of Serj. at Arms, according to the Effect and Tenor of the foreſ. Letters Patent made to him from the 8th Day of *Octob.* in the 12th Year of the Reign of the ſaid L. the now Q. unto the 1ſt Day of *Feb.* then laſt paſt, before the Caption (taking) of the Inquiſit. aforeſ. but for that whole Time abſented himſelf from the ſame Office, as by the ſaid Inquiſit. returned in the Court of Chancery of the ſaid L. the Q. as in the Files of Record there remaining it appeareth: And now at this Day, that is to ſay, the 7th Day of *May* in the 21ſt Year of the Reign of the ſaid L. the now Q. cometh the aforeſ. *M. Steward* into the Chancery of the ſaid L. the Q. now at *Weſtm.* by *Ed. Cordel* his Attorney, and complaineth, that by Reaſon and Colour of the Inquiſition aforeſ. himſelf to be unjuſtly removed from the exerciſing and holding of his ſaid Office aforeſ. becauſe, by Proteſtation, that the ſaid Inquiſition is not ſufficient in Law, to remove him the ſaid *Mark* from the exerciſing of his Office aforeſ. for the ſhewing of his Right in this behalf, the ſaid *Mark* ſaith, that the ſaid L. the now Q. long after the making of the ſaid Letters Patent, that is to ſay, the laſt Day of *Nov.* in the 11th Year of her Reign, at *Weſtm.* in the County of *Middleſ.* gave Licenſe to the ſaid *Mark* to abſent himſelf from the exerciſing his Office, during the Pleaſure of him the ſaid *Mark*, until he was commanded by her the ſaid Lady the now Queen, to ſerve in his Office aforeſaid. By Virtue of which Licenſe of the ſaid Lady the Queen, to the aforeſaid *Mark* made, as afore is ſaid, the ſaid *Mark* by the whole Time of his Abſence, ſpecified in the Inquiſition aforeſaid, abſented himſelf from the exerciſing of his ſaid Office aforeſaid. And further the ſaid *Mark*, for further ſhewing of his Right ſaith, that he now is, and always from the aforeſaid Time of Removing him from the Exerciſing of his Office aforeſaid, was ready, and often time offered himſelf to ſerve in his Office aforeſaid: And

that as yet from the Time of the Licenſe of the ſaid L. the Q. of abſenting himſelf to the ſaid *Mark* given, the ſaid L. the now Q. had not commanded him to ſerve in his Office aforeſ. Without that, that the ſaid L. the now Q. hath any other Right or Title in or to the Office aforeſ. than as before above is alledged; and without that, that there is any ſuch Record, beſides the Record of the Inquiſition aforeſ. which makes or ſhews, or can make or ſet forth, any Title of the ſaid L. the now Q. in or to the Office aforeſ. All and ſingular which the ſaid *Mark* is ready to aver, as the Court here ſhall award; and therefore he demandeth Judgm. and that to the Poſſeſſion and exerciſing of his Office aforeſ. together with the Wages and Fee aforeſ. and to the Iſſues and Profits to the ſaid Office due and belonging, from the Time of his Removing from the ſaid exerciſing of his Office aforeſ. he be reſtored, &c. And *Gilb. Gerrard*, Eſq; Attorn. Gen. of the L. the now Q. who proſecuteth for the ſaid L. the Q. in this behalf ſaith, that by any thing by the ſaid *M. Steward* above in plead. alledged, the ſaid L. the Q. of her Right and Title, in or to the Office aforeſ. ought not to be barred; becauſe he ſaith, that the ſaid L. the Q. did not give Licence to the ſaid *Mark* to abſent himſelf from the exerciſing of his Office aforeſ. during the Pleaſure of him the ſaid *Mark*, until he were commanded by the ſaid L. the Q. to ſerve in his ſaid Office aforeſ. in Manner and Form as the aforeſ. *Mark* in his ſhewing of his Right to the Office aforeſ. above hath alledged: And this the ſaid Attorn. of the ſaid L. the now Q. for the ſaid L. the Q. prayeth it be enquired of by the Country; and the aforeſ. *Mark* likewiſe. Therefore Day is given before the ſaid L. the now Q. in the Morrow of the Aſcenſion of our Lord, whereſoever ſhe ſhould be in *Engl.* to do and receive what was juſt in the Premiſſes; and it is commanded to the Sheriff of *Middleſex*, that he cauſe to be here before the L. the Q. at that Day 12 good and lawful Men of the Vicinage of the City of *Weſtm.* who are not of Kindred or Affinity of the ſaid *Mark*, to recognize upon their Oath more fully the Truth of the Premiſſes; at which Morrow of the Aſcenſion of our Lord, before the L. the Q. at *Weſtm.* come as well the aforeſ. *Gilb. Gerrard*, who proſecutes, &c. as the aforeſ. *Mark Steward*, by *John Manning* his Attorn. And the Sheriff returns the Names of 12, whereof none, &c. Therefore it is commanded to the Sheriff, that he do not omit, &c. but that he diſtrain them by all their Lands, &c. and that of the Iſſues, &c. and that he have their Bodies before the L. the Q. in 8 Days of the *H. Trin.* whereſoever, &c. to recognize in Form aforeſaid, &c. And the ſame Day is given as well to the aforeſaid *Gilbert Gerrard*, who proſecutes, &c. as to the aforeſ. *Mark Steward*, &c. At which 8 Days of the *Holy Trinity*, before the Lady the Queen at

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Weſtminſter, come as well the aforeſaid *Gilbert Gerrard*, who proſecutes, &c. as the aforeſaid *Mark* by his Attorney aforeſaid, and the Jurors of the Jury aforeſaid, being called, likewiſe come; and upon this, publick Proclamation is made for the Lady the Queen, as the uſe is, that if there be any one who will inform the Juſtices of the Lady the Queen here, the Serjeant at Law of the Lady the Queen, or the Attorney General of the Lady the Queen, or the Jurors aforeſaid of the Premiſſes, that he come and ſhould be heard; and *Edward Anderſon*, one of the Serjeants of the Lady the Queen at Law, to do this offered himſelf; by which it is proceeded to the taking of the Jury aforeſaid, by the Jurors aforeſaid now there appearing, who to ſay the Truth of the Premiſſes being choſen, tried, and ſworn, ſay upon their Oath, That the Lord *Philip* and the Lady *Mary*, late King and Queen of *England* by their Letters Patent under the Great Seal of *England* made, bearing Date at *Weſtminſter* the 23d. Day of *September* in the 3d and 4th Years of the Reigns of the ſaid late King and Queen, gave and granted to the ſaid *Mark* the Office of Serjeant at Arms, attending upon their Chancellor of *England* for the Time being, and him the ſaid *Mark* their Serjeant at Arms aforeſaid made, ordained, and conſtituted by the ſaid Letters Patent, for the Term of his Life; To have and enjoy the ſaid Office, to him the ſaid *Mark* for the Term of his Life. And moreover, the ſaid late King and Queen gave and granted by the Letters Patent aforeſaid, for them, and the Heirs and Succeſſors of the ſaid Queen, for the exerciſing and holding of the Office aforeſaid, the Wages and Fee of 12 Pence *per Diem*; To have, hold and perceive Yearly the ſaid Wages and Fee of 12 Pence a Day, to the ſaid *Mark* for the Term of his Life, of the Iſſues and Profits of their Hanaper of their *Chancery*, by the Hands of the Clerk or Keeper of the ſaid their Hanaper, and the Heirs of the aforeſaid late Queen for the Time being, at the Feaſt of Saint *Michael* the Archangel and *Eaſter*, by equal portions Yearly to be paid, together with all other Profits, Commodities, Emoluments, Allowances, and Advantages, to the ſaid Office any way anciently belonging, due and accuſtomed. And the ſaid *Mark Steward* brings here into Court the Letters Patent aforeſaid, which follow in theſe Words; *Philip* and *Mary*, by the Grace of God, King and Queen of *England*, *Spain*, *France*, both *Cicilies*, *Jeruſalem*, and *Ireland*, Defenders of the Faith, Archdukes of *Auſtria*, Dukes of *Burgundy*, *Milain*, and *Brabant*, Earl of *Haſpurge*, *Flanders*, and *Tiroll*, &c. To All to whom theſe preſent Letters ſhall come Greeting. Whereas our moſt Dear Brother *Edward*, late King of *England* the 6th by his Letters Patent made under the Great Seal of *England*, bearing

Date at *Greenwich* the 8th Day of *April* in the 4th Year of his Reign, of his ſpecial Grace, certain Knowledge, and meer Motion, as alſo with the Advice and Conſent of his Council, had given and granted to his well-beloved *Richard Hatchman*, Gentleman, the Office of his Serjeant at Arms, Attendant upon his Chancellor of *England* for the Time being, and had made, ordained, and conſtituted by his ſaid Letters Patent him the ſaid *Richard* his Serjeant at Arms, for the Term of his Life: And moreover, by his ſaid Letters Patent, had given and granted to the aforeſaid *Richard Hatchman*, for the exerciſing and holding the Office aforeſaid, the Wages and Fee of 12 *d.* by the Day; To have, hold, and receive Yearly, the ſaid Wages and Fee of 12 *d.* by the Day, for the Term of his Life, from the Time of the Death of his Serjeant at Arms which ſhould next die, of the Iſſues and Profits of the Hanaper of the *Chancery*, either by the Hands of the Clerk, or the Keeper of the ſaid his Hanaper, for the Time being, at the Feaſts of St. *Michael* the Archangel and *Eaſter*, by equal portions Yearly to be paid, with all other Profits, Commodities, Emoluments, Allowances, and Advantages to the ſaid Office any ways anciently due and accuſtomed, as by the ſame Letters Patent more fully appeareth; and becauſe the ſaid *Rich. Hatchman* is now willing to deliver up the aforeſ. Letters Patent into our *Chancery* to be cancelled; which Letters Patent there now are cancelled, as we have certain Knowledge, to the intent, that we would be graciouſly pleaſed to grant to our well-beloved *Mark Steward*, *Gent.* other Letters Patent of the Premiſſes: We therefore, taking Conſideration of the Premiſſes, of our ſpecial Grace, certain Knowledge, and meer Motion, have given and granted, and by theſe Preſents, for us and the Heirs and Succeſſors of the ſaid Lady the Queen, do give and grant to the ſaid *Mark Steward* the aforeſ. Office of our Serjant at Arms, attendant upon our Chancellor of *England* for the Time being: And him the ſaid *Mark* our Serjeant at Arms do make, ordain, and conſtitute by theſe Preſents, to have and enjoy the ſaid Office to the ſaid *Mark Steward*, for the Term of his Life; And moreover we have given and granted, and by theſe Preſents, for us and the Heirs and Succeſſors of the ſaid Lady the Queen, we do give and grant to the aforeſaid *Mark Steward*, for the exerciſing and holding the Office aforeſ. the Wages and Fee of 12 *d.* by the Day; To have, enjoy, and perceive Yearly the ſaid Wages and Fee of 12 *d.* by the Day, to the aforeſ. *Mark* for the Term of his Life, of the Iſſues and Profits of our Hanaper of our *Chancery*, by the Hands of the Clerk or Keeper of the ſaid our Hanaper, and the Heirs of our ſaid Lady the Q. for the Time being, at the Feaſt of St. *Michael* the Archa. and *Eaſter*, by equal portions yearly to be paid, together with all other Profits, Commodities, Emoluments, Allowances, and Advantages to the ſaid Office any ways anciently due

due and accuſtomed, &c. Although the certain expreſs mention of the Premiſſes, or any of them, or of other gifts or grants by us, or by any of our Progenitors, to the aforeſaid *Mark Steward*, before this Time made in the Premiſſes, there is not made any Statute, Act, Ordinance, Proviſion, or any other Thing, cauſe or matter whatſoever, in any thing notwithſtanding; in Witneſs whereof, theſe our Letters we have cauſed to be made Patent. Witneſs our ſelves at *Weſtminſter*, the 23d. Day of *September* in the 3d and 4th Year of our Reigns. By Colour of which Letters Patent the ſaid *Mark Steward* well and truly to execute the ſaid Office was ſworn. And further the ſaid Jurors ſay, That the laſt Day of *November* in the 11th Year of the Reign of the Lady the now Queen, the ſaid Lady the Queen at the humble Petition and Requeſt of the Right Honourable Lord, the Earl of *Leiceſter*, and *Robert Huyck*, Doctor of Phyſick, granted that the ſaid *Mark Steward* might abſent himſelf from the exerciſing of his Office of Serjeant at Arms, attendant in his proper Perſon upon her Chancellor of *England* for the Time being, during the good pleaſure of the ſaid *Mark*, until the ſaid Lady the Queen ſhould command him to ſerve in his Office aforeſaid, as by the depoſition of the ſaid *Robert Huyck*, and by a certain Letter, under the proper hand-writing of the ſaid Earl of *Leiceſter*, which we found to be true in theſe *Engliſh* Words following, here in the Court to the Jurors aforeſaid in evidence given and ſhewed it more fully appeareth: The Depoſition of which *Robert Huyck* followeth in theſe Words, That is to ſay, *I was an humble Suiter unto her gracious Majeſty about ten Years paſt, that ſhe would licence* Mark Steward *Serjeant at Arms, Attendant upon the then Lord Keeper, to give off his Attendance in his own Perſon, to the End he might withdraw himſelf into the Country to play the good Husband at home in his own Houſe, ſo long only as ſhe ſhould permit him, and not revoke him to his former Attendance, and the Office ſhould be ſerved otherwiſe to her Majeſty's Contentation, and the Lord Keeper's well liking, the which my Suit ſhe did very graciouſly grant me; and after that, upon my Lord Keeper's praiſing* Auguſtine Steward, *I commended him to the Queen as one very fit to diſcharge his Brother's Abſence with his Attendance;*

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I did ſue to my Lord of Leiceſter *and divers other of the Lords to ſpeak in my behalf for the Furtherance of the Suit: So in the End the Queen ſaid, I do like well and am right well content that* Mark Steward *do ceaſe from his Waiting till we ſhall reſolve otherwiſe, and if his Brother be found fit he ſhall ſerve in his Place during the Time of his Abſence.* Quæ quidem (*a*) litera manu propr' ipſius com' Leic' ſubſcript' ſequitur in hæc verba. *To my very good Lords the Lord Chancellor, and the Lord Chief Juſtice of* England, *and to either of them,* ſſ. *After my moſt hearty Commendations to your Lordſhips, this Bearer* Mark Steward *hath earneſtly beſought me to advertiſe your Lordſhips of my Knowledge touching her Majeſty's Leave for the ſaid* Steward's *not Attendance in his Office of Serjeantſhip: Wherein this is very true, that about* Michaelmas, *as I take it, in the tenth Year of her Majeſty's Reign, the Court being then at* Windſor, Mark Steward *both by himſelf and his Friends, for that he had a Deſire to remain in the Country, earneſtly travelled with me to be his Mean for the obtaining of her Majeſty's good Licence and Favour, that without any Prejudice for not attending he might at his Pleaſure ſo do, and for the Supplying of his Place which he had to ſerve about the late Lord Keeper of the Great Seal as Serjeant at Arms, he acquainted me with the good Liking and Contentation my ſaid Lord Keeper had to have a Brother of his to attend in his Place, to which alſo I gave my beſt Furtherance afterwards: Whereby her Majeſty pleaſed both to grant her favourable Licence to* Mark Steward *for his Abſence, and to allow his Brother to ſupply his Place, who was accordingly ſworn therein, and many Years ſerved the Place. Thus much, being on my own Knowledge to be true, at his humble and earneſt Suit, I thought good to advertiſe your Lordſhips, and ſo do bid your LL. farewell from the Court the* xxi. *of* May 1579. *Your LL. loving Friend* R. Leic'. And the Jurors further ſay, That the aforeſaid *Auguſtine Steward*, Brother of him the ſaid *Mark*, the 6th Day of *January* in the 11th Year aboveſaid, at *Hampton Court* in the County of *Middleſex*, by the ſaid Lady the Queen, was admitted, ordained and conſtituted to attend in the Place and Room of him the ſaid *Mark* his Brother upon *Nicholas Bacon* Knight, then being Lord Keeper of the Great Seal of *England*, and to the ſaid Office for and in the Place and Room of him the ſaid *Mark* well and faithfully to exerciſe

(*a*) Godb. 199 2 Rol. 686. Hob. 213.

erciſe and execute then and there in the Preſence of the ſaid Lady the Q. was ſworn, as by the Depoſition of the ſaid *Auguſtine Steward*, which followeth in theſe Words, we find to be true. *After* Chriſtmas, *and before* Hillary Term *in the eleventh Year of her Highneſs's Reign, on a Sunday or Holiday, her Majeſty coming from the Cloſet at* Hampton Court, *was moved by the Right Honourable the deceaſed Earl of* Pembroke *for the inſtituting of* Auguſtine Steward *Serjeant at Arms to attend upon the Lord Keeper; to whom her Majeſty anſwered, My Lord, he is not to have his Brother's Office, but is to be appointed only to attend in his Place for him at ſuch Time as his Brother ſhall be abſent, her Majeſty making then Relation of her favourable Licence already granted to* Mark Steward, *to abide in the Country, and to abſent himſelf from her Service at his Pleaſure, until he ſhould by her Majeſty be called again to his Attendance upon the ſaid Lord Keeper: And then the ſaid* Auguſtine *was ſworn to attend, as is above ſpecified.* By colour of which the ſaid *Auguſtine Steward* in the Abſence of him the ſaid *Mark Steward*, his Brother, the aforeſ. Office of Serjeant at Arms, Attendant upon the Chancellor of *Engl.* from thence, until the 20th Day of *June* in the 18th Year of the Reign of the ſaid Lady the now Q. uſed and executed. But whether the ſaid Lady the Q. by Word only, without Writing ſealed, can give ſufficient Licence in Law to the ſaid *Mark Steward* to abſent himſelf from exerciſing of his Offi. aforeſ. the Jurors aforeſ. are utterly ignor. and thereof pray the Aid and Advice of the Court here in the Premiſſes; and if upon the whole Matter aforeſ. it ſhall ſeem to the Court of the Lady the Q. here, that the ſaid Lady the now Q. can by Word only, without her Writing ſealed, give ſufficient Licence in Law to the ſaid *Mark* to abſent himſelf from the exerciſing of his Office aforeſ. then the ſaid Jurors ſay, that the ſaid Lady the now Q. gave Licence to the ſaid *Mark Steward* to abſent himſelf from the exerciſe of his Office aforeſ. during the Pleaſure of him the ſaid *Mark*, until he ſhould be commanded by the ſaid Lady the Queen to ſerve in his Office aforeſaid, in Manner and Form as the ſaid *Mark* above in pleading hath alledged. And if upon the whole Matter aforeſaid, it ſhall ſeem to the Court of the Lady the Queen here, That the ſaid Lady the Queen cannot by Word only, without her Writing ſealed, give ſufficient Licence in Law to the ſaid *Mark* to abſent himſelf from the exerciſing of his Office aforeſaid; then the Jurors aforeſaid ſay, that the ſaid Lady the Queen did not give Licence to the ſaid *Mark* to abſent himſelf from the exerciſing of his Office aforeſaid, during the Pleaſure of him the ſaid *Mark*, until he ſhould be commanded by the ſaid Lady the Queen to ſerve in his Office aforeſaid. And becauſe the Court of the Lady the Queen here, of giving their

their Judgment thereof, is not yet adviſed, &c. Therefore Day thereof is given as well to the aforeſaid *Gilbert Gerrard*, who proſecutes, &c. as to the aforeſaid *Mark Steward*, until in eight Days of St. *Michael*, before the Lady the Queen, whereſoever, &c. in State as now, &c. to hear their Judgment thereof, &c. At which fifteen Days from St. *Michael*, before the Lady the Queen at *Weſtminſter*, come as well the aforeſaid *Gilbert Gerrard*, who proſecutes, &c. as the aforeſaid *Mark* by his Attorney aforeſaid; and becauſe the Court of the Lady the Queen here of giving their Judgment thereof are not yet adviſed, &c. Therefore further Day thereof is given as well to the aforeſaid *Gilbert Gerrard*, who proſecutes, &c. as to the aforeſaid *Mark Steward*, until from the Day of St. *Martin*, in fifteen Days, before the Lady the Queen, whereſoever, &c. in State as now, &c. to hear their Judgment thereof, &c. At which fifteen Days from St. *Martin*, before the Lady the Queen at *Weſtminſter*, come as well the aforeſaid *Gilbert Gerrard*, who proſecutes, &c. as the ſaid *Mark Steward*, by his Attorney aforeſaid: Upon which, all and ſingular the Premiſſes being ſeen and fully underſtood by the Court here, and mature Deliberation being had thereof; the Queen's Serjeant at Law and the Attorney General of the ſaid Queen being called to it and preſent, it was awarded, That the ſaid Office of Serjeant at Arms, retained in the Hands of the ſaid Lady the Queen, be reſtored to the ſaid *Mark*, and that the ſaid *Mark Steward* to the exerciſing and holding of his Office aforeſaid, from which he was amoved, together with the Wages and Fees thereof to the ſaid Office due and belonging, from the Time of his amoving from the exerciſing of his Office aforeſaid, hitherto received and with-holden, be reſtored, &c. Saving the Right of the Queen, if any, &c.

MAR-

MARGARET PODGER's *Caſe.*

Paſch. 10 Jac. 1. *which began Mich.* 8 Jac. 1. *Rot.* 3648.

IN *Replevin* between *Ralph Bicknel* Plaintiff, and *John Tucker* Defendant, the Plaintiff declared of taking his Cattle *viz* Sheep at *Curririvel* in the County of *Somerſet*, in a Place called *Hillfield Cloſe*, &c. the Defendant made Conuſance as Baily to *Margaret Podger*, becauſe the Place where, was the Freehold of the ſaid *Margaret Podger*, for Damage-feaſant, *&c.* In bar of which Avowry the Plaintiff ſaid, That before the ſaid *Margaret* had any thing in the Place where, one *Thomas Wiſe*, Eſq; was ſeiſed of the Manor of *Hampenbridge* in the County aforeſaid, whereof the Place where was Parcel, and that the Place where was demiſed, and demiſable by Copy of Court-Roll, *&c.* for one, two, or three Lives; and that within the ſaid Manor, there was, *&c.* a Cuſtom, *Quod ille vel illa, qui vel quæ primus vel prima nominat' foret in tali Copia*, ſhould have the Lands and Tenements to him only for his Life, and he who was ſecond named ſhould have it only for his Life, *poſt mortem* of him who was firſt Tenant, and ſo of the third after the Death of the ſecond: And that the ſaid *Tho. Wiſe* Lord of the ſaid Manor, at a Court held 15 *Octob. Anno* 9 *Eliz.* granted the Place where, *&c.* to *John Podger* and *Eliz.* and *Mary* his Daughters for their Lives, *&c.* by which *John* entred, *&c.* and died, after whoſe Death *Eliz.* entred, and married the ſaid *Ralph Bicknel*

1 Brownl. 181. 2 Brownl. 134, 153.

Bicknel the Pl. by which he entred, and put in his Cattle, &c. and averred the Life of *Eliz.* The Avowant replied and confeſſed that the ſaid *Tho.* was ſeiſed of the Manor, and that within the ſaid Manor there were ſuch Cuſtoms, as the Pl. in Bar of the Avowry had alledged, and confeſſed alſo the Grant made to *John Podger*, *Eliz.* and *Mary*, *prout*, &c. but further ſaid, That the ſaid *J. Podger* of the Place where, &c. ſo being ſeiſed, the ſaid *Tho. Wiſe* Lord of the ſaid Manor, *anno* 23. *El.* by Deed intended and inrolled in the Chancery, according to the Stat. for 46 *l.* 13 *s.* 4 *d.* bargained and ſold to the ſaid *J. Podger* the Place where, &c. to have and to hold to him and his Heirs; by Force of which, and of the Stat. of transferring of Uſes into Poſſeſſion, the ſaid *J. Podger* was ſeiſed of the Place where, &c. in Fee, and the ſaid *John* ſo ſeiſed, the ſaid *T. Wiſe Menſe Mich. anno* 23 *El.* levied a Fine *come ceo*, &c. of the Place where, &c. to the ſaid *John Podger* and his Heirs with Proclam. according to the Stat. of (*a*) 4 *H.* 7. and afterwards *anno* 39. *El. J. Podger* died ſeiſed, after whoſe Death it deſcended to *Marmaduke Podger* his Son and Heir, who thereof *an.* 4 *Jac.* levied a Fine to *Collins* and *Northover*, and to the Heirs of *Collins*, which was to the Uſe of the ſaid *Marmaduke* and *Margaret* his Wife, and to the Heirs of the ſaid *Marmad.* (but this Fine was not pleaded to be with Proclamations) and afterwards 24 *Junii an.* 8 *Jac.* the ſaid *Marmaduke* died, and *Margaret* ſurvived him, and was thereof ſeiſed for the Term of her Life, and afterwards the Pl. entred into the Tenements, and put in his Cattle, &c. and that 10 Years and more after the Death of the ſaid *J. Podger* were paſt, and that the ſaid *Eliz.* 1 *Nov. an.* 35 *El.* accompliſhed her Age of 21 Years, and that ſhe was not Covert Baron, nor *non compos mentis*, nor out of the Realm, nor in Priſon, and that the ſaid *Eliz.* after the Death of *J. Podger*, and after her full Age, nor the ſaid *Ralph* and *Eliz.* after their Marriage, within 5 Years did not make any Entry or Claim &c. by which ſhe was barred of all Right and Claim of and in the Place where, &c. by Force of the ſaid Stat. and averr'd the Life of the ſaid *Margaret*: Upon which the Pl. demurr'd in Law. And in this Caſe 3 Queſt. were moved. 1. If cuſtomary Eſtates granted by Copy, at the Will of the Lord, according to the Cuſtom of the Manor, &c. are within the Stat. of (*b*) 4 *H.* 7. *c.* 24. of Fines, to be barr'd by Fine with Proclamation and Non-claim by 5 Years. 2. Admitting that ſuch Eſtates were within the ſaid Stat. if by the Acceptance of the ſaid Bargain and Sale they in the Remainder of the Copyhold Eſtate were put out of Poſſeſſion of their Remainder, or if their Remainder continued in them. 3. If after the ſaid Bargain and Sale to *John Podger*, *Elizab.* in the Remainder might enter.

(*a*) 4 H. 7 c. 24.

(*b*) 10 Co. 96. a. Co. Lit. 262 a. 326. a. 372 a. b 1 Leon 77. 213 2 Leon 53. 157 3 Leon. 10, 221 227. 3 Inſt. 216. 1 Anderſ. 170. Cr. El. 561. Poph. 108, 114. Sav. 85, 88, 106. 107. Palmer 255. Golds. 171, 172 Plowd. 360. b. 371. b. 4 Co. 125. b. 3 Co 77. b. 78. b 79. a. 86. b. 87. a b. 88. a. b 89. a 90. a. 91. 7 Co. 32. b. 3 Bulſtr. 152. 2 Inſt. 519. Dy 72. pl. 3. 133. pl. 2. 186 pl. 68 215. pl. 53 224. pl. 28. 254. pl. 104, 258. pl. 9. 270. pl. 21. 2 Anderſ. 176. 13 Co. 20,

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As to the firſt it was object. that ſuch Cuſtomary Eſtates are not within the ſaid Act, for divers Reaſons. 1. In reſpect of the Baſeneſs of the Eſtate; for in the Judgm. of the Law, they have but a Tenancy at Will, which is ſo weak, that the Makers of the Act of 4 *H.* 7. never intended to include 'em within the general Words of the Act, no more than the Stat. of *W.* 2. (*a*) *de donis conditionalibus* extends to ſuch baſe Eſtates granted by Copy at Will, &c. as it was reſolved *per totam Curiam* in the laſt Term, upon Evidence to a Jury in *Treſpaſs*, between (*b*) *Thornton* and *Lucas* for Lands in *Lambeth*, in the County of *Surry*, which began 9 *Jac. Reg. Rot.* 3129. *Vide Heydon's Caſe in the 3d Part of my Reports, f.* 7. 2dly, It would be very prejudicial to Lords of Manors; for if a Diſſeiſor of Land held by Copy levies a Fine with Proclamation, it would be dangerous to Lords, that they might loſe not only their Fines upon Alienations or Deſcents, and the Benefit of Forfeitures, but alſo might be in Danger of being barred of their Freehold and Inheritance of the Land held by Copy, without any Fault in them. But it was reſolved *per tot' Cur'*, that Lands held (*c*) by Copy, &c. are within the Words and Intent of the ſaid Act of 4 *H.* 7. for the Words of the Purview are general, *And the ſaid Proclamation ſo had and made, the Fine to be a Final End, and conclude as well Privies as Strangers to the ſame*: And if no Exception had been in the Stat. by the Words aforeſ. all Perſons generally would be concluded, as it is held in (*d*) 19 *H.* 8. 6. *b.* & 7. *a.* Then let us ſee what Things are ſaved by the ſame Act; the Words of the Saving are, *And ſaving to every Perſon*, &c. *ſuch Right, Claim and Intereſt*, &c. *ſo that they purſue their Title, Claim or Intereſt, within five Years after the Proclamations*: Within which Words and principally this Word (*e*) (*Intereſt*) a Leaſe for (*f*) Years is included, ſo that if he makes not Entry or Claim within 5 Years, he ſhall be bar'd, as it was reſolved in *Saffin's Caſe in the 5th Part of my Reports, f.* 123, 124. and there the Words of the Preamble of the ſaid Act are well obſerved, (*That Fines ought to be of greater Strength to avoid Striſes and Debates, and to the Final End and Concluſion*, &c.) and there it is inferred, That great Miſchief, Vexation and Trouble would enſue, if Leaſes for Years (which now many Times are made for a great Number of Years, &c.) ſhould not be within the Act; but greater Miſchief, Vexation and Trouble would enſue if the ſaid Act ſhould not extend to cuſtomary Lands held by Copy, for a great Part of them is granted in Fee-ſimple, ſo that it would be more miſchievous, and greater Cauſe of Contention than the ſaid Caſe of the Eſtate for Years. And as to the ſaid Objections, they are anſwered by the ſaid Reſolution of the Caſe of the Eſtate for Years, for ſuch Prejudice might be

(*a*) Cr. Car. 42, 43, 44. Godb. 367, 368. 2 Rol. Rep. 383. O Benl. 163, 164, 166, 167. 1 Rol. Rep. 48 49. 3 Co. 8. a. 92. Sav. 67. Moor 188, 189. Cr. El. 149, 307, 391. 2 Leon. 175. Pop. 34, 128. 2 Sand. 422. Hard. 433. 1 Rol. 838. Lit. Sect. 76. Co. Lit. 60. a. b. 1 Co. 22. a.

(*b*) 1 Rol. 838.

(*c*) 4 H. 7. c. 24. 1 Inſt. 517. Winch. 122. 2 Brownl. 156. 3 Bulſt. 152. O. Benl. 163. Cr. Car 45.

(*d*) Br. Fine 1. Br. Tail. 3.

(*e*) 5 Co. 123. b.

(*f*) 2 Inſt. 517. Cr. Car. 110. Cr. Jac. 60, 61. Plowd. 374. a. 1 Vent. 56. Hard. 400, 413. Carter 82.

See Carthew 415.

objected in ſuch Caſe to the Leſſor, as well for his Benefit of Forfeiture, &c. as for the Hazard of his Inheritance, as in this Caſe of Copyhold to the Lord. But if Leſſee for Years, or Copyholder by Aſſent and Covin to bar the Leſſor or Lord of his Inheritance, makes a Feoffm. and levies a Fine with Proclamation in the ſame Manner as appears in *Farmer's Caſe in the 3d Part of my Reports*, f. 77. ſuch Fine ſhall not (a) bar the Leſſor or the Lord for the Reaſons there given at large. And the Eſtate of a Copyholder is not a meer Eſtate at (b) Will, but *ſecundum conſuetudinem Manerii*, which Cuſtom hath fixed and ſtrengthen'd his Eſtate.

(a) 2 And. 176 Perk Cent. 253 1 Jon. 35, 317. Winch 116, 117.

(b) 4 Co. 27. a. b. Cary's Rep. 20. Raym. 149. 2 Roll. r. 139.

Nota, Reader, a Difference betw. a Leaſe for Years, and a Leaſe for (c) Life, and alſo betwixt a Grant by Copy, &c. for Life, or in Fee, by Cuſtom, &c. and a Leaſe for Life by the Com. Law: For if Leſſee for Years is ouſted, and he in Reverſion diſſeiſed, and the Diſſeiſor levies a Fine with Proclamat. and 5 Years paſs, as well the Leſſor as the Leſſee is barred by their Non-claim, and the Leſſor ſhall not have 5 Years after the Years expired. So if Copyholder for Life, or in Fee be ouſted, and the Lord diſſeiſed, and the Diſſeiſor levies a Fine with Proclamat. and 5 Years paſs, as well the Lord as the Copyholder is barred, and the Lord in ſuch Caſe ſhall not have 5 Years after the Death of the Copyholder for Life. And the Reaſon of theſe Differences ariſes upon the Words of the two Savings in the ſaid Act of 4 *H.* 7. the firſt Saving is, *Saving to every Perſon, &c. ſuch Right, Claim and Intereſt, &c. ſo that they purſue their Title, Claim or Intereſt by way of Action, or lawful Entry within five Years, &c.* The ſecond ſaving is, *And ſaving to all other Perſons ſuch Action, Right, Title, &c. as firſt ſhall grow, remain or deſcend, or come to them after the ſaid Fine, &c. by Force of any Gift, &c. or by any other Cauſe or Matter had or made before the ſaid Fine.* The firſt Saving extends to thoſe who have preſent Rights, and may immediately enter or have their Action to recover the Lands, and therefore they are confined to 5 Years after the Fine levied. And the ſecond Saving extends to thoſe who at the Time of the Fine levied, can't immediately have an Action, nor make an Entry, but *in futuro*, and therefore they ſhall have five Years after that their Action, &c. firſt accrues. Then when (d) Leſſee for Years, or Ten't by Copy, &c. for Life, or in Fee, is ouſted, and the Leſſor or Lord diſſeiſed, the Leſſor or the Lord may immediately have *Aſſiſe* or other real Action, and recover the Land, and therefore they are within the firſt Saving, and by Conſequence, if they do not purſue their Action within the five Years after the Fine levied, they are barred for ever: And they are not within the ſecond Saving, becauſe the Leſſor or Lord has a preſent Action and Remedy, and therefore he is out of the ſaid ſecond Branch, for the Action, &c. doth not accrue firſt to him after the Fine.

(c) 2 Co. 17 a. 4 Co. 21. a. 24. b. 8 Co. 64. a. Litt. Sect. 77. Co. Litt. 60. b. 3 Co. 8. a. 6 Co. 37 b. Cr. Car. 45. Hetl. 6 Moor 60, 61. (c) Cr. El. 220, 254. Jones 35, 211. Moor 71. 1 Leon. 40. Cr. Car. 157 Plowd. 373. b. 374. a. Raym. 219. 3 Co. 78. b.

(d) 1 Jon. 569.

And altho' a (*a*) Stranger can't of his own Head enter in the Name of him who has Right to avoid the Fine without command precedent, or Aſſent ſubſequent, within the 5 Years, as it was reſolved in the L. *Audley's Caſe*, *M.* 38 & 39 *El.* in the K.'s Bench, where the Caſe was, that the L. (*b*) *Audley* being ſeiſed of certain Lands, *an.* 6 *El.* levied a Fine with Proclamat. 5 and within the 5 Years a meer Stranger, who had not any Right or Intereſt in the Land comprized within the Fine, made an Entry in the Name of him who had Right within the 5 Years, without any requeſt or command precedent or Aſſent ſubſeq. within the 5 Years, that this Entry ſhould not avoid the Fine, for the Saving in the ſaid Act has appropriated the Purſuit by way of Action or lawful Entry to him who has Right either by Command precedent or Aſſent ſubſequent within the 5 Years, (*c*) *omnis enim ratihabitio retrotrahitur & mandato æquiparatur*: And of ſuch Opinion were all the Juſtices of the *Serjeants Inn* in *Fleet-ſtreet*, as *Popham* Ch. Juſt. openly reported in Court, againſt the Opinion in 31 *H.* 8. *Entry Congeable*, *Br.* 123. *Vide* 45 *E.* 3. *Releaſe* 28. (*d*) Guardian by Nurture or in Socage may enter in the Name of the Infant who has Right of Entry, and that ſhall veſt the Eſtate in the Infant, without any Command or Aſſent, for there is Privity betwixt them. *Vide* (*e*) 10 *H.* 7. 12. *a.* (*f*) 11 *Aſſ. p.* 11. & 26 *E.* 3. 62. *b.* by *Thorpe*. Yet (*g*) he in the Reverſion expectant upon an Eſtate for Life or Years, or the L. of a Ten't by Copy, &c. may well, within the ſaid Act, enter in the Name of the Ten't for Life, Leſſee for Years, or Ten't by Copy, and in his own Right, to ſave as well their own Freehold and Inheritance, as the ſaid particular Intereſts, for the Leſſor and the Lord are not Strangers, for they are Privies in Eſtate, and as the Entries of thoſe particular Ten'ts ſhall avail the Leſſor and the L. in ſuch Caſes for the Privity of their Eſtates, ſo the Entry of the (*h*) Leſſor or the Lord in ſuch Caſes in the Names of the particular Ten'ts ſhall avail them for the Privity of their Eſtates, and for the Salvat. of their ſeveral Rights without any Requeſt precedent, or Aſſent ſubſequent. For in ſuch Caſe the Leſſor or Lord purſues their Title and Claim which they have to the Inheritance by lawful Entry within the 5 Years, but ſo doth not he who is a meer Stranger, who has not any Right, becauſe the Saving annexes the Entry to him who has Right, &c. as is aforeſaid.

(*a*) Cr. El. 132. 1 Leon. 34. Owen 137. Moor 222. Co. Lit. 206. b. 258 a.

(*b*) Cr El. 561 Moor 450, 457. Poph. 108. Co. Lit. 245. a. 258. a.

(*c*) Co. Lit. 180. b. 207. a. 145. a. 258.

(*d*) Cr. El. 132. Moor 222. Co. Lit. 206. b. 1 Leon. 34. 35.

(*e*) Br. Seiſin 50.

(*f*) Br. Entry Congeable 50. Br. Seiſin 21.

(*g*) Carter 35.

(*h*) Carter 35.

As to the 2d Point, It was reſolved *per totam Curiam*: 1. That no Fine nor (*i*) Warranty ſhall bar any Eſtate in Poſſeſſion, Reverſion or Remainder which is not deveſted and put to a Right: For he who has the Eſtate or Intereſt in him can't be put to his Action, Entry or Claim, for he has that which the Action, Entry or Claim would veſt in or give him. 2. When the Lord made the Bargain and Sale by Deed indented and inrolled

(*i*) 10 Co. 96. b. 97. a. Co. Lit. 327. b. 338. b. 1 And. 37, 38.

rolled to *J. Podger*, that did not deveſt the Eſtate of them in Remaind. for divers Reaſons. 1. Becauſe the Lord did that which he might do by Law, and the Copyholder accepted that which he well might: 2. The Copyholder was in lawful Poſſeſſion, and was only paſſive in this Caſe, and not active; and by Acceptance he who is in lawful Poſſeſſion, by Force of a particular Eſtate, can't deveſt the Eſtate of him who has the Freehold or Inheritance. And therefore if Tenant for Life (*a*) accept a Fine of a Stanger, *come ceo*, &c. it is a Forfeiture, 1 *H.* 7. but it does not deveſt the Eſtate of him in Reverſion or Remainder. 3. *J. Podger* the Bargainee was in by Force of a Bargain and Sale by Deed indented and inrolled, by Force of the Stat. of 27 *H.* 8. of Inrolments, and an Act of Parliament never does a Wrong; and thereupon the Ch. Juſtice put a Caſe which was adjudged *Trin.* 31 *El.* in the Exchequer, between the Queen and the Lady (*b*) *Greſham*, late the Wife of Sir *Tho. Greſham*, Knight, which was ſuch, Sir *Tho. Greſham* being ſeiſed of the Manor of *Mileham*, *Caſtleacre*, &c. in the County of *Norfolk*, levied a Fine thereof to *A. Stringer* and *Phil. Cely*, *an.* 12 *El.* to Uſes declared by certain Indentures, *ſc.* to the Uſe of himſelf and the Lady *Anne* his Wife, and their Heirs, (for ſo it was in Effect, for there were divers particular mean Eſtates limited, but they were all either determined, or never came in *eſſe*) with Power of Revocation, (contained in the ſaid Indentures limited, that if Sir *T. Greſham* ſhould pay 40 *s.* to *Stringer* and *Cely*, or to the Heirs of *Stringer*, that then the Fine ſhould be to the Uſe of Sir *Thom.* and his Heirs; and afterwards the ſaid Sir *Thomas* levied a Fine, *an.* 13 *El.* to the ſame Conuſees of the Manors of *N. F.* &c. in the Counties of *York*, *Derby*, &c. to the ſame Uſes declared in another Pair of Indentures with the like Power of Revocation upon Payment of 40 *s.* as was contained in the other Indentures *mutatis mutandis*; and afterwards the ſaid *A. Stringer* died, and afterwards the ſaid Sir *Thomas* paid one Sum of 40 *s.* to *Cely*, and to the Heirs of *A. Stringer*, for Revocation of the Uſes raiſed upon both the Fines; and this Payment was teſtified by an Inſtrument in Writing under the Seals of the Parties, by good Advice, as Sir *Thomas* was perſwaded, and afterwards he raiſed divers Uſes and Eſtates of divers Manors held *in Capite*: And afterwards Sir *Thomas* died, after whoſe Death. *viz. Hill.* 23 *Eliz.* by the Opinion of the Juſtices it was reſolved, That the Uſes were not revoked, but that the Revocation was utterly void, becauſe two ſeveral Sums of 40 *s.* ought to have been rendred, and not one Sum of Forty Shillings, for they were ſeveral Indentures, and ſeveral Manors, &c. and could not be ſatisfied with one Sum, wherefore all the ſaid Manors accrued to the Lady *Greſham*

(*a*) 2 Co. 56 a. Co. Lit. 252. Dy. 148. pl. 79. 1 Mod. Rep 117 3 Kel. 687, 683. 1 H. 7. 12. a. b. 1 Rol. 852.

(*b*) Moor 261, 262. 1 Leon. 89, 90. 1 Vent. 176. Sav. 65.

Greſham by Survivor. And afterwards the ſaid Revocation was enacted and adjudged to be good and ſufficient in Law, by a private Act of Parliament, made *an.* 23 *El.* And becauſe the ſaid Sir *Thomas* had by Indentures of Covenants raiſed new Uſes after the ſaid ſuppoſed Revocation of divers of the ſaid Lands held *in Capite*, the Lady *Greſham* was called by Proceſs into the Exchequer, to anſwer a Fine to the Queen for the ſaid (*a*) Alienation of the ſaid Manors, being held of the Queen *in Capite*, without Licence, becauſe now the ſaid new Uſes raiſed were good, and the Manors paſſed according to the Limitation of them, forasmuch as now the Revocation was by Authority of Parliament adjudg'd good. But becauſe at the Time of the Death of the ſaid Sir *Tho.* which was before the ſaid Act of 23 *El.* the Lady *Greſham* was diſcharged by Survivor, and every Alienation without Licence, implies a Wrong and a Treſpaſs, and an Act of Parliament, to which the Queen, and all her Subjects are Parties, and give Conſent, can't do a Wrong; for this Reaſon the Lady *Greſham* was diſcharged of the Fines for the ſaid Alienations, which had upon the Matter their Eſſence by Means of the ſaid Act of Parliament.

(*a*) Savil 65.

As to the 3d Point (which did not tend directly to the Concluſion of the Caſe) it was reſolved, That after the Bargain and Sale *Elizabeth* could not enter, for her Eſtate was to commence in Poſſeſſion after the Death of the ſaid *John* by the ſaid Cuſtom: And ſo if a Copyholder for Life, where the Remainder is over for Life, commits a Forfeiture, he in the Remainder ſhall not enter, (*b*) but the Lord, and he ſhall retain it during the Life of him who committed the Forfeiture, but that ſhall not (*c*) deſtroy the Remainder, without an expreſs Cuſtom in ſuch Caſe. And Ten't by Copy for Life, where the Remainder is over, may (*d*) ſurrender to the Lord, and he in Remainder ſhall not enter till after his Death, for his Eſtate is to commence in Poſſeſſion *poſt mortem*, and no Incident of the Com. Law belongs to him, unleſs by Cuſtom. And the Ch. Juſtice ſaid, That a Surrender of Copyholds is not to be compared to a Surrender at the Common Law; for if a Copyholder in Fee ſurrenders to the Uſe of another for Life, no more ſhall paſs from him than ſhall ſerve the Eſtate limited to the Uſe, and he who made the Surrender ſhall not pay any Fine for (*e*) Re-admittance to the Reverſion, for that continued always in him; and the Chief Juſtice further ſaid, That he conceived, that if the Lord in the Caſe at Bar had charged the Inheritance of the Copyhold, that *John Podger* ſhould not hold it charged during his Life, for

(*b*) 1 Rol. 509. 2 Rol. 794. 1 Jones 229. 1 Saund. 151. Carter 238.

(*c*) 2 Rol. Rep. 179. 1 Rol. 509, 568. Cr. El. 598, 879, 880. Moor 40. con. Noy 42. Yelv. 1.

(*d*) 1 Rol. 503.

(*e*) 1 Rol. 505.

the mean Eſtates in the Remainder preſerve the Eſtate of *John Podger* by Copy, from the Lord's Incumbrances. *Vide* in *Wroteſly's Caſe*, *Plow. Com.* If Tenant for Life grants a Rent-charge to one, and he in Reverſion grants a Rent-charge to another, and afterwards Tenant for Life ſurrenders, the Grantee of the Tenant for Life ſhall be preferred.

8 Co. 145. b. Co. Lit. 338. b. Cr. Car. 102. Plowd. 198. a.

[*Quære the laſt Paragraph in* Meriel Treſham's *Caſe*, *poſt.* 110. b.]

MERIEL

MERIEL TRESHAM's *Caſe*. See Carthew 431.

Paſch. 10 Jacobi 1.

In the Common Pleas.

HElen Brokesby and *Anne Vaux* Adminiſtrators of *Henry Vaux*, Eſq; brought an Action of *Debt* againſt *Meriel Treſham*, Adminiſtratrix of Sir *Thomas Treſham*, Knt. on a Bond of 600 *l.* made by the ſaid Sir *Thomas* to the ſaid *Henry Vaux* 23 *Maii an.* 25 *Eliz.* which Plea began *Trin.* 9 *Jac. Rot.* 917. The Defendant (*a*) pleaded, That the ſaid Sir *Thomas Treſham*, and *Francis* his Son, 1 *Julii an.* 43 *Reg. El.* before the Barons of the Exchequer *pro juſto & vero debito recognover' ſe debere dictæ nuper Reginæ C. l. Solvend' in Feſto Sancti Mich' Archangeli* next following: And that the ſaid Sir *Thomas* and *Francis* his Son 8 *Julii an.* 3 *Reg. Jac.* acknowledged a Recognizance in the Nature of a Statute, before the Lord *Anderſon*, Chief Juſtice of the Bench, to *John Brudnel* in 800 *l.* to be paid at the Feaſt of St. *James* next following, *pro juſto & vero debito:* And that the ſaid Sir *Thomas* and *Francis* his Son, &c. 16 *Decemb. an. Regni dictæ nuper Reginæ El.* 45. acknowledged another Recognizance in the Nature of a Statute Staple before the ſaid Chief Juſtice to *John Moor* Alderman of *Lond.* in 1000 *l. ſolvend' eide' Johan' pro juſto & vero debito, ſolvend' in Feſto Natalis Dom' tunc proxim' ſequen':* And that the ſaid Sir *Thomas* 16 *Sept. an.* 45 *El. Reg.* before the ſaid Ch. Juſt. acknowledged another Recognizance in the Nature of a Statute Staple to *Anne Offeley* in 1000 *l. pro juſto & vero debito, ſolvend' in Feſto Natal' Dom' proxim' ſequen':* And another Recogniz. of the like Nature

1 Brownl. 51. Co. Ent. 151. pl. 30. Swinb. 330. Bridg. 80, 81.

(*a*) Bridg 80.

17 *Dec. ann.* 2 *Reg. Jac.* to *John Ireland* in 1000 *l. pro juſto & vero debito, ſolvend' in Feſto Natalis Dom' tunc proxim' ſequen'*, and pleaded that ſhe had fully adminiſtred, *& quod ipſa nulla habet bona ſeu catalla quæ fuerunt ejuſdem* Thomæ Treſham *tempore mortis ſuæ in manibus ſuis adminiſtrand', nec habuit die impetrationis brevis originalis præd' nec unquam poſtea, præterquam bona & catalla ad valentiam* of the ſaid Debt to the King, and of every of the ſaid Recognizances, and averred that all the ſaid Recognizances remain yet in Force, *& quod ipſa nulla alia ſive plura habet bona & catalla quæ fuer' præd'* Thomæ Treſham *tempore mortis ſuæ in manibus ſuis adminiſtranda præterquam bona & catalla quæ non* * *ſufficiunt ad ſatisfaciend' præd' ſeparalia debita eiſdem Dom' Regi nunc*, Johan' Brudnel, Johan' Moor, Annæ Offley, & Johan' Ireland *de eorum debit' ſupradict', ac quæ eiſdem debit' obligat' & onerabilia exiſtunt, &c.* And the Defendant (*a*) averred that neither the ſaid Sir *Thomas* in his Life-Time, nor the ſaid Adminiſtratrix after his Death had paid the ſaid Debts, *&c.* The Plaintiffs replied and ſaid, That as to the ſaid Recognizance of 800 *l.* to the ſaid *John Brudnel*, that the ſaid Recognizanee was made *pro ſecuritate ſolutionis* 400 *l. & c.* and that the Def. after the Death of the ſaid Sir *Thomas*, paid to the ſaid *John Brudnel* the ſaid 400 *l.* of the principal Debt, in full Diſcharge of the ſaid Recognizance of 800 *l.* which 400 *l.* the ſaid *J. Brudnel* in full Diſcharge of the ſaid Recogniz. of 800 *l.* there then (*b*) received. And as to the ſaid 1000 *l.* acknowledg'd to the ſaid *J. Moor*, that the ſaid Recogniz. was made *pro ſecuritate performationis quarundam* (*c*) *convention' in quadam indentura tripartita geren' Dat' 15 Decemb' anno dictæ nuper Reginæ* 45. *ex parte ipſius Tho' obſervand', performand' & cuſtodiend'*, which were all performed, and none of them broke. And as to the ſaid Recogniz. of 1000 *l.* to *Anne Offeley*, that the ſaid Sir *Thomas* in his Life-time had paid the ſaid 1000 *l.* to the ſaid *Anne*, *&c.* and as to the ſaid 1000 *l.* acknowledged to *J. Ireland*, that the ſaid Sir *Thomas* had alſo paid them to the ſaid *J. Ireland*, *&c. quodque ſeparales recognitiones præd', &c. ſic ut præfertur ſeparatim recognitæ per fraudem & (d) covinam ipſius* Merielæ. *& ea intentione ad ipſas* Helenam & Annam Vaux *de debito ſuo præd' defraudand' minime exonerat' & non cancellat' adhuc remanent:* And further the Plaintiffs ſaid, That the ſaid *Meriel* the Day of the Writ brought, *ſc.* 14 *Febr. anno* 6 *Jac. Reg.* had divers Goods and Chattels, which were of the ſaid Sir *Tho.* the Day of his Death, in her Hands to be adminiſtred, to ſatisfy the

* 1 Rol. 922.

(*a*) 1 Brownl. 51. Swinb. 330.

(*b*) Bridg. 80.

(*c*) Bridg 80. 18. Jenk. Cent 274. Cr. Jac. 9. Cr. El. 363. Moor 752. 1 Rol. 925. 1 Rol Rep. 405. Swinb 370 1 Bulſtr. 101. 2 Leon. 212. Gold. 142.

(*d*) 1 Brownl. 19. 2 Saund. 49. Moor 705. 1 Jones 91, 92.

the Pl.'s debt, *præterq' bona & catall' ad valent' præd'* 100 *l. præd' nup' Regin' in forma præd' recognit'*, &c. upon which the Def. (*a*) demur'd in law. And the case was argu'd by the Def.'s and Pl.'s counsel at the bar in several terms; and the Def.'s counsel conceiv'd that the replicat. was insufficient as well for the manner, as for the matter: concerning the manner for 4 reasons: 1. Because the Pls. in their replicat. have alledg'd, that the said recognizance of 800 *l.* to the said *John Brudnel* made, was *pro securitate solutionis* 400 *l.* &c. and so have taken a bare averment against the recognizance, which is matter of record, for Sir *Thomas* by the said recognizance acknowledges himself to be indebted to the said *J. Brudnel* in 800 *l.* to be paid such a day, and the Pls. have alledg'd that it was made for surety of the paym. of 400 *l.* but the Pls. ought to have shew'd that there was a defeazance made by deed for the paym. of 400 *l.* &c. for a recogniz. may be defeated by deed in writing, but not by bare agreem. 2. The like exception was taken, because they have alledg'd, that the said recogniz. to the said *J. Moor* was made *pro securit' performat' quarund' convention*, &c. 3. If such general pleading should be admitted; yet it ought to have been shewed when the 400 *l.* were to be paid; but now it doth not appear whether he paid it at the day, before the day, or after the day; for replicat. ought to contain convenient (*b*) certainty; so that it may appear to the court that the Pl. has cause of action. 4. Where they alledge that the recogniz. to the said *J. Moor* was made for perform. of covenants, and that none of the cove'nts were broke, they ought to have traversed, *sc.* that it was not acknowledged, (*c*) *pro vero & justo debito*, for that was expressly alledg'd by the Def. in the bar. As to the matter, the Def.'s counsel conceiv'd the replicat. insufficient for 2 reasons: 1 Because altho' *J. Brudnel* had accepted 400 *l.* in satisfaction of the Stat. of 800 *l.* yet in law the Stat. remains in force, and he might sue execution against the Def. upon it when he would, and therefore, if she should pay debts by specialty before this debt of record, the Def. may be charged by a (*d*) *Devast'*, and thereby not only her own lands and goods, but her Body also will be subject to execution upon the said recogniz. of 800 *l.* And it was said, that this case at bar differs from (*e*) *Turnor's case*, reported by me in the 8 *part of my Rep. f.* 132. For there *Billet* who had the judgm. not only accepted 60 *l. in plenam satisfact' & exonerationem* of the judgm. of 100 *l. & obtulit & adhuc offert ad relaxand, &c. vel ad cognoscend satisfaction' in cur'*, &c. and that the Def. *decep-tive & ea intentione ad defraudand' & decipiend præd' Edw' Turnor, &c. de justo debito suo cogn' satisfactionis, &c. distulit & adhuc differt*, &c. but in the case at bar it doth not appear, that the said *John Brudnel* ever offered either to release or acknowledge satisfaction, &c. for then default had been in the defendant, as it was in *Turnor's Case*; but in

(*a*) Bridg. 81.

(*b*) Co. Lit. 303. a.

(*c*) Cr. Jac. 626. 1 Brownl. 50.

(*d*) Moor 299, 358, 678, 752. Cr. El. 102, 216, 318, 530, 734, 735, 822. 1 Brownl. 33, 50, 80, 116, 117. Hob. 167, 266. Noy. 69, 129. 2 Brownl. 81, 82, 83. Golds. 115, 142, 181. Godb. 29. 1 Leon. 320. 2 Leon. 188. 1 Rol. 931. 1 Sid. 347, 397, 398, 412. 1 Saund. 216, 217, 218, 307, 308. 2 Saund. 403. Cr. Car. 519, 603. Carter 2. 1 Vent. 292. 2 Vent. 360. Allen 39. Style 54, 55. Yelv. 29, 196, 197, 219, 220. Cr. Jac. 270, 271. 2 Jones 88, 89.

(*e*) 1 Jones 91, 92.

in this caſe ſuch default does not appear to be in the Def. 2. the Pls. in their replication aver, that the ſaid recognizances remain not diſcharged by covin of the Def. &c. to the intent to defraud the Pls. of their Debt; and ſhe alone can't commit covin, for covin ought to be betwixt two, and therewith agrees 36 *H.* 6. 19. *a. b.* where in *Debt* by the Prior of *D.* againſt *Hugh Lacy*, the Def. pleaded foreign attachment in *Lond.* at his own ſuit; the Pl. would have averr'd, that the Plaint which was affirm'd by the ſaid *Hugh* againſt the Prior, was to make the Prior loſe his debt, and there *Priſot* Chief Juſt. ſaid, as to the *(a)* covin it ſeems here that it is not to the Purpoſe, for the ſaid *Hugh* can't affirm the ſaid plaint by covin of himſelf alone; for covin ought to be betwixt two, &c. And in *P.C.* in *Talboiſe's Caſe*, 54. *b.* it is held, that covin (according to the true definition of it) is a ſecret aſſent determined in the hearts of two or more men, to the prejudice of another. And afterwards the caſe was argued in *Paſch.* 10 *Jac. Reg.* by the Juſtices; and judgment was given for the Pls. And in this caſe theſe points were unanimouſly reſolved.

(a) Br. Collusion 23.

1. That the Def.'s ba. was repugnant in it ſelf; for firſt the Def. pleads, *quod ipſa plene adminiſtravit omnia bona & catalla quæ fuer' præd' Thomæ tempore mortis ſuæ & qd' ipſa nulla habet bona & catalla quæ fuer' ejuſd' Thomæ tempore mortis ſuæ in manibus ſuis adminiſtrand' nec habuit die impetrationis brevis originalis præd' (b) præterq' bona & catall' ad valentiam* of the debt to the K. and the ſeveral debts by the ſaid ſeveral recogniſ. by which ſhe confeſſes, that ſhe has ſufficient in her hands to ſatisfy them. And afterw. ſhe pleads, *qd' ipſa nulla alia ſive plura habet bona ſeu catall' quæ fuer' præd Thom' temp' mortis ſuæ in manibus ſuis adminiſtrand' præterq' bona & catalla, quæ non ſufficiunt ad ſatisfaciend' præd' ſeparalia debita*, which is meerly and *ex diametro*, repugnant to that which ſhe had confeſſed before.

(b) 1 Rol. 922. Swinb. 330. See Carthew 196.

2. It was reſolved, that if ſhe had only pleaded, *qd' ipſa non habet, nec die impetration' original' præd' habuit, aliq' bona & catalla quæ fuer' præd' Tho' Treſham, tempore mortis ſuæ, præterq' bona & catalla non attingentia ad ſatisfaciend' debita præd' aut quæ non ſufficiunt ad ſatisfaciend' debita præd'*, or a plea to ſuch effect, that ſuch plea had been *(c)* inſufficient. For the execut. or adminiſtrator either ought to plead as the Def. does in this caſe, *ſc.* that ſhe has not goods or chattles, &c. *præterq' bona & catalla ad valentiam debit' præd'*, and ſo confeſs that ſhe has ſufficient to ſatisfy them; or if the truth be, that ſhe has not aſſets to ſatisfy the debts of record, then to confeſs how much ſhe has, *ſc.* that ſhe has not goods and chattles, &c. *præterq' bona & catalla ad valentiam* of a *(d)* ſum certain, *& non ultra, quæ eiſdem debitis obligat' & onerabilia exiſtunt*, but ſhe ought not to ſay, *præterquam bona & catalla non excedentia, aut quæ non ſufficiunt ad ſatisfaciend' debita prædicta*, for the incertainty,

(c) 1 Rol. 922. Swinb. 330.

(d) 1 Sid. 210. Hob. 133. Doct. pl. 61, 170, 171. Cr. Jac. 626. Vaugh. 103.

certainty, for to that the Plaintiff can't reply, whereupon a certain Iſſue may be taken; for if the Truth of the Caſe be, that ſhe has Aſſets to ſatisfy all the Debts of Record but a Penny, or an Half-penny, or other ſmall Sum, ſuch Plea would be true; and an Executor or Adminiſtrator is privy and repreſents the Perſon of the Teſtator or Inteſtate, and by Intendment of Law has Notice of the Certainty, and certain Value of the Goods, and therefore he ought in that Caſe to plead certainly, as is aforeſaid; as well as the Heir when he pleads Detainment of Charters in a Writ of *Dower*, he ought to ſhew the (*a*) Certainty, becauſe he is privy; or otherwiſe it would be in the Caſe at Bar a Device to bar poor Creditors (an uſual Attempt in theſe Days) of their true and juſt Debts; and therefore ſuch Innovation in pleading, tending to ſo dangerous a Conſequence, was utterly condemned *una voce per totam Curiam*.

(*a*) Dy. 230. pl. 53. Br. Dower 1, 53, 67. 18 H. 8. 1. a.b. 9 E. 4. 47. a. Antea 18. a. Perk. Sect. 356. Plowd. 85. a.b. 2 H. 7. 6. a Fitz. Dower 14, 17. Godb. 370. Co. Lit. 286. b. Doct. pl. 150.

3. It was reſolved, That ſuch (*b*) general Pleading, *ſc.* that ſuch Recognizance was made *pro vera ſolutione*, &c. or *pro performatione Conventionum*, &c. (becauſe the Creditor who is wholly a Stranger to it, and has no Means in Law to know the particular Certainty,) was good enough. *Vide Plow. Com.* 85. *a. b. in Croker's Caſe*, and 18 *H.* 8. 1. *a. b.* &c. And altho' they do not (*c*) ſpecify the certain Day of Payment, nor that the leſſer Sum was paid before, or upon the Day of Payment, yet the Pleading is good in this Caſe, for admit that the Payment was after the Day of Payment, yet when the ſaid *John Brudnel* accepted the leſſer Sum *in plenam exoneracionem* of the ſaid Recognizance of 800 *l.* This is a good Ground for the Plaintiffs to aver, that by Fraud of the Defendant, and to the Intent to defraud the Plaintiffs of their Debt, the Recogniſance was not diſcharged nor cancelled: The which the Defendant has now confeſſed by her Demurrer, but ſhe might have taken Iſſue upon it, and left it to Trial of the Country upon the Evidence, declaring the Truth of the Caſe.

(*b*) 1 Brownl. 51. Bridg. 81. 1 Jones 91, 92. Doc. pl. 61, 171. Raym. 304.

(*c*) Doct. pl. 171.

4. It was reſolved, That altho' they have not alledged ſpecial Matter, as in *Turnor's Caſe*; *ſc.* that the Conuſee (*d*) offer'd and was ready to releaſe, or acknowledge Satisfaction; yet it was reſolved, that the (*e*) general Allegation of Fraud in the Caſe at Bar was ſufficient, as it is reſolved in *Talbois's Caſe*, That general Averment of Covin was good, becauſe Covin is ſo ſecret, whereof by Intendment another Man can't have Knowledge. And if of the ſpecial Manner of Covin, which (as it is there held) *ex vi termini* ought to be betwixt two by Intendment of Law, a Stranger can't

(*d*) 8 Co. 132. b 133. a.

(*e*) Plowd. 54. b. Raym. 304.

can't have Knowledge, *a fortiori* in the Caſe of Fraud, which may be in the Heart of one only, for if one by Deed makes a fraudulent Gift of his Goods to diverſe who know not of it, it is Fraud only in him who makes it; and ſo it was adjudged in *Turnor's Caſe*, that Fraud may be in one, or of one Part only. And for as much as the Replication was good, as to the Debt of 800 *l.* to *John Brudnel*, and the Def. has confeſſed in her Bar, that ſhe has Aſſets to ſatisfy all the Recogniſances, for this Reaſon the Pls. ſhall recover their Debt of 600 *l.* due by the ſaid Bond. And altho' of it ſelf, and *ex vi termini*, (*a*) *Covina* ought to be betwixt two; yet when it is coupled with Fraud, which may be committed by one only, the Court ſhall adjudge upon the Matter, and not upon the ſtrict Etymology of the Word; and if the Addition of Covin be in vain, then the Court ought to adjudge upon the Word, *ſ.* Fraud, which may be committed by one, & *plerumq*; *dum* (*b*) *proprietas verborum attendit' ſenſus veritatis amittitur*. And the Chief Juſt. ſaid, *quodſæpe in Captione juris fuit digitus Dei*; for the Def.'s Bar was altogether inſufficient; for the Def. has averr'd, That Sir *Thomas* had not paid the Debts due by the ſaid Recognizances in his Life, nor his Adminiſtrator after his Deceaſe; but (*c*) has not averr'd, That *Francis* who was jointly bound with him in all the Recognizances had not paid them, whereby the Bar was inſufficient. And if the Bar be (*d*) inſufficient in Matter, and the Writ and Declaration good, and the Replication ſuperfluous, without any Matter which impugns or deſtroys the Action, the Pl. ſhall have Judgm. as it has been oftentimes ruled and adjudg'; *qd' fuit conceſſum per tot' Cur'*, and afterwards Judgm. was given, and entred for the Pls. and Execution awarded accordingly. *Vide* the 3 (*e*) Point in *Turnor's Caſe*, a good Judgment in theſe Days, where Executors and Adminiſtrators contend, by Fraud and ſubtil and cunning Pleadings and Devices, to bar Creditors of their juſt and true Debts; and obſerve well the 3 Point reſolved in *Turnor's Caſe*.

(*a*) 1 Sid. 21.

(*b*) 7 Co. 27. b. Calvin's Caſe.

(*c*) 1 Brownl. 51. Swinb. 330.

(*d*) 1 Brownl. 51. Co. Lit. 303. b. Doct. pl. 69, 70. 325. Cr. Car. 5. 8 Co. 133. b. Palm. 287. Cr. Jac. 133. Lit. Rep. 341. Godb. 138.

(*e*) 8 Co. 133. b.

Nota Reader, At the Common Law; if there be Lord, Meſne, and Tenant, and the Meſne truly does his Services to the Lord Paramount, and yet the Lord diſtrains the Tenant peravail for them, at this Time the Diſtreſs is tortious, and the Tenant is not diſtrained in Default of the Meſne; but in this Caſe if the Tenant peravail requeſts the Meſne to take his Cattle out of the Pound, and put in his own (*f*) Cattle in lieu of them; or if the Tenant has replevied his own Cattle, and requeſts

(*f*) F. N. B. 136. h. 7 H. 4. 18. 2. Co. Lit. 100 a.

requeſts the Meſne to join and acquit him, and he refuſes, by this Matter *ex poſt facto*, the Law will adjudge that the Tenant peravail was diſtrained in Default of the Meſne, and if in a Writ of Meſne, the Meſne (*a*) ſhould plead not diſtrained in his Default, it ſhould be found againſt him, otherwiſe the Tenant peravail will be in no Default, and will have Wrong, and yet will be without Remedy: And it is all one to the Tenant, if the Diſtreſs be wrongful or rightful, if he ſhall not have any Redreſs. *Vide* * 39 *E.* 4. 34. *a.* 17 *E.* 3. 15. & 44. *a.* 7 (*b*) *H.* 4. 18. *a. b.* 12 (*c*) *E.* 4. 2. *a.* 13 (*d*) *E.* 4. 6. *a. b. F. N. B.* (*e*) 136. By which it appears, That Judges in all Ages have endeavoured to put the Rule of *W.* 2. † in Execution, (*f*) *Curia Domini Regis non debet deficere conquerentibus in Juſtitia exhibenda; Juſtitia eſt ſuum cuique tribuere.*

(*a*) Ant. 22, 23. * 9 Co. 23. a. (*b*) Br. Reple. 14 Br. Meſne 4. (*c*) Br. Joinder in Action 67. 9 Co 23. a. (*d*) Br. Meſn. 24. Br. Replev. 42. (*e*) F. N. B. 136. h. † W. 2. cap. 24. 2 Inſt. 405, 406. (*f*) Co. Lit. 74. a. 9 Co. 88. b. 2 Inſt. 405, 408.

[*Note*; *This laſt Paragraph ſeems to belong to* Margaret Podger's *Caſe*, *ante* 107. b.]

ROBERT

Skinner 342.

ROBERT MARYS's *Case.*

Trin. 10 Jac. 1.

Godb. 185.
1 Brownl. 197.
2 Brownl. 55. 146.

Edward Cregate brought an Action on the Case against *Robert Marys*, and declared, That *William Winter*, Gent. was seised in Fee of the Manor of *Townbarningham*, whereof an House and 2 Acres, and 2 Rods of Land in *Townbarningham* are, &c. Parcel, and demised and demisable by Copy, &c. in Fee, for Life, or Years. And whereas the said *William* and all those whose Estate he has in the said Manor with the Appurtenances, *pro tenentibus Custumariis suis præd' messuagii 2 acr' & 2 Rod' terræ cum pertin' habuerunt, & a toto tempore cujus contrarii memoria hominum non existit habere consueverunt communiam pastur' in quadam pecia pastur' cont' per æstimationem septem acras vocat'* Townbarningham Common, *jacen' in Townbarningham præd' pro omnibus equis & vaccis suis levant' & cubant', &c. quolibet anno omni tempore anni tanquam ad præd' messuag, &c. pertin'*, and convey'd a Grant by Copy of Court-Roll of the said Manor of the said House and Land with the Appurtenances to the Plaintiff and his Heirs, according to the Custom of the Manor, by Force of which he entred, and was and yet is seised of the said Messuage and Land with the Appurtenances, *& præd' Robertus machinans & intendens ipsum Edw. de communia pastur' sua præd' in præd' pecia pastur' continent' per æstimationem 7 acr' vocat'* Townbarningham Common, *habend' minus juste impedire & de proficuo suo inde totaliter deprivare, primo die Maii, an' regn' Dom' Reg' nunc Angl' 7 equos, boves & vaccas suas in præd' peciam pasturæ, cont' per æstimat' 7 acr voc'* Tawnbarningham Common, *posuit, & herbam ibid' crescen' cum equis bobus, & vaccis suis depastus fuit, conculcavit, & consumpsit*, with Continuance *a præd' prim' die Maii an' septimo*

ſeptim' ſuprad' uſq; feſt' S. Mich' Arch' tunc proxim' ſequen' per qd' idem Edw. exſtens per tot' idem tempus tenens cuſtomarius præd' meſſuag & 2 acr' & 2 rod' terræ cum pertin' communiam paſtur' ſuam præd' procquis, bobus & vaccis ſuis, in tam amplo & beneficiali modo prout ipſe præantea habuit, &c. per tempus illud habere non potuit, ſed proficuum ſuum inde per tot' idem tempus amiſit ad damn', &c. 40*l.* The Def. pleaded, *Non culp'*, and the Jury found, *quod quoad poſitionem equorum, bovium, & vaccarum ipſius Rob. Marys in infraſcript' peciam paſtur' vocat'* Townbarningham Common, *interius per præd' Rob' fieri ſuſpoſit' dicunt ſuper ſacram' ſuum quod præd' Rob' Marys non eſt inde culpabil', prout &c. & quoad depaſtur', conculcation' & conſumption herbæ infraſcript' in infraſcript' pecia paſtur' vocat'* Townbarningham Com. *infraſcript' equis, bobus, & vaccis per tempus infraſcript' Jurator' præd' dicunt ſuper ſacram' ſuum, qd' præd' Rob' Marys eſt inde culp' & aſſid' damna, &c.* And this plea began *Hill.* 7 *Jac. Reg. rot.* 336. and was oftentimes debated by the Serjeants at bar, and by the Juſt. at the bench: And it was argued *ex parte Def.* that the wrong found by the Jury is not the wrong whereof the Pl. in his action *on the caſe* has complain'd; for he has complain'd of a misfeaſance, and they have found a nonfeaſance, which is againſt the Pl. for he has declar'd that the Def. *poſuit averia ſua, &c.* which is a wrong and a misfeaſance, and the Jury have found, *quod non poſuit, &c.* but that his Cattle have depaſtured, *&c.* which ought to be by (*a*) eſcape, which is a nonfeaſance, and many caſes were put on this Ground. (*a*) Godb. 185.

But as to that it was reſolved, that the action notwithſtanding that was well maintainable; for the Judges in finding of verd'ts rather reſpect the ſubſtance (*b*) than the circumſtance; and therefore in the caſe which concerns the life of a man, which is more favour'd than any thing in the world, Judges regard the ſubſtance, and not the circumſtance: as if *A.B.* and *C.* are indicted for killing *J.S.* and that *A.* ſtruck him, *&c.* and the others were preſent, abetting, *&c.* And the jury find, that *A.* did not ſtrike him, but that *B.* ſtruck him, and that the other 2 were preſent abetting, *&c.* this (*c*) is a good verd. for it is but circumſt. who ſtruck him, for in law it is the ſtroke of them all. 2. It was well obſerved, that the declarat. is, that the Def. put in his cattle 1 *Maii, &c.* and that *a præd' 1 Maii* they continued there till the feaſt of S. *Mich.* now the jury have found. *quoad poſitionem non culp' prout, &c.* which is the firſt day of *May*: but the Jury have found *quoad depaſt' conculcat', &c. per tempus infra content', ſc. a primo die Maii uſq' feſt' S. Mich.* they found him guilty, *prout.* So that the Jury have found the continuance, *&c.* in the ſame manner, and for the ſame time as the Pl. has alledged; and the Pl. is a ſtranger to it, and therefore come the Def.'s cattle by eſcape, or otherwiſe, the conſumption of the graſs, and ſo the deſtruction of his common, that is the ſubſtance and cauſe of the action: and ſo it was adjudg'd, *Hill* 5 *Jac.* in this court, as it after appears. * 2. It was objected

(*b*) 2 Rol. 704. Cr. Jac. 136. Hob. 73, 249. Yelv. 148. 1 Brownl. 213, 214.

(*c*) Antea 67. b. Hale's Pl. Cor. 265.

* Poſt. 113. b.

that one commoner ſhall not have an Action for conſumption of the graſs, &c. for then every other com'ner might have an action for the ſame cauſe, and ſo actions for ſmall cauſes would be (*a*) multiplied, which the law will not permit; and for that *William's Caſe in the 5 part of my Rep. f. 72. b.* of a common, (*b*) chapel, or church an action on the caſe doth not lie for nonfeaſance of divine ſervice, nor for a common nuſance done in the * highway. *Vide* (*c*) 27 *H.* 8. 26. *a.* 27. *a.* & (*d*) 5 *E.* 4. 3. &c. where the law denies an Action to any one in particular, for avoiding infinite actions in ſmall cauſes.

To which it was anſwer'd and reſolv'd, that notwithſtanding this object. the (*e*) action lies for divers reaſons. 1. It is evident, that a com'ner may take the cattle of a ſtranger (*f*) damage-feaſant, as it is held in 24 *E.* 3. 42. *a.* 46 *E.* 3. 23. *b.* 15 *H.* 7. 2. *a. b.* & 12. *b.* which proves that it is a wrong and damage done to him; and it would be a great miſchief if the com'ner ſhould not have an action, for then all the feed might be taken, and eat by many ſheep and other cattle, and with ſtrong hand there detained, till all the graſs is conſum'd, and likewiſe with ſtrong hand driven out, ſo that the com'ners could not take them damage-feaſant, or the cattle after the graſs conſum'd might eſcape out, and then by the argument which has been made, the com'ner ſhall have no remedy; and then the (*g*) lord, or other great man might at their pleaſure deprive thoſe who have com. in their waſtes, of their com. there. 2. If the com'ner has a freehold in his com. and the Lord or others will feed or conſume all the graſs in the land where the com. is to be taken, the com'ner ſhall have *aſſize*; and by (*h*) conſequ. the com'ner in the caſe at bar having com. but at will by copy, ſhall have an *action on the Caſe*: As if a man has com. of eſtovers in the wood of another in fee, or for life, and the owner of the wood, or any other fells all the (*i*) wood, he who ought to have the eſtovers ſhall have *aſſiſe*, for it is a diſſeiſin of his com. *F. N. B.* 58, 59. and if he has but a term in the eſtovers, he ſhall have an *action on the caſe*. *H.* 5 *Jac. in Com. Ban. Edw. Buttolph* brought an *action on the caſe* againſt *Rob. Kipping* and others, and declared, that *Hen. Gawdy* Kt. was ſeiſed of an houſe and 100 acres of land in *Sowood* in *Norf.* and that the ſaid Sir *Henry* from time whereof, &c. had uſed for him and his ten'ts of the ſaid houſe and land, to cut and take brakes in a piece of heath called *Caronhill* in *Sowood* aforeſaid, for their fewel to be ſpent in the ſaid houſe, as to the ſaid houſe appertaining; and ſo being thereof ſeiſed demiſed the ſaid houſe and land with the appurtenances for term of years, &c. by force of which he entered, and was thereof poſſeſſed, the Defendants *præmiſſorum non ignari* cut down, and carried away 3 loads of Brakes in the ſaid place, *per qd'* the Plaint. could not have brakes for his fewel in ſo ample and beneficial manner as before, and as of right he ought, &c. The Defendant pleaded not guilty, and it was found by verdict for the Defendant, and he had Judgment accordingly.

(*a*) 1 Brownl. 297. 2 Brownl. 147, 148. 1 Sid. 34. 2 Sid. 174. 2 Jones 157. Co. Lit. 56 a.
(*b*) Lit. Rep. 95. 2 Brownl. 147. Cr. El. 664.
* Br. Nuſance. 1, 29. Br. Chimin 1. Br. Action ſur le Caſe 6, 93. Co. Lit. 56. a. 5 E. 4. 2. b. 27 H. 8. 27. 2. 5 Co. 73. a. Cr. Jac. 446. Noy 120. 2 Rol. Rep. 26. 2 Jones 157. Cr. El. 664. 2 Brownl. 147.
(*c*) 27 H. 8. 27. a.
(*d*) 5 E. 4. 2. b.
(*e*) Cr. El. 199. Hob. 43.
(*f*) 2 Brownl. 148. 1 Rol. 405. Yelv. 130. Godb. 185.
(*g*) Yelv 130.
(*h*) 1 Brownl 197.
(*i*) Cr. El. 199, 466, 845.
(*i*) 1 Brownl. 197. 2 Fr. wal. 149.

3. For *(a)* every feeding by the cattle of a ſtranger, the commoner ſhall not have an *Aſſiſe* nor an action *on the caſe*, as his caſe is, but the feeding ought to be ſuch *per quod* the commoner, &c. common of paſture, &c. for his cattle, &c. *habere non potuit, ſed proficuum ſuum inde per totum id' tempus amiſit*, &c. So that if the treſpaſs be ſo ſmall, that he has not any loſs, but ſufficient in ample manner remains for him, the commoner ſhall not take 'em damage-feaſ. nor have any action for it; but the ten't of the land may in ſuch caſe have an action. And therefore, if my ſervant is beat, the *(b)* maſter ſhall not have an action for this battery, unleſs the battery is ſo great that by reaſon thereof he loſes the ſervice of his ſervant, but the *(c)* ſervant himſelf for every ſmall battery ſhall have an action; and the reaſon of the difference is, that the maſter has not any damage by the perſonal beating of his ſervant, but by reaſon of a *per qd'*, *viz. per quod ſervitium*, &c. *amiſit*; ſo that the original act is not the cauſe of his action, but the conſequent upon it, *viz.* the loſs of his ſervice is the cauſe of his action; for be the battery greater or leſs, if the maſter doth not loſe the ſervice of his ſervant, he ſhall not have an action. So in the caſe at bar, the lord of the ſoil ſhall have an action for treſpaſs done in the waſte or common, as an immediate treſpaſs to him, be it greater or leſs, but the commoner ſhall not have an action but by *(d)* conſeq. *viz.* If the treſpaſs be ſuch, *per quod proficuum communiæ ſuæ*, &c. *amiſit*, or that he could not have his common in ſo beneficial manner as he had before. 4. In this caſe it doth not judicially appear to the court, that any other has common there but the Pl. himſelf, and therefore the colour of multiplicat. of ſuits is not to be reſembled to this caſe: And it is true for a nuſance in the *(e)* high way, without ſpecial damage, none ſhall have a private action, for it is not *damnum privatum*, but *damnum commune*, and therefore it ought to be only puniſhed and reformed at the K.'s ſuit; for a publick nuſance ſhall not be reformed at the ſuit of a private party; for the dam. is not private, but publick: But *privatum damnum ſive nocumentum* ſhall be reform'd by the action of the priv. party griev'd, and *commune nocumentum* at the ſuit of the K. who is the head of the whole commonwealth: But a treſpaſs done to many commoners is *privatum*, and not *commune nocumentum*: And ſo it is adjudged in 27 *Aſſ. p.* 6. *a.* preſentment was in a leet, that *J.N.* had encloſed ſuch lands, which ought to lie in common for all the inhabitants of the town, &c. *ad commune nocumentum inhabitant' villæ præd'*, and this preſentm. was adjudged void: For it is a private wrong to the partic. inhabitants of this particular town, and no publick comm. nuſance. And the *Ch. Juſt.* in his argument in this caſe cited 2 judgments in the Point in this court, *Trin.* 41 *Eliz. rot.* 1536. *John (f) Holland*, Eſq; brought an action *on the caſe* againſt *Thomas Lovell* Eſquire, and others Defendants, and declared that the Plaintiff was ſeiſed of the manor of *Chalk-*

(a) 1 Brownl. 197.

(b) 1 Brownl. 197. 2 Brownl. 148.

(c) 2 Brownl. 148.

(d) 1 Brownl. 197.

(e) Co. Lit. 56. a. 5 Co. 73. a. Moor 180. Cr. Jac. 446. Noy 120. 2 Rol. Rep 252. Jones 157. Cr El. 664. 2 Brown 147. 27 H. 8. 27. a. Br. Action ſur le Caſe 6. Br. Chimin 1. Br. Nuſance 1. 5 E. 4. 2. b. Br. Action ſur le Caſe 93. Br. Nuſance 29.

(f) 2 Brownl. 118. Co Ent. 14. pl. 12.

hill in *Larlingford* in *Norfolk*, and prescribed to have Common for 400 Sheep in a Place called the Plains in *Larlingford*, as belonging to the said Manor, the Defendants, *præmissorum non ignari*, with their Sheep did eat the Grass growing in the said Place called the Plains, *per quod* the Pl. could not enjoy his Common there in so ample and beneficial Manner as he had before, and as of right he ought to have, to his Damage of 40 *l.* The Defendants pleaded Not guilty, and it was tried by *Nisi prius* before Sir *John Popham*, Ch. Justice of *England*, and found for the Pl. and he had Judgment and Execution. *Hill.* 5 *Jac. Rot.* 1427. *in Communi Banco. Norf. George (a) England* brought an Action *on the Case* against this *Edw. Crogate*, and declared that the Bp. of *Norwich* was seised in the Right of his Bishoprick of the Manor of *Thurgarton* in *Norfolk*, and that the Pl. was a Copyholder of a Tenement Parcel of the Manor, and prescribed in the Bishop, &c. to have Common for the Copyholders of the said Tenement *, for all Horses, Cows and Hogs in a Piece of Pasture in *Basingham*, called *Basingham Common*, &c. at all Times of the Year, as to the said Tenement belonging; the Defendant *præmissorum non ignarus* put his Horses and Cows into the said Piece of Pasture called *B. per quod* the Pl. could not have Common there in as ample and beneficial Manner as he had used before, &c. The Defendant as to the putting in of his Cattle pleaded Not guilty, which Issue was found for the Defendant, and as to the Eating of the Grass he pleaded, That the said Piece of Pasture, called *Basingham Common*, adjoined to another Pasture called *Barningham Common*, in which the Defendant had Right of Common, and that these two Commons lay open the one to the other, and claimed to have Common in *Basingham Common* for cause of Vicinage, upon which Common for cause of Vicinage Issue was joined, and found for the Plaintiff; whereupon Judgment was given, and Execution awarded. In which Case both the Points which now in the Case at Bar were in Question were adjudged. 1. Altho' the Plaintiff declared that the Defend. put in his Cattle, &c. and it be found that he did not put them in, but that they came in by (*b*) Escape, yet the Plaintiff should have Judgment, for the Eating of the Grass is the Substance. (*c*) 2. It was adjudged, That the Commoner in this Case should have an Action *on his Case*.

(*a*) 2 Brownl. 149. Co. Ent. 9. pl. 8. Ant. 112. a.

* Salk. 336.

(*b*) Godb. 185.

(*c*) Ant. 112. a.

The

The Lord SANGHAR's *Caſe,*

The Record of the Conviction of Carliell & al'.

THE Inquiſition taken at the Seſſions of the Peace of the Lord the King, held for the City of *London*, at the *Guildhall* of the City of *London* aforeſ. upon *Wedneſday* the 27th Day of *May* in the Year of the Reign of our Lord *James*, by the Grace of God of *England*, *France* and *Ireland* King, Defender of the Faith, &c. the 10th, and of *Scotland* the 45th, before *James Pemberton*, Knt. Mayor of the City of *London* aforeſaid, *Stephen Soan*, Knt. *John Garrard*, Knt. *Thomas Bennet*, Knt. *Thomas Low*, Knt. *Henry Row*, Knt. and *Henry Mountague*, Knt. one of the Serjeants at Law of the Lord the King, and Recorder of the ſaid City, Juſtices of the ſaid Lord the King to the Peace in the City aforeſaid to be kept, as alſo to divers Felonies, Treſpaſſes, and Miſdeeds in the ſaid City committed, to hear and determine aſſigned, by the Oaths of *William Palmer*, *John Pemberton*, *Edward Biſhop*, *John Harriſon*, *William Erbury*, *Thomas Nicholſon*, *Humphrey Waterſon*, *John Woodhall*, *Zachary Healing*, *Richard Downes*, *Thomas Eagles*, *Thomas Dennis*, *Richard Taylor*, *Meredith Broughton*, and *Ralph Hanſon*, good and lawful Men of the Body of the City aforeſaid, who ſay upon their Oath aforeſaid, that *Robert Carliel*, late of *London*, Yeoman, and *John Irweng* late of *London* aforeſaid, Yeoman, not having God before their Eyes, but moved and ſeduced by the Inſti-

gation of the Devil, the 11th Day of *May* in the Year of the Reign of our Ld. *James*, by the Grace of God of *Engl. Fr.* and *Irel.* King, Defend. of the Faith, &c. the 10th, and of *Scotland* the 45th, at *London* aforeſaid, that is to ſay, in the Pariſh of St. *Dunſtan* in the *Weſt*, in the Ward of *Farrington* without *London* aforeſaid, with force of Arms, &c. felonioufly of their forethought Malice in and upon one *John Turner*, then and there being in the Peace of God, and of the ſaid Lord the King, made an Aſſault and an Affray: And the aforeſaid *Robert Carliel* a certain Gun called a Piſtol, of the Value of 5 *s.* then and there charged with Gunpowder and one leaden Bullet, which Gun the aforeſaid *Robert Carliel* in his Right Hand then and there had and held, in and upon the aforeſaid *John Turner* then and there feloniouſly, voluntarily, and of his forethought Malice did ſhoot off and diſcharge; and the aforeſaid *Robert Carliel* with the leaden Bullet aforeſaid, from the Gun aforeſaid then and there ſent out, the aforeſaid *John Turner* in and upon the Left Part of the Breaſt of him the ſaid *John Turner*, near the Left Pap of the ſaid *John Turner*, then and there feloniouſly ſtruck, giving to the ſaid *John Turner* then and there with a leaden Bullet aforeſaid, out of the Gun aforeſaid then and there ſent out *, in and upon the aforeſaid Left Part of the Breaſt of the ſaid *John Turner*, near the aforeſaid Left Pap of the ſaid *John Turner*, one mortal Wound, of the Bredth of half of one Inch, and of the Depth of five Inches, of which mortal Wound the aforeſaid *John Turner*, at *London* aforeſaid, in the Pariſh and Ward aforeſaid inſtantly died; and that *James Irweng* feloniouſly, and of his forethought Malice then and there was preſent, adjoining, aſſiſting, abetting, comforting, and maintaining the aforeſaid *Robert Carliel* to the Felony and Murder aforeſaid, in Form aforeſaid, feloniouſly to be done and committed; and ſo the Jurors aforeſaid, upon their Oath aforeſaid ſay, that the aforeſaid *Robert Carliel* and *James Irweng* the aforeſaid *John Turner* at *London* aforeſaid, in the Pariſh and Ward aforeſ. in Manner and Form aforeſ. Feloniouſly, Voluntarily, and of their forethought Malice did kill and murder, contrary to the Peace of the Lord the King that now is, his Crown and Dignity, &c. And afterwards, That is to ſay, at the Gaol-Delivery of the Lord the King at *Newgate*, holden by the City of *London* aforeſaid, at the Juſtice Hall ſituate in the *Old Baily*, in the Pariſh of St. *Sepulcher*, in the Ward of *Farrington* without *London* aforeſaid, the 23d Day of *June* in the Year of the Reign of the ſaid our Lord *James*, by the Grace of God K. of *England*, *France* and *Ireland* the 10th, and of *Scotland* the 45th, before *James Pemberton*, Knt. Mayor of

* Diſcharged.

of the City of *London* aforeſaid, the Reverend Father in Chriſt *John* Biſhop of *London*, *Thomas Flemming*, Knt. Chief Juſtice of the Lord the King to Pleas, before the King himſelf to be holden, aſſigned, *Ed Coke*, Knt. Chief Juſt. of the ſaid Lord the K. of the Bench, *Lawrence Tanfield*, Knt. Ch. Bar. of the Excheq. of the Lord the K. *Chriſtoph. Yelverton*, Knt. one of the Juſt. of the ſaid Ld. the K. to Pleas, before the K. himſelf to be holden, aſſigned, *David Williams*, Knt. another of the Juſt. of the ſaid Ld. the K. to Pleas, before the K. himſelf to be holden, aſſign'd, *J. Croke*, Knt. another of the Juſt. of the ſaid L. the K. to Pleas, before the K. himſelf to be holden, aſſigned, *Steph. Soan*, Knt. *J. Garrard*, Knt. *Tho. Bennet*, Knt. *Baptiſt Hicks*, Knt. *Francis Bacon*, Solic. Gen. of the Lord the K. *Hen. Montague*, Knt. one of the K.'s Serj. at Law, and Record. of the City of *London* aforeſ. and other their Fellows Juſtices of the Lord the K. to his Gaol aforeſ. of Priſoners in the ſame being to be delivered aſſigned, the aforeſ. *Rob. Carliel* and *James Irweng*, under the Cuſtody of *Ed. Parkham* and *Geo. Smythes*, Sher. of the City aforeſ. to the Bar there then being brought, in their proper Perſons came, and ſeverally being aſked, how of the Felony and Murder aforeſ. they would acquit themſelves; the ſaid *Rob. Carliel* ſaith, that he cannot deny, but that he is guilty of the Felony and Murder aforeſ. to him in Form aforeſ. impoſed, and the Felony and Murder aforeſ. expreſly confeſſeth, and thereof putteth himſelf upon the Mercy of the K.; and the aforeſ. *James Irweng* ſaith, that he of the Felony and Murder aforeſ. to him in Form aforeſ. impoſed, is not guilty, and thereof for good and ill puts himſelf upon the Country: Therefore immediately a Jury come, *&c.* And the Jurors of that Jury by the aforeſ. Sheriffs of the City aforeſ. to this impanelled being called, that is to ſay, *Humph. Slany*, *Will. Morgan*, *Rowl. Healing*, *Hugh Hamerſley*, *Hen. Colthurſt*, *Will. Hicks*, *Will. Hayes*, *Rich. Bridges*, *Will. Wilde*, *Jo. Palmer*, *Solomon Green*, and *Rich. Rud* came, who to ſay the Truth of and upon the Premiſſes, on the ſaid *J. Irweng* impoſed, being choſen, tried, and ſworn, ſay upon their Oath aforeſaid, that the aforeſaid *J. Irweng* is guilty of the Felony and Murder aforeſ. to him in Form aforeſ. impoſed, in Manner and Form as by the Indictment aforeſ. againſt him it is ſuppoſed; and that he at the Time of the Felony and Murder aforeſ. in Form aforeſ. committed, or ever after had no Goods or Chattels, Lands or Tenements, to the Knowledge of the Jurors aforeſaid. Upon which the ſaid *Robert Carliel* and *James Irweng* were ſeverally ſpoken unto, if they had any thing for themſelves, or could ſay, wherefore the Court aforeſaid to Judgment and Execution of them and either of them of the Premiſſes ought not to proceed, who ſaid nothing, but what at firſt they had ſaid; upon which, then and there, It

is conſidered by the ſaid Juſtices, That the aforeſaid *Robert Carliel* and *James Irweng* to the Gaol of *Newgate* aforeſaid from whence they came ſhould be led back, and thence be led, and either of them be led unto the Place of Execution, and there be hanged, and either of them be hanged until, *&c.*

The

The Lord SANCHAR's *Caſe.*

The Indictment of Robert Creighton, *Eſq.*

Middl. ff. THE Jurors preſent, for the Lord the King upon their Oath, That whereas *Robert Carliel* late of *London*, Yeoman, and *James Irweng* late of *London* Yeoman, Not having God before their Eyes, but ſeduced by the Inſtigation of the Devil, the 11th Day of *May* in the Year of the Reign of our Lord *James*, by the Grace of God, of *England*, *France* and *Ireland* King, Defender of the Faith, &c. the 10th, and of *Scotland* the 45th, at *London*, that is to ſay, in the Pariſh of St. *Dunſtan* in the Weſt, in the Ward of *Farrington* without *London* aforeſaid, &c. with Force and Arms, &c. Feloniouſly, and of their afore-thought Malice, in and upon one *John Turner*, then and there in the Peace of God, and of the ſaid Lord the King being, made an Aſſault and Affray; and the aforeſaid *Robert Carliel* a certain Gun called a Piſtol, of the Value of 5 Shillings, then and there charged with Gunpowder, and one Leaden Bullet, which Gun the ſaid *Robert Carliel* in his Right Hand then and there had and held, in and upon the aforeſaid *John Turner*, then and there Feloniouſly, Voluntarily, and of his Malice fore-thought, did ſhoot off and diſcharge; and the aforeſaid *Robert Carliel*, with the Leaden Bullet aforeſaid, from the Gun aforeſaid then and there ſent out, the aforeſaid *John Turner*, in and upon the left Part of the Breaſt of him the ſaid *John Turnor* then and there feloniouſly ſtruck, giving to the ſaid *John Turner*, then and there with a Leaden Bullet as aforeſaid, near the left Pap of him the ſaid *John Turner*, one mortal Wound of the Breadth of half an Inch and Depth of 5 Inches, of which mortal Wound the aforeſaid *John Turner* at *London* aforeſaid, in the Pariſh and Ward aforeſaid, inſtantly died; and that *James Irweng* Feloniouſly,

and of his fore-thought Malice then and there was preſent, aiding, aſſiſting abetting, comforting and maintaining the aforeſaid *Robert Carliel* to the Felony and Murder aforeſaid, in form aforeſaid to be done and committed, and ſo the aforeſaid *Robert Carliel* and *James Irweng* the aforeſaid *John Turner*, at *London* aforeſaid, in the Pariſh and Ward aforeſaid, in manner and form aforeſaid, Felonioufly, Voluntarily, and of their fore-thought Malice killed and murdered, againſt the Peace of the Lord the now King, his Crown and Dignity; and that one *Robert Creighton* late of the Pariſh of St. *Margaret* in the County of *Weſtminſter*, Eſq; not having God before his Eyes, but being ſeduced by the Inſtigation of the Devil, before the Felony and Murder aforeſaid, by the aforeſaid *Robert Carliel* and *James Irweng* in manner and form aforeſaid done and committed, that is to ſay, the 10th Day of *May* in the Year of the Reign of our Lord *James*, by the Grace of God, of *England*, *France* and *Ireland* King, Defender of the Faith, the 10th, and of *Scotland* the 45th, the aforeſaid *Robert Carliel*, at the aforeſaid Pariſh of St. *Margaret* in *Weſtminſter* aforeſaid, in the County of *Middleſex* aforeſaid, to the Felony and Murder aforeſaid, in manner and form aforeſaid done and committed, Maliciouſly, Felonioufly, Voluntarily, and of his fore-thought Malice did ſtir up, abet, counſel and procure, againſt the Peace of the ſaid Lord the King that now is, his Crown and Dignity, *&c.*

By Indictments, *Trinitat.* 10. of King *James.*

The

The Lord SANCHAR's *Caſe.*

Trin. 10. Jacobi. 1.

RObert Creighton, Lord *Sanchar*, a Baron of *Scotland*, of his Malice prepenſe at *Weſtminſter* in the County of *Middleſex*, incited and procured *Robert Carliel* to kill *John Turner*, who accordingly aſſociating himſelf with one *James Irweng*, the 11 of *May* now laſt paſt, killed the ſaid *John Turner* within the City of *London*. And the King, in his Zeal to Juſtice in this Caſe, immediately ſent for the two *Chief Juſtices*, and *Chief* Baron, and commanded there ſhould be ſpeedy proceeding againſt the Lord *Sanchar*, according to Law. To which the Juſtices anſwered, That the Lord *Sanchar* was but an Acceſſory in this Caſe, and therefore he (*a*) could not by Law be convicted before the Principal is attainted; but if the Principal could be apprehended, then both might be attainted with more Expedition than could be, if the Principal ſhould be attainted by Utlagary: Then it was asked how the Lord *Sanchar* being an ancient Baron of *Scotland* ſhould be tried: And it was anſwered by them, That none within this Realm of *England* is accounted (*b*) a Peer of the Realm, but he who is a Lord of the Parliament of *England*; for every Subject either is a Lord of the Parliam. or one of the Com'ns, and the L. *Sanchar* was not a Lord of the Parliam. within this Kingd. and therefore ſhould be tried by the Commons of the Realm, *viz.*

Wilſon's Hiſt. 59, 60.

(*a*) 4 Co. 43. b.

(*b*) Co. Lit. 16. b. 7 Co. 15. a. Calvin's Caſe. 2 Inſt. 48. 3 Inſt. 30.

viz. Knights, Eſquires, or others of the Commons; and therewith agree our Books, as well ancient as others, (*a*) 11 *E.* 3. *Brief* 473. 8 *R.* 2. (*b*) *Proceſs pl. ult.* (*c*) 20 *E.* 4. 6. *a. b.* 20 *El.* (*d*) 360. Then the King asked in what Court, after the Principal is attainted, the Lord *Sanchar* ſhould be tried. And the Juſtices anſwered, that foraſmuch as the Procurement was in *Middleſex*, it was moſt convenient to try him in the King's Bench. And thereupon the *King* reſolved that he ſhould not be committed to the Tower, but to the Priſon of the King's Bench, where he might be, if Occaſion required, ſooner and eaſier examined than if he ſhould be committed to the Tower: And the King commanded the ſaid Juſtices that all Things ſhould be prepar'd for the legal Proceeding; and that he would endeavour to cauſe not only the Principal, but others alſo who might diſcover the Truth of the Fact, to be apprehended. And thereupon the ſaid Chief Juſtices conferred with the other Juſtices of the King's Bench before whom the Lord *Sanchar* ſhould be tried. And before them divers Queſtions were moved concerning the legal Proceeding in this Caſe.

(*a*) 7 Co. 15 b 16. a. Calvin's Caſe. (*b*) Fitz. Proceſs 224. 7 Co. 15. b. Calvin's Caſe. (*c*) 7 Co. 15 b. Calvin's Caſe. Br. Noſme de Dignity 49. (*a*) 7 Co. 15. b. 23. a. Calvin's Caſe. Dy. 360. pl. 6. Co. Lit. 261. b.

(*e*) 2&3 E. 6. c. 24 3 Inſt. 113.

1. Upon the Statute of (*e*) 2 *E.* 6. *c.* 24. by which it is enacted, as to this Point, in this Manner. *And further be it enacted by the Authority aforeſaid, That where any Murder or Felony hereafter ſhall be committed or done in one County, and another Perſon or more ſhall be Acceſſory or Acceſſories by any Manner of wiſe to any ſuch Murder or Felony in another County, that then an Indictment found or taken againſt ſuch Acceſſory, or Acceſſories, upon the Circumſtance of ſuch Matter before the Juſtices of the Peace, or other Juſtices or Commiſſioners, to inquire of Felonies, where ſuch Offence of Acceſſory or Acceſſories in any Manner of wiſe ſhall be committed or done, ſhall be as good and effectual in Law, as if the principal Offence had been committed or done within the ſame County where ſuch Indictment ſhall be found: And that the Juſtices of Goal-delivery, or Oyer and Terminer, or two of them, of or in ſuch County where the Offence of any ſuch Acceſſory ſhall be hereafter committed and done, upon Suit to them made, ſhall write to the* Cuſtos Rotulorum, *or Keepers of the Records, where ſuch Principal ſhall be hereafter attainted, or convicted, to certify them whether ſuch Principal be attainted, convicted or otherwiſe diſcharged of ſuch principal Felony, who, upon ſuch Writing to them or any of them directed, ſhall make ſufficient Certificate in Writing, under their Seal or Seals, to the ſaid Juſtices, whether ſuch Principal be attainted, convicted, or otherwiſe diſcharged, or not. And after they, that*

that ſo ſhall have the Cuſtody of ſuch Records, do certify that ſuch Principal is attainted, convicted, or otherwiſe diſcharged of ſuch Offence by the Law, that then the Juſtices of Gaol-delivery, or of Oyer and Terminer, or other thereto authoriſed, ſhall proceed upon every ſuch Acceſſory, in the County or Counties where ſuch Acceſſory, or Acceſſories became Acceſſory, in ſuch Manner and Form as if both the ſaid principal Offence and Acceſſory had been committed and done in the ſaid County where the Offence of the Acceſſory was or ſhall be committed or done. And that every ſuch Acceſſory, and other Offenders above expreſſed, ſhall anſwer upon their Arrainments, and receive ſuch Trial, Judgment, Order and Execution, and ſuffer ſuch Forfeitures, Pains and Penalties, as is uſed in other Caſes of Felony: Any Law or Cuſtom to the Contrary heretofore uſed in any wiſe notwithſtanding. And upon this Statute divers (*a*) Queſtions were moved. 1. If the Indictment in the County of *Middleſex* of the Acceſſory ſhould recite, that the Principal was indicted before Commiſſioners of Oyer and Terminer in the City of *London*, (as in Truth he was) or if the Indictment ſhould recite *in facto*, that the Principal committed the Murder in *Lond.* &c. And it was reſolv'd, that the Indictm. in *Middleſ.* ſhould recite *de facto*, that the Principal committed the Murder in *Lond.* for the Recital, that the Principal is indicted of Murder in *Lond.* is no direct Affirm. that the Principal committed the Murder; for the Indictment is but an Accuſation, and in lieu of the King's Declaration, which may be true or falſe; and this agrees with former Precedents: And accordingly the Indictment was drawn, upon which the Acceſſory was convicted, as appears before by the Indictment it ſelf. The ſecond Queſtion moved upon the Stat. was, If the (*b*) Juſtices of the King's Bench are within theſe Words, Juſtices of Gaol-delivery, or Oyer and Terminer. And it was objected, that the K.'s Bench is the higheſt Court of Ordinary Juſtice in criminal Cauſes within the Realm, and paramount the Authority of Juſtices of Gaol-delivery, and Commiſſioners of Oyer and Terminer; and as it is held in 27 *Aſſ.* 1. is (*c*) more than the Eyre; for they ſhall examine the Errors of the Juſtices in Eyre, Gaol-delivery, and Oyer and Terminer, and therefore in as much as the Juſtices of the King's Bench are paramount and ſuperiors over all the others, they can't be included within their Inferiors, *viz.* Juſtices of Gaol-delivery, or of Oyer and Terminer. Alſo the Juſtices of the King's Bench have a diſtinct and ſupreme Court, and the Juſtices of Gaol-delivery, and Oyer and Terminer

(*a*) 3 Inſt. 48, 49.

(*b*) 3 Inſt. 103. 3 Mar. Br. Oyer and Termin. 8. 4 Inſt. 73. Cawley 66. Poſtea 118. b.

(*c*) Stanf. Cor. 35. a. 4 Inſt. 73. Fitz. Aſſiſe 246. Br. Eſcape 21. Br. Juriſdict. 66. Poſtea 118. b. Br. Judges, Juſtices, &c. 16.

Terminer, other diſtinct and ſubordinate courts. And therefore it was adjudged *Hill.* 30. *El. Reg.* in the K.'s Bench that where *R. (a) Smith* was indicted of forgery of a falſe deed at the Seſſions of *(b)* peace in the county of *Oxf.* and the Stat. of 5 *El. c.* 14. which inflicts the puniſhm. and upon which act the indictm. was grounded, provides that the indictment ſhall be taken before Juſtices of aſſiſe, and Juſtices of oyer and termin. and altho' the Juſt. of peace by their commiſſion have power to hear and determine felonies, Treſpaſs, *&c.* and have an expreſs clauſe *ad audiendum & terminand'*, ſo that they are, as it was urged, Juſt. of oyer and termin. yet it was reſolv'd *per tot' cur'*, that becauſe there was a commiſſi. of *oyer* and *terminer* known diſtinctly by that name, and the commiſſi. of the peace known diſtinctly by another name, that the ſaid indictm. was not well taken, and therefore was quaſhed. But it was reſolved, that the *(c)* Juſt. of the K.'s Bench are the ſovereign juſt. of gaol-deliv. and of *oyer* and *terminer* and therefore they are included within the ſaid words: And therefore it is held in 7 *E.* 4. 18. *a.* & 4 *H.* 7. 18. that if an indictm. of forcible entry be remov'd into the K.'s Bench, the Juſt. of the K.'s *(d)* Bench ſhall award reſtitution, and yet the Stat. of 8 *H.* 6. *c.* 9. ſpeaks only of Juſt. of the peace; but the reaſon is, becauſe they have the ſovereign and ſupream authority in ſuch caſes. And according to this reſolution, the Juſt. of the K.'s Bench wrote according to the ſaid act to the Juſt. of gaol-delivery in *London*, before whom the principal was, *&c.* who certified the record, *&c.* as appears before at large.

(a) Cro. El. 87, 697. 3 Inſt. 103. Cawl. 258, 259.
(b) Cr. El. 601, 697. Cawl. 258, 259. Savil 134. H. P. C. 165.
(c) H.P.C. 165. Cawley 66. 3 Inſt. 103. Antea 118. a. 3 Mar. Br. Oyer & Terminer 8. 4 Inſt. 73.
(d) Kelw. 159, a. b. Dy. 187. pl. 6. 11 Co. 59. a. b. 65. a. 1 Rol. Rep. 92. Br. Forcible Entre 27. Dall. 25. pl. 8. Dall. in Kelw. 204. pl. 2. Dall. in Aſh. pl 2. Fitz. Entre 44. Br. Reſtitut. 11. Dalt. Juſt. c. 314. Jenk. Cent. 197, 221.

3. It was moved, if the L. *Sanchar* could not in term-time be indicted, arraigned, and convicted at *Newg.* before com'ers of (e) *oyer* and *termin.* for the county of *Middleſ.* and it was reſolved he could not; for the K.'s Bench, as has been ſaid, is *(f)* more than Eyre, and therefore in *(g)* term-time no commiſſi. of *oyer* and *termin.* or gaol-deliv. by the com. law, can ſit in the ſame county where the K.'s Bench ſits, for *(h) in præſentia majoris ceſſat poteſt' minoris*, and therewith agrees 27 *Aſſ. p.* 1. But *Carliell* and *Irweng* were indicted and attainted in *Lond.* where the murder was committed, before juſt. of *oyer* and *termin.* in the *(i)* term-time, becauſe in another county than where the K.'s Bench ſits. 4. It was mov'd, if the L. *Sanchar* being indicted in the K.'s Bench, if there muſt be (k) 15 days for the return of the *Ve. fa.* for if 15 days are requiſite, he can't be arraigned this term, and it was reſolv'd not, becauſe the offence was committed in *Middleſ.* where the court ſits; but if the indictment had been taken in any other county, and removed thither, there ought to be fifteen days, *&c.* and therewith agree the Precedents, and the continual uſage of the ſame court. 5. It was reſolved, that for as much as there was not any direct

(e) H.P.C. 156. 3 Inſt. 27. 4 Inſt 73.
(f) Stanf. Cor. 35. a. 4 Inſt. 73. Fitz. Aſſiſe 246. Br. Eſcape 21. Br. Juriſdiction 66. 27 Aſſ. pl 1. Br. Judges, Juſtices, &c. 16. Antea. 118. a.
(g) 10 Co. 73. b. 3 Inſt. 27.
(h) 10 Co. 73. b. 2 Inſt. 26, 166.
(i) Poſt. 121. a.
(k) 2 Inſt. 550, 568. H. P. C. 157. Co. Lit. 134. b.

direct proof, that *James Irweng* was commanded or procured by the Lord *Sanchar* to commit the murder, but that he associated himself to *Rob. Carliell* who was procured by him, that the (*a*) best way is to indict the Lord *Sanchar*, as accessory to *Rob. Carliell* only, for indictments which concern the Life of men ought to be framed as near the truth as may be, & *eo potius*, because they are to be found by the oath of the grand inquest, which finding is called (*b*) *vere-dictum, quasi dictum veritatis*, and yet it was resolved, that if one is indicted as accessory to (*c*) two, and he is found accessory to one, the verdict is good. *Vide* the Stat. of *W.* 1. *c.* (*d*) 14. by which it is enacted, *that none be outlawed upon appeal of commandment, force, aid, or receit, until he that is appealed of the deed be attainted, so that one like law be used therein thro' the realm*; which is but an affirmance of the com. law; for there can't be an accessory, unless there be a principal, no more than there can be a shadow, unless there be a body. But this word *appeal* has 2 significations in law, one general, and that is taken for an Accusation generally, and *accusatio est duplex*, either by inquisition, *i.* by indictment, and that is at the suit and in the name of the K. or by the party, and in his name, as in appeal by writ or bill; or 2dly, by appeal, *i.* accusation of an approver, and therewith agree all our books, and *Stamf. l.* 2. *de Plac' cor' c.* 52. *f.* 142. *b.* where he saith, after the confes. of the crime the felon may appeal, *f.* accuse others coadjutors with him to do the felony, and in this particular sense for accusation of the party it is often taken. And as there are 2 manner of accusations, so there are two manner of attainders of felony, *f.* by judgment given, *f.* one at the K.'s suit, and the other at the suit of the party, and both these attaind. are in 2 manners, one after (upon) appearance and the other upon default after appearance, 2 ways, *f.* either by verdict, or confession, and at the suit of the party, a third way, *f.* by battle, upon default by process of *outlawry*, where judgm. is given by the (*e*) coroners, or by those whom an act of parliam. and custom have enabled. And in the Stat. of *W.* (*f*) 1. these words *upon appeal of commandment*, &c. are to be intended of an accusation generally, *f.* by indictm. as by writ or bill, &c. and these words *until he that is appealed of the deed be attainted*, are meant of all manner of attainders, either at the K.'s suit, or at the suit of the party, and either upon appearance or upon default. And afterwards in the same act provision is made for the appeal of the party, which implies that the word appeal shall be taken in the general sense. 6. It was resolved that if the principal is (*g*) erroneously attainted, either for error in the process, or because the principal being out of the realm, &c. is owtlawed, or that he was in prison at the time of the outlawry, &c. yet the accessory shall be attainted, for the attainder against

(*a*) 2 Inst. 183.

(*b*) Co. Lit. 226. a.

(*c*) 2 Inst. 183. H. P. C. 265.

(*d*) 2 Inst. 182, 183. 3 Inst. 138. Outlawry 2 Salk. 699.

(*e*) 4 Co. 32. b. Co. Lit. 288. b. Cr. El. 50.

(*f*) W. 1. c. 14. 2 Inst. 182, 183. 184.

(*g*) Ant. 68. a. b. 2 R. 3. 21. b.

the principal ſtands till it is reverſed; and therewith agrees (*a*) 2 *R.* 3. 12. the reſolution of all the Juſtices in the King's Bench: And in 18 *E.* 4. 9. *b.* the (*b*) principal was erroneouſly outlawed for felony, and the acceſſory taken, indicted, arraigned, convicted, attainted, and hanged, and afterwards the principal reverſt the outlawry, and was indicted and arraigned of the ſaid Felony, and found not guilty, by which he was acquitted; and all this appears in the ſaid book. Then it will be demanded, that foraſmuch as there can't be an acceſſory, unleſs there is a principal, and in this caſe there is no principal, how the heir of the acceſſory ſhall be reſtored to the land which his father had forfeited by the ſaid unjuſt attainder? To that it is to be anſwered, that the Heir may enter or have his action, for now upon the matter by act in law the attainder againſt his father is without any writ of error utterly annulled; for by the reverſal of the attainder againſt the principal, the attainder againſt the acceſſory, which depends upon the attainder of the principal, *ipſo facto* is utterly defeated and annulled; and this notably appears in an ancient book, in the time of *E.* 1. Tit. *Mortdaunceſt.* 46. where the caſe is, *A.* was indicted of felony, and *B.* of the receipt of *A.* *A.* eloined himſelf (and is outlaw'd) *B.* was taken, and put himſelf upon inqueſt and found guilty, for which *B.* was attainted, and hanged, and the Lord entred, as into his eſcheat, and afterw. *A.* came, and reverſed the outlawry, and pleaded to the felony and was found not guilty, by which he was acquitted; whereupon the heir of *B.* brought a (*c*) *Mortdanceſter* againſt the lord by eſcheat, who came and ſhewed all this matter, and there was a demurr. upon it; and it was awarded that the heir of *B.* ſhould recover ſeiſin of the land, for if *B.* was now alive, he ſhould go quit by the acquittal of *A.* becauſe he could not be receiver of a felon, when *A.* is no felon; and all this appears in the ſaid book. *Vide* 4 *E.* 3. 36. *b. in Dower* 43 *E.* 3. 3. *a. in Aſſiſe & Rediſ.* 8 *H.* 4. 4. 11 *H.* 4. 4. 4 *E.* 4. 20. 6 *E.* 4. 9. 13 *E.* 4. 4. 9 *H.* 6. (13.) 38. *b.* 8 *H.* 7. 10. & *vide* the caſe of ſentence (*d*) of deprivation of one, and preſentm. inſtitution, and induction of another, and after by relation of a general pardon *ipſo facto* all are reſtored without appeal, or new preſentat. admiſſion, or inſtitution, *qd' vide* (*e*) *Dy. Nota* reader, to ouſt all queſt. to what gaol offenders ſhall be committed, it is enacted by the Stat. of (*f*) 5 *H.* 4. *c.* 10. that none ſhall be impriſonned by any juſt. of peace, but only in the com. gaol, ſaving to lords and others, who have gaols, their franchiſes in that caſe. By which it appears, how juſt.s of peace offend who commit felons, *&c.* to either of the counters in *Lond.* and other priſons, which are not com. gaols. But foraſmuch as ſeveral perſons have earneſtly deſired to know the circumſtances as well of the proceeding as of the fact itſelf, I will comply with their requeſt.

(*a*) Ant. 68 b. 2 R. 2. 21. b
(*b*) Br. Cor. 165.
(*c*) H. P. C. 207. 1 Rol. 777.
(*d*) 6 Co. 13. b. 14. a. 3 Inſt. 238. Hob. 82, 293. Cr. El. 41, 789. Moor 132. Owen 87. Latch 22, 141. 1 Sid. 164, 168. Palm. 412.
(*e*) Dy. 235. pl. 19. 6 Co 13. b.
(*f*) 2 Brownl. 41. 2 Inſt 43. Cro. El. 830.

A Brief

A Brief Recital of the Facts occurring in the ſaid Caſe.

Robert Creighton, Baron of *Sanchar*, a *Scotchman*, about five Years ago play'd at Foils with *John Turner*, a Fencing-Maſter, and it happen'd that *Turner* in playing ſtruck out the Baron's Eye with his Foil; upon which the Baron, finding himſelf impatient under ſo great an Affront, and not able to bear the Loſs of his Eye without having his Revenge, reſolved to procure ſome Body to kill *Turner*, and among his other Servants he prevailed upon *Gilbert Gray* and *Robert Carliell*, *Scotchmen*, two of his followers, to ſhoot *Turner* upon the firſt Opportunity that ſhould offer: Theſe two then undertook to accompliſh this Deſign, and induſtriouſly endeavoured to execute it; but the ninth Day of *May* laſt, *Gray* repenting of a Purpoſe and Act ſo barbarous, vile and bloody, being touched with the Motion of the Holy Ghoſt, reſolved to proceed no farther, which the Baron of *Sanchar* being informed of, and that *Gray* ſlackened in his Promiſe, *Robert Carliell* (as is aforeſaid) undertook to execute what he had promiſed; who the eleventh of *May* following aſſociating himſelf with *James Irweng*, a *Scothman* of the Frontiers, about ſeven o' Clock in the Evening came to an Houſe in the Friars, which *Turner* uſed to frequent as he came from his School, which was near that Place; and finding *Turner* there they ſaluted one another, and *Turner* with one of his Friends ſat at the Door, aſking them to drink, but *Carliell* and *Irweng* turning about to cock the Piſtol came back immediately, and *Carliell* drawing it from under his Coat diſcharged it upon *Turner*, and gave him a mortal Wound near the left Pap; ſo that *Turner* after having ſaid theſe Words (Lord have Mercy upon me, I am killed) immediately fell down: Whereupon *Carliell* and *Irweng* fled, *Carliell* to the Town, and *Irweng* towards the River, but miſtaking his Way, and entring into a Court where they ſold Wood, which was no Thoroughfare, he was taken. *Carliell* likewiſe fled, and ſo did alſo the Baron of *Sanchar*. The Ordinary Officers of Juſtice did

did their utmoſt, but could not take them: For in Fact (as appear'd afterwards) *Carliell* fled into *Scotland*, and *Gray* towards the Sea thinking to go to *Sweden*, and *Sanchar* hid himſelf in *England*.

The Impediments of Juſtice, Difficulties of Law, and Impoſſibilities of legal Proceeding to take *Carliell* the Principal, which were in this Caſe, are remarkable and worthy Conſideration. The Cure and Remedy of the Whole ought to be only and wholly attributed to the great Care of his moſt excellent Majeſty, and to his perpetual Love and Zeal for Juſtice, as will clearly appear by what follows.

The Impediments of Juſtice were two.

1. The Truth of this Fact touching the Baron of *Sanchar* could not appear, becauſe it conſiſted only in the Words of his Mouth by Incitation and Procurement, but by *Gray* and *Carliell* who were fled; or by himſelf, and he was likewiſe gone.

2. It was not as yet known whither they were fled, and it could not be found out by all the Search and Diligence which was uſed by the Officers and Magiſtrates of Juſtice.

The Difficulties of Law are manifeſt by the foregoing Reſolutions.

Impoſſibilities of legal Proceeding.

1. It was impoſſible by legal Proceſs to apprehend the Body of *Carliell* being in *Scotland*.

It was impoſſible alſo to proceed againſt the Baron of *Sanchar* (who was but an Acceſſory) before the Principal was attained, a Thing which would have required a very long Proceeding, if he had not been taken.

Now therefore let us behold here the Love and Zeal which his Majeſty always had for Juſtice, who being informed by ſome of his principal Judges, with whom he had conſulted touching the Nature of this preſent Caſe, and finding, if this Fact ſhould be left to the ordinary Proceeding of the Law, *Carliell* the Aſſaſſin could

could not be taken, and that no ordinary Power had been able to find *Gray* the Witneſs, nor *Sanchar* the Author; Lo! The King by Proclamation gives Authority to any Perſon whatſoever to apprehend theſe three, with a Promiſe of great Reward [*for their Apprehenſion*]. Ryn. Fœd. vol. 16. 53,721.

Upon this the Baron of *Sanchar*, well knowing that the Principal Aſſaſſin and the Witneſſes were fled, ſurrendered himſelf, and denied that he incited or procured the Fact: Wherefore his Majeſty ſent Poſt to the Sea Ports (the Gates of the Kingdom) as alſo into *Scotland* and other Places of his Dominions, where his admirable Prudence had Hopes of finding them. And the Lord ſo crowned his Royal Thoughts, and gave ſuch a Bleſſing to his Zeal for Juſtice, that ſome of his Couriers took *Gray* at the Port of *Harwich* ready to imbark for *Sweden*, and *Carliell* in *Scotland*, thinking to croſs the Sea for his greater Safety. *Gray* then, being by his Majeſty's Command examined, confeſt the whole Truth of the Fact againſt the Baron of *Sanchar*: Who likewiſe by his Majeſty's Direction being confronted with *Gray*, and particularly examined touching certain Articles ſpecial and pertinent (Dictated by his Majeſty himſelf,) confeſt by Writing under his own Hand, that he had incited and procured this Aſſaſſination, and being preſt thereupon by the Queſtions he diſcovered a long and inveterate Malice which he had had, with all the Occaſions and material Circumſtances of this Murder.

His Majeſty having Regard to that which the Holy Ghoſt admoniſhes us of (*quia non profertur cito contra Malos ſententia, abſque Timore ullo filii hominum perpetrant Mala*) gave Orders two Days after, that *Carliell* the Principal ſhould be brought to *London*, that he and *James Irweng* (in full Term, a Thing not uſual) might be carried before the Juſtices at *Newgate*, and attainted and convicted, and a few Days after the Baron of *Sanchar* was likewiſe attainted and convicted at the King's Bench in full Term, and in a ſhort Time after Eccleſiaſt. 8. 11. Antea 118 b.

to accompliſh his Majeſty's Zeal for Juſtice, the Baron (*d*) 3 Inſt. 13. *Sanchar* was (*a*) hanged publickly in Term-Time at the Palace of *Weſtminſter*, according to the Judgment and Sentence which he had before received.

I have reported this Caſe with all the Circumſtances, becauſe this Example has not its Parallel: For altho' 'tis true, that the late Queen *Mary* is very famous on Account of the exemplary Juſtice which ſhe cauſed to be executed upon Baron *Sturton* for the barbarous Murder of *Harquil*; yet this preſent Example of the Baron of *Sanchar* very much ſurpaſſes that of the Baron of *Sturton*, and that for many Conſiderations. 1. Becauſe the Baron of *Sturton* was taken by the ordinary Courſe of the Law, even within the Kingdom, but the Principal in this Caſe could not be taken by any common Power, but by Means of his Majeſty's Royal and abſolute Power only. 2. The Baron of *Sturton*'s Offence was very apparent, and without any *Difficulty of Law*: On the contrary this of *Sanchar* was *thereof* (as appears) very full, but by his Majeſty's Command all theſe Difficulties with the Conference and grave Conſideration of his principal Judges, after Search of Caſes precedent, were reſolved and cleared up, and notwithſtanding the Impediments, Difficulties and Impoſſibilities in legal Proceeding, greater Expedition was uſed in this Caſe than in that. In ſhort, the Accompliſhment of the Whole, the Clearing up the Truth of the Fact in the Caſe of the Baron of *Sanchar*, muſt be attributed to the great Wiſdom, Power and Vigilance of his Majeſty, as appears by that which has been thereof ſaid before.

Rym. Fœd. vol. 16 ante, & vol. 17. 59, 83, 187.

The Baron of *Sanchar* was a Man of a very ancient and noble Family in *Scotland*, he was a Man of great Courage and Wit, endowed with many excellent Gifts as well natural as acquired; the Eloquence of his Diſcourſe with the Civility and Diſcretion of his Behaviour, when he came before and went from the Judges, compelled the People (who honoured him on Account of his moral Virtues

Virtues, and thoſe for his ſake) to bewail his Fall with great Grief, (altho' the Occaſion of it was this baſe and barbarous Aſſaſſination premeditated for five Years together with a Malice bloody and inveterate). This extraordinary Affection of the People, was (as he himſelf confeſſed) a very great Conſolation to him in his laſt Troubles and Afflictions. But at laſt their Compaſſion abated, becauſe they perceived he died (*Papiſte obſtiné* an *obſtinate Papiſt*.

CASES IN THE *Court of Wards.*

ANTHONY LOWE's *Caſe.*

Trin. 7 Jac. 1. *In the Court of Wards.*

Skinner 606. *ANthony Lowe* held 59 Acres, and a Rood of Land in *Alderwaſley*, of the Manor of *Alderwaſley*, by Knights Service, and Suit of Court to *Bewraper*, *de tribus ſeptimanis in tres ſeptimanas*, of which Manor of *Bewraper* the Manor of *Alderwaſley* was Parcel; the ſaid Manors of *Bewraper* and *Alderwaſley* were Parcel of the Earldom, and afterwards of the Dutchy of *Lancaſter*, which Manors were held of the King by Knight's Service *in Capite* before they came to the Crown. The Dutchy of *Lancaſter* together with the ſaid Manors came afterwards to the Crown by Deſcent: The ſaid *Anthony* held alſo a Place where a capital Meſſuage was ſituate, and half an Acre of Land in *Alderwaſley* held of the Manor of *Alderwaſley* by Socage Tenure, and Fealty and Rent, amongſt other Lands: *H.* 8. by Letters Patent under the Dutchy Seal dated 22 *Junii anno* 15 granted to the ſaid *Anthony Lowe* and his Heirs, Anceſtors to the Plaintiff, whoſe Heir he is, the aforeſaid Rent, and further ratified, remiſed, releaſed, and confirmed *ſtatum præd' Anthonii in terris & tenementis præd', Habend' & tenend' præd' Anthonio & hæredibus ſuis, de nobis, hæredib' & ſucceſſorib' noſtris per fidelitatem*

tem tantum pro omni ſervitio ſeculari, exactione & demand'. And the ſaid *Ant. Lowe* ſo ſeiſed of the ſaid 59 Acres, &c. and of the Place where the capital Meſſuage was ſeiſed, 22 *Mart. an.* 19 *H.* 8. the K. granted the ſaid Manor of *Alderew.* and all Lands, Tenements, Rents, Reverſions, and Services in *Alderwaſley* and *Aſhleyham* Parcel of the Dutchy of *Lancaſter* to *Ant. Lowe* Anceſtor of the Pl. whoſe Heir he is, and his Heirs, to hold the ſaid Manor, Lands, Tenem. Rents, Reverſions and Services of the K. his Heirs and Succeſſors, by the yearly Rent of 26 *l.* 10 *s.* and Fealty only for all Services, Exactions and Demands: And the ſaid Grant was executed by Livery and Seiſin: All which Premiſſes are Parcel of the Dutchy of *Lanc.* and out of the County Palatine of *Lanc.* And it was objected, That when the K. granted his Seigniority to his Ten't, to have to him and his Heirs, by that the ancient Tenure is extinct, and then the Law will create a Tenure *in Capite* by the Knight's Serv. for the beſt ſhall be taken for the King, as if the King grants Land to another, without a Reſervation or Mention (*a*) of any Tenure, the Law will create a Tenure *in Capite* by Knights Service for that is the beſt for the K. and ſo if the K. grants Lands (*b*) *abſque aliquo inde reddendo*, the Law will create the like Tenure, and therewith agrees 33 *H.* 6. 7. *a.* for of Neceſſity all Land ought to be held of ſome Perſon. 2. When the King has extinguiſh'd the Services which are Parcel of the Manor of *A.* then the Tenancy ſhall be held as the Manor of *A.* was held, and that was a Tenure *in Capite*, and the Act of 1 *H.* 4. and divers other Acts have divided the Poſſeſſions of the Dutchy from the Crown.

But it was reſolv'd, That the Tenure of the ſaid 59 Acres, and Toft and half Acre ſhould be held by (*c*) Fealty only; and as to the ſaid Object. it was anſwered, That when the K. grants or releaſes the Services to the Ten't and his Heirs, it can't extinguiſh the Tenure in all for Neceſſity of Tenure, and the K. can't by his Charter alter the Law, but it ſhall be (*d*) expounded as near the K.'s Intent as may be, and that is to extinguiſh all the Services, but that only which is an inſeparable incident to every Tenure, and that is Fealty, for that the King may do by the Law, and *id Rex poteſt quod de jure poteſt. Vide* 8 *H.* 7. *caſu ultimo.*

And as to the Caſes which have been put out of the Book in (*e*) 33 *H.* 6. they were agreed and affirmed for good Law; but a Difference was taken when Land paſſes from the King by his Grant, and in his Grant (*f*) no Tenure is reſerved, or when a Clauſe is added *abſque aliquo inde reddendo*, there the Law will create a Tenure beſt for the King: But when the Land paſſes from a Subject, and the Law

(*a*) 6 Co. 6. b. 29 H 8. Br. Livery 57. 2 Rol 502. Poſtea 123. b. Ley de Gards, &c. 3. Plowd. 240. b. Br. N. C. 113.

(*b*) Poſt. 123. b. 2 Rol. 502. 6 Co. 6. b. Ley de Gards, &c. 3.

(*c*) Co. Lit 98 a. Ley de Gards, &c.

(*d*) 1 Co. 49 a. 6 Co. 6 a. 7. a. 56. a. 8 Co 77. a. 56. a b. 1666. b. 9 Co. 30 a. 10 Co. 67. b. 11 Co. 11. a. 2 Init 496, 497. 2 Rol. 200. 3 Bulſtr. 6. Kelw 175. a. 198 a. 4 Sid. 141. 2 Leon. 243. Plowd. 32, a. 126. a. 143. b. Hard. 500. Fitz. Grant 29. Br. Exemp 9. Co. Lit 98 a.

(*e*) 33 H 6. 7 a.

(*f*) 2 Rol. 502.

for Neceſſity changes one Tenure to another, there the Law, (*a*) which is *æquiſſimus judex*, will create a Tenure as (*a*) near the Freedom of the firſt Tenure as may be: As if a Biſhop or (*b*) other Man of the Church held certain Land of the King in Frankalmoigne, and at the Common Law had infeoffed another and his Heirs of the ſame Land, in this Caſe the Feoffee ſhall hold by Fealty only, for that is as near the Freedom of the Tenure in Frankalmoigne as may be; and ſo was it reſolved in *Lone*'s Caſe.

(*a*) Co. Lit. 98. a.

(*b*) Lit. ſect. 139. Co. Lit. 98. a.

And the Reaſons and Cauſes of this Difference is, becauſe in the firſt Caſe the Land moves from the King, and therefore ſhall be ſubject to ſuch Tenure as the Law will create; but when Ten't in Frankalmoigne enfeoffs another, there the Feoffee is in by a Subject, and not by the King, for in ſuch caſe the King departs with nothing. Alſo in this later Caſe the Law doth not create any Tenure originally, as it doth in the firſt Caſe, but only changes one Tenure into another, *ſ.* a Tenure in Frankalmoigne into a Tenure by Fealty only.

And it was reſolved, That when the King grants any Land (*c*) without Reſervation of any Tenure, or (*d*) *abſq; aliquo inde reddendo*, or the like, there the Land by Operation of Law ſhall be held of the K. *in Capite* by Knights Service, according to the Rate and Proportion of Land which belongs to a Knight's Fee, and ſo of more more, and of leſs leſs; for the Act of Law reſpects Equity, and will never charge any one with more or leſs than in Equity and Reaſon it ought: (*e*) *Ipſæ etenim leges cupiunt ut jure regantur*. And the Caſe at Bar is ſtronger, becauſe the King upon the Grant of the Service, limits the Tenure to be by Fealty only, (*f*) for all Services Exactions and Demands. And the Juſtices took no Regard of the Tenure before the Crown and Dutchy were united in one and the ſame Perſon; for as long as they remain in one Perſon, the ancient Tenures of the Crown *dormiunt perpetuo ſomno*, for the King cannot hold of himſelf.

(*c*) Br. Tenure 3. 33 H. 6. 7. a. 6 Co. 6 b. 19 H. 8. Br. Livery 57. 2 Rol. 502. Antea 123. a. Ley de Gards, &c. 3. Plow. 240. b. Br. N. Ca. 113

(*d*) 2 Rol. 502, 516. 33 H. 6. 7. a. 6 Co. 6. b. Le de Gards. &c. 3. Br. Tenure 3. Ant. 123. a.

(*e*) 2 Co. 25. b. 5 Co. 100. a. 8 Co. 152. a.

Note Reader, there are many and divers Opinions of the Content (*g*) of a Knight's Fee; ſome ſay, that a Hide or a Carve of Land contains 100 Acres, and that eight Hides or 800 Acres of Land make a Knight's Fee: And others hold, that 680 Acres of Land make it. Others ſay, *Quod bovata terræ continet* 15 *acras*, & 8 *bovatæ faciunt carucatam terræ*, by which account a Carve of Land contains one hundred and twenty Acres, and divers other Opinions are concerning theſe Matters. But I conceive, That a Knight's Fee, or Hide, or Carve, or Yard, or Oxgang of

Co. Lit. 10. a. 43. a. 166. b. 174. b. 271. b.

(*f*) Lit. Rep. 49.

(*g*) Co. Lit. 69. a. 83. b. 2 Rol. 506. 7 Co. 33. b.

of Land, doth not contain any certain Number of Acres; but a Knight's Fee is properly to be (*a*) eſtimated according to the Quality, and not according to the Quantity, *i.* by the Value, and not by the Content; and therefore it is true, *quod Doctiſſimus Camden in ſua Britannia, p.* 126. *aſſerit*, viz. * *Subſequenti ætate ex cenſu ut colligitur facti fuer' Equites, &c.* and Antiquity thought that (*b*) 20 *l.* of Land was ſufficient to maintain the Degree of a Knight, as it appears in the ancient Treatiſe *De modo tenendi Parliamentum tempore Regis Edwardi filii Regis Etheldredi*; where it appears *Quod Comitatus. (viz.* an Earldom*) conſtat ex* (*c*) *viginti feodis unius militis, quolibet feodo computato ad viginti libratas*; *Baronia conſtat ex* (*d*) 13 *feodis*, & 3 *parte unius feodi militis, ſecundum computationem prædict' unum feodum militis conſtat ex terris ad valentiam* (*e*) 20 *l.* which Antiquity I cite, becauſe it concurs with the Act of Parliament *anno* 1 *E.* 2. *de militibus*, by which Act (*f*) *cenſus militaris* the Eſtate of a Knight is meaſured by the Value of 20 *l.* of Land *per ann.* and not by any certain Content of Acres: And therewith agrees the Statute of *W.* 1. *c.* (*g*) 35. & *F. N. B.* 82. where 20 *l.* of Land in Socage is put in Equipage with a Knight's Fee, and that is the moſt reaſonable Eſtimation, for one Acre may be better than many others, ſo that he who (*h*) had 680 Acres, or 800 Acres of ſome barren Land had not a ſufficient Revenue to maintain the Degree of a Knight; and he who had a leſs Number of Acres of ſome Land, had a living *in diebus illis* ſufficient for the Maintenance of a Knight. So Antiquity thought that (*i*) 400 Marks of Land *per ann.* was a competent living of a Baron; and 400 *l. per ann. ad ſuſtinendum nomen & onus* (*k*) of an Earl; and of late Time 800 Marks *per ann.* of a Marqueſs, and 800 *l. per ann.* of a * Duke: So that there annual Revenue was eſtimated by the Value, and not by the Content. (*m*) And a Carve of Land *Carucata terræ*, or a Hide of Land, *Hida terræ*, (which is all one) is not of any certain Content, but as much as a Plough can plough in a Year, and therewith agrees *Lambard, verbo Hyde.* And a Carve of Land, may (*n*) contain an Houſe, Wood, Meadow, and Paſture, becauſe by them the Ploughmen and the Beaſts of the Plough are maintained: And therewith agree, *Temp. E.* 1. (*o*) Tit. *Brief* 160 (860) 4 *E.* 3. 47. *Plo. Com.* in *Hill* and *Grange*'s Caſe 168. *Vide* 6 *E.* 3. 42. & 39 *H.* 6. 8. *a.* And *venerabilis Beda* calls a Plough-Land *familiam*, becauſe it contains neceſſary Things for the Maintenance of a Family. And (*p*) *Priſcot* well ſaid in 35 *H.* 6. 29. That a Plough may plough more Land in a Year in ſome Country than in another

(*a*) 2 Rol. 506. Co. Lit. 69. a.
* Co. Lit. 86. a.
(*b*) Co. Lit. 83. b.
(*c*) Co. Lit. 83. b. 69. a. Ley de Gards, &c. 5.
(*d*) Co. Lit. 83. b. 69. a. Ley de Gards, &c. 5.
(*e*) Co. Lit. 69. a. 83. b. Ley de Gards, &c. 5.
(*f*) Co. Lit. 69. a.
(*g*) Co. Lit. 69. a.
(*h*) Co. Lit. 69. a.
(*i*) Co. Lit. 69. a.
(*k*) Co. Lit. 69. a.
(*l*) Co. Lit. 69. a. Ley de Gards, &c. 5.
* Co. Lit. 69. a. Ley de Gards, &c. 5.
(*m*) Co. Lit. 69. a.
(*n*) Co. Lit. 69. a.
(*o*) Co. Lit. 69. a.
(*p*) Co. Lit. 69. a.

ther Country; and therefore it ſtands with Reaſon that a (*a*) Carve of Land ſhould be leſs in one Place than in another, 41 *E.* 3. *Fine* 40. & 13 *E.* 3. *Fine* 67. A Fine ſhall not be received *de* (*b*) *una virgata terræ*, for the Incertainty; *Vide* 39 *H.* 6. 8. But an Acre of Land is certain by the Statute (*c*) *de terris menſurandis*. (*d*) *Nota* alſo Reader, That every Carve of Land was of ancient Time of the yearly Value of five Nobles *per ann.* and that was the Living of a Sokeman or Yeoman, & *ex* (*e*) *duodecim carucatis conſtabit unum feodum militis*, which amounts to 20 *l. per ann.* and this you may ſee *Termino Paſchæ anno* 3 *E.* 1. *coram* Rogero *de* (*f*) Seyton & *ſociis ſuis Juſticiariis apud* Weſtm'. Ebor' *rot.* 10. Radulphus *de* Normanville *petens in brevi de medio queritur contra* Luciam *de* Kyme *quod cum ipſe teneat de ipſa duas carectatas terræ in* Coningſton *per homagium & ſervitium militare, unde duodecim carucatæ terræ faciunt unum feodum militis pro omni ſervitio, ipſa diſtrinxit ipſum ad faciendum ſectam ad curiam ſuam de* Thornton *in* Craven, &c. And it is to be obſerved that the (*g*) Relief of a Knight and of all ſuperiors who are Nobles, is the 4 Part of their Revenue *per ann.* as of a Knight 5 *l.* which is the 4 Part of 20 *l.* So *una Baronia conſtat ex* 13 *feodis militum*, & *de* 3 *parte unius feodi militis*, which amount to 400 Marks, and therefore his Relief is the 4 Part of it, *ſc.* 100 Marks; and an Earldom conſiſts of 20 Knights Fees, which amount to 400 *l.* and therefore his Relief is 100 *l.* and this appears by the Statute of *Magna Charta*, *chap.* 2. and by the Equity of that Statute, foraſmuch as a Marqueſdom which conſiſts of the Revenues of two Baronies, which amount to 800 Marks, he ſhall pay according to juſt Proportion for his Relief 200 Marks; and becauſe a Dukedom conſiſts of the Revenues of two Earldoms, *ſc.* 800 *l. per ann.* a Duke ſhall pay 200 *l.* for Relief, which is alſo the 4 Part of his Revenue, and therewith agree the Records of the Exchequer. *Nota* Reader, at the Time of the making of the Statute of *Magna Charta*, *f.* 9 *H.* 3. there was not any Duke, Marqueſs or Viſcount in *England*, (and therefore the Statute does not make mention of them) and (*i*) the eldeſt Son of King *E.* 3. called the Black Prince, was the firſt Duke in *England* after the Conqueſt, and *Robert* Earl of (*k*) *Oxford*, in the Reign of *R.* 2. was the firſt Marqueſs; *ſic enim inter ordines* Angliæ *in ſua Britannia teſtatur* Camden, *ubi ſupra*. *Et titulus* (*l*) *Marchionis ſerius ad nos devenit, nec ante* R. 2. *tempora cuiquam delatus, ille enim* Robertum *Vere* Oxoniæ *comitem delicias ſuas primum Marchionem* Dubliniæ *deſignavit, merumque erat honoris nomen. Hæc ille.* And before the Reign of K. *H.* 6. there was not any (*m*) Viſcounts; *ſic enim idem Author ubi ſupra*

(*a*) Co. Lit. 69. a.
(*b*) Co. Lit. 69. a.
(*c*) Co. Lit. 69. a.
(*d*) Co. Lit. 69. a.
(*e*) Co. Lit. 69. a.
(*f*) Co. Lit. 69a.
(*g*) 2 Rol. 515. 516. Co. Lit. 69. b. 83. b. 7 Co. 33 b. 34 a
(*h*) Co. Lit. 69. b.
(*i*) Co. Lit. 69. b.
(*k*) Co. Lit. 69. b.
(*l*) Co. Lit. 69. b.
(*m*) Co. Lit. 9. a.

pra asserit. (a) *Post comites, Vicecomites ordine sequuntur, Vicounts nos vocamus; hæc vetus officii sed nova dignitatis appellatio, &* H. 6. *tempore ad nos primum audita. Hæc ille. Et Dominus de* (b) *Bello monte* was the first Viscount created by King *H.* 6. *Vide Cassianeum in gloria mundi, parte* 4. *consider'* 55. That this Dignity of Viscount is of great Antiquity in other Realms.

(a) Co. Lit. 69. b.

(b) Co. Lit. 69. b.

FLOYER's

FLOYER's *Caſe.*

Hill. 8. Jac. 1.

In the Court of Wards.

Cr. Jac. 294, 295.

ANthony Floyer and *Anne* his Wife were ſeiſed in their Demeſne as of Fee, in the Right of the ſaid *Anne* of the 4 Part of the Manor of *Burdoceſton, alias Burſton*, held by Knight's Service *in Capite*, and *Anno* 36 *Eliz.* levied a Fine thereof to *Cribbe* and *Radway*, and to the Heirs of *Cribbe*, and the Conuſees granted and render'd the ſaid 4 Part to the ſaid *Anthony* and *Anne*, and to the Heirs of the ſaid *Anthony* on the Body of the ſaid *Anne* lawfully begotten, and for want of ſuch Iſſue to the Uſe of the right Heirs of the ſaid *Anthony:* And afterwards the ſaid *Anthony* and *Anne Anno* 2 *Jac. Regis* levied a Fine *come ceo, &c.* of the ſaid 4 Part to *Wadham* and *Manwaring*, to the Uſe of the ſaid *Anthony* and *Anne*, for the Term of their two Lives, and afterwards to the Uſe of *Anthony* their eldeſt Son in Tail, and afterwards to the Uſe of *William* their ſecond Son in Tail, and afterwards to the Uſe of *John* their third Son in Tail; and afterwards to the Uſe of the Heirs of the Body of the ſaid *Anthony* and *Anne*, and for want of ſuch Iſſue to the Uſe of the right Heirs of the ſaid *Anne:* And afterwards *Anthony* the Father died, *Anthony* his Son being within Age, *ſ.* of the Age of fourteen Years, the ſaid *Anne* being yet alive. And the Queſtion was, if the K. in this Caſe ſhould have the Wardſhip of the Body of *Anthony* the Son, and of the 3 Part of the ſaid 4 Part, or any of them; and it was argued on the King's Part, That the King in this Caſe had two Titles

to

to the Wardſhip of the Body; and ought alſo to have the third Part of the fourth Part of the Manor. And the firſt Title to the Body was by the Proviſo in the End of the Stat. of 32 *H.* 8. *c.* 1. For by the ſaid firſt Fine the fourth Part was rendred to *Anthony* the Father and *Anne*, and to the Heirs of *Anthony* of the Body of *Anne*; and altho' the Stat. ſaith; *where two or more Perſons now hold, or hereafter ſhall hold any Manors Lands, Tenements, or Hereditaments of the King by Knight Service jointly to them, and to the Heirs of one of them, and he that hath the Inheritance thereof dieth, his Heir being within Age, that in every ſuch Caſe the King ſhall have the Ward and Marriage of the Body of ſuch Heir ſo being within Age, the Life of the Freeholder or Freeholders*, &c. *notwithſtanding*. Yet if two are ſeiſed to them, and to the Heirs of the Body of one, and he who has the Eſtate-tail dies, his Heir within Age, he ſhall be in Ward, for that is in equal Degree, *qd' fuit quoad hoc conceſſum per tot' Cur. Vide* 7 *El. Dyer* 237. & 35 *H.* 8. 54. (*a*) Sir *David Owen's Caſe*. And it was ſaid, that altho' the Husband and Wife have altered the Eſtate before the Death of *Anth.* the Father, yet foraſmuch as they have not conveyed the Land but to the Uſe of themſelves and their Iſſues, it ſhall not toll the Intereſt which the King had by the firſt Fine, by Force of the ſaid Act. The 2d Title which the King had to the Ward of the Body, was upon the ſecond Fine, for by the ſecond Fine the Uſe is limited to the Wife for her Life, which is directly within the ſaid Act of 32 *H.* 8. and alſo of the Act of 34 *H.* 8. and for this Reaſon alſo the King ſhould have the Wardſhip of the third Part of the ſaid fourth Part of the Manor.

Cr. Jac. 40.

Cr. Jac. 40. Dy. 237. pl. 30.

(*a*) Dyer 54, 55. pl. 1, 2, 3, 4.

As to the firſt Point upon the Statute of 32 *H.* 8. it was anſwered and reſolved, that foraſmuch as the Eſtate limited by the Render of the firſt Fine did not continue till the Death of *Anthony* the Father, this Caſe was out of the ſaid Proviſo, for the Words thereof are *And he that hath the Inheritance thereof dieth*, &c. So that he ought to have the Inheritance (either in Fee-ſimple, or in Tail) at the Time of his Death. But in this Caſe *Anthony* the Father had but an Eſtate for Life in Poſſeſſion, and altho' the ſecond Conveyance was but a voluntary Conveyance for the eſtabliſhing of the Land upon his Iſſues; yet foraſmuch as thereby the ſaid *Anthony* had not any Eſtate of Inheritance at the Time of his Death, it is out of the ſaid Proviſo; for as the firſt was voluntary for the Advancement of the Husband and his Iſſues, ſo was the ſecond voluntary alſo.

32 H. 8. c. 1.

As to the ſecond, it was reſolved, that altho' by the ſecond Fine,

Fine, the Eſtate which the Wife had by the firſt Fine was barred and altered, and now ſhe has the Eſtate by the ſecond Fine out of the Eſtate which the Husband had by the firſt Fine, yet it is out of the Stat. of 32 & 34 *H.* 8. for the Words of the Stat. are *to and for the Advancement of his Wife*; and it was reſolved that the Eſtate which the Wife had by the Limitation of the Uſe upon the ſecond Fine was not any (*a*) Advancement of the Wife; for it is no more than ſhe had by the firſt Fine, for by both ſhe had an Eſtate for Life; and the firſt Eſtate for Life by the firſt Fine can't be an Advancement of the Wife by the Husband, for the Land was the Inheritance of the Wife, and moved from her; and upon the ſecond Fine, if no Eſtate had been limited, the Law would have reſerved to her ſuch Eſtate in the Uſe as ſhe had in the Land, as it is agreed in *Colgate* and (*b*) *Blythe's Caſe, in the 1ſt Part of my Reports*; and therefore it is not any more Advancement to her than ſhe had before; and therefore it is out of the ſaid Statutes.

(*a*) Palm. 215. Cr. Jac. 625. Hob. 51. Cr. Jac. 295.

(*b*) 1 Co. 127. a. b. Golds. 67, 68, 69, 70. 1 Anderſ. 164. Moor 196, 197. 2 Anderſ. 78. 4 Leon. 81, 89, 90. Co. Ent. 603. pl. 18. 2 Co. 56. b. 58. b. Palm. 214. Godb. 180.

It was alſo reſolved, that foraſmuch as the Eſtate of the Wife was out of the Statutes, no (*c*) Wardſhip either of the Body or of the Land could accrue to the King in reſpect of the Eſtates in Remainder limited to the Sons, &c. during the Wife's Life, for the Wife was Tenant to the King during her Life, and the Advancement of the Sons in Remainder when the Eſtate for Life is out of the Statute, ſhall not give the King Wardſhip either of the Body or of the Land. But if a Man has a Reverſion in Fee expectant upon an Eſtate for Life, held of the King by Knight's Service, if he conveys this Reverſion to the Uſe of his Wife, or his Children, &c. and dies, that ſhall give Cauſe of Wardſhip of the Body during the Life of the Tenant for Life, there the Tenant for Life is not the King's Tenant, but he in Reverſion. And it was ſaid, if a Man holds of the King by Knight's Service, and makes a Leaſe for Life, the Remainder to two, and to the Heirs of one of them, and he who has the Fee dies, living the Tenant for Life, this is within the Letter of the ſaid Proviſo of the Act of 32 *H.* 8. For the Words are, *Where 2 or more hold*, &c. *any Manors, Lands, Tenements, or Hereditaments jointly to them, and to the Heirs of one of them, and he that hath the Inheritance thereof dieth*, &c. and this Remaind. is an Hereditam. and is held of the K. But during the Life of the Ten't for Life, it is not immediately held of the K. and therefore in ſuch Caſe the Heir of him who has the Fee ſhall not be in Ward. And *Hill.* 25. *El.* in the Court of Wards, *Wray* Chief Juſt. ſaid, that it was reſolved by the 2 Chief Juſtices, and the Court of Wards; That if the Heir of him who has the Fee is of full Age, and the Heir dies, living the Tenant for Life, his Heir within Age, that he ſhall not be in Ward for his Body within this Proviſo, for the Words of the

(*c*) Cr. Jac. 295. Moor 177.

Act are, *And he that hath the Inheritance thereof dieth*, &c. *his Heir within Age, that in every such Case*, &c. so that his Heir at the Time of his Death ought to be within Age, which is to be intended of the immediate Heir, and not of the mediate Heir. *Vide* 2 *Eliz. Dyer* 172. *in Lane's Case*. Co. Lit. 78. a. Palmer 214. Dy. 172. pl. 12. 2 Co. 76. b.

SONDAY's

SONDAY's *Case.*

Hill. 8 Jacobi 1.

In the Court of Wards.

Swinb. 112. Bridgm 137.

MErick Sonday being ſeiſed in Fee of an Houſe in *Lambeth* held in Chief by Knight's Service 7 *Aprilis* 1587, by his Will in Writing deviſed the ſaid Houſe to *Margaret* his Wife, for Life, *and after her Deceaſe his Son* William *to have it, and if his Son* William *marry, and have by his Wife any Male Iſſue lawfully begotten of his Body, then his Son to have it; if he have no Male Iſſue lawfully begotten of his Body, then his Son* Samuel *to have the Houſe; if* Samuel *marry, and have Iſſue Male of his Body lawfully begotten, that then his Son to have the Houſe after his Deceaſe; if no Iſſue Male then his Son* Thomas *to have the Houſe; if* Thomas *marry, having a Male Iſſue of his Body lawfully begotten, then his Son to have the Houſe after his Deceaſe; if he have no Iſſue Male, then his Son* Richard in like Manner, *& totidem Verbis*, and ſo to *Daniel totidem Verbis*; And then he adds this Clauſe, *And his Will and Mind was, that if any of his Sons, or their Heirs Males Iſſue of their Bodies go about at any Time to alienate, or mortgage the Houſe, that then the next Heir to enter upon*

upon the Houſe and enjoy it: And afterwards *Merick* died, and *William* died without Iſſue Male, having Iſſue *Margaret*, (who had the 3d Part of the Houſe in reſpect of the Tenure) *Samuel* alſo died without Iſſue Male, *Thomas* entred into 2 Parts, and *Trin.* 6 *Jac.* he and his Wife ſuffered a common Recovery with ſingle Voucher, which was to the Uſe of the ſaid *Thomas* and his Heirs, and afterwards 17 *Dec. Thomas* died without Iſſue Male, and in this Caſe two Queſtions were moved, 1. What Eſtate *Thomas* had. 2. If by the Suffering of the ſaid Recovery, he hath forfeited his Eſtate, and that thereupon the Entry of the ſaid *Richard* was lawful or not.

As to the firſt it was objected, that when *Merick* deviſed, that *Thomas* his Son ſhall have his Houſe, if the Will had not gone further, he ſhould have had but for Life, then when he added, *if* Thomas *my Son marry, having a Male Iſſue, that then his Son to have the Houſe*, that is an expreſs Deviſe to the Son that he ſhall have, and not to himſelf. But it was anſwered and reſolved, That as well the ſaid *Thomas* as the other Sons have an Eſtate (*a*) Tail to them ſeverally, and to the Heirs Males of their Bodies; and that for three Reaſons. 1. Becauſe he farther ſaith, *if he hath no Iſſue Male, his Son* Richard *to have it*, which is as much as to ſay, if *Thomas* dies without Iſſue Male, which Words are ſufficient to create an Eſtate-tail in him. 2. The ſaid laſt Clauſe, *if any of his Sons or their Heirs Males Iſſue of their Bodies go about*, &c. which explains the firſt Words, that the Male Iſſue ſhall be Heir, and take by Deſcent; the firſt Words being, *that his Son ſhall have the Houſe after his Deceaſe*, *i.* ſhall have it as Heir; for the Words of the Will make it manifeſt, *and if any of their Sons, or their Heirs Males Iſſue of their Bodies*, &c. alſo after it is ſaid, *that then the next Heir to enter.* 3. The Thing prohibited proves it alſo; for as well his Sons as their Heirs Males are prohibited to alien or mortgage, &c. and every Reſtraint (*b*) implies (and eſpecially in a Will) that the Parties (if the Reſtraint had not been made) had Power to do that which is prohibited, which is the Reaſon that he reſtrains them. And if his Sons ſhould have but an Eſtate for Life, (*c*) this Clauſe of Reſtraint, That if they ſhould alien, &c. that then the next Heir ſhould enter, &c. would be idle, and of none Effect.

As to the 2 Point, it was reſolved by the 2 *Ch. Juſtices*, *Ch. Baron*, *and the Court of Wards*, That no (*d*) Condition or Limitation, be it by Act executed, or by Limitation of an uſe,

(*a*) Bridg. 137. Swinb. 112. Lit Rep. 8, 259, 347. Moor 128. Cr. Jac. 416, 695. Cro. Car 367, 369. Hard. 149.

(*b*) Bridgm. 137. (*c*) Cr. Car. 185. (*d*) 2 Rol. Rep. 468. Swinb. 112. Cr. Jac. 697, 698. Godb. 351. 10 Co. 37. a. 38. b. 39. a. 42. b. 6 Co. 41. a. Hob. 170. Co. Lit. 223. b. 224. a. 2 Brownl. 67. 1 Rol. 418. Cart. 23.

Uſe, or by Deviſe in a laſt Will, can bar Tenant in Tail from aliening by (*a*) common Recovery for the Cauſes and Reaſons reported at large in the 6th *Part of my Reports, in Sir Anthony Mildmay's Caſe*; and according to thoſe Reſolutions the Caſe was decreed, *&c.*

(*a*) Car. 23. 1 Rol. 418. 2 Brownl. 67. 10 Co. 37. a. 38.b.39.a. 42.b. Co. Lit. 223. b. 224. a. Hob. 170. 6 Co. 41. a. Cr. Jac. 697, 698. 2 Rol. Rep. 468. Godb. 351. Swin. 112.

QUICK's *Case.*

Pasch. 9 Jac. 1.

In the Court of Wards.

QUeen *Elizabeth* Lady, *John Northcote*, and *Thomas Quick* Tenants in Common, of the Manor of *Newton* (being the Mesnalty held of the Q. *in Capite* by Knight's Service, and one *Will. Bodley* Tenant peravail of three Acres of Meadow, called *Warram Meadow*, held of the Manor of *N.* by Knight's Service. *Thomas Quick*, 34 *El.* infeoffed *Babb* and others of his Moiety of the said Manor, to the Use of himself for his Life, and after to the Use of *John Quick* his Son and Heir apparent in Tail, and afterwards to the Use of the Heirs of *Tho. Quick*; and afterwards *Will. Bodley* of the said three Acres of Meadow enfeoffed the said *John Quick* and his Heirs, and afterwards *John Quick* five Days before his Death, and being sick, by Collusion betwixt him and his Father, enfeoffed his Father and his Heirs, to the Intent to defraud the said *John Northcote* of the Wardship of *Andrew*, Son and Heir of *John Quick*, being an Infant within Age, and afterwards *John Quick* died; after whose Death *John Northcote* seised the Body of *Andrew Quick*, and afterwards *Thomas Quick* died, after whose Death the Moiety of the said Manor descended to *Andrew Quick*. The Question was, Whether the Wardship of the Body and of the Moiety of the said three Acres of Meadow belonged to the King, or to the said *John Northcote*. And this Case was argued by Counsel learned on both sides, in *Hillary* and *Easter Terms*: And 2 Questions were moved in this Case.

1. When *J. Quick* Ten't in Tail in Remaind. of the Mesnalty died, his Heir within Age, then accru'd to the K. beginning of

Wardſhip, *ſ.* when Ten't for Life died, and by the Death of *Jo.* accrued to *Northcote* Wardſh. of the Body, in reſpect of the Feoffm. by Colluſ. of the ſaid 3 Acres of Meadow, and of the Moiety of the 3 Acres of Meadow; and afterwards when *T. Quick* who was Ten't for Life of the Meſnalty died, then was the K.'s Title, which was begun before, conſummated; and therefore it was argued, that the K.'s Title ſhould be preferred; for now the K.'s Title is by the Deſcent from him in the Remaind. and the Death of the Tent't for Life is but the removing of the Impedim. *Et quando jus Dom' Reg' & ſubdi ti inſimul (a) concurrunt, jus Reg' præferri debet.* As in *Dame* Hale's *Caſe*, (*b*) Husband and Wife Joint-ten'ts of a Term for Years, the Husb. is *felo de ſe*, he ſhall forfeit the Whole, *Plow. Com.* 262. and yet there it ſurvives till Office, but after Office it has Relation, either before, or at leaſt to the Time of the Death. So in the Caſe at Bar altho' the K.'s Title is not full till the Death of the Ten't for Life, yet when he dies, then the K.'s Title is by the Deſcent which accrues together with the Tit. of *Northcote* by the Death of *J. Quick*. *Nota* the Caſe put by *Weſton* in *Dame* Hale's *Caſe* of diſcent to a (*c*) Villain being Indeot, 263. *b. Vide* 44 *E.* 3. 25. *a.* if the K. and a common Perſon join in a Foundat. the King is Founder. As to that it was anſwered and reſolved, that in this Caſe the Intereſt veſted in *Northcote* ſhall not be deveſted; for the Tit. of *Northcote* was (*d*) conſummated by the Death of *J. Quick*, but by his * Death the K. had but a Poſſibility if *Thomas* ſhould die during his Minority; for if *And. Quick* had come of full Age, during the Life of *T. Quick*, he ſhould never be in Ward, altho' he was within Age at the Time of the Deſcent of the Remaind. And *Bingham's Caſe in the 2 Part of my Reports f.* 91. proves, that it is but a Poſſibility: For if after the Deſcent of the Remaind. and before the Death of the Ten't for Life, the Seigniory is granted over, and afterwards the Ten't for Life dies, the Heir of him in the Remaind. within Age, neither the Grantor, nor the Grantee ſhall have the Wardſhip of him. *Vide* 24 *E.* 3. 25. the Caſe of the D. of *Lancaſter*: But the ſaid Point never came in Queſtion, for by the Feoffm. of *J. Quick* of the ſaid 3 Acres to *Thomas*, the Meſnalty as to the ſaid 3 Acres was extinct, becauſe *T. Quick* had the Reverſion of the Meſnalty; ſo that the Reverſ. being extinct, no particular Eſtate of the Meſnalty, either for Life or in Tail, can remain. And that was the clear Opinion of the two Chief Juſtices and Chief Baron. *Vide* 3 *H.* 6. 1. 15 *E.* 4. 12 & 40 *E.* 3. 14. the Caſe of Warranty.

(*a*) Hardr. 24. Co. Lit. 30. b. 4 Co. 55. a.
(*b*) Hardr. 24.
(*c*) Hardr. 24. Co. Lit. 30. b.
(*d*) Hardr. 27.
* Poſt. 132. a.
Antea 126. b.

2. It was moved, That when the Tenant makes a Feoffment to certain Perſons by Colluſion, that the Lord ought to recover the Land by Writ of *Right of Ward*, before he ſhall have a Writ of *Raviſhment of Ward*: and therewith agree *F. N. B.* 134. (143) *k.* 12 *H.* 4. 13. *b.* 33 *H.* 6. 16. by *Priſot*, and the Statute of 34 *H.* 8. in Caſe of Colluſion gives a Writ of *Right of Ward* for the Body

and Land, and therefore in this Caſe *Northcote* could not ſeiſe the Ward till he had recovered the Land; and then it was objected, That the Title of the King by the Death of *Thomas Quick* is in Poſſeſſion, and ſhall be preferred before the Title of *Northcote*, which is only in Action. As to that it was reſolved, That the Title of Wardſhip which accrued to him by the Death of *John Quick*, (altho' it ſhould be in Action) ſhould not be deveſted by the Death of another Anceſtor, *ſ.* of *Thomas Quick*.

BEWLEY's *Caſe.*

Trin. 9 Jac. 1.

In the Court of Wards.

LEonard Bewley ſeiſed in Fee of an Houſe and certain Lands in *Culgath* in the County of *Cumberland*, died thereof ſeiſed 25 *Jan. an.* 38 *El.* after whoſe Death it was found by Office, that the ſaid Houſe and Lands, with the Manor of *Culgath*, whereof they were Parcel, by the Attainder of Treaſon of *Andrew Hartley* were forfeited to King *E.* 2. and afterwards K. *E.* 2. by his Letters Patent granted the ſaid Manor, whereof, &c. to *Morisby*, in Fee, *tenend' de nobis & hæredibus noſtris per ſervitium medietat' feodi unius militis imperpetuum, & reddend' inde nobis & hæred' noſtr' per annum ad Scaccar'* 10 *l. & faciend' aliis Capital' Dom' feodi illius ſi qui fuer', reddit' & ſervitia quæ inde debebantur antequam ad manus noſtras devenerunt, Salvis nobis & hæred' noſtr' feod' militum, & advocationibus eccleſiarum*, &c. and found further the other Points of the Writ: By Office after the Death of *Morisby* *anno* 22 *E.* 3. it is found, that the Manor of *Culgath*, whereof, &c. is, and before the Attainder of *Hartley* was held of *Robert Nevil* of *Hornby*, *qui illud tenuit de Domino Rege in capite per ſervitium* 16 s. & 8 d. *ad* cornagium *ſolvend' ad feſtum aſſumption' beatæ Mariæ pro toto anno. Et Juratores præd' ulterius dicunt, quod poſt mortem Chriſtophori de Morisby* 3 *partes dicti manerii tenentur de Dom' Rege per ſervitium militare*: And by an Office found *anno* 29 *E.* 3. and another 48 *E.* 3. and by a Record *anno* 8 *H.* 4. *in computo Collectorum rationabilis auxilii*, &c. and by Office *anno* 17 *H.* 8. and by Office *anno* 38 *H.* 8. it was found (altho' it was not in one and the ſame Manner) that the ſaid Manor of *Culgath* was held of the King *per ſervitium militare.*

Ley de Gards, &c. 4.

And

And it was reſolved by the two *Chief Juſtices*, and the *Chief Baron*, that by the Patent of King *E.* 2. the Tenure of the Meſne ſhould be revived, altho' the King in the firſt Place had reſerved to himſelf other Services, *ſ.* Knight's Service, where the Meſne before the Attainder held of the King in Socage, as appears by the ſaid Office in 22 *E.* 3. and altho' the King had reſerved another Rent, yet becauſe the King for his Honour, and in Advancement of the ancient Right according to Equity and Conſcience, expreſly intended that the Menalty ſhould be revived (which by the Attainder of the Tenant peravail by Rigour of Law, without the Fault of the Meſne was extinct) the Clauſe of Revivor of the Meſnalty ſhould be preferred before his Profit; and therefore the Tenant peravail ſhould hold of the Meſne, as he held before the Attainder, and the Reſtitution of an ancient Right ſhould be preferred. And Sir *J. Molyn's Caſe* in the *6th Part of my Reports*, *f.* 5. was affirmed for good Law. *Vide* 2 *E.* 3. 33. *ſeu* 60. *b.* 8 *E.* 3. 283. *(a)* 17 *E.* 3. 59. *(a)* 6 Co. 6. a. *b.* 25 *E.* 3. 46. 46 *E.* 2. *Petition* *(b)* 19. 49 *E.* 3. 10. 22 *Aſſ.* 53. 31 *Aſſ. p.* 30. 4 *H.* 6. 20. 33 *H.* 6. 7. *Nota* upon the ſaid Books a Difference betwixt a Creation of a new Tenure, without any aſpect to the ancient Right, for there the firſt Reſervation ſhall ſtand, and betwixt a Reſtitution of an ancient Tenure; for that ſhall be preferred before the Reſervation, which is firſt in Words. *Nota*, a good Difference.

Ley de Gards, &c. 4.

6 Co. 5. b. 6. a.

11 Co. 73. b. 74. a. b. 2 Inſt. 501.

(b) 6 Co. 6. a. Lit. Rep. 43. 2 Inſt. 501.

THOMAS HOLT's *Caſe.*

Mich. 9 Jacobi 1.

In the Court of Wards.

Francis Holt the Grandfather had Iſſue *Thomas Holt* the Father, his eldeſt Son, and four other Sons; *Thomas* had Iſſue *Francis*; *Francis* the Grandfather being ſeiſed of divers Lands in Fee of the County of *Lancaſter*, Part of which were held of the King by Knights Service in *Capite*, and the reſt held of others, conveyed Part of his Lands held, and of the other Lands not held, to the Uſe of *Tho. Holt* the Father, and *Conſtance* his Wife, yet living, for their Lives, and afterwards to the Uſe of *Francis* the Son, and to the Heirs Males of his Body, with divers Remainders over in Tail, the Remainder to *Francis* the Grandfather for Life with other Remainders in Tail, the Reverſion in Fee to the Right Heirs of *Francis* the Grandfather, and conveyed other Lands held, *&c.* to the Uſe of himſelf for Life, with ſeveral Remainders to other of his younger Sons then living, for their Lives ſeverally, the Remainder to *Thomas* the Father for his Life, the Remainder to *Francis* the Grandfather, and to the Heirs Males of his Body, with divers other Remainders, the Reverſion in Fee to *Francis* the Grandfather and his Heirs; *Francis Holt* the Grandfather died, *Thomas* the Father being of full Age, who tendred his Livery, and died before Livery ſued, or Office found, *Francis* the Son being of full Age; and all this is found by Office; *Francis* the Son continues the Livery, *Conſtance* the Wife of *Thomas* the Father, and the four younger Sons of *Francis* are yet living. And two Queſtions were moved in this Caſe: 1. If the King ſhould have any primer Seiſin in this Caſe in Poſſeſſion. 2. If he ſhould have any primer Seiſin for the Reverſion in Fee (expectant upon the ſaid Eſtates-tail) which deſcended after the Death of the ſaid *Thomas* the Father.

And

And in this case these points (the case being often debated, and good considerat. had) were resolved. As to the first 3 points were resolv'd, 1. That by the death of *Tho.* before livery sued, the K. had lost having any primer seisin after the death of *Fra.* the Grandf. as before in (*a*) *Northcot's case*, and in (*b*) *Hale's case in the 8 part of my reports*, and oftentimes it has been resolv'd. And there is a difference betwixt livery or primer seisin, and mean rates, for livery or primer seisin is lost by the death of the Heir, but mean Rates, if any are due, not; for they are absolutely vested in the K. 2. That *Fr.* the son should not sue livery, or pay any primer seisin, because he was out of the stat. of 32 *H.* 8. & 34 *H.* 8. as also it has been often times resolved, because after the death of the grandf. primer seisin was due by the father, and the son living the fath. is not within the stat. 3. That where the statutes of 32 & 34 *H.* 8. give the K. primer seisin in case of acts executed, that if the K. has a primer seisin, the stat. is (*c*) satisfied, and he shall not have of others in remaind. or of the younger sons, &c. as the common experience is in the court of wards. Then it was strongly urged, that in this case for as much as a right and interest of primer seisin was vested in the K. altho' afterw. by the act of God by the death of *Th.* the primer seisin by act in law is discharg'd, yet for as much as the K. should have but one primer seisin, that for the land convey'd to the younger sons the K. should not have any primer seisin; but it should be accounted the laches of the K.'s officers, that they did not force *Th.* to sue livery, or have taken security of him to answer it. But it was resolv'd, that the K. should have primer seisin for the lands convey'd to the young sons in this case, because they are within one of the 3 cases in which wardship and primer seisin are given to the K. by the said acts, *s.* advancem. of his wife, preferm. of his child. and paym. of his debts: And the reason and cause of this resolution was, that when the said acts give the K. primer seisin, it is intended of an actual and effectual primer seisin, and not of any which is mathematical and imaginary, for the K. ought always to have the full and compleat * effect of the thing which is due to him; and therefore if one who is within the said 3 cases dies before livery, so that the K. has lost his primer seisin, and has not the effect of the stat. the K. shall have primer seisin of others who are within one of the said 3 cases but not of any other who is out of the said 3 cases) and this resolut. is well prov'd by former resolutions and authorities in the like cases; and therefore if the K. has title to present by lapse *hac vice*, and he presents, and his clerk is admitted and instituted, and dies before induction, the (*d*) K. shall present again, for he has not the full and compleat effect of his presentat. as it was resolved by Sir *James Dyer & totam Curiam* in *Giles's Case* 18 *El. in Communi Banco*. So if the King marries a Daughter, whom he has in (*e*) ward, *infra annos nubiles*, and before the age of consent the Husband dies, the King shall have the marriage of the Heir again, because the first marriage was

(*a*) Ant. 129. b. (*b*) 8 Co. 172. b.

(*c*) 2 Co. 93. b. Co. Lit. 78. a.

* 1 Co. 43. a. Lit. Rep. 135.

(*d*) Cr. Jac. 463. 2 Rol. 353, 354. Lit. Rep. 135. Dy. 360. pl. 7.

(*e*) Co. Lit. 79. b. Lit. Rep. 135. 6 Co. 22. b. Moor 742. Ley Gards, &c. 7.

not compleat, as it is resolved in *Ambrosia Gorge's Case in the 6 Part of my Reports, f. 22. b.* and yet in these Cases a common Person shall be barred. In (a) 6 *E.* 3. 56. *a. b.* the Case was such, King *H.* 3. granted the Honour of *S. Wolrey* with the Advowson of *Mixby* thereto appendant, *Rich. Com' Cornub & Reg' Almannorum*, and to the Heirs of his Body, saving the Reversion to the King, which Earl had Issue *Edmund* his Son, and died; *Edmund* his Son *Octab' Purific' an'* 8 *E.* 1. levied a Fine of one Acre of Land Parcel of the said Honour, with the Advowson of the said Church of *Mixby*, to the Bishop of *Rochester*, &c. which Alienation was before the Statute *de Donis Conditionalibus* made *anno* 13 *E.* 1. and afterwards the said *Edmund* Earl of *Cornwal* died without Issue. And by the Authority of that Book it appears, that altho' the Alienation was made before the Statute, and *post prolem suscitatam*, the Donees and their Issues *habuerunt potestatem alienandi* to bar the Reversion of common Persons, yet it should not bar the K.'s Reversion, altho' it be with collateral Warranty, if there be not Assets descended, so that the K. may have a full Satisfaction and Recompence, for without Warranty and Recompence it is not such compleat Alienation, because it moved from him who had not a compleat Estate, which should bar the King of his Reversion: And therewith agrees (b) 45 *Ass. p.* 6. and yet in the Case of a common Person such bare Alienation before the Statute, without any Warranty, or collateral Warranty, without any Alienation would bar the Donor in such Case. As to 2. it was resolved, and so was it affirmed by the Attorney of the Court of Wards, That the Usage had always been in such Cases, that *Francis* being of full Age at the Death of *Thomas* the Father, the King should not have Primer Seisin * of the said seck and fruitless Reversion in the Case at Bar; and the Reason is, because the Words of *Prærogativa Regis*, c. 3. are (c) *Rex habebit primam seisinam, &c. capiendo exitus eorundem terrarum & tenementorum donec, &c.* So when no Rent or Profit is reserved, the King can't take *exitus, &c.* in such Case but if the King's Tenant by Knights Service *in Capite* makes a gift in Tail, rendring a yearly Rent or other Profit to him and his Heirs, and dies, his Heir of full Age, there the K. may take Primer Seisin of the Rent or Profit which descends to the Heir for one Year: And so *Nota* for such a seck and fruitless Reversion the Heir shall be in Ward if he be within Age, but shall not pay Primer Seisin for such fruitless Reversion, if he be of full Age at the Time of the Death of the Ancestor.

(a) Co. Lit. 19. 19. a. b. 370. b.

(b) Co. Lit. 19 b. 370. b. 7 Co 11. a. Calvin's Case. Br. Assets per discent 31. Br. Tail 34. Fitz. Garranty 68. Br. Garran. 52. Plow. 234. a. 553. b. 10 Co. 96. b. Br. Prærog. 52. Br serch pur le Roy 5.

* 10 Co. 80. b.

(c) Standf. Prærog. 11. b. 12. a. b. &c.

MAT-

MATTHEW MENE's *Caſe.*

Mich. 9 Jac. 1.

In the Court of Wards.

Matthew Mene the Grandfather being ſeiſed in Fee of divers Meſſuages, Lands, and Tenements in *Kent* of Cuſtom of *Gavelkind*, and of an Houſe held of the King by Knights Service *in Capite*, and the Reſidue of common Perſons in Socage, had Iſſue *Andrew*, who had Iſſue *Matthew*, *Thomas*, *John* and *Andrew*: *Andrew* the Father died, *Matthew* the Grandfather by his Will in Writing deviſed all his ſaid Lands, *viz.* to *Mat.* eldeſt Son to *Andrew* the Father, one Part, and to the Heirs of his Body, and to *Thomas* ſecond Son of *Andrew* the Father another Part, whereof the Houſe held *in Capite* was Parcel of like Eſtate; and to the other Sons of the ſaid *Andrew* the Father other Parts of the like Eſtate: *Matthew* the Grandfather died ſeiſed of the ſaid Meſſuages, Lands, and Tenements, *Matthew* the Son being of the Age of 15 Years, and all the ſaid Brothers of *Matthew* being alive; and all this was found by Office. And in this Caſe 2 Queſtions were moved. 1. Whether the King ſhould hava a 3d Part of the Meſſuage only, and not of the other Lands not held of the King? 2. Admitting he ſhould have a 3d Part of the whole, whether he ſhould have a full 3d Part out of the Part of the eldeſt Son only, or out of the Part of every Brother? And as to the firſt it was ſtrongly urged, that the K. ſhould have but a 3d Part of the Land held, and of the third Part of the Part of the eldeſt Son; and their principal Reaſon was, becauſe if no Will had been made, the K. ſhould have but the 3d Part of that which deſcended to the eldeſt Son, and not of the Parts which deſcended to the younger Sons, for where the Stat. of *Prærogativa Regis*, *c.* 1. ſaith, *Dominus Rex habebit Cuſtodiam omnium terrarum eorum qui de ipſo tenent in Capite per ſervitium militare, &c. de quocunque tenu-*

10 Co. 80. b.

Stamf. Præog. 1, 2.

tenuerunt, &c. it is meant, if the Land deſcends to the ſame Heir, to whom the Land held deſcends; but if any Part deſcends to another Heir, the King ſhall not have it, and therewith agree 12 *E.* 4. 18. & *Stamf. prærog.* 8. *b.* And the Statutes enable one to deviſe 2 Parts of his Lands for the Benefit of his Children, where the King would have all if no Deviſe was made; but in all Caſes where no Will is made the K. would have nothing, there the Stat. gave not any Wardſhip or Primer Seiſin, altho' a Will be made, and thereby the Land deviſed to his Sons, for that is not within the Purview of the ſaid Acts. To which it was anſwered and reſolved, That it is true if no Will had been declared, the King ſhould not have the Lands held of others in Socage, which deſcended to younger Sons, but when by the Will (to which he is enabled by the Statutes) he deviſes them to his Sons, in ſuch Caſe the Saving in the ſame Statutes gives the King Wardſhip and Primer Seiſin; and therefore a ſtronger Caſe was agreed for Law, Tenements deviſable by Cuſtom in (*a*) *London* came to King *H.* 8. by the Diſſolution of Abbies, and afterwards the King by his Letters Patent granted them in Fee to hold by Knight's Service *in Capite*, and the Patentee by his Will deviſes them for Preferment of his Wife, Advancement of his Children, or Payment of his Debts, and dies, his Heir within Age, the King ſhall have the 3d Part in Ward: And yet the Deviſe is good for the whole Land by the Cuſtom, without any Help of the ſaid Statutes of 32 & 34 *H.* 8. And notwithſtanding the King in ſuch Caſe ſhall have the Wardſhip of the 3d Part by Force of the ſaid Saving in the ſaid Statutes; and therewith agree 5 *Mar. Dyer* 155. 6 *Eliz. Dalliſon* 4 *Paſch.* 20 *Eliz.* between * *Barbor* and *E.* his Wife Plaintiffs, and *William Long* Defendant, *in Partitione facienda*, Judgment given upon a ſpecial Verdict reported by *Bendloes* Serjeant: Wherefore it was reſolved that the K. *a fortiori* in the Caſe at Bar ſhould have a 3d Part of the Whole.

(*a*) Dyer 155. pl. 21, Dall. in Kelw. 205. b. 206. a. Dall. in Aſh. pl. 9. Dall. 64. pl. 24, 75. pl. 60. Style 476. Moor 70. 1 Anderſ. 52, 53, 147. Co. Lit. 111. b. Benl. in Kel. 214. Benl. in Aſh. 32. N. Benl. 317. pl. 300. 3 Co. 35. a. Palm. 543. * Supra in (*a*)

As to the ſecond Point, it was alſo reſolved, that the K. ſhould have the 3d Part out of every ſeveral Part, ſo that the Charge ſhould be (*b*) equal, and ſhould not fall upon one only. *Vide* 35 *H.* 8. *Teſtaments* (*c*) *Br.* 19. 4 *E.* 3. *Aſſiſe* 178. *Vide* 21 & 22 *Eliz.* (*d*) *Dyer* 366. *b.*

(*b*) 10 Co. 84 b. 8 Co. 173. b. (*c*) 2 Co. 25. b. 5 Co. 100. a. (*d*) Dyer 366. pl. 38. 3 Co. 31. b. 1 Keb. 97.

ASCOUGH

ASCOUGH's *Caſe.*

Mich. 9 Jacobi 1.

In the Court of Wards.

IT was found by Office, after the Death of *William Aſcough* Eſq; that Sir *Edward Aſcough*, Father of the ſaid *William*, was ſeiſed in Fee-Tail of the Manor of *Darcy*, and of the Manor of *Selby* in *Stallingborough* in the County of *Lincoln*, the Remainder to *Francis* his Brother in Tail, the Remainder to the ſaid Sir *Edward* in Fee; And that the ſaid *William Aſcough* was ſeiſed in Fee of an Houſe 31 Acres and an half of Land, 9 Acres of Meadow, and 2 Acres and an half of Paſture in *Stallingborough* aforeſaid, and held them of the ſaid Sir *Edw. Aſcough*, as of his Manor of *Darcy*; *ſed per quæ ſervitia Juratores ignorant*; And that the ſaid *Will.* was alſo ſeiſed in Fee of an Houſe, and 40 Acres of Land, *&c.* in *Owresby* in the ſaid County, and held them of Sir *Thomas Mounſon*, as of his Manor of *Owresby* in the ſame County; and afterwards, upon the Marriage of *William* with *Katharine* the Daughter of *William Henage*, the ſaid Sir *Edward* and *Francis* levied a Fine of the ſaid Manors to the Uſes following, *viz.* of ſome Part in certain of the Manor of *Darcy*, and of ſome Part in certain in the Manor of *Selby*, to the Uſe of *William* and *Katharine* for their Lives, and to the Heirs Males of the Body of the ſaid *William*, the Remainder to the ſaid Sir *Edward* in Tail, with other Remainders in Tail, the

the Remainder to Sir *Edward* in Fee; and for the Reſidue of the ſaid Manors to the Uſe of Sir *Edward* for the Term of his Life, and afterwards to the Uſe of the ſaid *William* and to the Heirs Males of his Body, with divers Remainders over in Tail, the Remainder to the right Heirs of the ſaid Sir *Edward*; and afterwards the ſaid *William* died, as aforeſaid, ſeiſed, *Edw. Aſcough* his Son then being within Age, and that the ſaid Manors of *Darcy* and *Selby* are held of the King by Knight's Service *in Capite*; and that Sir *Edw. Aſcough* the Father, *William* and *Katharine* are yet alive.

And the ſole Point in this Caſe was ſhortly ſuch. The King Lord, Meſne, who held by Knight's Service *in Capite*, Tenant peravail in Socage; the Meſne granted the Meſnalty to the Uſe of himſelf for Life, and afterwards to the Uſe of the Tenant peravail in Tail; if in this Caſe the Meſnalty be ſuſpended during the Life of the Meſne, by Force of this Remainder in Tail. And in was reſolved, that a Remainder in Tail, or for Life, expectant upon an Eſtate for Life or in Tail, ſhall never ſuſpend a Meſnalty, Seigniory, Rent, *&c.* For altho' the Remainder veſts immediately, yet it can't ſuſpend the preſent Freehold of the Rent during the Life of the firſt Tenant for Life, becauſe the Tenant for Life is Tenant to the Lord or to him in Reverſion as long as he lives, and he ſhall do the Services, and the Avowry ſhall be made upon him, for he is the very Tenant by the Manor; and during his Life the Heir of him in the Remainder in Tail ſhall not be in Ward, *&c.* and as a Seigniory, Rent, *&c.* can't be (*a*) ſuſpended in Part and in *eſſe* for Part, in Reſpect of the Land out of which it is iſſuing; ſo a Seigniory, Rent, *&c.* can't be ſuſpended in Remainder, and in *eſſe* for a particular Eſtate in Poſſeſſion, for then (*b*) Fractions of Eſtates would enſue, and particular Eſtates would be created without Donors or Leſſors, againſt the Rules and Maxims of the Law: But in this Caſe aforeſaid, if the Meſne grants his Meſnalty to one for Life, or in Tail, the Remainder to the Tenant peravail in Fee; there the Meſnalty is extinct, becauſe he has as high an Eſtate in the Inheritance of the Meſnalty as he has in the Tenancy, and there is not any Poſſibility of reviving the Meſnalty. And in the ſame Caſe the Meſnalty is not extinct for the Inheritance, and in *eſſe* for the particular Eſtate for Life, or in Tail, in Poſſeſſion; but the Meſnalty by the Remainder in Fee is extinct in the Whole, for otherwiſe in the ſame Caſe this Abſurdity would enſue, *ſc.* that there would be a Fee-ſimple of the Tenancy peravail, and alſo a Fee-ſimple of the Seigniory

(*a*) 1 Vent. 277.

(*b*) 1 Co 45.

niory paramont, and but an Eſtate for Life, or in Tail of the Meſnalty only; and ſo a Tenancy in Fee-ſimple would be only held of a Meſnalty for Life, or in Tail, and a Seigniory in Fee would be iſſuing out of a Meſnalty for Life or in Tail only, which is impoſſible, and by no Means can be. *Vide* 3 *H.* 6. 1. 15 *E.* 4. 12.

Nota, Reader, I conceive, That if the Lord grants his Seigniory for Years, the Remainder to the Tenant peravail for Life, in this Caſe the Seigniory is ſuſpended, becauſe the Tenant for Life has the Freehold of the Seigniory, and he is Tenant to every *Præcipe* of the Seigniory, as in the Caſe of *Lit. lib.* 2. *c. Attorn. f.* 128. if (*a*) Land is leaſed to a Man for Term of Years, the Remainder to another for Term of Life; and afterwards the Leſſor grants over the Reverſion, and he in the Remainder for Life attorns, it is a good Attornment, and ſhall bind the Leſſee for Years, without any Attornment made by him, for he was Tenant of the Freehold; and at the Common Law the Termor for Years was ſubject, and under the Power of the Tenant of the Freehold, for he ſhould not (*b*) falſify a Recovery at the Common Law againſt the Tenant of the Freehold, becauſe he had but a Chattel. And where it is ſaid in this Caſe, that the Seigniory can't be ſuſpended in Part, and in *eſſe* for Part, as it is held in 32 *H.* 8. Tit. (*c*) *Extinguiſhment Br.* 48. that is regularly true, but *habet hæc regula plures fallentias*, all which may be well explained with this Difference between the Act of the Party, and Act in Law, or the Act of a 3d Party: For by Act of the Party, be it rightful or wrongful the whole Seigniory, *&c.* is ſuſpended; and therefore if the Lord, or Leſſor diſſeiſes or (*d*) ouſts the Tenant or Leſſee of any Part, the whole is ſuſpended, as it is held in 11 *E.* 3. *Ceſſavit* 21. 7 *H.* 6. 26. *a.* 35 *H.* 6. *Avowry* 46. (*e*) 9 *E.* 4. 1. *a.* 4 *H.* 7. 6. *b.* (*f*) 32 *H.* 8. aforeſaid. And the Book in 21 *E.* 4. 29. *a.* is miſprinted, for there it is ſaid, *quod fuit negatum* by all, where it ſhould be *quod fuit conceſſum* by all the Juſtices. *Vide* 9 *E.* 3. 7. The Law is the ſame, if the (*g*) Lord takes a Leaſe of any Part of the Tenancy, the whole Seigniory is ſuſpended, as it is reſolved in 32 *H.* 8. before. So if a (*h*) Commoner takes a Leaſe of any Part of the Land, in which, *&c.* the whole Common is ſuſpended; and therewith agrees 11 *H.* 6. 22. *a. b.* But in the Caſe of (*i*) Rent-Service, if the Lord purchaſes Part of the Tenancy in Fee, Part is extinct, and in *eſſe* for the Reſidue. Now, for the other Part of the Difference by Act in Law, a Seigniory may be ſuſpended in Part, and in *eſſe* for Part; and therefore, (*k*) if the Lord ſeiſes the Wardſhip of the Land of his Tenant by Knight's Service, now the Seigniory is ſuſpended, but if the Guardian endows the Wife of the Tenant of the third Part of the Tenancy, now the third Part of the Seigniory is revived, and the Tenant in Dower

(*a*) Co. Lit. 316 b. Lit. Sect. 571. Lit. 129. a. b.

(*b*) F. N. B. 198. c. Cr. El. 284, 718. 6 Co. 57. a. Plowd. 83. b. 7 H. 7. 11. b. 2 Init. 322. o. Lit. 46. a. Br. Fauxifier de Recovery 25.

(*c*) 3 Keb. 500. 558. 1 Rol. 938. Co. Lit. 148. b. 1 Ventr. 277.

(*d*) Co. Lit. 148. b. 1 Rol. 938.

(*e*) 3 Co. 22. b. Br. Apportionment 7. Br. Bar. 39. Co. Lit. 148. b.

(*f*) 32 H. 8. Br. Extinguiſhment 48.

(*g*) Co. Lit. 148. b.

(*h*) 1 Anderſ. 159. 4 Leon. 43, 44. Goldsb. 53. 8 Co. 79. a.

(*i*) Lit. Sect. 222. Co. Lit. 147. b. 148. a.

(*k*) Co. Lit. 148. b. 1 Rol. 939.

(*a*) 1 Rol. 685. 8 Co. 36. a. dower ſhall be (*a*) attendant to the guardian for 3 parts of the ſervices, becauſe the tenant in dower is in by act in law, as it is held in 33 *E.* 3. *Dower* (*b*) 138. and for the ſame Reaſon, if a man (*c*) ſeiſed of lands in fee takes a wife, and infeoffs another, the feoffee grants a rent-charge to the husband and wife, and to the heirs of the husband, the husband dies, the wife is endowed of the 3 part of the land, out of which the rent is iſſuing, the 3 part of the rent in ſuch caſe which the wife has for life is extinct, and the 2 parts of the rent remain to her, iſſuing out of the other 2 parts, for altho' it is a rent-charge, yet by act in law it ſhall be apportioned, as it is adjudged in *Jurden's caſe*, 5 *E.* 2. (*d*) *Avowry* 206. *Vide* 30 (*e*) *Aſſ. p.* 12. where a rent-charge ſhall be ſuſpended in part, and in *eſſe* for part by act in law; and 29 *Aſſ. pl.* 10. If guardian in knight's ſervice ſeiſes the land of one daughter and heir within age, the other daughter being of full age, there the ſeigniory is ſuſpended for one moiety, and in *eſſe* for another moiety: So if two (*f*) coparceners are of a ſeigniory, and one diſſeiſes the ter-tenant, or comes to the land by defeaſible title, the other may diſtrain her for her moiety of the ſeigniory, for the act of her coparcener can't prejudice her in ſuch caſe. And where it is ſaid in the caſe before, that where the tenant makes a leaſe for life, or a gift in tail, the remainder over in fee, that the tenant for life, or donee in tail is very tenant by the manner to the lord paramount, it is true that at the com. law there are (*g*) four manner of avowries for rents, ſervices, *&c.* 1. By reaſon of a tenure, upon one as upon his very tenant, and that is when the lord has fee in the ſeigniory, and the tenant has fee in the tenancy, *ut ſuper verum tenentem ſuum*: 2. Upon one as upon his very tenant by the manner, *ut ſuper verum tenentem ſuum in forma præd'*; and that is when the tenant makes a leaſe for life, or a gift in tail, with the remainder in fee, in that caſe, if the lord has fee in the ſeigniory, he ſhall avow upon the tenant for life, or donee in tail, as upon his very tenant by the manner. 3. Upon one as upon his tenant by the manner, omitting this word (*very*), and that is when the lord has a particular eſtate in a ſeigniory, as an eſtate in tail, eſtate for life, or leſs intereſt *ſuper tenentem ſuum in forma præd'*; ſo ſhall the donor upon the donee, the leſſor upon the leſſee for life, or years. 4. Upon the matter in the land, as within his fee and ſeigniory; as where the ten't by knight's ſervice makes a leaſe for life rendring rent, and dies, his heir within age, the guardian ſhall make ſuch avowry upon the leſſee, *ſc. ſuper materiam præd' in terris & tenementis præd' ut infra feodum & dominium ſuum.* And all theſe forms of avowries you will find in your books 20 *H.* 6. 9. 2 *H.* 4. 24. 12 *E.* 4. 2. 26 *H.* 6. *Avow.* 17. 9 *El. Dy.* 257. *a.* 5 *H.* 7. 11. 7 *E.* 4. 24. 20 *E.* 3. *Avowry* 131. 47 *E.* 3. *f. uit* 38 *H.* 6. 23. But now by the Stat.

(*b*) Co. Lit. 148. b.
(*c*) Co Lit. 150. a.
(*d*) Lo. Lit. 150. a.
(*e*) Br. Apportionment 11. Br. Extinguiſhment 29. Co. Lit. 148. b.
(*f*) Co. Lit. 148. b.
(*g*) Co. Lit. 269 a b. Doct. pl. 319, 320. Raym. 257.

21 *H.* 8 *cap.* 19. The Lord (*a*) may avow the Taking of the Diſtreſs within the Tenancy, as in Lands or Tenements within his Fee or Seigniory, without making any Avowry upon a Perſon certain; but the Lord has Liberty, if he will, to make his Avowry according to the Common Law.

(*a*) Ant. 23. b. 36. a. Co. Lit. 268. b. 269. b.

[*But it ſeems in both Caſes, the Lord muſt prove his Title, if Iſſue be taken on the Avowry, Q.*]

THOROUGH-

THOROUGHGOOD's *Caſe.*

Hill. 9. Jac. 1.

In the Court of Wards.

Diem clauſit extremum.

IT was found by Office in the County of *Cambridge*, 21 *Jan. anno* 36 *Eliz.* by Force of a Writ of *Diem clauſit extremum* after the Death of *Robert Thoroughgood*, that he was ſeiſed in Fee of an Houſe, *&c.* and divers Lands and Tenements in *Tadlowe* in the County aforeſaid, and that the ſaid Houſe, *&c.* was held of the King in Chief by Knight's Service; and he being thereof ſo ſeiſed *fecit & ſigillavit in dicto meſſuagio quoddam ſcriptum indentatum, in hæc verba:* To all Chriſtian People, *&c. Robert Thoroughgood* ſendeth Greeting, *&c.* Know ye, that I the ſaid *Robert* for divers good Cauſes, *&c.* have given, granted, and enfeoffed, and by theſe Preſents do give, grant, enfeoff and confirm to *Henry Hutton* and *Edward Eliot* all that my capital Meſſuage, *&c.* Lands and Tenements, *&c. Habendum* unto the ſaid *Henry Hutton*, and *Edw. Eliot*, and their Heirs, *&c. dat'* 18 *Julii anno* 35 *Eliz. Et ulterius dicunt, quod præd' Robert' jacens in extremis deliberavit in præd' meſſuagio præd'* 18 *Julii ſcriptum præd' indentatum præfatis Henrico Hutton & Edwardo Eliot pro & in nomine ſeiſinæ præd' meſſuagii & omnium reſiduorum terrarum & tenementorum in dicto ſcripto indentato contentorum:* And further found the other Points of the Writ. And upon this Caſe 2 Queſtions were moved; 1. If in this Caſe the Jury have found a ſufficient Delivery of the Indenture, to make it a Deed in Law. 2. If this Delivery of the Indenture in the Houſe, in the Name of Seiſin of the Houſe, and of the Reſidue of the Lands and Tenements aforeſaid, was a ſufficient Livery of Seiſin in Law, or not. As to the Firſt, it was reſolved, that the actual (*a*) Delivery of a Writing ſealed to the Party, without any Words, is

(*a*) 1 Rol. 24. Co. Lit. 36. a. 49. b. Cr El. 356, 356. Dall. 105.

is a good delivery; for *in traditionibus ſcriptorum non quod dictum eſt, ſed quod geſtum eſt inſpicitur*: But here he ſaith, *I deliver this writing to you*, which clearly is ſufficient, altho' he doth not ſay, as (*a*) his deed or as his act. And therefore if *A.* makes a writing to *B.* and ſeals it, and delivers it to *B.* as an * eſcrow, to take effect as his deed when certain conditions are perform'd, it has been adjudg'd to be immediately his deed, for the law reſpects the delivery to the party himſelf, and rejects the words which will make the expreſs delivery to the party upon the matter no delivery. And therefore in *Mich.* 12 *H.* 8. *Rot.* (*b*) 751. *in Banco*, *Anne Quilter* late wife of *John Quilter*, and others, executors of the will of the ſaid *John Quilter*, brought an Action of *Debt* againſt *Ed. Cobham* on a bond, &c. the defend. pleaded that he deliver'd the bond to the teſtator as a ſchedule, upon condition if the plaintiff made indentures between the defend. *ex una parte, & præfat' Teſtator ex altera parte, de certis conditionib', convent' & agreament' inter eaſd' partes adtunc concord', &c. pro adnullatione præd' ſcript' obligat', &c. ante feſtum Mich' Archang' deliberand' qd' extunc præd' ſcript' obligator' in omni ſuo robore ſtaret, ſin aliter, vacua foret: Et id' defendens dicit qd' præd' teſtat' non fecit aliquam indent', &c. & ſic id' defendens dicit, qd' ſcript' præd' in forma præd' deliberat' dictis indent' inter eaſd' partes minime confectis non eſt factum ſuum, & hoc, &c.* Judgm. if action? And thereupon the pl. demurr'd in law, and it was reſolv'd that the ſaid delivery was good in law, altho' the condit. was not perform'd, and the plaintiffs had judgm. to recover. And (*c*) *Tr.* 13 *H.* 8. *rot.* 405. *in Banco*, between *T. Bodenham*, Eſq; pl. and *Ed. Marmion* clerk def. in *Debt* on a bond the like plea pleaded, and a demurrer upon it, and judgm. given for the pl. which judgments (upon ſearch which I commanded to be made) I have ſeen. And therewith agrees the report of 19 (*d*) *H.* 8. 8. *a.* and takes the difference when it is ſo delivered to the party himſelf, and when to a ſtranger, as it was there agreed. 35 *Aſſ. p.* 6. (*e*) a writing may take effect by actual deliv. to the party himſelf without any words: And as a writing may take effect by actual delivery without words, ſo it may take effect by words without actual delivery: As if a writing is ſealed, and it lies in a window, or upon a (*f*) table, and the obligor ſaith to the obligee, ſee there's the writing, take it as my deed, and he takes it accordingly, it is a good delivery in law: In the ſame manner as if one (*g*) makes a Charter of feoffment, and within the view of his land ſaith to another, ſee you the land, enter into it and enjoy it according to the form and effect of this charter, and the feoffee enters, it amounts to a good livery of ſeiſin of the land: And if words in ſuch caſe ſhall amount to a livery of ſeiſin, by which a freehold ſhall paſs, *a fortiori* words ſhall amount to a delivery of a deed;

(*a*) Dall. 104. 2 Rol. 24. * Cr. El. 520, 835, 836, 884. Co. Lit. 36. a. 2 Rol. 26, 27. Moor 642, 696, 697. Noy 6. 50. Cr. Jac. 85, 86. Style 251. Hob. 246.

(*b*) 2 Rol. 26.

(*c*) 2 Rol 25.

(*d*) 2 Rol. 26.

(*e*) Co. Lit 49. b. 36. a. 2 Rol. 24. Cr. El. 7, 356. Dall. 104.

(*f*) Cr. El. 122, 356. Owen 95. Co. Lit. 36. a. 1 Leon. 140. 2 Rol. 24.

(*g*) 2 Rol. 6, 7. Co. Lit. 48. b. Palm. 434.

wherefore it was concluded *a fortiori* in the caſe at Bar, when *Rob. Thoroughgood* delivered the writing to the parties, ſaying, *Here I deliver you this* (*a*) *writing*, it is a good delivery thereof to take effect as a deed: *Vide* 33 *Aſſ.* 2. 33 *E.* 3. *Aſſiſe* 367. 43 *E.* 3. 28. 13 *E.* 4. 8. 8 *H.* 6. 26. 9 *H.* 6. 37 & 59. *Vide* 4 *H.* 6. 5. If the obligor delivers the bond to the obligee to redeliver to him, the obligee may detain the bond for ever, and theſe words to redeliver to him are void. *Vide* 29 *H.* 8. 34 & 35 (*b*) *Dyer*, & *Trin.* 43 *El.* between (*c*) *Hawkſton* and *Catcher* in *B. R.* where ſome opinions *ex improviſo* were conceived, that the obligor might deliver a bond as an eſcrow to the obligee; but believe you the ſaid judgments given upon demurrer in law in the point: Wherefore as to the firſt point it was clearly reſolved, that the ſaid writing ſealed took effect as a deed by the delivery aforeſaid.

(*a*) 2 Rol. 24.

(*b*) Dy. 34, 35. pl 25. Cr. El. 835. 2 Rol. 27.

(*c*) Cr. El. 835, 836. 2 Rol. 27. Noy 50. Co. Lit. 36. a.

As to the 2d point, firſt it was clearly reſolv'd, that the (*d*) delivery of the deed upon the land, doth not amount to a livery, for it has another effect, *ſc.* to take effect as a deed, as it is reſolved in *Sharp's caſe, an* 42 *El. in Com' Banco reported by me in the 6th part of my Reports f.* 26. *and there it is well agreed*, that to every livery of ſeiſin there is requiſite, either an act, which the law adjudges livery, or apt words which amount to it, and there the caſe of 43 *E.* 3. *Feoffments* & (*e*) *Faits* 51. is cited, which is to this effect: In *Aſſiſe* the recognitors found a ſpecial verdict, *ſc.* that the Pl. was ſeiſed of land in fee, and the tenant drew and engroſſed a charter of Feoffment of the land in view, &c. in the name of the pl. to the tenant himſelf and his heirs, and the tenant deliver'd the charter to the pl. and pray'd him to deliver ſeiſin in the ſame land, and the plaintiff would not deliver ſeiſin, but he delivered back the charter to the tenant upon the land, and the tenant kept himſelf in, and if the delivery of the charter upon the land was a ſufficient livery of ſeiſin, was the queſt. and there *Kirton* juſtice ſaid, if the plaint. had ſpoke in this manner, when he delivered the charter to the tenant, Sir I deliver to you this charter in the name of ſeiſin of all the lands and tenements contained in the charter, it had been a good delivery of ſeiſin, but ſo he doth not do in this caſe, wherefore the court awarded that the plaint. ſhould recover ſeiſin. And it was reſolved, that altho' moſt properly livery of ſeiſin is made by delivery of a twig or (*f*) turf of the land it ſelf, whereof livery of ſeiſin is to be given; and ſo it is good to be obſerved; yet a delivery of a turf or twig growing upon other land; of a piece of gold or ſilver, or other thing upon the land in the name of ſeiſin is ſufficient, for the turf or twig which grows upon the land, when it is ſevered is not parcel of the land, and when the feoffor is upon the land, his words without any act are ſufficient to make livery of ſeiſin; as if he ſaith, I deliver ſeiſin of this land to you in the name of all the land contained in this deed: or, enter you into this land, and take ſeiſin

(*d*) Moor 458. Co. Lit. 48. a. 56 b. 57. a. Owen 44. 6 Co. 26. b. Cr. Jac. 80.

(*e*) Palmer 434. 6 Co. 26. b.

Q.

(*f*) Co. Lit. 48. a. 6 Co. 26. a. Poph. 49. Clerk. 43. a.

of it in the Name of all the Land contained in this Deed, or ſuch other Words, without any Ceremony or Act done; and that is the Reaſon that the Delivery of any Thing upon the Land in the Name of Seiſin is ſufficient, becauſe his Words alone without any Thing were ſufficient; for if Words alone out of the Land which is within the View are ſufficient in Law, *a fortiori* when they are ſpoke upon the Land it ſelf; and yet it is not wiſely done to omit uſual Ceremonies and Acts in ſuch Caſes, for they imprint a better Remembrance of the Thing which is done, becauſe they are ſubject to ſight, than Words alone, which are only heard, and which eaſily and uſually ſlip out of Memory: Wherefore it was reſolved, That the Delivery of the Deed upon the Land in the Name of Seiſin was ſufficient in Law. And the ſaid Caſe of *Sharp* was affirmed for good Law in this Caſe. 3. It was reſolved, That this Delivery of the Writing amounted to two ſeveral Acts at one and the ſame Inſtant, *viz.* to deliver the Writing as a Deed, and to deliver Seiſin of the Land according to the Deed.

Lucas 121.

BEAUMONT's *Caſe.*

Paſch. 10 Jacobi 1.

In the Court of Wards.

1 Jones 393, 394. Cr. Jac. 476, 477. 2 Inſt. 681, 682.

SIR *Humphrey Foſter* ſeiſed in Fee of the Scite of the Monaſtery of *Gracedieu*, and other Lands in Queſtion, gave them to *John Beaumont* and *Elizabeth* his Wife, and the Heirs of their two Bodies begotten, the Remainder in to Fee to *John Beaumont*; *an.* 6. *E.* 6. *John Beaumont* levied a Fine *come ceo* to King *E.* 6. his Heirs and Succeſſors, with Proclamations; K. *E.* 6. *anno* 7. granted the ſaid Scite, *&c.* by his Letters Patent to *Francis* Earl of *Huntington* and his Heirs, *John Beaumont* died, after whoſe Death *Elizabeth* within five Years entred, claiming her Eſtate, the ſaid *Francis* E. of *Huntington* died, *Henry* his Son and Heir, *an.* 16 *El.* by Indenture reciting the ſaid Gift by Sir *Humph. Foſter* to the ſaid *John* and *Elizabeth* his Wife in ſpecial Tail, and that *Elizabeth* was then ſeiſed in her Demeſne as of Fee-Tail, by Force of the ſaid Gift, ratified, allowed and confirmed to the ſaid *Elizabeth* her Eſtate, *Habendum* the Lands to her and to the Heirs of the Body of the ſaid *J. Beaumont* deceaſed, and of the ſaid *Elizabeth*. The ſaid *Elizabeth* died ſeiſed, having Iſſue *Fra. Beaumont* one of the Juſtices of the Com. Pleas, Son and Heir of both their Bodies. *Francis Beaumont* entred into the ſaid Scite, *&c.* and took the Profits, *&c.* and afterwards accepted a Fine with Proclamations *ſur Conuſans de droit tantum* of two Strangers, with a Render for ninety-nine Years after the Death of the ſaid *Francis*, if *Anne* his

his wife ſhould ſo long live, the proclamations paſt, *Fr. Beaumont* having iſſue Sir *Hen. Beaumont* his elder ſon, and *J.* his younger ſon, dyed, Sir *H.* being in ward to Q. *El.* attained to his full Age *an.* 45 *El.* and before livery, by indent. 2 *Jacobi* covenanted upon good conſiderat. to ſtand ſeiſed to the uſe of himſelf and the heirs males of his body, and afterwards to the uſe of *J. Beaum.* his brother and the heirs males of his body, with divers remainders over; Sir *Henry* died without iſſue male, having iſſue *Barbara*, who now is of tender years, and in ward to the K. The queſt. was, whether the ſaid ſcite and land belong'd to *Barbara*, or to the ſaid *J. Beaumont*: And in this caſe 2 points were moved and argued by counſel on both parts, *ſc.* in the terms of *Trin. Mich. & Hill.* by *Coventry*, *Tho. Crew*, and *G. Crooke* on the K.'s part, and by *Finch*, *Walter*, and *Harris* ſerj. on the part of the heir male: And the firſt point was, if by the fine levied with proclamations, and the death of *J. Beaum.* the wife had but an eſtate for life diſpuniſhable of waſte, as ten't in tail after poſſibility of iſſue extinct? The 2. admitting ſhe had an eſtate tail, what is wrought by the ſaid confirm. if thereby the iſſue in tail ſhall inherit or not? As to the firſt it was objected, that by the fine levied by the (*a*) husband. the eſtate-tail was barred, becauſe the iſſue ought to make himſelf heir of both their bodies, as it is adjudged in 18 *El.* 351. *b.* So, and for the ſame reaſon, if one donee is (*b*) attainted of treaſon, the eſtate-tail is extinct, as it is expreſly held in 16 *El. Dyer* 332. *b.* and therewith agrees (*c*) 5 *H.* 7. 32. *b.* by *Brian*, Ch. Juſt. of the bench, from thence it follows, that the wife can't be ſeiſed of an eſtate-tail, becauſe the eſtate-tail by fine was barred and extinct; and therefore for neceſſity of reaſon, the eſtate of the wife ſhall be (*d*) chang'd into an eſtate for life diſpuniſhable of waſte: And it was reſembled to the caſe in 7 *H.* 4. 16. *b.* husband and wife ten'ts in ſpecial tail are (*e*) divorced (which is intended of a divorce which diſſolves the marriage *ab initio*, and the husb. and wife *a vinculo matrimonii*) the donees have but an eſtate for their lives, becauſe the eſtate tail is determ. and extinct: It was alſo urged, that if the wife ſhould have an eſtate in tail, then ſhe might (*f*) ſuffer a recovery, or levy a fine, and ſo bar the conuſee of her husband, or prevent the K. of his forfeiture for treaſon, which would be againſt the reſolutions aforeſaid reported by the Lord *Dyer*. Then if the eſtate is converted into an eſtate for life diſpuniſhable of waſte (*g*) in the nature of a ten't in tail after poſſibility of iſſue extinct, *ſequitur* that the confirmation enlarges her eſtate, and makes *Barbara* daughter of Sir *Henry* inheritable to the Land.

But admitting, for the argument of the ſecond point, That the ſaid *Elizabeth* had an eſtate in ſpecial tail, the reverſion expectant to the ſaid *Henry* Earl

(*a*) 8 Co. 72. a. b. Dy. 351. pl. 24. 2 Inſt. 681 Hob. 157, 333. 1 Leon 84, 157. Moor 147. 1 Brownl. 140. Dall. in Kelw. 205. pl 7. Dall. in Aſh. pl. 7. Dall. 50. pl. 16. 1 Ander. 39. pl. 101, Godb. 312. N. Benl. 225. pl. 257. Benl. in Aſh. pl. 27. Benl. in Kelw. 213 pl. 27. 2 Rol. Rep. 321. Moor 8. pl. 90, 114. pl. 256 Cr. Car. 478. 1 Jones 40. 1 Rol. Rep 424. 1 Co. 87. b. Lit. Rep. 291.

(*b*) Hob. 257. 8 Co. 72. a. b. Moor 147. 1 And. 39. pl. 102. Raym. 6, 7. Godb. 312, 325. 2 Rol. Rep. 321. Moor 114. pl. 256. Dy 332. pl. 27. Hob. 346. Cr. Car. 478. 1 Brownl. 139, 140. 1 Jones 40.

(*c*) 2 Inſt. 681. Godb. 312. 5 H. 7. 32. a.

(*d*) 2 Inſt. 682.

(*e*) Poſt. 141. a. 2 Inſt. 682. Br. Tail 9. Br. Eſtate 11. Br. Deſaignm. & Dever ce 13. Co. Lit. 22. a.

(*f*) Poſt. 142 b. Hob. 259. 1 Leon. 157. 1 Rol. Rep 424. 2 Rol. Rep. 427. Winch 43.

(*g*) 11 Co. 80. a. Dr. & Stud. lib. 2. cap. 1. Lit. Sect. 34. 12 H 4. 3. b. 4. a. 10 H 6. 1. b 45. E. 3. 25. a. 18 E. 3. 32. b. 11 H 4. 14. b. 15. a. 11 H. 6 1. b. 2 Rol. 826, 828. 1 Rol. Rep. 100, 179, 184. Weſt Symb. 180. b. 6 Co. 41. a 2 Inſt. 302, 306. 4 Co 63. a. Co. Lit. 27. b. F. N. B. 58. p. 39 E. 3. 16. a. b.

of *Huntingdon* to take effect in poſſeſſion (in reſpect of the ſaid fine levied by the husband) immediately after the death of the ſaid *Elizabeth*, then the 2 Point is, if againſt the ſaid confirmation made by him who has the reverſion in fee expectant, as is aforeſaid, he ſhall not enter into the land after the death of *Eliz.* or if the confirmation to *Eliz.* in tail *ut ſupra*, makes the Iſſues of the ſaid *John* and *Elizabeth* inheritable; and it was ſtrongly urged that the Iſſues ſhould be inheritable by the ſaid confirmat. for 2 reaſons, one, in reſpect of the eſtate of him who has made the confirm. by way of extraction of a new eſtate out of the reverſion; the other, in reſpect of the eſtate of him to whom the confirmation is made, by way of incorporat. and alterat. of the quality of the eſtate: As to the firſt, the ſaid Earl has the entire reverſion in fee, out which he may raiſe and create as many eſtates in tail one after the other, as he will, and therefore when he confirms the eſtate of the wife, to have and to hold to her and to the heirs of the body of the ſaid *John* and *Elizabeth*, thereby the E. has excluded himſelf and his heirs by expreſs words, ſo long as the ſaid *John* and *Elizabeth* have heirs of their bodies to claim the land: As if a feme (*a*) covert be ten't for term of her life, the reverſion over in fee, if he in reverſion confirms the eſtate of the husband and wife, to have and to hold to them for term of their lives, in that caſe the husb. ſhall have an eſtate for life after the death of his wife, for it would be againſt reaſon, that he who has the reverſion in fee, out of which he may derive as many eſtates for lives as he will, ſhould enter into the land after the death of the wife, during the life of the husb. againſt his own confirmat. when the husb. had ſuch eſtate upon which the confirmat. might enure, by way of extraction of a new eſtate out of the reverſion; and therewith agree *Lit. f.* 120, 121. *b.* & (*b*) 17 *E.* 3. 68. *b.* So in the caſe at bar, it would be againſt reaſon that the E. who made the confirmat. after the death of *Elizabeth* ſhould enter into the land, againſt the limitation of his own confirmat. *viz.* ſo long as the ſaid *John* and *Elizabeth* have heirs of their Bodies. Secondly, in reſpect of the eſtate of the ſaid *Elizabeth*, for this confirmation alters the quality of her eſtate, and thereby incorporates a new quality in the eſtate; for where the E. after the death of *Elizabeth*, might have entred and excluded all the heirs in tail, now by this confirmation he has added this enlarging quality, to make all the heirs in tail inheritable. And that a Confirmation may alter or add to the quality of the eſtate in land appears in our Books; and therefore, if the leſſor confirms the eſtate, of his leſſee for life, (and adds this clauſe) without (*c*) impeachment of waſte, it is good. So if the

(*a*) Plowd. 31. b. 160. a. Cr. Car. 478. Lit. ſect. 525. Co. Lit. 299. a. b Cr. El. 163. Kelw. 129. a.

(*b*) Co. Lit. 299. b. Fitz. Confirm. 9.

(*c*) 2 Co. 23. a. 72. a. 82. a. 11 Co. 82. b. 83. b. 1 Rol. Rep. 182. 2 Rol Rep. 325. Moor 18, 317, 327. 2 Inſt. 146. Hob. 132. Popham 193, 194, 195. 4 Co. 63. a. Latch 269, 270. Bridgm. 102. Dyer 47. pl. 11. Plowd. 132. b. Cr. Jac. 216. 2 Rol. 835. 9 Co. 9. a. Hetl. 77. Co. Lit. 220. a. 19 H. 6. 63. b. 4 E. 4. 36. a.

the lord paramount confirms the eſtate of the meſne with clauſe of acquittal, it is good, *6 E.* 3. 7. 19 *H.* 6. 63. *b. F. N. B.* 136. *Vide* 4 *E.* 4. 35. (*a*) *Iſabel de Upſey's caſe*. So a confirmat. may alter the quality of the eſtate of the land; as if the eſtate of the feoffee is upon condit. the feoffor may confirm his eſtate abſolute, and ſo alter the quality of the eſtate of the land, *ſ.* from (*b*) conditional into abſolute, * 7 *H.* 6. 7. *b.* and *Mayowe's caſe in the* 1 *part of my Reports*, *f.* 146. So in 49 *E.* 3. 7. *a. b.* If the lord of (*c*) ancient demeſne confirms the eſtate of the ten't, to hold by certain ſervices *ad communem legem*, altho' the eſtate of the ten't is not changed, nor any tranſmutat. of the poſſeſſion, yet the quality of his eſtate is changed, for the ten't ſhall not be afterwards impleaded by petit writ of *right cloſe*, and the land by the confirmat. is diſcharged from the cuſtoms of the manor. So in the caſe at bar, altho' the eſtate of *Elizabeth* is not changed, nor any tranſmutat. of poſſeſſion had, yet the quality of the eſtate of the ſaid *Elizabeth* is changed, by incorporating of a quality to the eſtate of the ſaid *Elizabeth*, *ſ.* that the heirs in tail ſhall inherit.

As to the firſt point, it was anſwered and reſolved, that the (*d*) wife after the death of her husband had an eſtate in ſpecial tail; and for the better underſtanding of the true reaſon thereof, let us ſee, by what law the eſtate of the wife ſhall be altered and changed to an eſtate for life, and firſt, it was reſolved, that it was not by the com. law, for at the com. law, if lands had been given to husb. and wife, and to the heirs of their two bodies, and after iſſue the husb. had alienated and died, this alienat. had not barred neither the wife, nor the iſſue in tail, becauſe the husband alone had not *poteſtatem alienandi*, for as much as he had an undivided eſtate jointly with his wife, and therewith agree 12 *H.* 4. (*e*) *Formedon* 15. 21 *E.* 3. 345. and by the Stat. of *W.* 2. *de donis conditionalibus*, it is enacted, that a fine levied by ten't in tail *ipſo jure ſit nullus*. As to the caſe *an.* 16 *El. Reg'* of treaſon whereof the husband is (*f*) attainted, it muſt be known, that ſuch bar and forfeiture is made by the Stat. (*g*) of 26 *H.* 8. *c.* 13. by which it is enacted, That every offender convicted of high Treaſon, *&c.* ſhall loſe and forfeit to the King, his heirs and ſucceſſors, all ſuch lands, *&c.* whereof any ſuch offender ſhall have any eſtate of inheritance: But in the ſame act there is a ſaving to every perſon (other than the offenders, their heirs and ſucceſſors) all rights, titles, intereſts, *&c.* So that it appears, that the eſtate of the wife, if ſhe ſurvives her husband, is ſaved by this act, and that the bar by the Statute is only as to the iſſues in tail, and not as to the wife, and the reaſon of the reſolution that the heir is diſabled in ſuch caſe is, becauſe he ought in his lineal conveyance to make himſelf heir as well to the father as to the mother by the opinions of *Catlyn*, *Wray*, *Saund-*

(*a*) 4 E. 4. 36. a.
(*b*) 1 Co. 147. b. Poph. 51. Co. Lit. 300. a. Poſtea 142. a. * Poſtea 142. a.
(*c*) 1 Rol. 324. Fitz. Ancient Demeſne 42. Br. Antient Demeſne 8. Poſtea 142. a.
(*d*) Cr. Car. 478. Cr. Jac. 689. 1 Co. 87. b. Hob. 257, 259. 1 Jones 73. Goab 317, 325. Dy. 351. pl. 24. N. Benl. 225. pl. 257. 1 Ander. 39. pl. 101 Benl. in Aſh. pl. 27. Benl. in Kelw. 205, pl. 7. 213. b. pl. 17. Dall. 50. pl. 16. Winch 43.
(*e*) Ant. 26. b.
(*f*) Dy. 332. pl. 27. Hob. 257, 346. Cr. Car. 478. 8 Co. 72. a. b. Moor 147. 1 Ander. 39. pl. 102. Raym. 6, 7. 2 Rol. Rep. 321. Godb. 312, 325. 1 Jones 40. Moor 114 pl. 256. 1 Brownl. 139, 140.
(*g*) 3 Co. 10 b. 1 Rol. Rep. 162. 2 Rol. Rep. 314, 315, 318, 319, 320, 321, 323, 324, 325, 340, 374, 416, 418, 420, 501, 503, 507, 508. 1 Jones 70, 71, 75, 76, 77, 80. 1 Co. 24. a. 7. Co. 33 a. 34. b. 12. Co. 6. 3 Inſt. 19. 4 Inſt. 42. 2 And. 34. Palm 439. Hetl. 151, 157. Co. Lit. 372. b. 392. b. Dy. 332. pl. 27. 343. pl. 56. Co. Ent. 422. a. Plow. 552. b. Godb. 300. 303, 307, 308, 309, 311, 313, 315, 321, 322, 323, 324. Hob. 334, 339, 340, 341, 343, 344, 346, 347, 438. 1 Leon. 21 Cr. Car. 428.

(a) Dy. 351. pl. 24. 8 Co. 72. a. b. 2 Inſt 681. Hob. 257, 333. Moor 147. 1 Brownl. 142 Dall. in Kelw. 205. pl 7. Dal. in Aſh. pl 7. Dall 15. pl. 16. 1 Anderſ. 39. pl. 101. Godb. 312. N. Benl. 225. pl. 257. Benl. in Aſh. pl 27. Benl. in Kelw. 213. pl. 27. 2 Rol. Rep. 321. Moor 28 pl. 90. 114. pl. 256. Cr. Car. 478. 1 Jones 40. 1 Leon. 84, 157. 1 Co. 87. b. 1 Rol. Rep. 424 Lit. Rep. 291. (b) 3 Co. 77. b. 86. b. 87. a. b. 88. a. b. 89. a. 90. a. b. 91. a. 9 Co 105. b. 13 Co. 20. Savil 85, 88, 105, 107. 1 Anderſ. 170. 2 Anderſ. 176. Co. Lit. 262. a 326. a. 372. a. (c) 10 Co. 50. a. Moor 115, 146 1 Anderſ. 46 Savil 85, 88. 1 Bulſt. 33. Co. Lit 237 a. Goldsb 11. 3 Co. 51. a. Hob 257, 258. 7 Co. 32 a. b. 11 Co. 75. a. 1 Leon 244. 2 Leon. 62, 224 3 Leon. 10. (d) Supra. in a) (e) 1 Rol. 875. Cr. El. 513, 514. Hob. 258. 2 And. 44, 45. Moor 455. Cr Car. 478, 479.

ders and *Dyer*. And as to the ſaid caſe (*a*) of the fine with proclamation in 18 *Reg. El.* levied by the husb. alone, the bar (*b*) is made by the Stat. of 4 *H.* 7. *c.* 24. & (*c*) 32 *H.* 8. *c.* 36. and in the Stat. of 4 *H.* 7. there is a ſaving for the wife, if ſhe brings her action or lawful entry within 5 Years after ſhe ſhall be uncovert, as ſhe did in this caſe; and by the Statute of 32 *H.* 8. the fine levied with proclamat. of lands intailed to him who levies the fine, or any of his anceſtors, ſhall be a ſufficient bar againſt the ſaid Perſon and his heirs claiming only by force of any ſuch intail, and againſt other perſons claiming only to their uſe, or to the uſe of any manner of heir of their body; in which caſe there needs not any ſaving for ſtrangers, for the purview of the act is ſpecial, and *ſecundum quid*, *viz.* againſt the heirs in tail, and others claiming to their uſe; and therefore *diſtinguendum eſt*, that the fine with proclamations levied by the husb. or the attainder of the husb. of high treaſon is a bar to the eſtate tail, *quoad* the iſſues in tail, but not *quoad* the Wife, but that ſhe ſurviving ſhall be ſeiſed of an eſtate tail, which eſtate is ſaved to her by all the ſaid acts; and that is proved by the ſaid book of (*d*) 18 *Eliz.* for there the husb. being jointly ſeiſed with his wife in ſpecial tail, levied a fine with proclamations, to the uſe of himſelf and his heirs (which fine is a bar to the iſſues in tail) and afterwards the husb. deviſed the land to the wife for life, and died, there the wife entred and waived the eſtate-tail, claiming for life by force of the deviſe, which proves, that if ſhe had not waived the eſtate-tail, that ſhe ſhould have had it, and not an eſtate for life, as has been ſuppoſed by the other ſide. And in the indenture of confirmat. which was made *in an.* 16 *Reg. Eliz.* it is recited, that the ſaid *Elizabeth* had an eſtate-tail, by which it appears that the law was ſo taken at that time. And as to that which was objected, that the ſaid *Elizabeth* could not have an eſtate-tail, becauſe as to the iſſues in tail the eſtate-tail is barred, alſo it was asked, to what end ſhould ſhe have an eſtate-tail, when it can't deſcend? It was anſwered and reſolved, that one may have an eſtate-tail, and yet all the iſſues in tail ſhall be barred to inherit, as in the caſe of Sir *George* (*e*) *Brown in the 3 part of my Reports*, *f.* 50. *b.* 51. *a. b.* Sir *Richard Bridges* ſeiſed of certain land in fee, did thereof infeoff *Winſcombe* and others, upon condit. that they ſhould give it back to him and his wife, and to the heirs of their two bodies begotten, the remainder to the right heirs of Sir *Richard*, which was done accordingly; they had iſſue *Anthony Bridges*; Sir *Richard* died, *Anthony Bridges* in the life of his mother levied a fine with proclamations to Sir *G. Brown* in fee, the wife living, the ſaid *Anthony* made a leaſe for 3 lives, which was not warranted by the ſtat. of 32 *H.* 8. *c.* 28. and there it is reſolv'd, that the ſaid fine levied by the ſaid

Anthony, ſhould bar the eſtate-tail, yet there it is clearly admitted, that the wife remained ten't in tail; for there the queſtion was, if the ſaid diſcontinuance for lives without warranty was within the ſtat. of (*a*) 11 *H.* 7. but if the eſtate of the wife had been changed to an eſtate for life, then without queſtion the ſaid leaſe for 3 lives had been a forfeiture by the com. law, and all the argument upon the ſtat. of 11 *H.* 7. had been in vain, and to no purpoſe, and in ſuch caſe the wife had an eſtate-tail reſtrained from alienations by the ſtat. of 11 *H.* 7. and not deſcendible to her iſſues. So in (*b*) *Archer's caſe* 20 *El. Reg. in the* 1 *part of my reports f.* 90. If the ſon of the tenant in tail in the life of the father levies a fine with proclamations, this after the death of the father (*c*) ſhall bar the eſtate-tail, and yet without queſtion the father remains tenant in tail, altho' the eſtate-tail doth not deſcend. So if lands are given to an (*d*) alien and the heirs of his body, he has an eſtate-tail, and yet ſuch eſtate aft. his death is not deſcendible to his iſſue. And if a diſſeiſor makes a gift in tail, the donee makes a feoffm. to *A.* and afterwards levies a fine with proclamat. to *B.* who has nothing, this fine ſhall bar the iſſues in tail, becauſe the iſſues in tail being privies ſhall not plead *Quod partes finis nihil habuerunt*, but ſhall not bar the diſſeiſee by nonclaim, becauſe the fine as to him was void: So as in ſuch caſe *quoad* the heirs in tail the fine ſhall bind, but not *quoad* the diſſeiſee, who is a ſtranger: *Pari ratione* in the caſe at bar, this (*e*) fine levied by the huſband, as to the iſſues in tail, ſhall be a bar, but not as to the wife, who is a ſtranger to it. Husb. and wife are ten'ts in ſpecial tail, the reverſion to the donor, they have iſſue, the husb. levies a fine with proclamations to a ſtranger and dies, the wife enters, the wife has deveſted the whole eſtate out of the conuſee, and reveſted the eſtate-tail in her, the immediate reverſion to the donor, and left nothing but a poſſibility in the conuſee: *Ergo* the eſtate of the wife is not changed into an eſtate for life, for then if error is in the fine, the iſſue in tail ſhould have a writ of *error* upon the ſtat. of (*f*) 9 *R.* 2. in the life of the wife, and ſo the iſſue in tail would have an eſtate in the land in the life of the donee, which would be abſurd; for he has not any eſtate by purchaſe, and living the donee he can have nothing by deſcent. As to the caſe of 7 *H.* 4. 16. b. where after (*g*) divorce the eſtate of the donees is changed to an eſtate for their lives, that is not like the caſe at bar for divers reaſons. 1. There the eſtate-tail is diſſolved *ab initio*, and the iſſue made baſtard; but in the caſe at bar the eſtate-tail is barred, and not diſſolved or determined, but has continuance as long as the wife lives, or the heirs in tail remain.

As to the 2 point, it was anſwer'd and reſolv'd that the confirmation (*h*) *nihil operatur*: And 1. It was admitted, that if

(*a*) 11 H. 7. c. 20. 3 Co. 50. b. 51. b. 4 Co. 3. b. 5 Co. 80 a. 10 Co. 37. a. Winch 43. 1 Leon. 261. 2 Leon. 168. 3 Leon. 78. Cr. El. 2, 24, 513, 514. Godb. 6. Moor 93, 250, 455. 2 Anderſ. 31, 44, 57. 1 Rol. 878. Cr. Jac. 174, 474. 624. Cr. Car. 244. 1 Jones 13, 254. Co. Lit. 326. b. 365. b. Hob. 166. 341. Brid. 136. (*b*) Hob. 258, 333. 3 Co. 90. a. b. Cr. Car. 435. 1 Jones 33, 37, 39, 40, 81. 2 Rol. Rep. 374. Winch 110. (*c*) 10 Co. 50. a. Godb. 316. Cr. Car. 435. 3 Co. 50. a. 1. Jones 33. 1 Leon. 244. 2 Leon. 36. 3 Leon. 211, 227. Goldsb. 107. Hob. 333. Cr. El. 122, 610. Hut. 84. (*d*) 2 Rol. Rep. 321. (*e*) 8 Co. 72. a. b. Dyer 351. pl. 24. 2 Inſt. 681. Hob. 257, 333. Moor 147. 1 Brownl. 140. 1 Leon. 84, 157. Dall. in Kelw. 205. pl. 7. Dall. in Aſh. pl. 7. Dall. 50. pl. 16. 1 Anderſ. 39. pl. 101. Godb. 312. N. Benl. 225. pl. 257. Benl. in Aſh. pl. 27. Benl. in Kelw. 213. pl. 27. 2 Rol. Rep. 321. Moor 28. pl. 90. 114. pl. 256. 1 Jones 40. Cr. Car. 478.

1 Co. 87. b. 1 Rol Rep. 424. Winch 43. Lit. Rep. 291. (*f*) 9 R. 2. c. 3. 3 Co. 4. a. 4 Inſt. 51. Dyer 2. pl. 5. 90. pl. 5. Bridgm. 71. Cr. El. 289. F. N. B. 99. e. Owen 149. 2 Bulſtr. 15. 10 Co. 44. b. Palm 251, 253. (*g*) Antea 139 a. 2. Inſt. 682. Br. Tail 9. Br. Eſtate 11. Br. Deraignment & Divorce 13. Co. Lit. 22. a. (*h*) Cr. Car. 477, 478. cont. Hob. 257.

the Reverſion or Remainder in Fee had been in a Stranger, and not in *John Beaumont*, then let us ſee when *Elizabeth* entred and was ſeiſed in Tail, what Eſtate was left in the Conuſee; and it was reſolved that no Part of the Eſtate-tail was left in him, for the Wife was ſeiſed of the whole Eſtate-tail, and no Part of the Reverſion remained in the Conuſee, for that was reveſted in him to whom the Reverſion or Remainder did appertain, and from thence it follows, that nothing remained in the Conuſee in ſuch Caſe, but only a (*a*) Poſſibility to have the Land after the Death of the Wife (who had the whole Eſtate-Tail) ſo long as the Iſſues in Tail remained, if any were alive at the Time of the Death of the Wife; and without Queſtion ſuch Poſſibility ſhall not paſs by the ſaid Confirmation. Then when *J. Beaumont* had the Remainder in Fee, the Confirmation made by the Heir of the Conuſee could paſs nothing in reſpect of the Poſſibility which was gained by the Fine during the Continuance of the Eſtate-Tail; but it ought to be extracted from the Rem'r in Fee, and that it could not be in this Caſe for divers Reaſons: 1. The old Eſtate-Tail as to the Iſſues is barred and can't deſcend, but the Wife is ſeiſed of the intire old Eſtate, and no new Eſtate is created by the Confirmation, but only the old Eſtate confirmed; *ergo* it can't deſcend. 2. A Confirmation can't add a deſcendible Quality to him who is diſabled to take by Deſcent; as if Lord and Tenant be of a Carve of Land, and the Ten't has Iſſue, and is attainted of Felony, and the King Pardons him, and afterwards the Lord confirms the Eſtate of the Tenant, and the Tenant dies. The Lord ſhall have the Land againſt his own Confirmation, for the Confirmation can't add to the Eſtate of the Tenant a Quality deſcendible to him who was diſabled to take the Land by Deſcent. So in the Caſe at Bar, the Confirmation of the Earl to *Elizabeth* can't add a Quality deſcendible to the Iſſue in Tail, who was diſabled by the Fine to take by Deſcent. 3. If this Confirmation in this Caſe ſhould add to the Eſtate of the Wife a deſcendible Quality, that in Effect as to this Point would repeal two Acts of Parliament, *viz.* the Act of 4 *H.* 7. and 32 *H.* 8. by which as appears before, the Eſtate-Tail is barred as to the (*b*) Iſſues, and the Iſſues diſabled to claim the Land by Force of the ſaid Eſtate-Tail; *Sed pacta privata juri publico derogare non poſſunt*, and theſe Statutes are *jura publica*, for they are two of the Principal Pillars of the Law. 4. In the ſaid Caſe of Sir *George Brown*, after that *Anthony* had levied a Fine to him in the Life of his Mother, ſuppoſe Sir *George* had confirmed the Eſtate of the Mother, yet after the Death of the Mother the

(*a*) Hob. 257. Cr. Car. 477.

(*b*) 8 Co. 72. a b. Dyer 351. pl. 24. 2 Inſt. 681. Hob 257, 333. Antea 139. a. Moor 28. pl. 90. 114. pl. 256. 1 Brownl. 140. Moor 147. Dall. in Kelw. 205. pl. 7. Dall. in Aſh. pl. 7. Dall 50. pl. 16. 1 And. 39. pl. 101. Godb. 312. N. Benl. 225. pl 257. Benl. in Aſh. pl. 27. Benl. in Kelw. 213. b. pl. 27. 2 Rol. Rep. 321. 1 Jones 40. Cr. Car. 478. 1 Co. 87. b. 1 Leon. 84. 157. 1 Rol. Rep. 424. Lit. Rep. 291.

the Land ſhould not deſcend to *Anthony*, for the Confirmation doth not increaſe the Eſtate of the Wife, but ſhe hath her old Eſtate, and as it hath been ſaid, the ſaid Earl by his Confirmat. can't add a deſcendible Quality. 5. The Law is, if Ten't in (*a*) Dower grants over her Eſtate, yet for Waſte done the Action ſhall be brought againſt Tenant in Dower, and Damages ſhall be recovered againſt her, and it is a deſcendible Quality to the Heirs of him in Reverſion: In that Caſe to ouſt and take away that Charge of the Tenant in Dower, he in the Reverſion by his Deed confirms her Eſtate, to have and to hold to her for Term of her Life, and dies, and afterwards ſhe grants over her Eſtate, and for Waſte done by the Aſſignee, the Heir brings an Action of *Waſte* againſt the Ten't in Dower, who pleads this Confirm. to her to have and to hold the Land for Term of her Life; in this Caſe, notwithſtanding this Confirm. the Action ſhall be maintainable againſt her, for the Confirmat. doth not enlarge her Eſtate, and therefore it can't take away this deſcendible Quality to the Heirs to have an Action of *Waſte* againſt her after her Aſſignm. made of her Eſtate; and ſo is the Book adjudged in 38 *E.* 3. 23, *a. b.* a principal Caſe: *Pari ratione* in the Caſe at Bar, for as much as the Confirmat. doth not enlarge the Eſtate of *Elizabeth*, it can't add a deſcendible Quality. 6. (*b*) *Quælibet confirmatio aut eſt perficiens, creſcens, aut diminuens: Perficiens*, as in *Mayowe's Caſe in the firſt Part of my Reports*, *f.* 146, 147. If Feoffee upon Condit. makes a Feoffm. over, and the Feoffor confirms his Eſtate to him and to his Heirs, *iſta eſt confirmatio perficiens*, for it doth not make Tranſmut. of the Eſtate, but it corroborates and perfects the Eſtate, and makes it ſimple and abſolute, where it was before conditional; and therewith agrees (*c*) 7 *H.* 6. 7. *b.* cited before. So if the Diſſeiſee confirms the Eſtate of the Diſſeiſor, or his Feoffee, it perfects and corroborates his Eſtate, for where it was defeaſible before it makes the Eſtate indefeaſible. 2. *Confirmatio creſcens*, *ſ.* when it enlarges the Eſtate of him to whom the Confirmat. is made; as to an Eſtate at Will to encreaſe it for Years, *&c.* to an Eſtate for Years, to encreaſe it for Life, to an Eſtate for Life, to increaſe it to an Eſtate in Tail, *&c.* or to an Eſtate in Tail, to increaſe it in Fee. But in the Caſe at Bar, *prædict' confirmatio non fuit creſcens*, for it did not enlarge the Eſtate of the Wife, for ſhe had as high an Eſtate in Point of Eſtate by the firſt Gift, as ſhe had by the Confirmat. 3. *Diminuens*, as where the Lord confirms the Eſtate of his Tenant who held by Knight's Service, to hold in Socage, or to hold by leſs Rent, or for Tenant in (*d*) Ancient Demeſn to hold at the Common Law, for thereby the Cuſtoms of the Manor are diminiſhed; but upon a Confirmation to the Tenant, the Lord can't reſerve new Services; as an Hawk for Rent, or Rent for an Hawk;

(*a*) Co. Lit. 44. a. 273. a. 316. a. 2 Rol. 828. 3 Co. 23. b. 30 E. 3. 16. a. b. F. N. B. 55. e. 56. f. Cr. El. 358. Fitz. Waſt 122. 2 Inſt. 301. 11 H. 4. 19. a. Br. Waſt 66. Regiſt. 72. a. Cr. Car. 430. 40 E. 3. 33 b. Fitz. Waſt 67.

(*b*) Co. Lit. 295. b.

(*c*) Ant. 140. a.

(*d*) Ant. 140. a. 1 Rol. 324. Fitz. Ancient Demeſne 42. Br. Ancient Demeſne 8. 49 E. 3. 7. a. b.

& ſic de ſimilibus. And the Confirmation in the Caſe at Bar, is neither *perficiens, creſcens, nec diminuens*; for the ſaid *Elizabeth* had as perfect and large an Eſtate before the Confirmation, as ſhe had after.

And as to that which was objected, That if the Wife ſhould have an Eſtate-Tail, that ſhe had Power to levy a Fine, or ſuffer a Recovery, *&c.* To that it was anſwered, That if the Wife had not ſuch Power, the Reaſon is, That ſhe can't bar that which was utterly barred before by the Priority of her Husband's Act: But this Point was not then in Queſtion.

Antea 191. a.

The

The Order of the Caſes in this Ninth Book.

Caſes

Caſes in the Court of Wards.

F I N I S.