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.

In 2 *E.* 3. 29. The King brought a *Quo Warranto* against *Reg. 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 Lecy* Ancestor of the said *Johan* was seised of the said Manor of *T.* and of other Lands after 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 forejudged 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

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

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 Defendants 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 the Juſtices in Eyre. And therewith agrees 18 *H.* 6 (*a*) [illegible] 45. if a Man has Allowance in Eyre of [illegible]ch lye in Point of Charter, as to have Com[illegible]as, &c. that he may preſcribe (by the Help of [illegible]lowance 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 Obiection 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 diverſe 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 foreſaid 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.

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

As to the 5. *Termino Hill.* 40 *Eliz. Edward* (*b*) *Amerédith* 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, Amerciaments, 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 *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 should have, (*d*) *tot, talia, eadem, & hujusmodi Libertates, Privilegia Franchesiat; Jurisdictiones*, &c. *quot, qualia, quanta, & quæ prædict' Comitissa* Sarum, *aut aliquis vel aliqui præmissa aut aliquam inde parcellam ante tunc habentes,*

(*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 with all Liberties, Privileges, Franchiſes, *&c.* by mean Conveyances, 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 Queen *Katharine*, but only by general Words, *prout aliquis ſeu aliqui, &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.

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

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

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

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 ſeiſed 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 ſeiſed, be they ſeiſed for Life, in Tail, or in Fee.

Cr. El. 794.

(*a*) Ant. 24. b. 25. a. 1 Bulſt. 130. (*b*) Mo. 621, 622. Bramſt. Cor. 152, 153. Co Lit. 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.

As to the 4 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 it ſelf. 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 *Aſſiſe* 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. 25. *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 Recogniſance 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

(*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. Dyer 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. 577. (*f*) 1 Bulſt. 130. 1 Kol. Rep. 305. 2 Rol. 572, 573. Co. Lit. 380. b. (*g*) 1 Bulſtr. 130. 1 Rol. 287, 796. Cr. Jac. 420, 421, 442, 581. Poph. 130. 2 Sand. 212, 213. 8 Co. 52. b. Cr. El. 58. Pal. 221, 225, 252. 1 Kol. Rep. 305. Yelv. 53. 1 Sid. 321, 322.

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. sa. tali die præd'* A. *ut per aspect' corporis sui constare poterit præfat' Justic' nostris si præd'* A. *sit plene 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 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 soveraign 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 demesne, 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 K'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, or

(a) 1 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. Stile 252, 253. 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, fur Prohibition 6. Br. Attachment fur 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. *vid.*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.* *E.* 3. 42. (*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.* 3. 4. 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. *Examinat.* 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 wager of law countervails a jury; for the tenant ſhall make his law *de duodecima manu*, *i. e.* eleven beſide him

(*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*) Fiz. Droit 1. Br. Droit. 20.
(*h*) Fitz. Trial 35.
(*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.

ſelf (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 Number of 12. that is to ſay by 16. 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.* 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.* 5. 5. 4 *H.* 6. 28. 12 *H.* 4. *& cætera patent.* Concerning Trials by particular Cuſtom, I wholly omit them on purpoſe. It appears by antient 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*, utterly forbid by the Cannons 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.*

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. 4 & 5. as he writes also of *Ordel*, but *Bracton lib.* 3. *Tractat'* 3. *cap.* 21. *fol.* 140. And *Briton cap.* 22. writes only of

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 *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 Sute 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 Sute is not material, because it is of another Quality and Nature, and the Tenure originally was not charged with any Service of such Quality as Sute, and therefore in such Case the Tenure is traversable. But where the Rent was 5 *s. per an.* if the Lord has got quiet and voluntary Seisin of more Rent than he ought, as of 5 *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 *E.* 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 he 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 a (*b*) *Ne injuſte vexes*, wherefore he ought to diſcharge himſelf by Plea. But Sir *William Bereford* Ch. 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 Statute 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 Non-ſuite; wherefore it was awarded, that the Prior ſhould have a Writ to the Biſhop; but *ceſſet executio* till the Colluſion was enquired of; and there Sir *William Herle* Chief 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, which of his Predeceſſors preſent, 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

(*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.

the said Advowson to such a Prior, his Predecessor, and to his Successors; and the Enquest returned and said, That the Writ was not brought by Collusion, and further said, That the Prior nor 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 Latches of his Predecessor, as a private Man. (*a*) Ant. 28. 8.

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 Init. 21. Plowd. 94. b. 10 H. 7. 11. b. 8 Co. 65. a. Doct. pl. 313. 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 Ten't 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 Feoffees or (*c*) 10 Co. 108. a. 4 Co. 11. b. 2 Init. 21, 118. (*d*) 4 Co. 121 b. 2 Init. 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 *Aff.* 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. *Willy* 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 al-

(*b*) Doct. pl. 132.

(*c*) Doct. pl. 132.

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

alledges the Tenure by Fealty, Rent, and Sute of Court, and alledges Seisin within Time of Limitation, and avows for Sute arrear, the Ten't may confess the Tenure by Fealty and Rent; and to the Sute never seised after the Limitation. And therewith agree 15 *E.* 2. *Avowry* 214. (*a*) 18 *E.* 3. 10. *b.* & 22 *E.* 3. 32. against the Opinion ill reported, in (*b*) 10 *H.* 6. 6. *b.* & 7. *a.* 5 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.* 15 *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 Plaintiff 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 could have pleaded, That he held the Land in the Avowry, 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.* & 9 *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;* & that he held the one Acre of Avowant *modo & forma*; and *Brian* there conceived the traverse good. But

(*a*) Fitz. Avowry 7
(*b*) Fitz. Avowry 9. Br. Avow 116. Postea 35. a.
(*c*) Fitz. Avow. 14. 3. Avow. 56.
(*d*) Br. Avow. 1.
(*e*) 4 Co 8 b.
(*f*) Fitz. Avowry 28. Br. Avow 76.
(*g*) Go'b. 24. Br. Avowry 87. B double Plea 53.

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 Judgm. 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 an. &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 Judgm. 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*. 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 *tantum*, the Avowry shall abate. Also if he makes several Avowries, supposing two 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.* 2. 34. 43 *E.* 3. 13. 47 *E.* 3. 5 *E.* 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 Sute 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; whereupon Issue was joined, and 'twas found, that the Land was held by Fealty and Rent, and not by Sute of Court;

(*a*) Fitz. Avow. 31 *E.* 3. Br. Avow. 49.

(*b*) Fitz. Replevin 80. Br. Avowry 9 (*c*) 7 H. 4. 10. a. Br. Avow. 37. Fitz. Avow. 50.

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. 759.

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 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*, 113. 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. a. pl. 101. Cr. Car. 83. 8 Co. 65. a.

Trin. 42 Eliz. *Reg.*

Henſloe's *Caſe.*

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* Co-executor with them, who had adminiſtred, *&c.* not named in the Writ, Judgment of the Writ. To which the Plaintiff ſaid, That before any Adminſtration, *&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 waived the Executorſhip, and utterly diſcharged himſelf thereof, he can't reſume it afterwards, as in all Caſes of Intereſt and Authorities, when one waives 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, never 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 waived 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*) Eitz. 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 Debt, and they may (*f*) releaſe the whole Debt: 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 Def. pleaded to the Writ that he is alive: To which the Pl. ſaid, That before the Ord'ry he was diſcharg'd of the Adminiſtration and that he never

(*c*) Dyer 160. pl. 42. 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.

(*f*) Thelo. 58. Salk. 307, 311. 1 Rol. Rep 176.

(*g*) 5 Co. 28. a. Br. Adminiſter 20. 21 E. 4. 24. a. Swinb. 281.

(*h*) Dyer 236. pl. 27. 1 Rol. Rep. 176. Fitz. Executors 163 Br. Executors 27. Statham Executors 4.

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 3 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.* 2 *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 (*k*) 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 (*b*) *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 Pl. 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 the People have Prabate of Wills in all other Places, except *Eng.* and in many Places in *Eng.* 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. in

(*a*) 7 E. 4. 12. b. 13. a. Fitz. Administer. 8. Br. Executors 111. Plow. 281. b.
(*b*) Fitz. Variance 65. 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. Sav. a. B. Det. 65. Br. Administ. 20.
(*f*) Fitz. Administrator 19. Br. Administrator 15. Br. Executors 39.
(*g*) Postea.
(*h*) Doctrin. pl. 370. Swinb. 358.
(*i*) Fitz. Executors 25. Br. Executors 20
(*k*) Br Executors 166.
(*l*) Fitz. Executors 18. Br. Executors 78. Br. Double Plea 53.
(*m*) 1 Mod. Rep. 213.
(*n*) Fitz. Executors 35. Br. Execut. 90. 9 E. 4. 47. a. b. Br. Ordinary 13.
(*o*) Ant 37. a. sup. Plow. 281. b. Fitz. Administr. 11.
(*p*) 2 Rol. 217. 2 Inst. 231, 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 Sav. 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 regni & 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* 28c. 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 Title and Intereſt by the Will and not by the Probate: But yet without the Probate, 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 277. b. 281. a. 5 Co. 28. a. Hutt. 31. 1 Rol. 917. Poſtea 39. a. 10 Co 52. a. Raym. 481. Sw: b. 281. Moor 119. Went. 51, 141, 151, 321.

once waived 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. 32. b. Plow. 278 a. b 279. a. Cr. El. 40. 2 Inſt. 398. Nov 53. Selden's Juriſdiction de Teſtamen s 21. 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 2 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 ſeiſe 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, 271. Selden's Juriſd. de Teſtamentis 22.

uch 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 Greisbrook'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 *H.* 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 Greisbrook'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 *Rich. Wilby* Chief Juſtice who gave the Rule, The Ordinary could not have ſuch Action, wherefore, how can he give this Action to another? *Stone*, A Man has not ſeen, That the Ordinary ſhall have an

(*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 Teſtaments 23. Fitz. Adminiſtrators 20. in fine.

an Action but of Goods, whereof they were ſeiſed 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. Fitz. Adminiſtrators 20 * 11 H. 4. 71. b

(a) 19 E. 3. Fitz. Adminiſtrators 20 * 11 H. 4. 71. b

(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.* 2. 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.* *Grenbrook'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.

(b) 5 Co. 82. a Dy. 232. pl. 5. 247. pl. 73. 1 Ro. 551. Cr. El. 429, 430. 2 Inſt 397. Br. Ordinaries 21.

(c) 31 E. 3 c. 11. Antea 28. b. Lit. Rep. 21. Plowd. 278. a.

As to the ſecond Point, the Stat. 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

(d) Cr. Car. 62, 63.

(e) Cr. Car. 265. 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 Stat. ſays, That in Caſe a Man dies Inteſtate, it is to be known that a Man may die (*a*) Inteſtate 2 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 another 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; 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 Com. 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 Juſt. who gave the Rule,

(*a*) 2 Inſt. 397. Dy. 236. pl. 27.

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

(*c*) 1 Inſt 132. a. 133. b. Sect. 220.

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

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

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 after that 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 Stat. 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 endowed 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 accountable to Ordinaries, as Executors are.

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

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

(*c*) Moor 44.

(*d*) 31 E. 3. 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 Courts; and therefore, if Iſſue is 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. Litt. 2. Antea 31 b

(*f*) Doctrin. pl. [illegible] 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 Letter, *&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 Def. to be Administrator; and the Def. said that the deceased made his Will, and made the Def. 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 Plaintiff 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 deputy they are Ordinaries as to this purpose with the same Act; and therewith agree (*h*) 1 *H.* 4. 64. *a.* 12 *E.* 4. 15. *b.* 7 *E.* 4. 14. *a.* 20 *H.* 6. 1. 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*) B. Montians, &c. 125.

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

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

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

(*e*) Doct. pl. 159.

(*f*) Fitz. Variance 10.

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

(*h*) Fitz. Administrator 12, B. Administrator 18.

G against

(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.

Trin.

Trin. 7 Jacobi *Regis Rotulo* 2612. Brownlow.

The Earl of Shrewsbury's *Case.*

Nottingh. ROBERT' Spencer nuper de Maunsfield in comitatu præd' armiger, & Thomas Woodward nuper de Maunsfield in comitatu prædicto *generosus*, attachiati fuerunt ad respondendum Rogero comiti Rotel' de placito, Quare cum Domina Elizabeth. nuper Regina Angliæ, quartodecimo die Junii, anno regni sui quadragesimo secundo, apud Westmonasterium in comitatu Middlesex. per Literas suas Patentes sub magno Sigillo suo Angliæ sigillatas, dedisset & concessisset eidem comiti, a tempore plenæ ætatis ipsius comitis viginti & unius annorum, ad terminum & pro & durante toto termino vitæ natural' ipsius comitis, officia senescalli dominiorum sive maneriorum ipsius nup' Reginæ de Maunsfield in comitatu præd' & Bolsover & Horseley in comitatu Derb. cum vad', & feod eisd' officiis ab antiquo debitis & consuetis, Habend' & annuatim recipiend' dict' vad' durante termino prædicto de exitibus, proficuis, firmis & reventionibus dictorum dominiorum sive maneriorum, per manus firmariorum, receptorum, sive aliorum occupator' eorund' pro tempore existentium, ad festa Sancti Michael' Archangeli

& Paſchæ per æquales portiones, una cum omnibus aliis proficuis, juribus, commoditatibus, juriſdictionibus, privilegiis, præheminentiis & emolumentis dictis Officiis provenientibus ſeu aliquo modo ſpectantibus: Cumque idem comes, ante confectionem prædictarum literarum patentium, ſcilicet, decimo nono die Novembris, anno regni præd' nuper Reginæ quadrageſimo, ad ſuam plenam ætatem viginti & unius annorum perveniſſet, & virtute literarum patentium prædict' fuiſſet ſeiſitus de prædicto officio Seneſchalli prædicti manerii de Maunsfield ut de libero tenemento pro termino vitæ ſuæ, ac officium illud a prædicto quarto decimo die Junii, anno regni præd' nuper Reginæ quadrageſimo ſecundo ſupradicto, per unum annum integrum tunc prox' ſequentem bene & fideliter exercuiſſet, ac vad', feod', & proficua prædicto officio Seneſchalli præd' manerii de maunsfield ab antiquo debit' & conſuet' per idem tempus habuiſſet & recepiſſet, præd' Robertus & Thomas machinan' ipſum comitem multipliciter prægavare, ac ipſum comitem de exercitio præd officii Seneſchalli prædict' manerii de Maunsfield magnopere diſturbare, ac eundem comitem de vad', feodis & proficuis quæ ratione executionis officii illius de jure habere & percipere potuiſſet & debuiſſet totaliter fruſtrare & impedire, de injuria ſua propria, abſque aliquo jure ſive legali authoritate ſine licentia ipſius comitis, ſextodecimo die Februarii, anno regni dictæ nuper Reginæ quadrageſimo quarto, apud Maunsfield præd', prædictum officium Seneſchalli ejuſdem Manerii de Maunsfield exercuerunt, & abinde hucuſque exercent & occupant; ac omnia & ſingula vad', feoda, commoda & proficua eidem officio debita, & ratione exercitii officii præd' infra manerium de Maunsfield præd' de jure pertinentia ad ſuum proprium uſum habuerunt & perceperunt, & eundem comitem ad exercendum officium illum infra præd' manerium de Maunsfield, & vadimonia, feoda, commoda & proficua eid' officio de jure pertinen' habere & percipere vi & arm' adtunc & ibid' impediverunt & adhuc impediunt, & alia enormia ei intulerunt, ad grave dampnum ipſius comitis, & contra pacem dictæ nuper Reginæ, & contra pacem dicti Domini Regis nunc, &c. Et unde idem comes per Johannem Muſcot Attornatum ſuum queritur quare cum prædicta nuper Regina quartodecimo die Junii, anno regni ſui quadrageſimo ſecundo ſupradicto apud Weſtmonaſterium prædictam, per prædictas literas ſuas Patentes, quas idem comes, ſub magno ſigillo ipſius nuper Reginæ Angliæ ſigillatas, hic in Curia profert, quarum dat' eſt

eſt eiſdem die & anno, dediſſet & conceſſiſſet eidem comiti, a tempore plenæ ætatis ipſius comitis viginti & unius annorum, ad terminum & pro & durante toto termino vitæ naturalis ipſius comitis, prædicta officia Seneſchalli prædictorum dominiorum ſive maneriorum ipſius nuper Reginæ de Maunsfield, Bolſover, & Horſeley, cum vad' & feodis eiſd' officiis ab antiquo debitis & conſuetis, Habendum & annuatim recipiend' dict' vad' durante termino prædicto de exitibus, proficuis, firmis, & reventionibus dictorum dominiorum ſive maneriorum, per manus firmariorum, receptorum, ſive aliorum occupatorum eorundem pro tempore exiſtentium, ad prædicta feſta Sancti Michaelis Archangeli & Paſchæ per equales portiones, una cum omnibus aliis proficuis, juribus, commoditatibus, juriſdictionibus, privilegiis, præheminentiis & emolumentis dictis officiis provenien', ſeu aliquo modo ſpectantibus: Cumque idem comes, ante confectionem prædictarum literarum patentium, ſcil't, decimo nono die Nov' anno regni præd' nuper Reginæ quadrageſimo ſupradicto ad ſuam plenam ætatem viginti & unius annorum perveniſſet, & virtute literarum patentium præd' fuiſſet ſeiſitus de prædicto officio Seneſchal' præd' manerii de Maunsfield, ut de libero tenemento, pro termino vitæ, ac officium illud, a prædicto quartodecimo die Junii anno regni præd' nuper Reginæ quadrageſimo ſecundo ſupradicto, per unum annum integrum tunc proxim' ſequentem bene & fideliter exercuiſſet, ac vad', feod', & proficua prædicto officio Seneſchalli præd' manerii de Maunsfield ab antiquo debit' & conſuet' per idem tempus habuiſſet & recepiſſet, prædicti Robertus & Thomas machinantes ipſum comitem de exercitio præd' officii Seneſchalli prædicti manerii de Maunsfield magnopere diſturbare, ac eundem comitem de vad', feodis & proficuis, videl't, de centum ſolidis annuatim pro vad' ſuis pro exercitio præd' officii Seneſchalli præd' manerii de Maunsfield ſolvend', ac de antiquis feodis debit' pro intratione querelarum & placitorum, pro copiis rotulorum Cur', pro repleg', pro probatione teſtamentor', commiſſione adminiſtration' quarumcunq; perſonarum infra præd' manerium de Maunſfield obien', pro intratione ſurſumredditionum, & admiſſione quorumcunque tenentium prædicti manerii de Maunſfield, pro intratione fidelitatis quorumcumque tenentium ejuſd' manerii de Maunsfield fidelitatem facientium, quæ de jure habere & percipere potuiſſet & debuiſſet, totaliter fruſtrare & impedire de injuria ſua propria, abſq; aliquo jure ſive legali authoritate, ſine licentia ipſius Comitis, prædicto ſextodecimo die Febr. anno regni dictæ nuper Reginæ quadrageſi-

mo quarto ſupradicto, apud Maunsfield prædictam, prædict' officium Seneſchalli ejuſdem maner' de Maunsfield exercuerunt, & abinde hucuſque exercent & occupant, ac omnia & ſingula vad', feoda, commoda, & proficua eidem Officio debita, & ratione exercitii ejuſd' officii infra præd manerium de Maunsfield præd' de jure pertin' ad ſuum proprium uſum habuerunt & perceperunt, & eundem comitem ad exercendum officium illud infra præd' manerium de Maunsfield, & vad', feoda, commoda & proficua eid officio de jure pertin & a toto tempore quo non extat memoria in contrarium habere & percipere vi & arm', &c. adtunc & ibid' impediverunt & adhuc impediunt, & alia enormia, &c. ad grave dampnum, &c. & contra pacem, &c. unde dicit quod deterioratus eſt & dampnum habet ad valentiam centum librarum: & inde producit ſectam, &c. Et præd' Robertus & Thomas per Will'um Cragge Attorn' ſuum ven' & defend' vim & injuriam quando, &c. & dic' quod ipſi in nullo ſunt culpabiles de trangreſſione præd' prout præd' comes ſuperius verſus eos queritur; & de hoc pon' ſe ſuper patriam; & præd' comes ſimiliter. Ideo præceptum eſt vicecomiti qd' venire fac' hic a die Sancti Trinitatis in tres ſeptimanas xii. &c. per quos, &c. Et qui nec, &c. Ad recogn', &c. Quia tam, &c. Poſtea die & loco infracontentis coram *Petro Warburton* milite, uno Juſtic' Dom' Regis de Banco, & *Thomæ Forſter* milite altero Juſtic' dicti Dom' Regis de Banco, Juſticiariis ejuſdem Dom Regis ad Aſſiſas in comitatu Nott' capiend' aſſignatis per formam Statuti, &c. ven' tam infranominatus Rogerus comes Rotel', quam infraſcripti Rob' Spencer & Thomas Woodward per Attorn' ſuos infracontentos; & Juratores Juratæ unde infra fit mentio exacti, quidam eorum, videl't, Edw' Bould de Halloughton armiger, Edw' Coppinger de Farnefield armiger, Geo' Hutchinſon de Basford generoſus, Franciſcus Hollingworth de Stapleford gener', Will'um Greiſley de eadem, Nic' Hamond de Lounde generoſus, Anthon' Whitewell de Wyeſton generoſ. Johannes Sturtevant de Calverton generoſus, Richardus Brigges de Gringley ſuper montem, & Johannes Seywell de Normanton juxta Plumtree ven' & in Juratam prædictam Jurati exiſtunt: Et qua reſid' Juratorum Juratæ illius non comparuerunt, ideo alii de circumſtantibus per vicecomitem commitatus præd' electi, ad requiſition' Rogeri comitis Rotel', ac per mandatum Juſticiarior' præd' de novo apponuntur, quorum nomina panello infraſcripto affilant' ſecund' formam Statuti in hujuſmodi caſu editi & proviſi: Et Jurat' ſic de novo approſit', videlit, Joh' Hutton & Ric'us Templeman ſimiliter ven' qui ad veritat' de infracont' ſimul cum aliis Jurat' præd' prius impanellat' & jurat' dicen-

dicendam electi, triati, & jurati, dicunt ſuper ſacrament' ſuum, Qd' Dom' Eliz. nuper Regin' Angl' ſeiſit' fuit in dominico ſuo ut de feod' in jur' coron' ſuæ Angl' de & in maner' de Maunsfield in com' Nott', ac de & in maner' de Bolſover & Horſley in com' Derb', & ſic inde ſeiſit' exiſten' quarto decim' die Jun' an' regni ſui quadrag' ſcd' per liter' ſuas patent', ſub magn' ſigil' ſuo Angl' ſigillat', ac Jurat' præd' in evidenc' oſtenſas, conceſſit præfat' com' Rotel', a temp' plen' ætatis ipſi' com' vigin' & unius annor', ad termin' & pro & durant' tot' termino vitæ natural' ipſi' com', offic' Seneſc' dominiorum ſive maner' præd' cum vad' & feod' eiſd' offic' ab antiquo debit' & conſuet', prout in eiſdem lit' patent' continet', quarum tenor ſequit' in hæc verba: Eliz. Dei grat' Angl', Fran' & Hibern' Reg', fidei defenſ. &c. Omnib' ad quas præſent' lit' pervener' ſalut': Sciat' qd' nos de grat' noſtr' ſpeciali ac ex cert' ſcient' & mero motu noſtr' dedimus & conceſſim' ac per præſent' pro nobis hæred' & ſucceſſor' noſtr' damus & concedim' prædilect' conſanguin' noſtro Rog' com' Rutl' officium Conſtab' Caſtri noſt' de Nott', ac janitor' ſive cuſtod' port' ejuſd' caſtri, necnon offic' Seneſc', Cuſtod', Gardian', & Capital' Juſtic' Foreſtæ noſt' de Sherwood & parcor' noſtr' de Billowe, Birkeland, Romwald, Owſeland, Folwood, Beskwood, & Clipſ. cum ſuis pertinent' in com' noſt' Nott', Ipſumque Roger' comitem Rutl' Conſtabul' caſtr' noſt' præd' ac Janitor' ſive Cuſtod' port' ejuſd' caſtr', necnon Seneſc', Cuſtod' & Juſtic' Itinerant' Foreſt' & Parcor' præd' facimus, ordinam', & conſtituimus per præſent', dant' & concedent' eid' Roger' comit' Rutl' tenore præſent' plen' poteſt' & autho' omnia & omnimod' plac', querel', & cauſas infr Foreſt' & parcos præd' & eor' quodlibet emergent', ſecund' leg' & conſuetud' Foreſt' audiend' & terminand', Habend', gaudend', occupand', & exercend' offic' præd' & eor' qd'libet præf. Rog' com' Rutl' per ſe vel per ſufficient' deputat' ſuum ſive deputat' ſuos ſufficien' a tempore plenæ ætat' vigint' & unius annor' ejuſd' comitis ad termin' & pro & durante toto termin' vitæ natural' prædict' Roger' comit' Rutl', una cum poteſtate in eiſd. officiis faciend' & conſtituend' omnes officiar' ab antiquo debit' & conſuet'; & pro exercitio & occupac' offic' præd' damus & concedim' per præſent' præfat' Rog' comiti Rutl' vad' & feod' quadrag' marcar' per ann' a tempore plen' ætat' viginti unius an' ejuſd' comit' ad termin' & pro & durante toto termin' vitæ natural' ejuſd' comit' Rutl', necnon annuit' ſive annual' reddit' novem librar' a tempor' plenæ ætat' viginti unius an' ejudem comit' ad terminum & pro durante toto term' vitæ natural' ejuſd' com' Rutl' pro vad' ſive ſtipend' novem Foreſtarior' per ipſ. comit' ad cuſtodiend Foreſt' præd' aſſignat', percipiend, & annuat' recipiend' dict' vad' & feod' quadragint' marcar' de Theſauro noſt' hæred' & ſucceſſorum noſtror' ad receptum Scaccarii noſtri Weſtm' provenien'

per manus Theſaurar' & Camerar' noſtr' ſeu eor' alicui' ibid' pro tempore exiſten' ad feſt' Sanct Mich' Archang' & Paſc. per equales portiones, ac etiam dict annuitat' ſive annual' redditum novem librar pro vad' ſive ſtipend' præd' præfat Roger' comit' Rutl' a tempore plen' ætatis viginti unius ann' ejuſd' comit' ad terminum & pro & durante toto termin' vitæ naturalis ipſius Roger' comit Rutl de Theſauro noſtro, hæred' & ſucceſſorum noſtror' ad receptum Scaccarii noſtri provenien' per man' Theſaurar & camerar' noſtror' ſive eorum alicujus pro tempore exiſten', ſive de prat' noſtris juxta caſtr' noſtrum de Not' prædict', vocat' the King's Meadow, ac de profic' pannag' & herbag' Parci noſtri de Beskwood, necnon de omnib' redditib' ſive profic' de Foreſt' præd' provenien ſive creſcen', per manus Ballivorum, propoſitor', firmarior', receptor', ſive aliorum occupator' dict' praterum, de redditib' ſive profic' præd', ſive eorum alicujus pro tempore exiſten' ad feſt' prædict' per equales portion': Damus etiam & per præſent' pro nob', hæredibus & ſucceſſor' noſtris concedim' præfat' Roger' comiti Rutl', a tempore plenæ ætatis viginti unius annor' ejuſd' comitis, ad termin' & pro & durante toto termin vitæ naturalis dict' Roger' comit' Rutl' offic' Seneſchall' dominiorum ſive manerior' noſtror' de Maunsfield, Boiſover, & Horſley, cum vad' & feod' eiſd' offic' ab antiquo debit' & conſuet' capiend', habend' & annuatim percipiend' dict' vad' duran' termin' prædict' de exitib', profic', firmis, & reventionib' dict' dominior' ſive manerior' noſtror' de Maunsfeld, Iolſover, & Horſley præd', ſive eorum alicujus, per manus firmarior, receptor' ſive alior' occupator' eorun', ſive eor' alicujus pro tempore exiſten', ad dict' feſta San' Mic' Archang' & Paſchæ, per equales portion', una cum omnib' aliis profic, juribus, commodatib', juriſdictionib', privilegiis, prærhe minentiis, & emolument' dict' omnibus & ſingulis officiis cum cæteris præmiſſis, & eorum alicui, provenien' ſive aliquo modo ſpectan' & adeo, plene, libere, & integre, ac in tam amplis modo & forma prout Tho' Manners milites aut Joh' Manners ar', aut Johannes nup' comes Rutl', aut ante eum Edward' nuper [illegible] de'unct', ſive ante eos Thom & Henric nup' co[illegible] ad dict', Anth Frowne ſive Ric' Southwell milit' [illegible], aut aliquis alius ſive aliqui alii offic' præd' vel eor' ali[illegible] hæc tempora occupans ſive occupant hab' & percepit, erunt ſive percepierunt, aut habere & percipere debet vel [illegible] & pro eiſd' vel eor' aliquo: Ac inſup' de uberiori gra[illegible] ac ex certa ſcientia & mero motu noſtris dedimus & [illegible]imus, ac per præſent' pro nob hæredib' & ſucceſſoribus [illegible] & concedim' præfat' Reg comiti Rutl' Offic' Cu[illegible] ri de Not' cum omnib' & ſing' vad', feod', profic', [illegible]ib' & emolumentis quibuſcunq; offic' præd' debi[illegible], ſive pertinent', in tam ampl' modo & form' prout

prout prædict' Thomas Manners miles, aut Johan' Manners armig', aut prædict' Johan' aut Edw' nuper' comites Rutl' jam defuncti, aut ante eos quidam Rich' Manners aut Franciſ. Leake milit' jam defunct', aut aliquis alius ſive aliqui alii offic' præd' exercen' ſive exercentes habuit ſive percepit, habuerunt ſive perceperunt, habend', occupand', & exercend' offic' præd' præfat' Roger' com' Rutl' per ſe vel per ſufficientem deputatum ſuum ſive deputatos ſuos ſufficien' a tempore plenæ ætat' viginti unius an' ejuſd' com', ad tot' termin' & pro & durante tot' term' vitæ naturalis præd' Roger' com' Rutl' cum vad', feod', profic', commoditat' advantaglis & emolumentis quibuſ. eid' offic' ab antiquo debit' & conſuet' ſive pertinen', aut ratione ejuſd' per quamcunq; perſona' præantea percept' & habit' per manus Recept', Firmarior', Præpoſitor', ballivor', Occupator' ſive Offic' noſtror' ejuſd' pro temp' exiſten', de exitibus, reventionibus & profic' ejuſd' ad feſta Paſch. & S. Mich' Arch' equis portionib' ſolvend' quæ quid' offic' & feod' ac cæter' omnia & ſingula præmiſſ. ſuperius per præſent' data & conceſſ. per l'ras n'ras Patent' ſub' mag' ſigill' n'ro Angl' confect', geren' dat' apud Weſtm' viceſimo tert' die Julii an' reg noſtri triceſim' tert', cuida' Joh. Manners armig' durant' minore ætat' præd' Roger' com' Rutl' nuper dat' & conceſſa fuer', Qui quid' Roger' com' Rutl' modo plen' ætat' eſt, prout certam inde habem' notitia', volent' etiam & firmit' injungend' præcipient' per præſentes, omnib' & ſingul' offic', miniſtris, & ſubdit' noſt', tam infra libertat' quam extra, tenor' præſent', qd' eid' Roger' com' Rutl' & deputato ſuo ſive deputatis ſuis, in præmiſſ. omnib' faciend' & exequend' ſint auxiliantes, aſſiſtent' & conſulent' prout decet, eo qd' expreſſ. mentio de vero valore annuo, vel de certitudine præmiſſor' ſive eorum alicujus, aut de aliis donis ſive conceſſion' per nos ſeu per aliq' progenitor' n'ror' præf. Rog. com' Rutl' ante hæc temp' fact' minime fact' exiſtit, aut aliquo ſtatut', actu, ordination', proviſione ſive reſtrict' in contrar' inde antehac habit', fact', edit', ordinat', ſive proviſ. aut aliqua alia re, cauſa, vel materia quacunq; in aliq non obſtant'. In cujus rei teſtimon' has lit' noſt' fieri fecim' patent', Teſte meipſa apud Weſtm', quartodecim' die Jun', an' reg' n'ri quadrageſim' ſecundo. Quodq; præd' Rog' com' Rotel' ante confection' præd' l'raru' patent', ſ. decimo nono die Nov. an' reg' præd' nuper Reginæ quadrageſ. ad ſuam plena' ætat' viginti & unius an' pervenif. & virtute l'raru' patent' præd' fuiſſet ſeiſit' de præd' officio Seneſcalli præd' maner' de Maunsfield præd' in narratione infraſcript' ſpecificat' ut de libero tenemento pro termin' vitæ ſuæ; ac quod præd' Roger' com' Rotel', a tempore confection' literarum patent' prædict', exercuit officium Seneſcalli manerii prædict' de Maunsfield in narratione prædicta mentionat',

tionat', per deputat' ſuos & non per ſeip' in prop' perſ. ſua: Quodq; poſtea, ſc. decimo ſeptim' die Decemb. an' regni dictæ nup' reginæ Eliz. quadrageſ. quarto, ead' nup' reg' de præd' maner' de Maunsfield præd' ſic ut præfert' ſeiſita exiſten' per l'ras ſuas patent' ſub mag' ſigill' ſuo Angl' ſigillat', gerent' dat' eiſd' die & an', ac Jurat' præd' in evidenciis oſtenſas, conceſſiſſet præd' maner' de Maunsfield cu' pertinent', inter alia, quibuſd. Will'mo Hamond & Ranulpho Catteral, Habend' & tenend' præd' maner' de Maunsfield cum pertinent' præfat. Will'mo Hamond & Ranulph' Catteral hæred' & aſſignat' ſuis imperpet'; Virtute cujus præd' Will'us Hamond & Ranulph' Catteral in præd' maner' de Maunsfield præd' cum pertinen' intraverunt, & fuerunt inde ſeiſit' in dominico ſuo ut de feod', quodq; præd' Will'us Hamond & Ranulph' Catteral ſic inde ſeiſit' exiſtent', poſtea, ſ. viceſimo tertio die Jan', an' reg' dom' Eliz. nup' Reg' Angl' quadrageſ. quart' per quanda' indent' ſua' gerent' dat' eiſd' die & an', & poſt', ſ. viceſimo ſeptim' die ejuſd' menſis Jan. an' quadrageſ. quarto ſupradict' coram dicta nup' regina in Canc' ſua de recordo irrotulatam, pro & in conſideratione decem ſolidorum eiſd' Will'mo & Ranulph' per prænobilem Gilbertum com' Salop' & Mariam uxorem ejus ſolutorum, conceſſerunt, alienaverunt, barganizaverunt, & vendiderunt præd' maner' de Maunsfield præd' cum pertinent' præf. com' Salop' & Mariæ uxor' ejus, habend' & tenend' maner' præd' cum pertinen' præf. com' Salop' & comitiſſæ & hæred' & aſſign' ſuis imperpet': Virtute cujus, necnon vigore actus in Parliam'to d'ni Henr' nup' regis Angl' octavi an' reg' ſui viceſim' ſeptim' tent' edit', præd' comes Salop' & comitiſſa fuerunt de præd' maner' de Maunsfield præd' cum pertinen' ſeiſiti in dominico ſuo ut de feodo. Et jurator' præd' ulterius dicunt ſuper ſacram'tum ſuum præd', quod præd' comite Salop' & comitiſſa ſic ut præfert' ſeiſit' exiſten', poſt', ſ. præd' ſextodec' die Febr' an' regni dicti nup' Reg' quadrageſ. quarto in narratione infraſcript' ſpecificat', quid' Simo' Sterne adtunc exiſten' deputat' præd' com' Rotel' pro exercit' præd' offic' Seneſc' præd' maner' de Maunsfield, acceſſit ad villa' de Maunsfield ad uſual' locum ibid' ubi Cur' maner' de Maunsfield præd' communiter tenta & cuſtod' fuit ad tenend', Anglice, to keep, curiam Baronis ejuſd' maner' de Maunsfield præd', & præd' Tho. Woodward illuc acceſſit ad cuſtodiend' curiam ejuſd' maner' ut Seneſc' pro præd' Gilbert' comite Salop', quodq; prædict' Tho. Woodward ut Seneſcall' præd' comitis Salop' & præd' Simon Sterne ut deputat' prædict' comitis Rutl', ad locum prædict' pariter & inſimul acceſſerunt, & prædict' Simon Sterne ut deputatum prædict'

comitis Rotel' mand' ballivo maner' illius qd' proclam' fac' pro tenend' cur' Baron' maner' illius per ipſum Simon' Sterne ut deputat' præd' comitis Rotel' adtunc tenend', & prædict' Tho. Woodward ut Seneſcall' præd' comitis Salop' ſimiliter mand' ballivo maner' ill', qd' proclam' faceret pro tenend' cur Baron' maner' præd' per ipſum Tho. Woodward ut Seneſcall' præd' comitis Salop', ſed nulla Cur' adtunc tent' fuit, ſed per eundem Tho. Woodward adjornat' fuit, & abinde uſq; impretrationem præd' brevis originalis præd' Tho. Woodward ut ſeneſcall' præd' Gilberti comit' Salop' cuſtodivit Curias maner' præd' & ſemper abinde ipſe idem Tho. Woodward & præd' Robertus Spencer receperunt omnia feoda pertinen' Seneſcallo ibid. ſicut debita deveniebant: Et ſi ſuper tota materia præd' per Jur' præd' in forma præd' comperta vidèbitur Cur' hic quod præd' Robertus Spencer & Tho. Woodward ſunt culpabiles de tranſgr' infraſcript', tunc Juratores præd' dicunt ſuper ſacrm' ſuum præd' quod prædict Rob. Spencer & Tho. Woodward ſunt culpabiles de tranſgr. infraſcript' prout præd' Roger' comes Rotel' interius verſus eos queritur, & tunc aſſident dampna illius Roger comit' Rotel' occaſione tranſgr. infraſcript' ultra miſ. & cuſtag' ſua per ipſum circa ſecta' ſuam in hac parte appoſita, ad quadraginta libras, & pro miſ. & cuſtag. ill' duodecim denar'; & ſi ſuper tota materia præd' per Jur' præd' in forma præd' compert' videbitur Cur' hic quod præd' Rob. Spencer & Tho. Woodward non ſunt culpabil' de tranſgr' infraſcript' tunc Jurator' præd' dicunt ſuper ſacrm' ſuum præd', quod præd' Rob. Spencer & Tho. Woodward non ſunt culpabil' de tranſgr' infraſcript', prout iidem Rob. & Tho. interius allegaverunt. Et quia, &c.

Trin.

Trin. 8 Jacobi.

The Earl of Shrewsbury's *Case.*

Yelv. 203. 4 Leon. 243. 2 Brownl. 30. 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 Gift 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 Dominicrum 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 Patentee 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 fieri oportet 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 52.

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 aforesaid might be given in Evidence, to prove what Manor was granted: But if the other Party had demanded Oyer of the Let. 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, or

(*a*) Doctrin. 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. 5 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 K. 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 express 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. consist 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

(*b*) Bridgm. 31. Postea 48. b.

(*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.

repeat the Thing given again, and therewith agrees *Wrotesly* and *Adams'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 Abbreviations 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 Abbreviations shall be taken in the plural Number, *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 Abbreviation *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 *Warwick* the Writ was *Henr' Dei gratia Rex Angl'*, *Rex 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*) Stile 302.

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

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

(*d*) Dy. 342. pl. 53. Godb. 415. Stile 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 Discre-

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

Discretion; and therefore, *Fleta, lib. 2. cap.* 72. describes what Person a Steward ought to be, (a) *Provideat tunc sibi Dominus de Seneschallo circumspecto & fideli, viro provido, discreto & gratioso, humili & pudico, & pacifico, & modesto, qui in legibus consuetudinibusq; Provinciæ, & officio Seneschalciæ se cognoscat, & jura domini sui in omnibus tueri affectet, quique sub-ballivos 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.* 80. *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 adjudged, 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 *Wood-ward*, who has the Custody and Charge of Wood, and so *Hayward* of my Hedges & *sic de similibus.* And *Seneschallus* in *Latin* has the same Signification, as appears in the History of *Ingulphus* 463. *inter Consuetudines Scaccarii*, where the Under-Sheriff because he exercised 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 testiment'*, *& comitt' administrat' infra manor'*, &c. and the Suitors

(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.
(g) Co. Lit. 61. a.

(h) Perk. Sect. 100.

(i) Cawley 148.
(k) 4 Co. 23 a. 5 Co. 7. a. Cawdry's Case.
(l) Plow. 379. b.

are Judges of the Court-Baron, and the Steward for the moſt Part as Prothonotary or Regiſter to the (*a*) Sutors, &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; 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 Demandant 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 Parkeſhip is granted to an Earl, without Words to make a Deputy, he may keep it by his Servants. And in many Caſes the

(*a*) 4 Co. 33. b. 6 Co. 11. b. 8 Co. 60. b. 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. Stil. 222. (*c*) 6 Co. 53. a. 27 H. 8. 22. b. Br. Exempt. 3. Co. Lit. 156. c. 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. 2 Inſt. 50. 9 Co. 31. a. 2 Rol. 575. 22 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. 18. (*e*) Co. Li. 135. a. 27 H. 8. 22 b. Fitz. Jour. 8, 12. 27 E. 3. 88. a. 40 E. 3. 31. a. (*f*) Cr. Car. 206.

Law 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. Shirereve, 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 E. 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 E. 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 Knights Service, *ſ.* to go with his Lord (when the King 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 more ſtrong 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 Regero Comiti Rutl'nd & deputato, ſive deputatis ſuis in præmiſſis omnibus faciend' & exequend' ſint auxiliantes, aſſiſtentes, & conſulentes prout decet*: By which it appears that ſhe

(*a*) Br. Treſp. 287. Br. Licence 10.
(*b*) Br. Treſp. 431.
(*c*) Co. Lit. 168. a. Powel 97. b.
(*d*) Co. Lit. 168 a. 4 Co. 33. a.
(*e*) Co Lit. 168. a.
(*f*) 8 Co. 105. a. Co. Lit. 70. a. Lit. ſect. 96.

in-

intended that the 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 plerunq; 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.

As to 2. Admitting that the Pl. can't 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, nor 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*) 18 *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, Clerk 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 Commonwealth. *Vide* (*n*) 2 *H.* 7, 11. *b.* So of holding the Sheriffs 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 Requeſt 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*) *Plommer's Caſe*, 41 (*q*) *E.* 3. *Brendon's Caſe.*

(*c*) Co. Lit. 233. a. Haidres 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 29. 4 Leon. 120. 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.

(*r*) Palm. 533.

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-attendance 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

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 Declaration 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 Declart. 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 Declart. 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* 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 belonged to a Fair, and that the Def. with Force and Arms diſturbed 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 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. 375, 377, 378.

* Raym. 72.

(*e*) 2 Rol Rep. 138. Fitz. Trip. 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. 246.

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. Br. Nugation, & c9. The 4 Point.

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.

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 or 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 5 Point.

(*d*) 8 Co. 91. a. b. 1 Rol. [illegible] 1 Jones 169. 1 Anders. 173

any Interruption. 2. There is no Diſturbance found *vi & a'm'* which is alledg'd in the Declarat. To which it was anſwered and reſolved by the Court; that there was an expreſs 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 Circumſtances 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 Queſtion is directly found. 3. The Verdict is, *Qd' quid'* Si. Sterne *adtunc exiſtens 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*, (*a.* 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 Caſe the Verdict was inſufficient. To which it was anſwered 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 2 *abinde* alſo. 2. The Jurors, if, &c. find them guilty *de tranſgreſſ. infraſcript'* which was allegded in the Writ and Declaration from the 16th of *February 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.

(*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.

Mich. 8 Jacobi *Regis.*

In Communi Banco.

Hickmot's *Caſe.*

IN an Action of Debt brought by *William Hickmot* againſt *Thomas 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
Winch. 92. 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 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.
Dct. 166.
Kelw. 34. b.
37 H. 6. 9. a.
40 E. 3. 2. a.
Fitz. Oblig. 14.
Br. Oblig. 8.
Srath. 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.

Mich.