

Mich. 9 Jac. Regis.

In Communi Banco.

Henry Peytoe's Case.

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

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

(a) Raym. 203.

(b) 2 Brownl.
 131.
 Ly. 226. pl. 40.
 (c) Doctrin.
 p. 51.
 Cr. Jac. 559.
 Cr. El. 826.
 2 Rol. Rep. 181.
 2 Anderl. 178.
 2 B. O. Anl. 129,
 130, 133.

And

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

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

(a) 6 Co 43. b.
2 Brownl. 129.
(b) 6 Co 43. b.
Br. Accord 13.
Postea 78. b.
2 Brownl. 128,
129.
Cro. El. 357.

(c) Dy. 75. pl. 25.
Doctrin. pl. 19.
2 Brownl. 131.

(d) Cr. Car. 88.
Postea 78. b.
5 Co. 105. a.

(e) Dy. 75 pl 27.
6 Co. 44. a.

(f) 1 Rol. 266.
6 Co. 44. a.
Doctr. pl. 17.

(g) Co Lit.
212. b.
Postea 79. a.
1 Rol. 455, 456.

(h) Doctrin.
pl. 18.
1 Rol. 266, 267.
2 Rol. Rep 181.
1 Brownl. 133.
2 Brownl. 128,
129, 131, 132,
133.
Godb. 149.
(i) 1 Brownl.

134.
2 Brownl. 132.
(k) Ci. El. 622.

(l) F.N.B. 36 L.

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

(a) Doct. pl. 17.
 (b) Doct. r. m. pl. 18.
 Antea 78. a.
 Godb. 149.
 1 Rol. 266, 267.
 2 Rol. Rep. 18.
 1 Brownl. 133.
 2 Brownl. 128.
 129, 131, 132, 133.
 (c) 2 E. 3. c. 7.
 (d) Br. Quare ejecit infra, &c. 4.
 Br. Execut. 25.
 Fitz. Execut. 53.
 4 E. 4. 8. a.
 2 Brownl. 120, 130, 131, 132.
 (e) 2 Brownl. 133.
 * Postea 80. a.
 (f) 2 Brownl. 133.
 Doct. pl. 17, 18.
 6 Co. 44. 3.
 (g) 2 Brownl. 128, 129, 130.
 Doct. pl. 18.
 6 Co. 43. b.
 (h) 2 Brownl. 128, 129.
 Postea. 80.
 (i) 6 Co. 43. b.
 Antea 78. a.
 Br. Accord 17.
 2 Brownl. 128.
 129, 132.
 Cr. El. 357.
 (k) 2 Brownl. 132.
 2 Inst. 307.
 (l) 2 Brownl. 128, 129, 130, 132.
 Cr. Jac. 100.
 Cr. El. 357.
 6 Co. 44. a.
 1 Rol. 266.
 Doct. pl. 17, 19.
 (m) O. Benlow 25.
 Moor 6.
 (n) Fitz. Acc. 2.
 Doct. p. 16, 19.
 2 Brownl. 137.

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

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

(a) Antea 78. b.
(b) Br. Accord
2 Brownl. 132:

(c) 1 Rol. 455;
456.
2 Brownl. 131.
Antea 78. a.
1 Rol. Rep. 296,
297.
Cr. El. 46, 193;
304, 458.
3 Bullst. 148, 149;
Co. Lit. 112. b.
Peck. 145. b.
146. a.
Hob. 178.
Palmer 550.

(d) 2 Brownl.
131.
3 Bullst. 149.

(e) 1 Rol. 456.

(f) 1 Rol. 456.

(g) Co. Lit.
207. a.

(h) Co. Lit.
207. a.
1 Rol. 456.

(i) 1 Rol. 472.
Co. Lit. 207. a.
Dyer 25. pl. 154.
Doct. pl. 390.

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

(a) 1 Rol. 472.
Cr. El. 755.
Co. Lit. 207. a.
Doct. pl. 390,
391.
(b) Fitz. Det. 55.
Br. touts temps
prist. 4.
(c) 1 Rol. 456.

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

(e) Post. pl. 15.
1 Rol. 129.
2 Jon. 6, 158.
Rayn. 450.

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

(f) 6 Co. 7. 2.
9. 2. 45. a.
11 Co. 69. a.
Hard. 128.
Godb. 242.
3 Bulitr. 98.

And Accords are favoured in Law, because *Expedi- Reipublice ut sit (f, finis litium: Et concordia parvæ res crescunt, discordia maximæ dilabuntur. Vide* 30 E. 3. 4. 22 E. 4. 25. The Bishop of Bath's Case. 11 R. 2. barr 243. 16 E. 4. 11. 19 Eliz. *Dyer* 356. And in a Writ of Covenant for want of Reparations altho' the Action is founded on a Deed, yet it is mixt with Wrong, for which Damages shall be recovered, it was adjudged *Pasch.* 3 Jac. Rot. 1033. between *Eden* (*g*) and *Blake*, that Accord with Satisfaction was a good Plea in Bar.

(g) 6 Co. 43. b.
Cr. Jac. 99, 100.
Noy 110.
2 Rol. Rep. 138.

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

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

fuerit ejetus de libero tenemento suo. Nunc dicendum est si quis ejiciatur de usufructu, vel usu & habitatione alicujus tenementi quod tenuit ad terminum annorum, ante terminum suum: And there against the Lessor he saith that the Lessee shall have a Writ de Conventione, against his Vendee he shall have a *Quare ejecit infra terminum*, and as well against the Lessor as *versus extraneum Ejectione firmæ*: And there a little after he saith, *Non magis poterit aliquis firmarium ejicere de firma sua, quam tenentem aliquem de libero tenemento suo, & unde si ille ejecerit qui tradidit seisinam, i. possessionem, restituat cum damnis: Si autem alius quam qui tradidit ejecerit, si hoc cum auctoritate & voluntate tradentis; uterque tenetur hoc judicio, unus propter factum, alius propter auctoritatem. Si autem sine voluntate, tunc tenetur ejector utriq; tam Dom. proprietatis quam firmario, firmario per istud breve, Domino proprietatis per Assisam nove disseisinae, & unus rebabeat terminum cum damnis, & alius liberum tenementum suum sine damnis.* By which it appears how the Law was taken in the Reign of H. 3. in which Time *Bracton* wrote. In 3 E. 1. *Quare ejecit infra terminum* 4. it was adjudged, That the Plaintiff in that Action should recover his Term and Damages: And the like Judgments are given in 18 E. 2. and 20 E. 2. *ibid. pl. 6.* which agree with *Bracton*, and with him F. N. B. (a) F. N. B. (a) 197. And in 38 Ass. p. 9. and 12 H. 4. 10. b. in *Ejectione custodie* the Term shall be recovered, *pari ratione* in *Ejectione firmæ*. Vide 44 E. 3. 22. in *Oyer and Terminer*. And it is held in 11 H. 6. 6. b. that altho' the Term incurs pending the Writ of *Eject' firmæ* the Writ shall abate, 7 H. 4. 16. 2 H. 6. 8. 33 H. 6. 42. 38 H. 6. 27. 7 E. 4. 6. 21 E. 4. 30. & 3 H. 7. 21. that the Term shall be recovered in *Eject' firmæ*. And 14 H. 7. in *Eject' firmæ* brought against a Stranger in the Com. Pleas, the Plaintiff had Judgment to recover his Term, and thereupon the Defendant brought a Writ of *Error*, and the Judgment was affirmed, and Execution awarded to the Plaintiff. And in Anno 17 H. 8. such Judgment was given in the Common Pleas, that the Plaintiff in *Ejectione firmæ* should recover his Term and Damages, as *Fitzh.* *Fitz. Ejectione* *firmæ* reports in his N. B. 220. b. and the Book in 6 R. 2. *firmæ* 2. *Antica* 78. a. *Eject' firmæ* is ill reported, for it seems that the Court proceed only to the Saying of *Belknap*, that if the Lessee be ousted by the Lessor, that he might recover his Term in a writ of Cov'nt: And afterwards in the same Case *Belknap* saith, that at the Com. Law, if the Lessee be ousted by a Stranger *Eject' firmæ* lies, and to what purpose was this Writ instituted, if thereby the Term shall not be recover'd, for he shall not recover Damages but for the Ejectm. only. Vide 12 H. 6. 56. 37 H. 6. 8. And it was resolv'd, in a Writ of *Quare ejecit infra terminum*, 2 Brownl. 128; *Antica* 78. b. *Antica* 78. a. *Antica* 78. b. given

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

(b) Doct. pl 16.
Fitz Bar 26.
Br. Bar 22.

Mich. 9 Jacobi.

Agnes Gore's Case.

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

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

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

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

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

(b) Pl. Com. 474. b.

(c) Pl. Com. 474. b.

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

(e) 3 Inst. 51.
Moer 87.

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

Brownlow.

*Trin. 6 Jac. Reg. Rot. 1611.**Conny's Case.*

Cantabr' **B**ARthol' Colpit summon' fuit ad respondend' Joh' Crane, de pl'ito quare cepit averia ipfius Joh' & ea iniuste detinuit contr' vad' & pleg', &c. Et unde idem Jo' per Tho' Gunton attorn' suum querit, qd' præd' Barthol', 19 die Oct' an' regni Domini Reg' nunc 5. apud Tidde sancti Egidii, in quodam clauf. ibid' continen' in se 2 acr' pastur', cepit averia, viz. 3 Juvencas, voc' *Stcers*, ipfius Joh' & ea iniuste detinuit contra vad' & pleg' quousque, &c. unde dic', quod deteriorat' est & dampnum habet ad valenc' 20l. Et inde produc' sect', &c. Et præd' Barthol' per Will' Davye attorn' suum ven' & defend' vim & injur' quando, &c. Et ut ball'ius Joh' Welby armig' bene cogn' caption' averior' præd' in præd' loco in quo, &c. Et iuste, &c. quia dic', qd' id' locus in quo supponit' caption' averior' præd' fieri continet, & præd' tempore quo supponitur caption' averior' illor' fieri, continebat in se præd' 2 acr' pastur' cum pertin' in Tidde sancti Egidii præd', jacen' ibidem in quodam campo voc' Southgratefield juxta terras nuper Rich' Welby generos. quond' Rich' Delaland ex parte boreal', & le Kirkland ex parte occidentali, quodq; quidam Hen' Conny ar', ante præd' tempus que, &c. fuit seisit' de præd' 2 acr' pastur' cum pertin' in quibus, &c. in dominico suo ut de feodo, & easd' 2 acr' pastur' cum pertin' tenuit de quodam Willielmo Stermin ar' ut de maner' suo de Richerds cum pertin' in Tidde sancti Egidii prædict', per fidelitat' & redditum tresdecim denariorum singulis annis, ad festum Sanct' Mich' Arch' solvend', necnon per servicium faciend' sectam ad cur' ipfius Will'mi Stermin manerii sui prædicti, de tribus septimanis

in tres septimanas, super rationabilem summonition', apud manerium illud annuatim tenend', de quibus serviciis præd' Williel' Stermin fuit seisit' per manus præd' Hen' Conny ut per manus veri tenent' sui, viz. de fidelitat' & secta cur' prædict' ut de feod' & jure, ac de reddit' prædicto in dominico suo ut de feodo, de quo quidem manerio cum pertin' præd' Will'us Stermin fuit seisit' in dominico suo ut de feodo, & sic inde seisit' existen' idem Will'us Stermin ante præd' tempus quo, &c. de eodem manerio cum pertin' feoffavit præd' Joh' Welby, habend' & tenend' eid' Joh' Welby hæredib' & assignatis suis imperpetuum, ad quod quid' feoffament' per præd' Wi' Stermin præfat' Jo' Welby in form' præd' fact' præd' Hen' Conny postea & ante prædict' tempus quo, &c. s. prim' die Nov' an' regni dicti Reg' nunc prim' tunc de præd' duabus ac' terræ cum pertin' in forma prædict' seisit' existen', apud Tidde sanct' Egidii præd' attornavit, quorum quidem feoffamenti & attornament' præd' prætextu id' Joh' Welby fuit & adhuc est seisit' de manerio præd' cum pertin' in dom'co suo ut de feodo, & quia quatuor solidi & quatuor denar' de reddit' præd' per quatuor an' integros, fuit ad fest' Sanct' Mich' Arch' an' regni dicti Domini Regis nunc quinto, ac post attornament' præd' in forma præd' factum præfat' Joh' Welby præd' tempore quo, &c. aretro fuer' non solut' idem Bartholom' ut ballivus præd' John' Welby bene cogn' caption' averiorum præd' in præd' loco in quo, &c. pro eisdem quatuor solid' & quatuor denar' de redditu præd' sic aretro existen', & juste, &c. ac infra feod' & dn'icum sua, &c. Et præd' Joh' Crane dic' quod præd' Bartholom' ut ballivus præd' Joh' Welby ratione præallegat' caption' averiorum præd' in præd' loco in quo, &c. just. cognoscere non debet, quia protestand' quod præd' H. Conny non tenuit præd' duas ac' terræ cum pertin' de præd' Will' Stermin ut de man'io suo de Richerds præd', per fidelitat' & reddit' tresdecim denar' per an' singulis an' ad festum Sanct' Mich' Arch' solvend', necnon per servic' faciend' sectam ad cur' præd' Williel' Stermin man'ii sui præd' de tribus septim' in tres septim' sup' rationabil' summon' apud man'ium illud tenend', prout præd' Bartholom' superius allegavit, pro pl'ito dic', qd' præd' H. ante prædict' tempus captionis prædict' fact' & prædict' tempore captionis &c. fuit & adhuc est seisit' de & in prædict' duabus ac' pastur' cum pertin' in dominico suo ut de feod', & ill' tenuit de Martino permissione divina ad tunc Eliens. Episcopo ut de manerio suo de Tidde sancti Egidii cum pertin' in Tidde sanct' Egidii prædict', per fidelitat' tant' pro omnib' servic', absque hoc quod prædict' Hen' apud Tidde sanct' Egidii prædict' præfat' Joh' Welby se attornavit tenen', modo & forma prout præd' Bartholom' superius allegavit, & hoc paratus est verificare: Unde ex quo præd' Bartholomæus captionem averiorum præd' in præd' loco in quo, &c. superius cogn',

cogn', idem Johannes petit judicium & dampna sua occasione captionis averiorum illorum sibi adjudicari, &c. Et præd' Bartholomæus, ut prius, dicit, qd' præd' Hen' se attornavit tenent' præfat' Joh' Welby modo & form' prout idem Bartholomæus superius allegavit, & de hoc pon' se super patriam, & præd' Johannes similiter; ideo præc' est vic', qd' venire fac' hic a die Sanct' Trin' in tres septimanas xii. &c. de vis. de Over proxim' adjac' villæ de Tidde sancti Egidii per quos, &c. Et qui nec, &c. ad recogn', &c. quia tam, &c. postea die & loco infracontent' coram *Ed. Coke* milite, capitali Justic' Dom' Regis de banco & *Nic' Herne* ar' eid' *Edw'ar do Coke* ac *Will' mo Danyell* mi' un' Justic' dict' Dom' Reg' de banco præd' Justic' ejusd' Dom' Reg' ad assisas in com' Cantabr' capiend' assignat', per form' statut', &c. hac vice associat', præsentia præd' *Will' mi Danyell* non expectat', virtute brevis dict' Dom' Reg' de si non omnes, &c. ven' tam infranominat' Joh' Crane quam infrascript' Barthol' Colpit per attorn' suos infracontent', & Jur' Juratæ unde infra fit mentio exact' similit' ven', qui ad veritat' de infracontent' dicend' electi, triat' & jurat', dicunt sup' fac' suum, qd' infranominat' Henr' Conny ante infrascript' tempus quo, &c. fuit seisit' de infrascript' duabus acr' pastur' cum pertin' in quibus, &c. in dom'ico suo ut de feodo, per discensum a patre suo, & qd' id' Hen' easd' duas acr' pasturæ cum pertin' tenuit de infranominat' W' Stermin ut de manerio suo de Richerds cum pertin' in Tidde sancti Egidii infrascript' per fidelitat' & reddit' tresdecim denariorum singul' annis, ad fest' Sanct' Mich' Arch' solvend', necnon per servic' faciend' sect' ad cur' ipsius Will' i Stermin manerii sui præd' de tribus septim' in tres septim', super rationabil' summon', apud manerium illud annuatim tenend', & qd' de serviciis illis præd' Will'us Stermin fuit seisit' per manus præd' Henr' Conny, ut per manus veri tenen' sui, viz. de fidelitat' & sect' cur' præd' ut de feodo & jure, ac de reddit' præd' in dominico suo ut de feodo, prout præd' Bartholomæus interius allegavit: Et ulterius jur' præd' dic' super sac' suum præd' qd' præd' Will'us Stermin de manerio præd' cum pertin' fuit seisit' in dominico suo ut de feodo, & sic inde seisit' existens idem Will'us Stermin ante infrascript' tempus quo, &c. de eodem manerio cum pertin' feoffavit infranominatum Joh' Welby, habend' & tenend' eidem Joh' Welby hæredibus & assignatis suis imperpetuum, & quod præd' Hen' Conny ætat' viginti annor' existens, & infra ætatem viginti & unius annor' ad prædict' feoffamentum per prædict' Williel' Stermin prætat' Johanni Welby in forma prædicta fact' de prædict' duabus acr' pasturæ cum pertin' in forma præd' seisit' existens apud Tidde sancti Egidii prædict' concordavit, & solutionem de reddit' prædict' præfat' Joh' Welby promisit: Et sic super tota materia prædict' per jur' prædictos in forma prædicta

dict' compert' videbitur cur', quod agreament' præd' Henrici Conny ad feoffament' præd' & promissio sua præd' solution' reddit' præd', sic ut præfertur per præfat' Henricum Conny ipsum infra ætatem viginti & unius annor' existen' sunt attornament', tunc jur' præd' dic' super sacr'm suum præd', qd' præd' Henricus se attorn' tenen' præfat' Joh' Welby modo & forma prout præd' Bartholomæus Colpit interius allegavit: Et si super tota materia præd' per jur' prædictos in forma præd' compert' videbitur cur', quod agreament' præd' Hen'ci Conny ad feoffament' præd' & promissio sua præd' solution' reddit' præd' sic ut præfat' per præf.H.Conny ipsum infra ætat' viginri & unius ann' existen' non sunt attornament', tunc jur' præd' dicunt super sacr'm suum, qd' præd' Henr' Conny se non attornavit tenen' præfato Johanni Welby prout prædict' Johan' Crane interius pl'itand' allegavit, & tunc affid' dampna ipsius Johannis occasione infraspec' ultra mis. & custag' sua per ipsum circa sectam suam in hac parte apposit' ad duodecim denar' & pro mis. & custag' illis ad quinque solid' Ideo, &c.

Mich. 9 Jacobi Regis.

In Banco.

Conny's Case.

1 Brownl. 47.
2 Brownl. 54.

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

2 Brownl. 8.
Culver 111.
Fol. 8. 3.
1 Repl. 1. 2. 6.
Fol. 2. 6. 3.
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during his minority, (which trenches to his benefit to discharge him of the arrearages incurred during his minority;) *a fortiori* his attornment in *pais* shall not prejudice him, nor bar him of the privilege and immunity which the law gives him during his minority in such case; but they conceiv'd, that if the infant had the tenancy by purchase, in such case he should be compelled to attorn, because in case of his own purchase he shall not have his age: and in the case at bar, for as much as the said *Henry Conny* had the ten'cy by descent, and was within age, his attornment shall not bind him to charge him with the arrearages during his minority. It was also objected, that if an infant who has the ten'cy by descent should be compell'd in *per qua servitia* to attorn, yet for as much as in the case at bar he has taken his estate by feoffment in *pais* of the manor, &c. and has not taken his estate by fine, upon which he might have *per qua servitia*, his attornment in *pais* shall not bind him, for as much as in this case he is not compellable to attorn. As to that it was answered and resolved *per totam cur'*, *sc.* *Coke* chief just. *Walmsley*, *Warburton*, and *Foster*, justices, that in the case at bar the attornment (a) was good, and should bind the infant. And first they resolv'd, that in *per* (b) *qua servitia* against an infant who has the ten'cy by descent, that he should not have his age, and the reason is, because the lord at first departed with the land, in consideration that the ten't should hold of him, and should do him services, and should pay him a yearly rent; and the ten't is in law called ten't peravail, because the law presumes he has benefit and avail above the services which he doth, and the rent which he pays to the lord; and therefore it would be against reason and the purpose of the creation of the ten'cy, that when the Heir has the ten'cy peravail by descent that he should not pay the yearly rent, &c. which was reserved upon the creation of the ten'cy; and that is the reason that the heir of the ten't, who hath the ten'cy by descent, may be distrained for the rent, &c. arrear during his minority, and therefore he shall not have his age, *vide 4 Mar. Dyer* 137. & *vide 2 E. 3. Age 85. and in Avowry, and 7 E. 2. Age 140.* in a Writ of (c) *Mesne* the parol shall not demur for the nonage of the Pl. because it is not reason that the infant should be distrained for the services of the mesne during his nonage and should not have any remedy till his full age; but forasmuch as his nonage shall not privilege him from the payment of the rent during his nonage, the law also will give him remedy during his nonage, but in a writ of (d) *Customs and Services* (which is a writ of *Right* in its nature, and in which final judgm. shall be given) against an infant who is in by descent, the book in *6 H. 3. Age 148.* is adjudged that he shall have his age. So in (e) *Cessavit* against an infant who has the ten'cy by descent, he shall have his age, altho' it be on his own cesser; because he can't know what arrearages to tender before judgm. and this is a writ of *Right*

(a) 1 Brownl.

47.

2 Brownl 84.

(b) Co. Lit.

315. a.

Antea 84. b.

Fitz. Age 33. 80.

1 Mol. 138, 296.

Postea 85. b.

2 Brownl. 84.

(c) 1 Rol. 138.

135, 142.

6 Co. 3. b.

(d) 1 Rol. 141.

(e) 1 Rol. 138.

141.

2 Inst. 401.

8 Co. 44. b.

Dy. 137. pl. 25.

Raym. 118.

28 E. 3. 22. a. b.

in

in its nature, and if he does not make a true tender, he shall lose his land, and so it is adjudged in 28 E. 3. 99. a. b. Vide 9 E. 3. 50. 14 E. 3. Age 88. 31 E. 3. Age 54. 2 E. 2. Age 132. But altho' an infant attorns in (a) *per quæ servitia*, it can be no mischief to him; for notwithstanding his attornm. within age, he may at full age* disclaim to hold of him, either to say that he does not hold of him, or acknowledge that he holds of him but by less or other services, and therewith agree 26 E. 3. 63. 32 E. 3. *per quæ servitia* 9. § tit. Age 53. Vide 2 E. 2. Age 77, & 78. 37 H. 8. Br. (b) attorn. And Coke ch. just. cited the book in 43 E. 3. 5. a. Where in *quid juris clamat* brought by an infant within age against one who said that he held the land for term of life, of the lease of the infant's ancestor, who granted by deed, that he should not be impeached of (d) waste, which he shewed forth in court, and said that he was ready to attorn, saving to him the advantage by the deed; and because the Pl. was within age, he could not confess the deed during his nonage; it was adjudged, he should attend till his full age: and further he said, that he had seen an ancient report in writing, in 32 E. 3. in which in the same case the infant when he comes to his full age, and the Def. attorn'd by judgm. of the court, that it should not turn the infant to any prejudice: for altho' the attornm. be after his full age; yet forasmuch as no laches was in the infant; but that he brought his writ of *quid juris clamat* to compel the ten't to attorn, the delay which is made till his full age (which the law provides for his benefit) shall not turn to his prejudice, and therefore by judgm. of law (which doth wrong to none) he shall have as much advantage as well for the arrearages of the rent, or for waste committed as if the ten't had attorned at the time of his plea pleaded. 2. It was resolved, that altho' the (e) infant in the case at bar was not compellable to attorn, because the manor was not convey'd by fine; yet, because by a (f) mean he was compellable to attorn, *sc.* if a fine had been levied, the attornm. was good: And so it is held in 9 E. 3. 58. b. in waste; that tho' the husband out of court does a thing which he and his wife may be compelled to do by law, the thing shall be establish'd, and therewith agree 8 E. 4. 4. b. 11 R. 2. Waste 98. and therefore (g) equal partition in such case shall bind; the same law, if the husband (h) attorns in *parts* to a grant by deed, it shall bind the wife, and therewith agree 15 E. 3. Attornm. 5 E. 3. 42. b. Sir J. Bofvil's Case, 44 E. 3. Fine 37. § 3. Attornm. gives no (i) interest, but is only a bare assent, and therefore 11 H. 7. 13. b. it is no *franchisem.* to a villein, and it can't be upon (k) condition, as it is resolv'd in *Tocker's Case*, in the 2 Part of my Rep. f. 66. ¶ 4. The end of an attornment is to (l) perfect a grant, and the law favours the consummation and perfection of things; for the end is ali. *§ finis coronat opus.* And with this resolution agree the books in 12 E. 4. 3. b. & 4. a. hoc

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

(b) Br. Attornment 41. (c) 6 Co. 4. a. Co. Lit. 315. a. 320. b. 1 Rol. 138. 3 Bailfr. 137. (d) 2 Co. 67. a. Co. Lit. 320. b.

(e) 1 Rol. 295, 296. Co. Lit. 315. a. (f) 5 Co. Lit. 172. a. (g) Fitz. Partition 2. B. Partition 28 (h) 2 Brownl. 87. 1 Rol. 295. Fitz. Attornment 11. (i) 1 Brownl. 47. 2 Brownl. 87. 2 Co. 67. a. * Co. Lit. 158. a. Br. Villenag. 75. (k) 1 Rol. 112. 2 Brownl. 84. Co. Lit. 274. b. 297. a. 320. b. 2 Co. 63. a. 5 Co. 21. a. b. (l) 1 Brownl. 27. 2 Brownl. 87.

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

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Mich.

Mich. 9 Jacobi Regis.

Pinchon's Case.

2 Brownl. 137.
Co. Ent. nu. 1.
C. Jac 293, 294.
Jenk. Cent. 290.

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

(a) C. Jac.
293, 294.

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

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

And as to the Objections which have been made (for the Confuting of them is a Confirmation that the Action doth well lie,) to the first it was answered, That the said Book in (b) 15 E. 4. is, That Debt lies not against Executors upon a Contract for the Testator's Debt, but the Reason thereof is not, (as hath been urg'd) because the Execut. can't have Knowledge of the Contract,

(a) Br. Executor 79.
 Br. Ley gager 55. 1 Rol. 924.
 (b) 1 Rol. 18, 729.
 2 Rol. Rep. 45, 144, 271.
 Co. Lit. 172. a.
 Cr. El. 126, 920.
 1 Leon. 113, 114.
 2 Leon. 105.
 Owen 94.
 Poph. 151, 152.
 Cr. Jac. 494, 560, 561.
 Latch. 21, 22, 156, 157, 169.
 Cart. 215, 216.
 Noy 85, 87.
 1 Sid. 112.
 March 40.
 Palm. 528, 529.
 1 Jones 146.
 Moor 679.
 Godb. 219, 364.
 10 H. 6. 14. a.
 Perk. 4. a.
 Plow. 364. b.
 Dr. & Stud. 113 a.
 (c) Co. Lit. 295. a.
 (d) 4 Co. 94. a.
 Moor 667.
 Yelv. 20.
 (e) 3 Bullst. 281.
 4 Inst. 315.
 1 Keb. 86.
 Postea 89. a.
 (f) Dy. 271.
 pl. 25 322. pl. 25.
 3 Keb. 592.
 1 Sand. 218.
 Cro. Car. 539.
 March 13.
 1 Rol. 921.
 (g) Cr. Jac. 273, 293, 294, 404.
 Jenk. Cent. 290.
 2 Bullst. 92, 236.
 3 Bullst. 235, 236, 237.
 Cr. El. 121, 454, 459. Golds. 154.
 Post. 93. 10 Co. 77. a. b. 1 Roll. 924. 2 Brownl. 137. 236. Godb. 176. Swinb. 327. 2 Rol. Rep. 433, 434. Golds. 154. Moor 691.

1 Leon. 165. Yelv. 20, 56, 196. (b) 15 E. 4. 16. a. Supra. a.

- nor of the Continuance thereof, because the Testator might have privately paid it: But the Reason of the Law which is given in the Book in the same Case is, because the Testator might have (a) waged his Law, it was awarded that the Pl. should take nothing by his Writ. And the like Judgment is in the same Year, fol. 25. a. That an Action of *Debt* lieth not against the Executors, (and the Reason of the Judgment is, for know That a Man shall never have an Action against Executors (b) where the Testator in his Life-time might have waged his Law) and the Reason thereof is because the (c) Executors shall be deprived of the Benefit of waging Law, if an Action will lie against them; which Reason strongly proveth, that in the Case at Bar the Action will lie against the Executors, because the Testator in an *Action on the Case* on this *Assumpsit*, could not wage his Law; and therefore his Executors shall not be deprived of it. But if a (d) Prisoner in the Tower for Treason hath Meat and Drink from the Lieutenant, and dieth, the Lieutenant shall have an Action of *Debt* against his Executors for the Meat and Drink of the Testator, and the Reason is, because in such Case the Testator could not (e) wage his Law, as it is adjudged in (f) 27 H. 6. 4. b. in *Thomas Bodulgar's Case*, and the Reason why no Wager of Law lieth in such Case is, because every Gaoler ought to keep his Prisoner in *salva & arcta custodia*, so that such Prisoner by the Com. Law shall avoid a (g) Descent cast, and a Fine levied during his Imprisonment, because the Law presumeth that he, in respect of his strict keeping can't have (h) Knowledge of a Disseisin or a Fine to command an Entry, or Claim to be made, and therefore the Gaoler is in a Manner * compellable to find Victuals for his Prisoners, and therefore the Prisoner shall not wage his Law in such Case, But if *A.* agreeth with *B.* for his (i) Commons by the Week or Month, &c. there in *Debt* brought against *A.* he shall have his Law; as the Books are adjudged in 22 H. 6. 13. b. 9 E. 4. 1. b. Vide 39 H. 6. 18. b. If a Victualer or common Hostler bringeth an Action of *Debt* for the Victuals delivered to his Guest, the Guest may wage his Law; for a Victualer or Hostler is not compellable to deliver Victuals till he be paid for them in * Hand. And therewith agrees 10 H. 7. 8. a.

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

(a) Dy. 25. a.
Pl. 144.

(b) Dy. 23.
Pl. 124.
1 Rol. 924

(c) Co Lit.
295. a.

(d) Co. Lit.
295. a.
Poph. 127.

(e) Co. Lit.
295. a.
1 Rol. Rep 338
Poph. 127.
(f) 27 H. 8. 4. b.
Br. Ley gager 8.
Fitz. Ley 15. 22.
(g) Co. Lit.
259. a.
(h) 8 Co. 100. b.

* Plow. 63. a.

(i) Cr. El. 8. 18
2 Rol. 107.
Co. Lit. 395. a.
Br. Ley gager
50 58, 70.
Fitz. Ley 25.

* 39 H. 6. 19. a.

(k) 1 Rol. 924.

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

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

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

(c) Co. Lit.
295. a.
2 Rol. 107.
Br. Det. 188.
Br. Execut. 163.
(d) 4 Co. 95. b.
Co. Lit. 295. a.
Godb. 291.
8 H. 5. Fitz.
Ley 66.
20 E. 3. Fitz.
Ley 52.
32 H. 6. 24. a.
Br. ley gager.
102.

of

of the Beginning or Continuance of it; but these are not material, for the Wager of Law is the true Reason and Cause allowed by the Law. And therewith agree 8 H. 5.

(a) 2 Co. 95. b.

(b) Br. ley gager
102.

(c) Fitz. Lx. cur.
50.

Br. Execut. 41.

Br. Det. 53.

Br. Labourers
22.

(d) Fitz. Ley. 22.

Br. Ley gager
70.

(e) 4 Co. 94. a. b.

(f) Cr. Jac. 294.
Plow. 182. b.

(g) Co. Lit.
295. 2.

(h) 7 Co. 7. a.
Balwer's Case
9 Co. 111. a.
11 Co. 39. b.
2 Inst. 403.
Co. Lit. 72. a.
* Polk. 50. b.

(i) Swinb. 154.

Tit. (a) Ley 66. (b) 32 H. 6. 24. a. In (c) 2 H. 4. 14. b. *Lawrence St. Martin* retained one for Term of his Life in Time of Peace and War, for 100 s. *per Ann.* which Service he as his Servant did for 2 Years, for which he brought his Action of Debt against *John Selton* and others Executors of the said *Lawrence St. Martin*, and Judgment was given against the Pl. for the Reason, and upon the same Difference as is aforesaid. *Vide (d)* 39 H. 6. 18. b. And therefore the Judgment in *Slade's Case* (which was resolved by the Advice of all the Judges in the Exchequer-chamber in 44 *El.* as appears in *the (e) 4 Part of my Reports, f. 92.*) in Effect over-rules this Point. For if an Action on the Case on *Assumpsit* lies upon every Contract executory, thence it follows, that forasmuch as the Testator could not wage his Law, that the Action shall lie against his Executors; And therefore also it is true, That an Action on the (f) *Assumpsit* made by the Testator, will lie against Executors, because in such Action the Testator could not (g) wage his Law; as in the same Case, an Action of Debt lies not against Executors, because in such Action the Testator might have waged his Law. So no Birth-right or Privilege of the Subject is taken away by this Resolution, but thereby Justice and Right is advanced, for as much as the Creditor shall be paid his just and true Debt. And the Executors who in Truth have the Goods in another Right, *sc.* to pay the Debts, &c. of the Testator, shall not convert them to their private Use, without paying the just and true Debts of the Testator; for that would be against Justice and Right, and against the Office of Executors, who are but Ministers and Dispensers of the Goods of the Dead; and notwithstanding the Testator's Death, yet the Debt remains, for Death is no Discharge of the Debt; and it would be a great Defect in the Law, that no Remedy should be given for it, (b) *Curia domini Regis deficere non debet conquerentibus in iustitia perquirenda. W. 2. cap. 24. Vide Doctor & Student lib. 2. c. 10, & 11.* Debts due by Bond shall be paid by Executors before Debts by simple Contract, and Debts by * simple Contract before Legacies; which proves that the Debt by simple Contract remains due and payable after the Testator's Death, and that it shall be paid before Legacies, for which Remedy is given in the Ecclesiastical Court. And therewith agrees 21 *E.* 4. 21. b. and Debts by (i) simple Contract shall be paid before the reasonable Part of the Wife and Children. *Vide 2 E. 4. 13. b. 2 H. 6. 16. d.*

As to the other Objection, That this personal Action of *Trespass* on the Case (a) *moritur cum persona*; altho' it is term'd *Trespass*, in respect that the Breach of Promise is alledged to be mixed with Fraud and Deceit to the special Prejudice of the Pl. and for that Reason it is called *Trespass* on the Case; yet that doth not make the Action so annexed to the Persons of the Parties, that it shall die with the Persons; for then if he to whom the Promise is made dies, his Executors should not have any Action, which no Man will affirm. And an Action *sur Assumpsit* upon good Consideration, without Specialty to do a Thing, is no more personal, *i. e.* annexed to the Person, than a Covenant by Specialty to do the same Thing.

Now for Authorities in Law, Judgments and Resolutions. 1 The Case in 3 E. 3. *Itinere North.* cited in *Norwood's Case* in *Plow. Com.* 183. a. in case of Debt, the Case in (b) 12 H. 8. 11. a. b. which is entred *Term. Mich.* 12 H. 8. *Rot.* 40. Between *Oliver* (c) *Cleymond* Pl. and *Rob. Vincent*, and *Thomassin* his Wife, Executors of the Testament of *Rob. Penfon* Defendants; the Record of which Case I have seen, and there the Pl. declares, That whereas Communication was had between one *Roger Penfon* and the said *Oliver* for six Barrels of Salt Salmon from the House of the said *Oliver* to the Value of 6 l. to be bought by the said *Roger* of the said *Oliver*, the said *Rob. Penfon* desired and requested the said *Oliver* to sell and deliver to the said *Roger* the said 6 Barrels, and assumed and promised for himself, his Executors, to the said *Oliver*, *qd' ipse executores seu assignati sui dictas sex libras pro barrellis & piscibus præd' præfato Olivero infra unum annum extunc proxime sequen' bene & fideliter solvere & contentare debuissent, idemq; Oliverus dictis assumptioni & promissioni præd' Rob' Penfon fidem adhibens, bona & mercimonia sua præd' præfat' Rogero ad desiderium & requisition' dicti Rob' Penfon, ei ut præmittitur fact' pro præd' 6 libris sibi ut præfertur solvend' ad tunc & ibid' vendidit, tradidit & deliberavit*, and declared that the said *Rob. Penfon* in his Life, nor the Defendants after his Death did not pay the said 6 l. &c. and alledged in the Declaration, *quod bona & catalla ipsius Roberti sufficien' ad solvend' easd' sex lib' & omnia alia debita ejusdem Roberti solvend', in manus præd' Ro' Vincent & Thomassinæ exist', &c.* which Goods they had converted to their own Use, *ad damnum 20 l.* the Defendants *protestando qd' præd' billa minus sufficiens est in lege quam iud' Rob' Vincent & Thomassinæ necesse non habent se per legem terræ tenentur respondere* for Plea say, That the said *Rob. Penfon* did not assume and promise to the said *Oliver*, &c. *modo & forma, &c.* upon which Issue was joined and tried before Sir *J. Fineux* Chief Justice of the Kings Bench, by *Nisi prius*, and found for the Plaintiff,

(a) Ant. 87 a
4 Init. 315.
1 Keb. 86.
12 H. 8. 11. b.
3 Bulltr. 201.

(b) Plow. 182. a.
Br. Action sur
le Case 106.
Finn. Executors
171.
(c) Plow. 182.
a. b.
Poltea 90. a.

and Damages assessed to 9l. upon which Verdict the Court took advice till *Hillary-Term*, and then the Judgment is entered, *Et super hoc visis & per Cur' Dom' Regis hic diligenter inspect' omnibus & singulis premissis, maturaq; deliberatione superinde habita, consideratum est, qd' pred' Oliverus recuperet versus prefat' Rob'um Vincent' damna sua pred' per Juratores in forma pred' assessa, &c.* Which I have reported out of the Record it self at length, to the Intent the Reader may be assured of the Truth of the said Case: Which Judgment being given in the King's Bench with so great Deliberation by Sir *Jo. Fineux, Conisby*, and other his Companions, Judges of profound Knowledge, and remaining yet of Record in full Force, ought not to be discredited or disgraced by the bare Saying of a Judge, upon a sudden Motion at the Bar, and it is to be observed in the same Case of 27 H. 8. 23. a. That *Knightley* gave the true Reason why no Writ of Debt would lie against Executors, *sc.* because the Testator might have waged his Law, and the Executors can't do it, and therefore they are nor chargeable in an Action of Debt. And *Knightley* further saith, in the Exchequer it is a common Course, That the King's Debtors shall have a (a) *Quominus* against the Executors of their Debtors, who were indebted to them by simple Contract; to which the same Judge answereth, it is not so, and there is no such Course in the Exchequer and the Law is quite otherwise; which is apparent by that which hath been said before, that the Judge denied (upon the sudden) the Law in this Point, and that which is the common Course of the Exchequer. Which Judgment so given was a leading Case to many others, not only in the King's Bench, where the Judgment was given, but also in the Com. Pleas; and therefore *Hill. 15 H. 8. Rot. 306. in Banco*, an Action on the Case upon *Assumpsit* of the Testator for Debt, was brought against Executors, who pleaded fully administered, and in the Book of Entries, Tit. *Action sur le Case, Division, Debt, pl. 2.* Action on the Case in the King's Bench against Executors, upon *Assumpsit* made by the Testator 5 Martii 28 H. 8. upon Sale of Corn to him. And *ibid. pl. 3.* another Action on the Case in the King's Bench against Administrators, upon *Assumpsit* by the Intestate, 28 Martii 31 H. 8. upon a Contract for Carpenters Wares: And *ibid. in the Division, Poyment pl. 1.* the like Action in the King's Bench by Executors against Exors, upon *Assumpsit* for Repayment of Money which was before deliver'd, if a Marriage should not take Effect. And the like Actions you may see in the Court of Com. Pleas, *Mic. 15 & 16 El. Rot. 1959.* in the Time of Sir *Ja. Dyer* Chief Just. of the Com. Pleas, an Action on the Case by *H. (b) Beccles*

27 H. 8. 23. a.

(a) Co. Lit.
295. a.(b) Co. Ent.
2. b. pl. 3.

and others, Executors of *Hen. Beecher*, against *Anne Mountjoy*, Administratrix of *Job. Bonham* Kt. upon *Assumpsit* of the Administratrix, in Considerat. that Administration was committed to her, and that she had Assets to pay, *Et. assumpsit super se ad solvend. 59 l.* in which Sir *John* the Intestate was indebted to the said *H. Beecher* the Testat. The Def. pleaded *Non assumpsit*, and found against her, and Judgm. was given (a) generally, *Et non de bonis defuncti*. Which Judgm. proves, that the Debt did not perish by Death, and that the Administratrix was chargeable to pay it, otherwise there was not any Considerat. *Pasc. 24 El. Rot. 1530.* in the Time of Sir *Edm. Anderson* Ch. Just. of the Bench, in an Action on the Case by *Jahan Michel*, Exe' trix of *Ralph Michel*, against *Wm. Vial* and others, Executors of *John Arundel*, Esq; *super assumptionem factam per præd' Joham' Arundel*; in Consideration that the said *Ral. Michel* in *vita sua vendidisset Et deliberasset eidem Johanni diversa mercimonia, Et. super se assumpsit*, to pay, *Et.* The Def. pleaded, *Non assumpsit*; and Judgm. was given *De bonis Testat. Trin. 27 El. Rot. 107.* in an Action on the Case by *Horne* against *Brough* Exe' or of *Brough*, upon a Promise made by the Testator in Considerat. that the Pl. had sold the Testator, *bona Et catalla, Et. assumpsit ad solvend', Et.* and upon *Non sum Informatus* pleaded, Judgm. was given for the Pl. And a Multitude of Judgments have been given in the King's Bench in the like Cases; and the Justices relied much upon the Case in *Hill. 4 Et 5 Ph. Et Ma.* in the King's Bench, between *Norwood* and *Read*, *Plow. Com. 181.* where it appears that upon a Demurrer in Law upon the Declarat. it was adjudged, That the Action upon *Assumpsit* made by the Testator, was maintainable against the Exe' ors, upon a Contract for Wheat: In which Case the Judgm. given in 12 H. 8. in (b) *Cleymond's Case*, is approved. So that upon all these Authorities, Judgments and Resolutions, and for the Reasons aforesaid being in Number three, 1 That the Testator could not wage his Law: 2 That after the Death of the Debtor the Debt remains, and that it would be a Defect in the Law, if no Remedy should be provided for it: 3 It is more consonant to Justice and Com. Right, that the just Debt should be paid, than the Executors, who have the Goods in another's Right, should convert the Goods to their private Use, without paying the Testator's Debts. It was unanimously upon long and mature Deliberation adjudged, That the Judgment given in the King's Bench should be affirmed. And you who make Payment or other Satisfaction of Debts, take Acquittances, or sufficient Proof of the Payment or Satisfaction thereof, or otherwise you or your Executors or Administrators will be in Danger of paying it again,

(a) 1 Rol. 930.
Poltea 94. a.

(b) 12 H. 8. 11.
a. b.
Ant. 89. a.
Plowd. 182. a. b.

Lastly, It was resolved in this Case, That 'twas not necessary to (a) aver that the Defendants had Affets to pay Legacies; as it was also resolved in the said Case between *Norwood* and *Read*, for Debts upon (b) Simple Contract, are to be paid before Legacies. And the Report of the said Case of (c) 12 H. 8. as to the Averment for Payment of Legacies is not warranted by the Record; for in the Record the Averment is only taken that the Executor had Affets to pay all Debts. And in *Mich. 29 & 30 El.* in an Action on the Case brought by *Codington* (d) against *Hulet*, as Executor, &c. upon an *Assumpsit*, made by the Testator for Payment of a Debt, the Defendant pleaded *Non assumpsit*, and it was found against him; and in arrest of Judgment it was moved, that the Declaration was insufficient, because the Plaintiff had not averred that the Defendant had Affets to satisfy the Testator's Debts. And it was adjudged by Sir *Christopher Wray*, Sir *Thom. Gaudy*, and the whole Court, that the Declaration was good enough; and that it should come in on the Defendant's Part; as in an Action of Debt against Executors, (e) or against the Heir, no Averment is taken in the Declaration that they have Affets, and the Law intends that every Man will in Discharge of his Conscience leave Affets to pay all the Debts, which he ought to pay to any.

(a) 2 Brownl.
138.

Postea 94. a.

1 Rol 921.

Cr. Jac. 47,

293. 297.

Plowd 181. a.

(b) Doct. and

Stud. 75. b. 78.

1 Rol. 627

(c) 12 H. 8. 11.

a. b.

Ant. 80 a. 90 a.

Plowd. 182. b.

(d) Cr E 52

1 Rol. 921.

(e) Doct. pl. 88,

168.

Postea 94. a.

*Term. Sancti Hill. anno 8 Jac.
Regis Rot. 1112.*

William Banes's Case.

Memorand', quod alias scilicet Term' Sanct' Mich' ultimo præterito coram Dom' Rege apud Westmonasterium ven' Will'mus Banes per Thomam Ferrer åttornat' suum, & protulit hic in curia dicti Dom' Regis tunc ibid' quand' billam suam versus Edward' Paine & Mariam uxorem ejus in custod' marr', &c. de placito transgressionis super casum, & sunt pleg' de prosequendo, scil' t, Johan' Doe & Rich'us Roe, quæ quid' billa sequitur in hæc verba. ff. London. ff. Will'us Banes queritur de Edw'do Paine & Maria uxore ejus in custod' mar' maresc' Dom' Reg' coram ipso rege existen', pro eo, videl't, qd' cum quidam Will'us Havert in vita sua nuper vir præd' Mariæ, scil' t, primo die Martii ann' regni Dom' Jac' nunc Regis Angliæ sexto, apud London', videl't, in parochia beatæ Mariæ de Arcubus in Warda de Cheape Lond' indebitat' fuit eidem Will'mo Banes in septuagint' sept' libr' legalis monetæ Angliæ pro divers' pecuniarum summis eidem Will'mo Havert in vita sua per præd' Will'mum Banes mutuo dat' & accommodat', & sic indebitat' existen', idem

Willielmus Havert postea scil't, sexto die Aprilis ann' regni dicti Domini Regis nunc Angliæ septimo, apud London' præd' in parochia & Warda præd' jacen' in extremis instant' requisivit eandem Mariam adtunc uxorem suam ad solvendum eidem Williel' Banes post mortem ipsius Will'mi Havert eandem septuaginta septem libras, & adtunc & ibidem idem Willielmus Havert condidit testamentum & ultimam voluntatem suam, & per idem testamentum fecit & constituit eandem Mariam executricem testamenti sui præd' & tunc & ibidem obiit, post cujus mortem eadem Maria onus executionis testamenti præd' super se suscepit; cumq; præd' Maria post mortem præd' Will'mi Havert prætextu testamenti præd' possessionatus fuit de interesse termini diversorum annorum adtunc & adhuc venturorum de & in quibusdam gardinis & quodam semite globali, Anglice a *bowling alley*, scituat' & existen' in Moorfield, videl't. in parochia Sancti Leonardi in Shorditch in comitatu Middlesex, eademq; Maria, dum ipsa sola fuit, percipiens quod præd' Will'mus Banes eandem Mariam pro præd' septuaginta & septem libris molestare & sectare intendisset, pro eo quod eadem Maria eandem septuagint' & septem libras eidem Will'mo Banes post mortem præd' Will'mi Havert viri sui defuncti non solvisset, eadem Maria dum ipsa sola fuit, postea, scilicet, vicesimo quinto die Junii anno regni dicti Dom' Regis nunc Angliæ septimo suprascripto, apud Lond' præd' in parochia & Warda præd', in consideratione quod præd' Will'mus Banes ad instantiam & specialem requisition' præd' Mariæ non molestaret aut sectaret eand' Mariam pro præd' septuaginta septem libris, sed differre vellet solutionem inde usque proxim' quarter', Anglice *would forbear the Payment thereof until the next Quarter*, videlicet, usq; festum Sancti Mich' Archangeli tunc proxim' sequen', super se assumpsit, eidemque Willielmo Banes adtunc & ibid' fideliter promisit, quod ipsa eadem Maria præd' septuaginta septem libras eid' Willielmo Banes adtunc, apud proxim' quarter' illud, videl't, apud festum Sancti Mich' Archangeli tunc proxim' sequen' assumptionem præd' anno septimo suprascripto bene & fideliter solvere & contentare vellet, aut aliter eadem Maria adtunc & ibid' assignare vellet eidem Will'mo Banes, Anglice *would set over to the said William Banes*, pro securitate sua in ea parte pro solutione præd' septuaginta septem librarum totum interesse termini annorum quem ipsa ead' Maria adtunc habuit ventur' de & in gardinis & semite globali Anglice

gllice bowling Alley præd', si eadem Maria eandem septua-
 gint' septem libras eidem Will'mo Banes juxta promission' &
 assumptionem suas præd' adtunc non solvisset, & idem Wil-
 lielmus Banes in facto dic', quod ipse idem Will'mus Banes
 promissioni & assumptioni præd' Mariæ fidem adhibens, non
 molestavit aut sectavit eandem Mariam pro præd' septuagint'
 septem libris, sed differebat solutionem inde a tempore as-
 sumptionis præd' usq; præd' proxim' quarter', viz. usq; festum
 Sancti Mich' Archangeli proxim' sequen' assumption' præd'
 anno septimo supradiçto. Idemq; Will'us Banes ulterius dic',
 quod post assumptionem præd' in forma præd', scil't, decimo
 die Nov. an' septimo supradiçto, apud Lond' præd', in paroch'
 & Warda præd', eadem Maria cepit in virum suum prædiçt'
 Edwardum Paine, præd' tamen Maria dum ipsa sola fuit, seu
 præd' Edwardus & Maria post sponsal' inter eos celebrat',
 promissionem & assumptionem ejusdem Mariæ dum ipsa sola
 fuit, minime curan', sed machinan' & fraudulenter intenden'
 eundem Will'um Banes de præd' septuagint' & septem libris
 callide & subdole decipere & defraudare, præd' septuagint'
 septem libras, nec eadem Maria dum ipsa sola fuit eidem
 Will'mo Banes apud præd' proxim' quarterium, videl't, apud
 festum Sancti Mich' Archangeli proxim' sequen' assumption'
 præd', an' septimo suprad' juxta promissionem & assumption'
 suas præd' in ea parte solvit, seu aliquo modo, pro eisdem con-
 tentavit, aut aliter adtunc & ibidem apud festum illud affig-
 navit eidem Will' Banes totum interesse termin' annor' quod
 ipsa eadem Maria adtunc habuit ventur' de & in gardin' &
 semit' global' præd' nec præd' Edward' & Maria post sponsal'
 int' eos celebrat' ad aliquod tempus imposterum hucusque
 præd' septuagint' septem libr' præf. Will'mo Banes juxta pro-
 mission' & assumption' ejusd' Mariæ præd' hucusque solver'
 seu aliquo modo pro eisd' contentaver', aut totum præd' inter-
 esse termini annor' eorund' Edwardi & Mariæ de & in gardinis
 & semit' global' præd' juxta promission' & assumption' ejusd'
 Mariæ eidem Will'mo Banes pro securitat' sua in ea parte huc-
 usq; assignaverunt, licet ad hoc per præd' Will'mum Banes
 eadem Maria dum ipsa sola fuit, & præd' Edw'us & Maria
 post sponsal' inter eos celebrat', s. ultimo die Sept. an' regni
 diçt' Dom' Reg' nunc Angliæ octavo, apud Lond' præd', in
 paroch' & Warda præd', sæpius requisit' fuer', per quod idem
 Will' Banes totum lucrum, commodum, & profic' quæ ipse cum
 præd' septuag' sept' libr' emendo, vendendo, liciteq; barganizan-
 do habere & lucrare potuisset si præd' Mar' promiss' & assumpti-
 on' suas præd' in forma præd' performass' totaliter perdidit & a-
 misit,

misit, unde idem Will'mus Banes dic', quod ipse deterioratus
 est & damnum habet ad valentiam centum librarum, & inde
 producit sectam, &c. Et modo ad hunc diem, scil't, diem
 mercurii proxim' post octabas Sancti Hill. isto eodem termi-
 no, usq; quem diem præd' Edw'us & Maria habuerunt licen-
 tiam ad billam præd' interloquend', & tunc ad respondend',
 &c. coram domino rege apud Westmonaster' ven' tam præd'
 Will'um Banes per attornatum suum præd', quam præd' Ed-
 wardus & Maria per Itham Nouel attornat' suum, & iidem
 Edw'us & Maria defend' vim & injuriam quando, &c. & dic'
 quod prædict' Maria non assumpsit super se modo & forma
 prout præd' Will'us Banes superius versus eos narravit, & de
 hoc pcn' se super patriam, & præd' Will'us Banes similiter,
 &c. Ideo ven' inde jur' coram Dom' Rege apud Westmonast'
 die Lunæ proxim' post quindenam Sancti Hill', & qui nec,
 &c. Ad recogn', &c. Qui tam, &c. Idem dies datus est par-
 tibus præd' ibidem, &c. Postea continuat' inde process. inter
 partes præd' de placito prædicto per jur' posit' inde inter eos
 in respectum, coram Domin' Rege apud Westmonaster' usq;
 diem Martis proxim' post octab' purificationis beatæ Mariæ
 extunc proxim' sequen', nisi dilectus & fidelis Domini Regis
T'bo. Fleming miles, Capital' Justic' Dom' Reg' ad placita in-
 cur' ipsius Dom' Reg' cor' ipso rege tenend' assign' prius die
 Lunæ proxim' post præd' octab' purification' beatæ Mariæ a-
 pud Guihald' Lond' per formam statuti, &c. ven' pro de-
 fectu jur', &c. Ad quem diem coram domino rege apud
 Westmonast' ven' præd' Will'us Banes per attornatum suum
 præd', & præfat' Capital' Justic' cor' quo, &c. mis. hic record'
 suum coram eo habitum in hæc verba. Postea die & loco in-
 fracontent' cor' dilecto & fideli dicti Dom' Reg' *T'bo. Flem-*
ing milite Capitali Justic' infrascript', associat' sibi Will' Price
 per formam statut', ven' tam infranominat' Will' Banes quam
 infrascript' Ed' Paine & Maria uxor ejus per attorn' suos infra-
 content', & jur' juratæ unde infra fit mentio exact' similis
 ven', qui ad veritat' de infracont' dicend' electi, triati, & jurat'
 dicunt super sac'r'm suum, qd' infranominat' Maria assumpsit
 super se modo & forma prout infrascript' Williel' Banes
 interius vers. eos narravit, & affid' damna ipsius Will' oc-
 casione non performance' promission' & assumptionis in-
 frascript' ultra mis. & custag' sua per ipsum circa
 sectam suam in hac parte apposit' ad octogint' libr', & pro
 mis. & custagiis illis ad quinquagint' tres solidos & quatuor
 denarios. Ideo conf. est, quod præd' Will'us Banes recuperet
 vers. præfat' Edw'um Paine & Mariam uxorem ejus dampn'

na prædict' per jur' prædictos in forma prædicta assess. nec-
non quinq; libras sex solidos & octo denarios pro mis. & cu-
stas. suis prædict' eidem Willielmo per cur' dicti Domini
Regis hic ex assensu suo de incremento adjudicat', quæ qui-
dem damna in toto se attingunt ad octogint' & octo libras,
& præd' Edwardus Paine & Maria uxor' ejus. in misericor-
dia, &c.

Hill. 9 Jacobi Regis.

William Banes's Case.

Cr. Jac. 47. 273.
Jenk. Cent. 290.
Moor 853, 854.
1 Rol. Rep. 379.
Yelv. 55. 56.

*T*Ermin' Hillar' 8 Jac. Regis Rot. 1112. in Banco Regis Will. Banes brought an *Action on the Case* upon an *Assump'* against *Edward Paine* and *Mary* his Wife, and declared, That whereas *William Havert* was indebted to the Plaintiff in 77 l. which the Plaintiff had lent him; and that the said *William Havert* made his Will, and thereof made the said *Mary* Executrix, and died, and that the said *Mary* took upon her the Charge of the said Will; and that she possessed as Executrix of an Interest of a Term for divers Years yet to come of certain Gardens, and of a Bowling Alley in *Moor-fields* in the Parish of *St. Leonards* in *Shoreditch*, in the County of *Middlesex*. The said *Mary* 28 Junii anno 7 Jac. perceiving that the said *William Banes* would sue her for Non-payment of the said Debt, in Consideration that the said *William Banes* at the Request of the said *Mary* *non molestaret aut sectaret eandem Mariam pro præd' 77 l. sed deferre vellet solutionem inde usq; festum S. Michaelis tunc proxim' sequen' assumed to pay the said Debt at the said Feast of St. Mich. or otherwise, eadem Maria ad tunc & ibidem assignare vellet eidem Willielmo Banes pro securitate sua in ea parte pro solutione præd' 77 l. totum interesse termini annorum præd', &c.* in Default of Payment of the said 77 l. and averr'd, that the Pl. did not molest or sue her, &c. and that at the said Feast the Defendant did

did not pay nor make Assignment of the said Interest ; and afterwards the said *Mary* married the said *Ed. Paine* : The Defs. pleaded *non Assump'*, and it was found against them to the Damages of 80 l. &c. Upon which a (a) general Judgm. was given against *E. Paine* and his Wife, *sc.* that the Pl. should recover against them his Damages : Upon which Judgm. the Defs. brought a Writ of Error in the Exchequer-chamb. by the Stat. of 27 *El. c.* 8. And the principal Error assign'd was, because the Pl. had not averr'd, That the Executrix had Affets in her Hands at the Time of the *Assump'* made of the Goods of the Deceased amounting to the Value of the said Debt ; and if she had not Affets, then it is *nudum pactum*, for there is no Consideration to charge her, nor to bind her to her Promise ; and *eo potius*, because she shall by this Promise be charged generally, and not only of the Goods of the Deceased ; and therefore, in Regard the *Assumpsit* charges her self, and transfers the Charge of her as Executr. in another Right to her self as for her proper Debt, in Respect of her Promise Reason requires that there ought to be some good Consideration thereof, which can't be if she has not Affets.

(a) 1 Rol. 930.
Antea 90. a.
Cr. El. 91.

But it was resolv'd by all the Just. of the Com. Pleas and Barons of the Excheq. that the Declarat. was good enough, for it shall be intended *prima facie*, that she had (b) Affets ; and therefore in *Debt* against Execut. or against the Heir, the Pl. shall never aver in his Declarat. that they have Affets, for the Law presumes that *prima facie* ; for the Law presumes that the Testat. or the Ancestor would not leave a greater Charge upon his Execut. or Heir, than he leaves Benefit to discharge it. And the Consideration in the Case at Bar is good ; for it is as much as if a (c) Stranger had said to the Pl. forbear your Debt, and do not sue the Def. till *Mich.* and at the said Feast I will pay you your Debt, that is a good Consideration, altho' it can't be any Benefit to him who makes the Promise ; yet because it is a Damage to the Creditor to forbear his Suit and Duty, it is a good Consideration : and as in the same Case he who makes the Promise for another shall be charged generally upon his own Promise ; so when one is Execut. and makes such a Promise, the Debt is due by him in Right of his Executorship, and the Promise is made in his own Right ; and therefore without Question he shall be charged in an Action brought upon his Promise (d) generally, and yet the Money which he pays in Satisfact. of the Debt of the Testator, shall be allowed him as Parcel of his Account as Execut. ; for his Promise extends to pay the Debt with which he was chargeable as Executor ; But I conceive, If the Truth of the Case be that in the Case at Bar there had not been (e) any Debt, or if there had been a Debt, and the Executrix had

(b) Hutt. 28, 108.
1 Rol. 921.
Antea 90. b.
Plowd. 182. b.
2 Brownl. 138.
Cr. Jac. 47, 293, 294.
Cr. El. 59.
Doct. pl. 88, 168.
Cr. Jac. 273, 604.
2 Bullst. 92.
(c) Cr. El. 881 ;
Yelv. 1. 2.
Hertl. 1.

(d) Cr. El. 91 ;
406.
Cr. Jac. 273.

(e) 2 Rol. 634.
Hutt. 28.
Doct. pl. 201.
Palm. 185, 522.
1 Vent. 121.

(a) 1 Vent. 121.
Palm. 185, 522.

had (a) nothing in her Hands at the Time of the Promise, she might have given it in Evidence, and thereupon have been helped, for then in Truth there was not any Consideration, for to forbear the Debt where none was, or with which she was not chargeable, is not any Benefit to the Defendant, nor Damage to the Plaintiff. Also the Case at Bar was stronger, because the Defendant promised either to pay the Money, or to assign the Interest of the Lease which she had as Executrix, for it was in her Election to do which of them she would. And so Note the principal Point resolved by both Courts.

Hill. 9 Jac. Regis.

Casus in Cancellaria.

Sir George Reynel's Case.

MOVIS quarto decimo die Novembris Anno Regni Regis
 Jacobi Angl', Sc. nono, inter dictum Dominum Regem
 Quer', & Georgium Reynel militem Defend'. Cum dies
 datus fuit præfato Defendenti usq; duodecimum diem in-
 stantis Novembris ad ostendendam causam, quare officium
 Marefcal' Marefcalciæ coram ipso Rege tanquam forisfact'
 in manus dicti Domini Regis seifiri non deberet, isto quar-
 todecimo die Novembris Magister Richardson e consilio cum
 præfato Defendente diversas Causas in ea parte allegavit,
 quod breve de Scire facias versus præfatum Defendentem
 prosequi debeat, antequam offic' præd' in Manus dicti Dom'
 Reg' seifiri debeat. Sed quia Curia hic in præmissis ulterius
 advisare vult, Ideo dies datus est per eandem Curiam usque
 diem Lune, s. vicesimum quintum diem instantis Novem-
 bris, quo die Dominus Cancellarius Angl' (associatis sibi
 Edwardo Coke milite capitali Justic' de Banco Laurentio
 Tanfield milite capital' Barone Scaccarii Petro Warburton
 milite uno Justic' de Banco & Jacobo Altham milite uno
 Baronum Scaccarii) quid per consilium ex utraq; parte di-
 ci poterit, utrum officium præd' in manus dicti domini Re-
 gis seifiri poterit sine brevi de Scire fac. prius lato, necne,
 audire proponit. At which Day, in Mich. Term now
 last past, the Case was argued before the Lord Chancellor
 and the said four Judges by Richardson for Sir George
 Reynel, and by Dampart for the King: And the Case was
 such, Ed. Peacock habuit & tenuit offic' Marefballi Maref-
 chale'.

chale' coram domino Rege for the Term of his Life; and the K. that now is 2 *Sept. anno primo Regni sui*, granted the said Office to Sir *James Elphinstone*, now Lord *Balerineth*, and to his Assigns for 31 Years in Reversion, who 26 *Jan. anno 2 Reg' Jac'* by Deed assigned it to *Hen. Spiller*, *Ed. Peacock* died 7 *Dec. an' 3 Reg'* who deputed Sir *Geo. Reynel* by Word to exercise the said Office as his Deputy at Will: And afterwards in *Jan.* following *Hen. Spiller* by his Deed assign'd the said Office to Sir *Geo. Reynel*. And it was found by Office by force of a Commission under the Great Seal, and returned in the Chancery, that Sir *G. Reynel* had committed divers Forfeitures of the said Office by suffering voluntary Escapes of Prisoners, &c. And the only Quest. which was argued at the Bar in the Chancery by the said Order of the Court was, If upon this Office the K. might seise without a *Sci. fa.* (for no Quest. was made upon the Validity of the Office;) But after the Arguments I moved, If such Office might be granted for Years, or not. And then the Lord Chancellor conceived it could not, but desired us to consider of these 2 Points, *s. 1.* If the K. might seise without a *Sci' fa'*; and 2. If such Office might be granted for Years. And we pray'd Time to advise till this Term; and in the Vacation we 4 severally consider'd of those 2 Points, and in the Beginning of this Term we met and conferred together. And as to the first, we all resolv'd, that the K. might seise without suing a (a) *Sci. fa.* for the Reasons and Causes which *Coke* Chief Just. in the Presence of the others in the Chancery this Term openly deliver'd in the Chancery. And because divers Authorities were cited at the Bar, and some seem to contradict the others, he made the Report in this Manner. 1. In some Cases the K. shall be in Possession by Seisure without Office, as in 21 (b) *H. 7.* and (c) *Stansford* in the Case of the Temporalties of a Bp. and of Priors aliens, because the Certainty of them appears in the Excheq. & (d) *frustra fit per plura, qd' fieri potest per pauciora.* 2. In some Cases the K. shall be in possession by Office without Seisure, as of Lands, Tenem. Offices, &c. which are local, or whereof continual Profit may be taken: As where it is found by Office that a Condit. is broke, or that a Person attainted of Felony is seised of Land, &c. or in the Case of Wardship of Land, &c. in all these Cases the K. immediately by Office is in Possessi. before any Seisure. *Vide (e) 2 H. 7. 8. b. 9 (f) H. 7. 2. b. 12 H. 7. 21. b. & 19. a. 14 H. 7. 21. b. 15 H. 7. 6. b. 21 H. 7. 7. a. b. 18. a. Stamf. 55, 56. &c. Vide Trin. 30 El. Downtie's Case in the 3 Part of my Rep. f. 10, 11. & Trin. 26 El. the Comp. of Sadlers Case in the 4 Part of my Rep. f. 54, 55.* 3. In some Case the K. shall be in Possessi. by Office and Seisure, as in Case of (g) *Advowf. &c.* the right Patr. shall not be ousted by such false Office found thereof, till the K. presents, and his Clerk is admitted and instituted; for if the K.'s Clerk is refused and the K. brings his

- (a) Dy. 198.
- pl. 50. 211. pl. 29.
- 2 Rol. 191.
- 1 Sid 81.
- Kelw. 33. b.
- 3 Co. 11. a.
- 1 Leon. 21.
- 2 Rol. Rep. 457.
- Hob. 242, 244
- (b) 21 H. 7. 3. a.
- Stamf. Prærog
- 55. a. b.
- (c) Stamf. P. æ-
- rogat. 55, 56.
- (d) 8 Co. 167 a.
- Co. Lit. 362. b.
- 3 Bulfr. 170.
- Noy 162.
- 1 Rol. Rep. 85.
- Hard. 113.
- (e) Fitz. Præ-
- rog. 10.
- Br. Prærog. 101.
- Br. Entry con-
- gruable 88
- Br. Office de-
- vant Escheat.
- 30.
- Br. Patents 46.
- Br. Condition
- 125.
- (f) Br. Office
- devant Eschea-
- tor 34.
- Br. Prærog 91.
- Br. Esch. 25, 33.
- 3 Co. 10. b.
- 1 Leon. 137.
- Postea 56. a.
- Plowd. 229. b.
- Moor 293.
- 4 Co. 58. b.
- Stamf. Prærog.
- 52. a.
- (g) Kelw. 42 1.
- 43. a.

Quare Imped. he may traverse the K.'s Title found by the Office in the same Action, and is not put first to traverse the Office as he is put in the Cases before said of Inheritances manual, where by the Office the K. is in Possession; for there he ought first to avoid the Office by traverse, &c. and till the Office is avoided, the K. shall be in Possession, (a) 17 E. 3. 10. b. 20 E. 4. (b) 10. & 14. 21 E. 4. 1. and *Dowty's Case* aforesaid, as if the Manor of *Dale* held of the K. is aliened in Mortmain by one who has nothing in it; and it is found falsly by Office, that he who aliened was seised in Fee and aliened in Mortmain, by this Office the K. is in Possession immediately, and in any Suit or Information commenced for the King for the Profits thereof, the right Owner shall not traverse the K.'s Title found by the Office, but first he ought to avoid the Office by traverse, &c. *Vide* 9 H. 7. 2. But if one aliens an Advowf. in Mortmain, in which he has nothing, and it is found falsly that he was seised in Fee, and aliened in Mortmain, the K. thereby is not in Possession of the Advowf. until he presents, and his Clerk is admitted and instituted; and if in such Case his Clerk is refused, and the K. brings a *Quare Imp.* the right Patron may traverse the K.'s Title in the *Qu. Imp.* before he avoids the Office by traverse, &c. because the Advowf. is not manual, but *hereditas incorporata*, and *eo potius*, because the Right to present, when it falls, is casual and not continual. 4. In some Case the K. shall be in Seisin, without any Office or Seisure; As where the K.'s Ten't dies without Heir, &c. the Law casts the Seisin upon the King, without Office or Seisure, as in (c) 9 H. 7. 2. b. *Vide the said Cases of* (d) *Dowty*, and of the *Company of* (e) *Sadlers*. 5. when 2 distinct Matters of Rec'd amount to an Office, there ought to be a *Sci. fa.* before the K. seises, altho' a Common Person in such Case may enter or seise, unless it is in special Cases; As if it be found by Office, that the Manor of *D.* is held of the K. and it appears by Fine of Record that the Manor of *D.* is aliened in Mortmain, there ought to be a *Sci. fa.* in which it shall appear by Averment that all is one and the same Manor, for there may be divers of one and the same Name, and that he who aliened was seised, for both without such Averment shall not put the Party to answer, but when there is Identity of a Thing, and it appears to the Court that they can't be divers, there 2 Matters of Record shall amount to an Office: As in the Case of *Sir J. Savage*, who was (f) Sheriff of the County of *Worcester* for Life by Let. Patent under the Great Seal, he was indicted of 2 voluntary Escapes of Felons, and it was held *per cur' in Banco Regis* that those Records amounted to an Office, and that the King might seise without a *Sci. fa.*; and the Reason was, that it appear'd to the Court, that there could be but one Sheriff in a County, and therefore no *Sci. fa.* was necessary

(a) 3 Co. 11. a.
Stamf. Prærog.
55. a.
(b) 20 E. 4. 11. a.
3 Co. 11. a.
Br. *Quare Imp.*
138.
Br. Travers de
Office 40.
Br. Office dev.
Escheat. 45.
Stamf. Prærog.
54. a.

(c) Br. Office
devant, &c. 34.
Br. Prærogat.
91.
Br. Escheat. 25,
33.
3 Co. 10. b.
3 Leon. 187.
Antea 95. b.
4 Co. 58. b.
Plowd. 229. b.
Moor 239.
Stamf. Prærog.
54. a.
(d) 3 Co. 10. 11
(e) 4 Co. 58.

(f) Dyer 151.
pl. 4.
Kelw. 194, 195,
196.
2 Rol. 155.
Antea 50. a.

(a) Dy. 151. pl. 4.
 Kelw. 194, 195, 196.
 2 Rol. 155.
 Ant. 50. a. 96. a.
 (b) Dyer 211. pl. 29.
 (c) Stamf. Prærog. 55. a. b.
 4 Co. 56. b.
 (d) 14 H. 7. 21. b.
 (e) Stamf. Prærog. 54, 55, 56.
 (f) 3 Co. 10, 11.
 (g) Finch's Argument in Quo Warranto 12.
 Fitz. Franchise 2.
 Br. Forfeit. 93.
 Br. Franchise 5.
 (h) Finch's Argument in Quo Warranto 12.
 (i) Br. Office de-
 vant Escheator
 39.
 2 Rol. 153.
 Br. Patent 59.
 (k) Antea 96. a.
 Dyer 151. pl. 4.
 Kelw. 194, 195, 196.
 2 Rol. 155.
 Antea 50. a.
 (l) 2 Rol. 153.
 1 Rol. 847.
 1 Jones 463.
 Cr. Car. 537.
 Hard. 49, 552,
 355.
 2 Jones 127.

in such Case: *Mich. 8 H. 8. Rot. 21.* reported by (a) *Dy. 40* & *5 Phil. & Mar. 151. b.* Nota good Difference. *Vide 16 E. 3. Brief 651. 21 Aff. 36. 40 Aff. 46. 50 Aff. 2. 2 E. 3. 10. b.*
 4 *El. (b) Dyer 211. 30 Eliz. 41. 6.* In all (c) Cases when a common Person is put to his Action; there upon an Office found the K. is put to his *Sci. fa.* as in Case of * *Waste, Cessavit, &c.* But when a common Person may enter or seise, there an Office without a *Sci. fa.* shall suffice for the King, *12 H. 7. 21. b. 14 (d) H. 7. 2. 15 H. 7. 6. b. Stamf. (e) 54.*
Vide (f) Dowty's Case aforelaid; and by these Differences apparent in our Books, all the Books are well reconciled and agreed. And for Authorities in Law in Cases of Offices, *8 H. 4. 18. a.* The Abbot of St. (g) *Albans* had a Gaol, and detained Prisoners, because he would not be at the Charge to sue forth a Commission for their delivery, the K. has Cause to seise the Franchise into his Hands; *20 E. 4. 5. b.* The Abbot of (h) *Cro-wland* had a Gaol in which the Prisoners were imprisoned, and because once he kept Men who were acquitted of Felony, and also had paid their Fees, the K. resealed the Gaol for ever, and that was for Misuser of his Franchise. *5 E. 4. 3. a. b.* The Duke of (i) *Norfolk* being Marshal of *England*, granted the Office of the Marshal of the Marshalsea of the King's Bench by his Deed to one *John Bouchier* for Term of his Life, with Warranty, who was admitted accordingly of Record, and afterwards the Duke died, his Heir within Age; and it was found by Office that the Duke died seised of an Estate-Tail in the said Office, and that it descended to his Heir within Age; And there it is held, by this Office *Bouchier* is out of Possession, and the King is in Possession till he has avoided the Office by Traverse, &c. And *Coke* Chief Justice cited a Record in *Trin. 21 E. 1. Rot. 33. Cant', corum Rege Fulco de Valebus attornat', sive vicgerens Rogeri Bigot com' Norff. & Mareschal' Angl', quia permisit Alanum Osmond qui utlegatus fuit pro morte Henrici Hagam qui fuit sub custod' sua sicut nullo crimine relectatum, & missas in duabus ecclesiis audire, & per plateas, vicos, & tabernas, sine compedibus ambulare & vagari, forisfecit officium suum mareschal' una cum virga, que capiuntur in manibus Regis, & committitur Viccom' Cantie.*
 And the said Case of Sir *John (k) Savage* was cited again to this Purpose; Wherefore it was concluded, that in the Case at Bar the King might seise without any *Sci. fa'*; and all this was agreed by the Lord Chancellor of *England*.

As to the other Question, it was resolved by the Chief Justice, Chief Baron, and Warburton Justice, that the said Grant for (l) Years of the said Office was void. 1. Because this Office is an Office of great Trust annexed to the Person, and concerns the Administration of

of Justice, and the Life of the Law, which is to keep those who are in Execution in * *salva & arcta Custodia*, to the End they may the sooner pay their Debts, &c. and this Trust is individual and personal, and shall not be extended to his (a) Executors or Administrators. For the Law will not repose Confidence in Matters concerning the Administration of Justice in Persons unknown. 2. This Office requires continual Attendance in Court, and perhaps the Lessee may die (b) Intestate, and then who shall be Officer till the Administration is granted? Shall the Ordinary, or who else? And if the Officer dies in Debt, and none will prove the Will, or take Administration, who then shall be Officer? &c. 3 Every such Officer ought to be admitted and allowed by the Court, and sworn there; but if such Officer is admitted for Years, then the Executors or Administrators will be Officers without Allowance or Admittance, which will be inconvenient. 4. This is an ancient Office, and has always been granted for Life, or at Will, so that the Person to whom, &c. was certainly known, and before these Days never was granted for Years, and in these Cases Innovations are dangerous. 5. If it may be granted for Years, it may be demanded if it shall be forfeited by Utlary, or shall be Assets to his Executors, and many other Questions will arise upon it. M. 16 H. 6. * rot. 63. in the K.'s Bench, this Office granted to one for Life. (c) 39 H. 6. 32. b. granted to *Brandon* for Life. (d) 5 E. 4. 3. a. b. this Office was granted to *Bourchier* for Life, M. 10 & 11 Eliz. to * *Garwdy* for Life, and in no Book or Record can it be found before this Time, that this Office has been granted for Years. But yet, by an Act in Law, Term, which is but a Chattel, may be in such Office, as it appears in 5 E. 4. 3. a. b. The D. of (e) *Norfolk* had an Estate-Tail in the Office held of the K. *in Capite*, and died, his Heir within Age, and that found by Office, in that Case the K. has a Chattel in the Office, *sc.* during the Minority, and if the K. dies, it would descend to the next K. and would not go to his Executors or Administrators, so an Act in Law both not introduce any Inconvenienc. But there it is put, that if the K. grants the Office for Life, or during the Minority, there ought to be a *Sci. fa.* against the Patentee; and without Question the Grant for Life in such Case, (f) the K. having but a Chattel, is void. And so for the Reasons aforesaid seems also the Grant thereof, during the Minority; for if the Patentee should die, his Executors or Administrators would have it, which would be inconvenient. And the principal Case of 5 E. 4. 3. a. b. The King having the Office in Ward granted it to *Wingsfield* at (g) Will, which without Question stood good in Law. And where the Chief Baron in 39 H. 6. 34. a. saith, If a Man grants an Office to another for Life or for Years, and he shall not (b) execute his Office, or otherwise misdoth his Office,

* Ant. 87. b.

(a) 1 Rol. 84. 2 Rol 153. 2 Jones 127.

(b) Cr. Car 587.

* Dy. 275 pl. 47.

(c) Br. Office 18. Br. Deputy 7. B. Forfeiture, &c 27.

39 H. 6. 32. b. 33 a. b. 34. a. (d) Ant 96. b.

* Dy. 278 pl. 5. 3 Keb. 591

(e) Ci. Car. 556. 2 Rol. 153.

Ant. 96. b. Br. Office de-

vant Escheator 39. Br. Patent 59.]

(f) 2 Rol. 155. ,

(g) 2 Rol. 155

(h) Co. Lit. 233. a. Postea 99. a

Office, the Grantor shall seise his Office: First it doth not appear what manner of Office he means, *sc.* of great Trust, or concerning the Administration of Justice. 2. It is but a sudden Opinion not pertinent to the principal Case: And there neither *Prisot*, nor any other of the Justices affirm, That the said Office of Marshal may be granted for Years. And where it was objected, That the K. may grant the Custody of a (a) Gaol to another in Fee; and also to be (b) Sheriff of such County to one and his Heirs, which Estate in Fee-Simple includes all other Estates, and the Heir in such Case is as well unknown at the Time of the Grant, as the Executors or Administrators in Case of a grant for Years. To that it was answered, That it is true, That such grants may be made by Law, but they differ from this Case at the Bar for divers Reasons. 1 There can't be any such Intermiſſion, for immediately by the Ancestor's Death the Office descends to the Heir. 2 Such Estate can't be forfeited by Outlawry. 3 In ancient Time Comes had the Custody of the County, and was called (c) *Prepositus Comitatus*, Shire-reeve, *i.* Reeve of the Shire, which is as much as to say *Prepositus Comitatus*; and afterwards it was transferred to the Sheriff, who is (d) *Viccomes*, *i.* in *Vice Comitatus*; but as the K. can't grant to one, that he and his Executors or Administrators shall be Counts or Earls for (e) Years, for then his Executors or Administrators, one being appointed by himself, the other by the Ordinary, would be Earls: So without Question the K. may create an E. for Life, in Tail, or in Fee. 4 This Office of Marshal, &c. ought to come in by Admittance or Allowance of the Court, so does not the Sheriff or Gaoler. 5 Grants of such Offices in Fee, or for Life, have been allowed and approved, but such Grants for Years, were never allowed or approved; & *periculosum existimo quod honorum virorum non comprobatur exemplo.* And if this, and such Offices may be granted for Years, then the Offices of *Custos Brevium*, of the Chirographer, or of the K.'s Silver, &c. may be demised in Possession or Reversion for 1000 Years or more; so of the Clerk of the Pipe, and of the K.'s Remembrancer, &c. in the Excheq. and so of the Office of Clerk of the Crown in this Court, and of other Offices in other Courts, upon which the Subversion of Justice, by reason of Ignorance in the Officers, would ensue, for good Clerks would be deterr'd from applying themselves to get Knowledge and Experience, when such Offices shall be saleable, and transferred from one to another for lucre and gain; upon which also would ensue Corruption in the Officers, and Extortion from the Subjects, and other great Inconveniencies. And the Lord Chancellor hearing these Reasons, agreed clearly with this Resolution, and said, That so was the Opinion of Sir *Jahn Popham* late Chief Justice of England, in all

(a) 2 Rol. 157.

(b) 2 Rol. 155.

(c) Co. Lit. 168. a.

Antea 49. b.

(d) Co. Lit. 168. a.

(e) Co. Lit. 16. b.

such Cases; as he had often affirmed to the said Ld. Chancellor, and to me also when I was Attorney General. And it was also resolved, That for as much as the Office was found by Force of a Commission under the Great Seal and return'd in this Court, that (altho' the Office be to be executed in another Court) yet the Award of the Seifure shall in this Court, where the Office is returned, and in this Court the Party shall have his traverse, or *Monstrans de droit*, as his Case is, to avoid the Office, and when such award shall be made, the Custody of the Prisoners is to be committed to another, to avoid the Escapes of those who are in the said Prison, and so has it always been used, but the Admittance and Allowance of such Person to whom the Custody shall be newly in the Interim committed, belongs to the Court of King's Bench. Then the L. Chancellor asked, how this seifure should be made? And I answered, That by the Office and the Award of the Seifure, the K. is in Possession without any Writ or Commission awarded for that purpose; but that there should be a Writ of Discharge directed to Sir G. Reynel, according to the Effect of the Writ in the Register, 295. when an Escheator is removed. *Et (a) mandatum est nuper Escheatori R. in Com' (a) 3 Co. 72. a. præd' qd' eid' J. rotulos, brevia, & omnia alia Offic' illud tangentia quæ in Custodia sua existunt per Indenturas inde inter eos debite conficiend' liberet, &c.* and the like Writ should be directed to Sir G. Reynel, to deliver by Indenture all the Prisoners, &c. which are in his Custody; and as when the K. is falsely entitled by Office, and upon Petition, Traverse, or *Monstrans de droit*, Judgm. is given, *quod manus Dom. Reg. (b) amoveantur*, that without other Writ the Hands are removed, as it is held in 10 *Aff. p. 2. 10 E. 3. 2. Tit. Aff. 156. 5 E. 3. Qu. Im. 34. Stamf. prærog. 78.* and so it was adjudged in *Communi Banco* between *Brown* and (c) *Terry, Hill. 37 El. rot. 620.* and yet in such Case the Use is, to have a Writ of *Amoveas manum*: So when an Office is found forfeited, presently by the Law the Party is out of Possession, and the K. is in Possession, and yet the Use is, and to good purpose, to have such Writ of Discharge as is aforesaid; and yet till he is actually removed he shall answer for all Escapes. For he who occupies or has the Custody of a Gaol * by right or wrong, shall be charged for Escapes of Prisoners, 11 *H. 4. 73. a.* and he who has the Custody of a Gaol in Fee, and substitutes another at Will, or for Life, under him, the Action upon the Escape will lie against him who has the actual Possession of the Office, 13 *E. 3. Bar 253.* The Abbot of *Westminster's* Case against a Gaoler at Will, 10 *Eliz. 278, 279. Dyer, Gaudy Under-Marshal for Life;* but if they are not sufficient, *respondeat (d) superior, sc. he who granted at Will, or for Life, as appears in 39 H. 6. 32. b.*

(a) 3 Co. 72. a.

(b) Cr. El. 523. Moor 346.

(c) Cr. El. 523.

*Hale's Pl. Cor. 114.

(d) Dy. 272. 279. pl. 5. 3 Keb. 591, 593, 657. Noy 27. 2 Inst. 332. Hale's Pl. Cor. 115.

Sir George Reynel's Case. PART IX.

(a) 2 Bulstr. 58.

for the Insufficiency of *John (a) Brandon* who had the Marshalsey for Life, the D. of Norfolk who had the Inheritance was charged for Escapes of Prisoners. And a Case was cited which began in this Court *Pasc. 21 Regine El. Rot. 1. inter placita Regine*, the Record of which begins in this Manner, *Midd' Constat qd' Dom' Philip & Domina Maria nuper Rex & Regin' Angl', soror Dom' Regine nunc precharissime, pro se hereditibus & successor' dict' Regine Marie, per eorundem nuper Regis & Regine Philippi & Marie literas patentes sub magno sigillo suo Anglie confect' geren' Dat' apud West. 23. die Sept. annis eorund' nuper Regis & Regine 3 & 4 Dederunt & Concesserunt Marco (b) Steward generoso officium Servient' eorund' nuper Regis & Regine Marie ad arma, attendend' super Cancell' Anglie pro tempore existen', ac ipsum Marcum Servientem suum ad arma fecer' ordinaverunt, & constituerunt per easd' literas patentes, habend' & gaudend' offic' illud pro termino vite sue, with all Fees, and a certain Fee of 12 d. per diem: By Force whereof the said Mark was seised of the said Office for Term of his Life; and it was found by Office 24 Junii an. 19 El. by Force of a Commission, &c. directed to *Randal Hurleston, John Nuthal Esqrs;* and others, and returned in the Chancery, quod *pred' Marcus non deservivit in officio Servientis ad arma pred' juxta effectum & tenorem pred' literarum patent' sibi confect', de 8 die Octob' an' regni dict' Dom' Regine nunc 12 usque 1 diem Feb' tunc ult' praterit' ante caption' inquisit' pred' sed per totum idem tempus ab eodem officio se absentavit. Et modo ad hunc diem, sc. 7 diem Maii, anno reg' dict' Dom' Regine nunc 21 venit hic prefat' Marcus Steward, & queritur se ratione & colore inquisit' pred' ab exercitio officii sui predict' amotum esse, & hoc minus juste, (by which it appears that immediately by the Inquisition he was in Law removed from the said Office, which also appears by the Judgment) pro monstracione recte sive juris sui in hac parte, idem Marcus dicit, quod domina regina nunc, sc. ult. die Nov' an' regni sui 11 apud Westm' in Com' Midd' dedit eidem Marco licentiam, ad se absentand' ab exercitio officii sui pred' durante beneplacito ipsius Marci, donec per ipsam Dom' Reginam ei preceperetur ad deservien' in officio suo pred'. And that from the Time of the Licence till this Day, the Q. has not commanded him to exercise the said Office, &c. *Gerrard the Q's Attorney General* took Issue, *Qd' ead' Domina Regina non dedit eid' Marco licentiam ad se absentand' ab exercitio officii sui predict' durante beneplacito ipsius Marci, donec per ipsam Dom' Reg' nunc ei preceperetur ad deservien' in officio suo predict' modo & forma, &c. Et hoc idem Aitor nat', &c. per qd' inquiratur per***

(b) 2 Rol. 15.
M. or 193.
1 Sid. 436.
C. El. 42.

patriam, & præd' Marcus similiter: Ideo dies datus est coram eadem Domina Regina in crastino Ascension' Dom' ubicunque tunc fuerit in Anglia ad faciend' & recipiend' qd' iuste fuerit in præmissis, & Venire facias awarded to the Sheriff of *Midd'* returnable in the K.'s Bench at the same Day. And *Sir Thomas Bromley Kt. (a)* Chancellor of *Engl. die Luna post Crastin' a-* *scension' Dom' Term' Pasc' 21 El. Reg' per manus suas propri-* *as deliberavit record' præd' cor' ipsa Reg' in Cancell' sua habit'* *in Cur' coram Dom' Reg', (s. the Court of K. s Bench) in cra-* *stino Ascensionis* a Jury was return'd who appear'd and gave a special Verdict, they found the said Let. Pat. of the K. and Q. P. & M. to the said *Mark Steward* of the said Office, which are entred in *hæc verba*. And further found, that at the humble Petition of the E. of *Leicester*, an *Dr Hunt, Dom' Regina præd' uli' Nov' an' regni dict' Dom' Reg' nunc 11. Concessit qd'* *id' Marcus se ipsum absentaret ab exercitio dict' officii sui du-* *rante benepl' to ipsius Marci quousq; ead' Dom' Reg' ipsum præ-* *ciperet deservire in offic' suo præd'*, and that *August. Steward* Brother of *Mark Steward*, 6 *Marcii anno 11 Reg' per dict'* *Dom' Regin' admissus ad attendend' loco & vice ipsius Marci* *fratris sui super N. Bacon militem ad tunc Dom' Custod' magni* *sigilli*, and then in the Presence of the Queen was sworn, &c. by Force whereof the said *Augustine* exercised the said Office, *usq;* *10 Junii, an' 18 El. Sed utrum dict' Dom' Regin' per verba,* *tantum absq; script' sigill' potest sufficient' in lege licentiam dare* *eid' Marco ad se ipsum absentand' ab exercitio officii sui præd'* *Jur' prædict' penitus ignorant; & inde pet' auxil' & advisa-* *ment' Cur' in præmissis.* And this Case was argued at the Bar and Bench, and depended in Advise ment till *Michaelmas-Term*, and then it was resolved by *(b)* *Sir Ch. Wray*, Ch. Just. and *to-* *tam Curiam*, That the Licence by *(c)* word was good enough, and because all Pleas in the Chancery, according to the Ordinary Power are *coram Dom' Regin' in Cancell'*, and the Keeper of the Great Seal or Chancellor of *Engl.* is but the Q.'s Deputy during her Pleasure, and therefore the Service of the Serjeant at Arms done to the Q.'s Deputy, is in Law done to the Q. her self. And that well appears by the Let. Pat. themselves, for K. and Q. P. & M. *concesserunt, &c. officium servient' eorund' nuper Regis & Reginae ad arma attendend' super Can-* *cellar' Angliæ, &c.* so that he is the K. and Q.'s Serjeant at Arms, and therefore Q. El. might well license him to absent himself, &c. which in a Manner is a Refusal of his Service for the Time, for it is at her Pleasure whether she will accept his Service or not; another reason was given, that the Queen did not depart with any Interest in this Case, but suspended the Service of a Serjeant for a Time, and therefore such License by Word was good enough. Also it was resolved that it is true, That *(d)* Non-attendance upon the said Office is a Cause of Forfeiture, but it ought to be a vo-

1. Nota, coram Domina Regina generally is meant B. R. the Entry of Pleas in Chancery is, coram Dom' Reg' in Cancell'.
2. Day given in Chancery to appear in B. R. for Trial of the Issue.
3. Ven' fac' awarded in Canc' return' in B. R.
4. The Delivery of the Record in B. R. per Manus Cancellari. Vide 10 E. 3.
5. Spec. Verd. on a collateral Issue.
(a) 2 Sand. 27.
1 Sid. 436.
4 Inst. 80.
1 Mod. Rep. 29.

(b) 2 Sand. 27.
1 Sid. 436.
4 Inst. 80.
1 Mod. Rep. 29.
(c) 2 Rol. 154
C1. El. 424.
Moor 193.

(d) Co. Lit. 23. a.
Anc. 50. a. 97. a.

(1. Sand 27.
i Sid 436
4 Mod. Rep 29.

luntary Negligence, and not when he has the Queen's Assent, who is to take Advantage of the Forfeiture for the Non attendance. And afterwards (a) Judgment was entred in this Manner, *Supr quovisis & per Curiam hic intellectis omnibus & singulis fræmissis maturaque deliberatione ind. habita, Servient' dictæ Dom' Regin' ad legem ac ipsius Regine attornat' ad hoc convoccat' & præsent', consideratum est, quod dictum officium dicti servientis ad arma in manibus Domina Regine revent' eidem restituatur, & quod præd' Marcus ad exercitiu' officii sui præd' a quo amotus fuit, una cum vadis & feodis inde eidem officio debitis & pertinent', a dicto tempore orationis sue, ab exercitio officii sui præd' hucusque percept' & detent' restituatur, salvo semper jure Regine si quod, &c.* Which Record at large (being worthy Observation) is as follows.

Termino Pasche Regine Elizabethæ vicesimo primo, Rot' 1. inter placita Regine.

Memorandum qd' *Thomas Bromley* mil' Domin' Regin' nunc cancellar' die Lunæ proxim' post crastin' ascensit' Dom' isto eodem termino, coram Dom' Regin' apud Westm' per manus suas proprias deliberavit hic in cur' quoddam record' coram ipsa Dom' Reg' in cancellar' sua habit', in hæc verba, Placita cor' Dom' Regin' in cancellar' sua apud Westm' termino Pasch' anno regni Eliz' Dei gratia Angliæ, Franciæ, & Hib' Regin', fidei Defensoris, &c. vicesimo primo. Middl' ff. Constat quod Dom' Philippus & Dom' Maria nuper Rex & Reg Angliæ, soror Dom' Reginæ nunc præchansimæ, pro se hæredib' & successorib' dictæ Reginæ Mariæ, per eorund' nuper Reg' Philippi & Regin' Mariæ liter' patentes sub magno sigill' suo Angl' confect' geren' dat' apud Westm. vicesimo tertio die Sept' an eorundem nuper Reg' Philippi & Regin' Mariæ tertio & quarto, dederunt & concesserunt cuid' Marco Steward generoso offic' servien' eorund' nuper Regis Philippi & Reginæ Mariæ ad arma, attendend' super cancellar' suum Angliæ pro tempore existen', ac ipsum Marcum servien' suum ad arma fecer', ordinaver', & constituer', per easd' literas suas patentes, Habend' & gaudend' officium illud eidem Marco pro termino vitæ suæ, & quod iidem nuper Rex Philippus & Regina Maria pro se & hæred' & successor' dictæ Reginæ Mariæ, per easdem literas suas Patentes dederunt & concesserunt eidem Marco, pro exercitio, & occupatione officii præd' vad' & feod' duodecim denar per diem, habend', gaudend', & percipiend' annuatim præ-

dict' vad' & feod' de duodecim denar' per diem præfat' Marco pro termino vitæ suæ de exit' & profic' hanaperii eorund' nuper Regis Philippi & Reg' Mariæ per manus Clerici sive custod' ejusd' hanaperii sui & hæred' ejusd' nuper Reginæ pro tempore existen', annuatim solvend', prout per præd' literas patentes inter alia plenius liquet & apparet, quarum quidem literar' paten' prætextu idem Marcus fuit seisit' de officio præd' ut de liber' tenemento pro termino vitæ suæ: Cumq; etiam comperitum est per quand' inquisition' indentat' capt' apud Westm' in comitat' Midd' vicesimo quarto die Junii anno regni dictæ Dom' Reginæ nunc decimo nono cor' Ranulpho Hurleston armiger', Joh' Muthall armig', Francis' Folyat armig', & Joh' Statham generoso, virtute commission' dictæ Dominæ Reginæ nunc sibi ac cuidam Joh' Goodman direct', per sacramentum xii. &c. quod præd' Marcus non deservivit in officio servien' ad arma prædicto juxt' effect' & tenor' prædict' literarum paten' sibi confect', de octavo die Octobris anno regni dictæ Dominæ Reginæ nunc duodecimo usque primum diem Febr' tunc ultimo præterito ante captionem inquisitionis præd', sed per totum idem tempus ab eodem officio se absentavit prout per eandem inquisitionem in cancellar' dict' Reginæ nunc retorn' & in filiciis ejusdem cancellar' de record' residen' plenius liquet & apparet: Et modo ad hunc diem, viz. septim' diem Maii anno regni dict' Dom' Reg' nunc vicesimo primo, venit hic præfat' Marcus Steward in cancellar' dictæ Dominæ Reginæ nunc apud Westmon' per Edw' Cordell attorney suum, & querit se ratione & colore inquisitionis præd' ab exercitio & occupation' officii sui præd' amotum esse, & hoc minus juste, quia protestand', quod dict' inquisitio minus sufficiens in lege existit ad ipsum Marcum ab exercitio officii sui præd' amovend', pro monstracione recti sive juris sui in hac parte, idem Marcus dicit qd' dict' Dom' Regina nunc, diu post confectio' præd' literar' paten', scil't, ultimo die Nov. an' regni sui undecimo, apud Westmonst' in com' Midd' dedit eid' Marco licentiam ad se absentand' ab exercitio offic' sui duran' beneplac' ipsi Marci, donec per ipsam Dom' Regin' nunc ei præciperet' ad deservien' in officio suo prædicto, virtute cujus quid' licentiæ dict' Dom' Regin' præfat' Marco, ut præfertur fact' id' Marcus per totum tempus absentatiæ suæ in inquisition' præd' spec' se absentavit ab exercitio officii sui præd': Et ulterius id' Marcus, pro ulteriori monstracion' juris & recti sui, dicit, qd' ipse nunc est & semper a tempore amotionis suæ ab exercitio officii sui præd' parat' fuit, & læpius se obtulit ad deservien' in officio suo

suo prædicto; & quod adhuc a tempore licentiæ dictæ Do-
 minæ Reginæ se absentandi dicto Marco dat', eadem Domin'
 Regina non ei præcepit ut deserviret in officio suo prædicto;
 absque hoc quod dicta Domin' Regina nunc habet aliquid
 aliud jus sive titul' in vel ad officium præd' quam ut superi-
 us allegat' existit, & absq; hoc, quod habetur aliquid aliud
 recordum præter recordum inquisitionis præd', quod facit seu
 præbet, seu facere seu præbere possit aliquid titulum dictæ
 Dominæ Reginæ nunc, in vel ad officium præd': Quæ om-
 nia & singula idem Marcus paratus est verificare prout cur'
 hic consideraverit, unde petit judicium, & quod ad possession'
 & exercitium officii sui præd', una cum vad' & feod' præd', ac
 exit' & proficuis eidem officio debet' & pertinet', a tempore a-
 motionis suæ ab exercitio inde percept' restituatur, &c. Et
 Gilbert' Gerrard ar' attorn' dict' Dom' Reginæ nunc genera-
 lis, qui pro eadem Dom' Regin' nunc in hac parte sequitur,
 pro eadem Dom' Regin' dicit, quod per aliqua per præfat'
 Marcum Steward superius placitand' allegat', eadem Domi-
 na Regina a jure sive titulo suo, in vel ad officium præd' præ-
 cludi non debet, quia dicit quod eadem Domina Regin' non
 dedit eidem Marco licenciam ad se absentand' ab exercitio
 officii sui præd', duran' benepl'ito ipsius Marci, donec per ip-
 sam Domin' Reginam nunc ei præciperetur ad deservien-
 in officio suo prædicto, modo & forma prout præd' Marcus in
 monstrand' jus suum ad officium præd' placit' do allegavit, &
 hoc idem attorn' dictæ Dom' Regin' nunc pro ead' Domina
 Regina petit qd' inquiratur per patriam, & præd' Marcus si-
 militer: Ideo dies datus est eis coram dict' Domin' Regin'
 nunc in crastino ascensionis Dom' ubicunque tunc fuerit in
 Anglia ad faciend' & recipiend' quod justum fuerit in præ-
 missis; Et præc' est vic' Middl', quod venire faciat cor' ea-
 dem Domin' Regin' ad diem illum xii. liberos & legales
 homines de vicineto civitatis Westmonasterii qui præfatum
 Marcum nulla affin' attingant, ad recogn' per eorum sacra-
 ment' super præmissis plenius veritatem, ad quod quidem
 crastin' ascensionis Dom' coram Domin' Regina apud West-
 monaster' ven' tam præd' Gilbert' Gerrard, qui sequitur,
 &c. quam præd' Marcus Steward per Johan' Manning attorn'
 suum, & vic' retorn' nomina xii. jur' quorum null' &c. Ideo
 præc' est vic' quod non omitt', &c. quin distr' eos per omnes
 terras, &c. Et quod de exit', &c. Et quod habeat corpora
 eor' coram Dom' Regin' in Octab' Sanct' Trin' ubicunq; &c.
 Ad recogn' in form' præd', &c. Idem dies dat' est tam præfat'
 Gil' Gerrard qui sequit', &c. quam præfat' Mar' Steward, &c.
 Ad quas quidem Octab' Sanct' Trin' cor' Domin' Regin' apud

Westmonaster' ven' tam præfat' Gilbertus Gerrard qui sequit', &c. quam præd' Marcus Steward per attornat' suum præd', Et jur' juratæ præd' exacti, similiter vener': Et super hoc fact' hic in cur' publica proclamatione pro Dom' Regina, prout moris est, qd' si aliquis sit qui Justic' Dom' Reginae hic, servien' ipsius Dom' Reginae ad legem, sive attornat' ejusd' Dom' Reginae general', aut jur' juratæ præd' de præmis. informare vellet, veniret & audiretur. & *Edw. Anderson* unus servien' dictæ dom' Reginae ad legem ad hoc faciend' se optulit, per qd' processum est ad captionem jurat' præd' per juratores præd' modo inde comparent', qui ad veritatem de præmis. dicend' elect', triati, & jurati, dicunt super sacram' suum, qd' Dom' Philippus & Dom' Maria nuper Rex & Regina Angl' per literas suas patentes sub magno sigillo suo Angl' confect', geren' dat' apud Westmonaster' vicesimo tertio die Septemb', annis regnorum ejusd' nuper Regis & Reginae tertio & quarto, dederunt & concesserunt eidem Marco officium servien' ad arma, attendend' super cancellar' suum Angl' pro tempore existen', ac ipsum Marcum servien' suum ad arma supradict' fecer', ordinaver', & constituer' per easdem literas patentes, habend' & gaudend' officium illud eidem Marco pro termino vitæ suæ, & insuper iidem nuper Rex & Regina dederunt & concesserunt per literas patentes præd' pro se hæred' & successoribus præf. Reginae pro exercitio & occupatione officii præd' vad' & feod' duodecim denariorum per diem, habend', gaudend', & percipiend' annuatim dict' vad' & feod' duodecim denar' per diem præf. Marco pro termino vitæ suæ de exit' & proficuis hanaperii cancellar' suæ per manus clerici sive custod' ejusd' hanaperii sui & hæred' præd' nuper Reginae pro tempore existen', ad festa S. Mich' Archangeli & Paschæ per equales portiones annuatim solvend', una cum omnibus aliis proficuis, commoditatibus, emolumentis, allocationibus, & advantagiis eidem officio qualitercunq; ab antiquo debitis & consuet', & profert hic in cur' idem Marcus Steward literas patentes præd', quæ sequuntur in hæc verba, Philippus & Maria Dei gratia Rex & Reginae Angl', Hispanorum, Franciæ, utriusq; Siciliæ, Jerusalem, & Hiberniæ, fidei defensor', Archduces Austriæ, Duces Burgundiæ, Mediolanæ, & Brabantiae, comit' Haspurgi, Flandriæ & Tirollis, omnibus ad quos præsent' literæ pervenerint salutem. Cum præcharissimus frater noster Edw. nuper Rex Angl' sextus, per literas suas patentes sub mag' sigillo suo Angl' confect', geren' datum apud

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Sir George Reynel's Case. PART IX.

Greenewich, octavo die Aprilis anno-reg' sui quarto, de grat' sua speciali ac ex certa scienc' & mero motu suis, necnon de advisamento & concensu concilii sui, dederit & concesserit dilecto suo Ric' Hatchman gen' officium servien' sui ad arma, attenden' super cancellar' suum Angl' pro tempore existen', ac ipsum Ric' servien' suum ad arma supradicta fecerit, ordina-ver', & constituer' per easd'. habend' & gaudend' officium illud eid' Ric' pro termino vitæ suæ & insuper per easd' liter' suas paten' dederit & concesser' præf. Ric' Hatchman, pro exercitio & occupatione officii præd', vad' & feod' duodecim denar' per diem, habend', gaudend', & percipiend' annuatim dict' vad' & feod' duodecim denar' per diem pro termino vitæ suæ a tempore mortis illius servien' suor' ad arma qui tunc prox' obierit, de exitibus & proficuis hanaperiæ cancellar', sive per man' clerici sive custodis ejusd' hanaperiæ suæ pro tempore existen' ad festa S. Mich. Archangel', & Paschæ per equales portiones annuatim solvend', una cum omnibus aliis proficuis, commoditatibus, emolument', allocationibus, & advantagiis eid' offic' qualitercunq; ab antiquo debet' & consuet', prout per dictas liter' suas paten' inter alia plenius liquet & apparet: Et quia præd' Ric' Hatchman in voluntate jam existit liter' patentes præd' nobis in cancellar' nostram restituere cancellandas, quæ quid' literæ patent' ibid' jam cancellar' existunt, prout certam inde habemus noticiam, ea intentione qd' nos alias liter' nostr' patent' de grat' nostra speciali dilecto nostro Marco Steward generos. de officio præd' & cæteris præmissis concedere dignaremur, nos igitur præmissa considerantes de grac' nostra speciali, ac ex certa scientia & mero motu nostris, dedimus & concessimus, ac per præsentés pro nobis hæred', & successoribus nostris dictæ Reginæ damus & concedimus præf. Marco Steward prædict' officium servien' nostr' ad arma, attenden' super cancellar' nostrum Angl' pro tempore existen', ac ipsum Marcum servien' nostr' ad arma facimus, ordinamus, & constituimus, per præsentés, habend' & gaudend' officium illud eidem Marco Steward pro termin' vitæ suæ: Et insuper dedimus & concessimus, ac per præsentés pro nobis hæred' & successoribus nostris dictæ Dom' Regi-nædamus & concedimus præf. Marco Steward, pro exercitio & occupatione officii præd', vad' & feod' duodecim denar' per diem, habend' gaudend' & percipiend' annuatim dict' vad' & feod' 12. denar' per diem præfato Marco pro termino vitæ suæ, de exit' & proficuis hanaperiæ cancellar' nostræ per manus clerici sive custodis ejusdem hanaperiæ nostræ & hæredum nostrorum dictæ Reginæ pro tempore existen',
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ad festa S. Mich. Archangeli & Paschæ per equales portiones annuatim solvend', una cum omnibus aliis proficuis, commoditatibus, emolumentis, allocationibus, & advantagiis eidem officio qualitercunq; ab antiquo debit' & consuet', eo qd' expressa mentio de certitudine præmissorum sive eorum alicujus, aut de aliis donis sive concessionibus per nos vel per aliquem progenitorum nostrorum præf. Marco Steward, ante hæc tempora fact', in præsentibus minime fact' existit, aut aliquo statut', actu, ordinatione, provisione' sive restrictione inde in contrar' fact', edit', ordinat', sive provis. aut aliqua alia re, causa, vel materia quacunq; in aliquo non obstan': In cujus rei testimonium has liter' nostr' fieri fecimus patent', testibus nobis ipsis apud Westmonaster' xxiii. die Setembris, annis regnorum nostrorum tertio & quarto, quarum quidem literarum paten' prætextu idem Marcus Steward ad officium præd' bene & fideliter exequend' jurat' fuit: *Et ulterius jur' præd' dicunt, qd' ultimo die Novemb' anno reg' dict' Dom' Reginae nunc undecimo dicta Dom' Regina nunc ad humillimam petitionem & requisitionem prænobilis Dom' comitis Leic' & Rob' Huyck in medicinis Doctoris, concessit quod idem Marcus Steward seipsum absentaret ab exercitio præd' officii sui servien' ad arma ad attenden' in propria persona sua super cancellar' suum Angl' pro tempore existen', duran' beneplacito ipsius Marci, quousque eadem Dom' Regina ipsum præciperet deservire in officio suo præd', prout per depositionem ipsius Rob' Huyck, & quandam literam manu propria ipsius comitis Leic' subscript', quæ comperimus fore vera, in hiis Anglicis verbis sequen', hic in cur' jur' præd' in evidenc' dat' & ostens. plenius liquet & apparet; deposit' cujus quidem Rob' Huyck sequitur in hiis verbis, videlicet,*

I was an humble Suiter unto her gracious Majestly about ten Years past, that she would licence Mark Steward Sergeant at Arms, Attendant upon the then L. Keeper, to give off his Attendance in his own Person, to the End he might withdraw him into the Country to play the good Husband at home in his own House, so long only as she should permit him, and not revoke him to his former Attendance, and the Office should be served otherwise to her Majestly's Contentation, and the Lord Keeper's well liking, the which my Suit she did very graciously grant me; and after that, upon my Lord Keeper's praising Augustine Steward, I commended him to the Queen as one very fit to discharge his Brother's Absence with his Attendance: I did sue to my

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