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FRANCIS BACON

THE ELEMENTS

OF THE COMMON LAWES

OF ENGLAND

1630

DA CAPO PRESS

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THE ELEMENTS OF THE COMMON LAWES OF ENGLAND.

Branched into a double Tract:

THE ONE
Contayning a Collection of some principall Rules and Maximes of the Common Law, with their Latitude and Extent.

Explicated for the more facile Introduction of such as are studiously addicted to that noble Profession.

THE OTHER
The Vse of the Common Law, for preseruation of our Persons, Goods, and good Names.

According to the Lawes and Customes of this Land.

By the late Sir *Francis Bacon* Knight, Lo: Verulam and Viscount S. Alban.

Videre Vtilitas.

LONDON,
Printed by the Assignes of *I. More* Esq. 1630.

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By Sir FRANCIS BACON, then Sollicitor *generall to the late renowned Queene* Elizabeth, *and since Lord Chancellor of* ENGLAND.

Orbe parvo sed non occidue.

LONDON,
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Anno cIↃ.IↃ.C.XXX.

CVM PRIVILEGIO.

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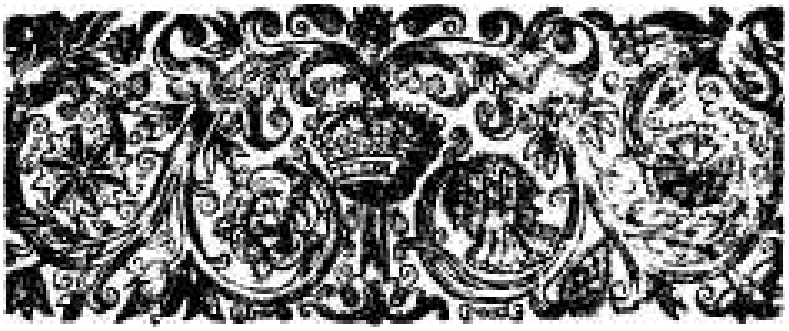
CUM PRIVILEGIO.

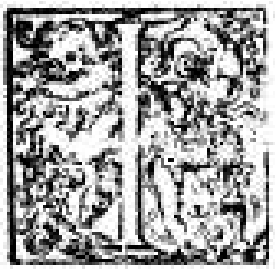


[The Epistle Dedicatorie.]

TO

HER SACRED

MAJESTY.



I Doe here most humbly present and dedicate unto your Sacred Majesty a sheafe and cluster of fruit, of the good and favourable season, which by the influence of your happy government wee enioy; for if it be true, that silent leges inter arma, *it is also as true, that your Majesty is in a double respect the life of our lawes: Once, because without your authority they are but* litera mortua, *and againe, because you are the life of our peace, without which lawes are put to silence*; *and as the vitall spirits doe not onely maintaine and move the body, but also contend to perfect and renew it, so your Sacred Majesty, who is* anima legis, *doth not only give unto your lawes force and vigour, but also hath bin*

carefull of their amendment and reforming; wherein your Majesties proceeding may be compared as in that part of your government (for if your government bee considered in all the parts, it is incomparable) with the former doings of the most excellent Princes that ever have reigned, whose study altogether hath beene alwayes to adorne and honour times of peace, with the amendment of the policy of their lawes. Of this proceeding in Augustus Cæsar, the testimony yet remaines.

Pace data terris animum ad civilia vertit Iura suum, legesq; tulitiustiisimus aucttor.2 *Hence was collected the difference betweene* gesta in armis *and acta* in toga, *whereof he disputeth thus.* Ecquid est quod tam proprie dici potest, actum eius qui togatus in republica cum potestate imperioq; versatus sit, quam lex? quære acta Gracchi? leges Sempronij proferantur, quære Sillæ Corneliæ? quid Cu. Pom. tertius consulatus in quibus actis consistet? nempe, in legibus: à Cæsare ipsosi quæreres quidnam egisset in urbe, & toga leges multas se responderet & præclaras tulisse.

The same desire long after did spring in the Emperor Justinian, being rightly called, Ultimus Imperatorum Romanorum, *who having peace in the heart of his Empire, and making his warres prosperously in the remote places of his dominions by his liuetenants, chose it for a monument and honour of his government, to revise the Romane lawes from infinite volumes, and much repugnancy, into one com-*

petent and uniforme corps of law; of which matter himselfe doth speake gloriously, and yet aptly calling of it, proprium & sanctissirnum templum iustitiæ consecratum, *a worke of great excellency, indeed, as may well appeare in that France, Italy, & Spaine, which have long since shaken off the yoke of the Romane Empire, doe yet neverthelesse continue to use the policy of that law; but more excellent had the worke beene, save that the mere ignorant, and obscure time undertooke to correct the more learned and flourishing time. To conclude with the domesticall example of one of your Majesties royall Ancestors; King Edward the first your Majesties famous progenitor, and the principall Law-giver of our nation, after hee had in his younger yeares given himselfe satisfaction in the glory of armes, by the enterprise of the holy land, and having inward peace, otherwise then for the invasions which himselfe made upon Wales and Scotland, parts farre distant from the Centre of the Realme, hee bent himselfe to endow his state with sundry notable and fundamentall lawes, upon which the government hath ever since principally rested: of this example, and others the like, two reasons may bee given; the one, because that Kings, which either by the moderation of their natures, or the maturity of their years and judgement, do temper their magnanimity with justice, do wisely consider & conceive of the exploits of ambitious warres, as actions rather great than good, and so distasted with that course of winning honour, they concert their mindes rather to doe somewhat for the better uniting of humane society,*

than for the dissolving or disturbing of the same. Another reason is, because times of peace, for the most part drawing with them abundance of wealth, and finenesse of cunning, doe draw also in further consequence multitudes of suits, and controversies, and abuses of law by evasions, and devices; which inconveniencies in such time growing more general, do more instantly sollicite for the amendment of laws, to restraine and represse them.

Your Majesties reigne having beene blessed from the Highest with inward peace, and falling into an age wherein if science bee increased, conscience is rather decayed, and if mens wits bee great, their wills bee greater; and wherein also lawes are multiplied in number, and slackened in vigour and execution, It was not possible but that not onely suits in law should multiply and increase (whereof a great part are alwaies unjust) but also that all the indirect courses and practices to abuse law and justice should have bin much attempted and put in use,[4] *which no doubt had bred greater enormities, had they not by the royall policy of your Majesty, by the censure and fore-sight of your Councell table and Star-chamber, and by the gravity and integrity of your Benches beene repressed and restrained; for it may bee truly observed, that as concerning frauds in contracts, bargaines and assurances, and abuses of lawes by delayes, covins, vexations, and corruptions in Informers, Jurors, Ministers of justice, and the like; there have beene sundry excellent statutes made in your Majesties time, more in number, and more politique in provision, than in any*

your Majesties predecessors times.

But I am an unworthy witnesse to your Majesty, of an higher intention and project, both by that which was published by your Chancellor in full Parliament from your royall mouth, in the 35. *of your happie reigne; and much more by that which I have beene since vouchsafed to understand from your Majestie, imparting a purpose for these many yeares, infused into your Majesties breast, to enter into a generall amendment of the states of your lawes, and to reduce them to more brevity and certaintie, that the great hollownesse and unsafety in assurances of lands and goods may bee strengthened, the swarving*[5] *penalties that lye upon many subjects removed, the execution of many profitable lawes revived, the Judge better directed in his sentence, the Counsellor better warranted in his counsaile, the Student eased in his reading, the contentious Suitor that seeketh but vexation disarmed, and the honest Suitor that seeketh but to obtaine his right, relieved; which purpose and intention as it did strike mee with great admiration, when I heard it, so it might bee acknowledged to bee one of the most chosen works, and of highest merit and beneficence towards the subject that ever entred into the minde of any King; greater than wee can imagine, because the imperfections and dangers of the lawes are covered under the clemency and excellent temper of your Majesties government. And though there bee rare presidents of it in government, as it commeth to passe in things so excellent, there being no president full in view but of* Justinian, *yet* I *must say as* Cicero

[4] Original has "vre".

[5] Original was swaruing. Might be swarming or swareing.

said to Cæsar, Nihil vulgatum te dignum videri potest, and as it is no doubt a precious seed sowne in your Majesties heart by the hand of Gods divine Majestie, so I hope in the maturity of your Majesties owne time it will come up and beare fruit. But to returne thence whither I have beene carried, observing in your Majesty, upon so notable proofes and grounds, this disposition in generall of a prudent and royall regard to the amendment of your lawes, and having by my private labour and travell collected many of the grounds of the common lawes, the better to establish and settle a certaine sense of law, which doth now too much waver in incertaintie, I conceived the nature of the subject, besides my particular obligation, was such, as I ought not to dedicate the same to any other than to your sacred Majestie; both because, though the collection bee mine, yet the lawes are yours; and because it is your Majesties reigne that hath beene as a goodly seasonable spring-

weather to the advancing of all excelent arts of peace. And so concluding with a prayer answerable to the present argument, which is, That God will continue your Majesties reigne in a happy and renowned peace, and that he will guide both your policy and armes to purchase the continuance of it with suerty and honour, I most humbly crave pardon, and commend your Majesitie to the divine preservation.

Your sacred Majesties most humble and obedient subject and servant,

FRANCIS BACON.

THE PREFACE.

[I] Hold every man a debtor to his profession, from the which, as men of course doe seeke to receive countenance & profit, so ought they of duty to endeavour themselves by way of amends to bee a helpe and ornament thereunto; this is performed in some degree, by the honest and liberall practice of a profession, when men shall carry a respect not to descend into any course that is corrupt, and unworthy thereof, and preserve themselves free from the abuses wherewith the same profession is noted to bee infected; but much more is this performed, if a man bee able to visite and strengthen the roots and foundation of the science it selfe; thereby not onely gracing it in reputation and dignity, but also amplifying it in perfection and substance. Having therefore from

the beginning comne to the study of the lawes of this Realme, with a desire no lesse (if I could attaine unto it) that the same lawes should bee the better for my industry, than that my selfe should bee the better for the knowledge of them; I doe not finde, that by mine owne travell, without the helpe of authority, I can in any kinde conferre so profitable an addition unto that science, as by collecting the rules & grounds, dispersed throughout the body of the same lawes; for hereby no small light will bee given in new cases, wherein the authorities doe square and varie, to confirme the law, and to make it received one way, and in cases wherein the law is cleered by authoritie; yet neverthelesse to see more profoundly into the reason of such judgements and ruled cases, and thereby to make more use of them for the decision of other cases more doubtfull; so that the incertainty of law, which is the principall and most just challenge that is made to the lawes of our nation at this time, will, by this new strength laid to the foundation, be somewhat the more settle and corrected; Neither will the use hereof be only in deciding of doubts, and helping soundnesse of judgement, but further in gracing of argument, in correcting unprofitable subtilty, and reducing the same to a more found and substantiall sense of law, in reclaiming vulgar errors, and generally the amendment in some measure of the very nature and complection of the whole law, and ther-

fore the conclusions of reason of this kinde are worthily and aptly called by a great Civilian *legum leges*, lawes of lawes, for that many *placita legum*, that is, particular, and positive learnings of lawes doe easily decline from a good temper of justice, if they bee not rectified and governed by such rules.

Now for the manner of setting downe of them, I have in all points to the best of my understanding and fore-sight applied my selfe not to that which might seeme most for the ostentation of mine owne wit or knowledge, but to that which may yeeld most use and profit to the Students and professors of our lawes.

And therefore, whereas these rules are some of them ordinary and vulgar, that now serve but for grounds and plaine songs to the more shallow and impertinent sort of arguments: other of them are gathered and extracted out of the harmony and congruity of cases, and are such as the wisest and deepest sort of Lawyers have in judgement, and use, though they bee not able many times to expresse and ser them downe.

For the former sort, which a man that should rather write to raise an high opinion of himselfe, than to instruct others, would have omitted, as trite and within every mans compasse; yet neverthelesse I have not affected to neglect them, but have chosen out of them such as I thought good : I have reduced them to a true application, limi-

ting and defining their bounds, that they may not bee read upon at large, but restrained to a point of difference; for as both in the law and other sciences the handling of questions by Commonplace without aime or application is the weakest, so yet neverthelesse many common principles and generalities are not to bee contemned, if they bee well derived and deduced into particulars, and their limits and exclusions duely assigned: for there bee two contrary faults and extremities in the debating and sifting out of the law, which may bee best noted in two severall manner of arguments: Some argue upon generall grounds, and come not neere the point in question; others without laying any foundation of a ground or difference doe loosely put cases, which though they goe neere the point, yet being put so scattered, prove not, but rather serve to make the law appeare more doubtfull, than to make it more plaine.

Secondly, whereas some of these rules have a concurrence with the civill Romane law, and some others a diversity, and many times an opposition, such grounds which are common to our law and theirs I have not affected to disguise into other words than the Civilians use, to the end they might seem invented by me, & not borrowed or translated from them: No, but I tooke hold of it as matter of greater Authority and Majestie to see and consider the concordance be-

tweene the lawes penn'd, and as it were dicted *verbatim* by the same reason: on the other side, the diversities betweene the civill Romane rules of law and ours, happening either when there is such an indifferency of reason, so equally ballanced as the one law imbraceth one course, and the other the contrary, and both just after either is once positive and certaine, or where the lawes varie in regard of accomodating the law to the different considerations of estate, I have not omitted to set downe.

Thirdly, whereas I could have digested these rules into a certaine method or order, which I know would have beene more admired, as that which would have made every particular rule through coherence and relation unto other rules seeme more cunning and deepe, yet I have avoided so to doe, because this delivering of knowledge in distinct and disjoyned Aphorismes doth leave the wit of man more free to turne and tosse, and make use of that which is so delivered to more severall purposes and applications; for wee see that all the ancient wisdome and science was wont to bee delivered in that forme, as may bee seene by the parables of *Solomon,* and by the Aphorismes of *Hippocrates,* and the morall verses of *Theognes* and *Phocilides,* but chiefely the president of the Civill law, which hath taken the same course with their rules, did confirme mee in my opinion.

Fourthly, whereas I know verie well it would have beene more plausible and more currant, if the rules, with the expositions of them had beene set do une either in Latine or in English, that the harshnesse of the language might not have disgraced the matter, and that Civilians, States-men, Schollers, and other sensible men might not have beene barred from them; yet I have forsaken that grace and ornament of them, and onely taken this course: The rules themselves I have put in Latine, not purified further than the propertie of the termes of the law would permit; which language I chose as the briefest to contrive the rules compendiously, the aptest for memory, and of the greatest Authoritie and Majesty to bee avouched and alledged in argument: and for the expositions and distinctions, I have retained the peculiar language of our law, because it should not bee singular among the bookes of the same science, and because it is most familiar to the Students and professors thereof, and because that it is most significant to expresse conceits of law; and to conclude, it is a

language wherein a man shall not bee inticed to hunt after words, but matter; and for the excluding of any other than professed Lawyers, it was better manners to exclude them by the strangenesse of the language, than by the obscuritie of the conceit, which is, as though it had beene written in no private and retired language, yet by those that are not Lawyers would for the

most part not have beene understood, or which is worse, mistaken.

Fiftly, whereas it might have beene more flourish and ostentation of reading, to have vouched the authorities, and sometimes to have enforced or noted upon them, yet I have abstained from that also; and the reason is, because I judged it a matter undue and preposterous to proove rules and maximes; wherein I had the example of M^r^ *Littleton* and M^r^ *Fitzherbert*, whose writings are the institutions of the lawes of England, whereof the one forbeareth to vouch any authoritie altogether, the other never reciteth a booke, but when hee thinketh the case so weake of credit in it selfe, as it needs a surety; and these two I did far more esteeme than M^r^ *Perckings* or M^r^ *Stamford* that have done the contrary: well will it appeare to those that are learned in the lawes, that many of the cases are judged cases, either within the books or of fresh report, and most of them fortified by judged cases, and similitude of reason, though in some few cases I did intend expressely to weigh downe the authority by evidence of reason, and therein rather to correct the law than either to sooth a received error, or by unprofitable subtilty, which corrupteth the sense of law, to reconcile contrarieties; for these reasons I resolved not to derogate from the authority of the rules, by vouching of any of the authority of the cases, though in mine owne copy I had them quoted:

for although the meannesse of mine owne person may now at first extenuate the authority of this collection, and that every man is adventrous to controule yet surely according to *Gamduells* reason, if it bee of weight, time will settle and authorize it; if it bee light and weake, time will reproove it: So that, to conclude, you have here a worke without any glory of affected noveltie, or of method, or of language, or of quotations and

authorities,dedicated onely to use, and submitted onely to the censure of the learned, and chiefly of time.

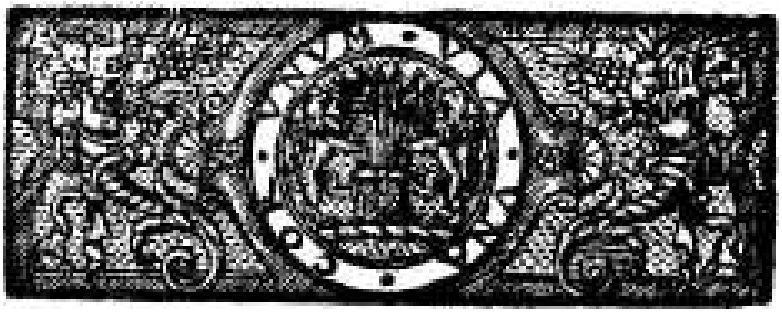
Lastly, there is one point above all the rest, I accompt the most materiall for making these reasons indeed profitable and instructing, which is, that they bee not set downe alone like short darke Oracles which every man will bee content still to allow to bee true, but in the meane time they give little light or direction; but I have attended them, a matter not practised, no not in the Civill law to any purpose; and for want whereof, indeed the rules are but as proverbs and many times plaine fallacies; with a cleere and perspicuous exposition, breaking them into cases, and opening them with distinctions, and sometimes shewing the reasons above whereupon they depend, and the affinity they have with other rules: and though I have thus with as good discretion and fore-sight as I could, ordered this worke, and as I might say without all colours or showes

husbanded it best to profit, yet neverthelesse not wholly trusting to mine owne judgement, having collected 300. of them, I thought good before I brought them all into forme to publish some few, that by the taste of other mens opinions in this first, I might receive either approbation in mine owne coarse, or better advice for the altering of the other which remaine; for it is great reason that that which is intended to the profite of others, should be guided by the conceits of others.

REGULAE.

1. *In iure non remota causa, sed proxima spectatur*. *fol*. l.

2. *Non potest adduci exceptio eiusdem rei, cuius petitur dissolutio.* 6.



THE

MAXIMES OF

THE LAW.

In jure non remota causa, sed proxima

spectatur.

IT were infinite for the law to judge the causes of causes, and their impulsions one of another; therefore it contenteth it selfe with the immediate cause, and judgeth of acts by that, without looking to any further degree.

As if an annuity be granted *pro consilio impenso & impendendo,* and the grantee commit treason, whereby he is imprisoned, so that the grantor cannot have accesse unto him for his counsell, yet neverthelesse the annuity is not determined by this

Regula I.

O. H. 8. Dys.

non feasance; yet it was the grantees act and default to commit the treason; whereby the imprisonment grew: But the law looketh not so farre, but excuseth him, because the not giving counsell was compulsary, and not voluntary, in regard of the imprisonment.

So if a Parson make a lease, and be deprived or resigne, the successors shall avoid the lease, and yet the cause of deprivation, and more strongly of a resignation, moved from the partie himselfe; but the law regardeth not that, because the admission of the new incombent is the act of the ordinary.

So if I be seised of an advouson in gross, and an usurpation bee had against mee, and at the next avoidance I usurpe arere, I shall be remitted, and yet the presentation, which is the act remoate, is mine owne act: but the admission of my Clerke, whereby the inheritance is reduced to mee, is the act of the Ordinary.

So if I covenant with I. S. a stranger in consideration of naturall love to my sonne, to stand seised to the use of the said I. S. to the intent he shall enfeoffe my sonne; by this no use ariseth to I. S. because the law doth respect that there is no immediate consideration betweene mee and I. S.

So if I be bound to enter into a statute before the Mayor of the Staple at such a day for the secu-

ritie of 100[l]. and the obligee before the day accept of mee a lease of an house in satisfaction, this is no plea in debt upon my obligation; and yet the end of that statute was but securitie of money: but because the entring into this statute it selfe, which is the immediate act whereunto I am bound, is a corporall act which lieth not in satisfaction, therefore the law taketh no consideration that the remoate intent was for money.

So if I make a feoffement in fee, upon condition that the feoffee shall enfeoffe over, and the feoffee be disseised, and a discent cast, and that the feoffee binde himselfe in a statute, which statute is discharged before the recoverie of the land, this is no breach of the condition, because the land was never liable to the statute, and the possibilitie that it should be liable upon the recoverie, the law doth not respect.

So if I enfeoffe two, upon condition to enfeoffe, and one of them take a wife, the condition is not broken, and yet there is a remoate possibilitie that the jointenant may die, and then the feme is intitled to dower.

So if a man purchase land in fee-simple, and die without issue, in the first degree the law respedeth dignitie of sexe and not proximity, and therefore the remote heire on the part of the father shall have it before the neere heire on the part

Litt. cap. 2. H. 4. 3. 26. H. 8. 2.

5. H. 7. 25.

M. 40. & 41. E1. Julius Winningtons case, ore report per le tresreuerend Judge, le Snr. Coke, lib. 2.

of the mother; but in any degree paramount the first the law respecteth not, and therfore the neere heire by the grand-mother on the part of the father shall have it before the remote heire of the grandfather on the part of the father.

This rule faileth in covenous acts, which though they bee conveighed through many degrees and reaches, yet the law taketh heed to the corrupt beginning, and counteth all as one intire act.

As if a feoffement bee made of lands held by Knights service to I. S. upon condition that within a certaine time hee shall enfeoffe I. D. which feoffement to I. D. shall bee to the use of the wife of the first feoffor for her jointure, &c. this feoffement is within the statute of 32. *H.* 8. *nam dolus circuitu non purgatur*.

In like manner, this rule holdeth not in criminall acts, except they have a full interruption, because when the intention is matter of substance, and that which the law doth principally behold, there the first motive will bee principally regarded, and not the last impulsion. As if I. S. of malice prepensed discharge a Pistoll at I. D. and misseth him, whereupon hee throwes downe his Pistoll, and flyes, and I. D. pursueth him to kill him, whereupon hee turneth and killeth I. D. with a Dagger; if the law should consider the last impulsive cause, it should say, that it was in his owne de-

fence; but the law is otherwise, for it is but a pursuance & execution of the first murtherous intent.

But if I. S. had fallen down his Dagger drawne, and I. D. had fallen by haste upon his Dagger, there I. D. had beene *felo de se*, and I. S. shall goe quit.

Also you may not confound the act, with the execution of the act; nor the entire act, with the last part or the consummation of the act.

For if a disseisor enter into religion, the immediate cause is from the party, though the discent bee cast in law; but the law doth but execute the act which the party procureth, and therefore the discent shall not binde, *et sic è converso.*

If a lease for yeares bee made rendring a rent, and the lessee make a feoffement of part, and the lessor enter, the immediate cause is from the law, in respect of the forfeiture, though the entrie bee the act of the party; but that is but the pursuance and putting in execution of the title which the law giveth, and therefore the rent or condition shall bee apportioned.

So in the binding of a right by a discent, you are to consider the whole time from the disseisin to the discent cast, and if at all times the person bee not priviledged, the discent bindes.

44. Ed. 3

Lit. cap. de disc.

21. Eliz,

24. H. 8. fo. 4, Dy.

And therefore if a feme covert bee disseised, and the Baron dieth and shee taketh a new husband, and then the discent is cast: or if a man that is not *infra* 4. *Maria*, bee disseised, and hee returne into England, and goe over sea againe, and then a discent is cast, this discent bindeth because of the *interim* when the persons might have entered, and the law respecteth not the state of the person at the last time of the discent cast, but a continuance from the verie disseised to the discent.

So if Baron and feme bee, and they joine in a feoffement of the wives land rendring a rent, and the Baron

dye, and the feme take a new husband before any rent day and hee accepteth the rent, the feoffement is affirmed for ever.

Non potest adduci exceptio ejusdem rei, cujus petitur dissolutio.

IT were impertinent and contrary in it selfe, for the law to allow of a plea in barre of such matter as is to bee defeated by the same suite; for it is included, otherwise a man should never come to the end and effect of his suite, but bee cut off in the way.

And therefore if tenant intaile of a mannour, whereunto a villeine is regardant, discontinue and dye, and the right of the entaile discend to the vil-

leine himselfe, who brings a *formedon,* and the discontinued pleadeth villenage, this is no plea, because the devesting of the mannor, which is the intention of the suite, doth include this plea, because it determineth the villenage.

So if tenant in ancient demesne be disseised by the Lord, whereby the seigniory is suspended, and the disseisee bring his assize in the Court of the Lord, Francke fee is no plea, because the suite is brought to undoe the disseis, and so to revive the seigniory in ancient demesne.

So if a man be attainted and executed, and the heire bring a writ of error upon the attaindor, and the corruption of bloud by the same attaindor bee pleaded to interrupt his conveighing in the same writ of error, this is no plea, for then hee were without remedy ever to reverse the attaindor.

So if tenant intaile discontinue for life rendring a rent, and the issue brings a *formedon,* and the warranty of his ancestor with assets be pleaded against him, and the assets is laid to bee no other but his reversion with the rent, this is no plea, because the *formedon* which is brought to undoe this discontinuance doth inclusively undoe this new reversion in fee with the rent thereunto annexed.

But whether this rule may take place where the matter of plea is not to be avoided in the same suite but in an other suite, is doubtfull; and I rather take

9. H. 7. 24. 3.& 4. P. & M.

D^{t} 143.

Regula 2.

7. H. 4. 39. 7. H. 6. 44.

38. Ed. 3. 32.

the law to be that this rule doth extend to such cases, for other wise the partie were at a mischiefe, in respect; the exceptions and barres might bee pleaded crosse either of them in the contrary suite, and so the party altogether prevented and intercepted to come by his right.

So if a man bee attainted by two severall attaindors, and there is error in them both, there is no reason but that there should be a remedie open for the heire to reverse those attaindors being erroneous, as well if they bee twentie as one.

And therefore if in a writ of error brought by the heire of one of them, the attaindor should be a plea peremptorily, & so againe if in error brought of that other, the former should be a plea, these were to exclude him utterly of his right; and therefore it should be a good replication to say that hee hath a writ of error

depending of that also, and so the Court shall proceed; but no judgement shall be given till both pleas bee discussed: and if either plea bee found without error, there shall bee no reversall either of the one or of the other: and if hee discontinue either writ, then shall it bee no longer a plea: and so of severall outlawries in a personall action.

And this seemeth to mee more reasonable, than that generally an outlawrie or an attaindor should bee no plea in a writ of error brought upon a di-

verse outlawrie or an attaindor, as 7. H. 4. and 7. *H.* 6. seeme to hold, for that is a remedy too large for the mischiefe; for there is no reason but if any of the outlawries or attaindors bee indeed without error but it should be a peremptory plea to the person in a writ of error as well as in any other action.

But if a man levy a fine S^{t} *conusaunce de droit come ceo que il ad de son done,* & suffer a recoverie of the same lands, and there bee error in them both, hee cannot bring error first of the fine because by the recovery his title of error is discharged and released in law *inclusivè,* but hee must begin with the error upon the recoverie (which he may do because a fine executed barreth no titles that accrew *de prisne temps* after the fine levied) and so restore himselfe to his title of error upon the fine: but so it is not in the former case of the attaindor; for a writ of error to a former attaindor is not given away by a second, except it bee by expresse words of an act of Parliament, but onely it remaineth a plea to his person while hee liveth, and to the conveyance of his heire after his death.

But if a man levy a fine where he hath nothing in the land, which inureth by way of conclusion onely, and is executorie against all purchases and new titles which shall grow to the Conusor afterwards, and hee purchase the land, and suffer a recoverie to the Conusee, and in both fine and recove-

rie, there is error: This fine is *Janus Bifrons,* and will looke forward, and barre him of his writ of error brought of the recovery, and therefore it will come to the reason of the first case of the attaindor that hee must reply that hee hath a writ also depending of the same fine, and so demand judgement.

To returne to our first purpose, like law is it if tenant intaile of two acres make two severall discontinuances to severall persons for life rendring a rent, and bringeth a *formedon* of both, and in the *formedon* brought of white acre the reversion and rent reserved upon blacke acre is pleaded, and so contrary. I take it to bee a good replication that he hath a *formedon* also upon that depending whereunto the tenant hath pleaded the discent of the

reversion of white acre, and so neither shall bee a barre; and yet there is no doubt but if in a *formedon* the warranty of tenant intaile with assets bee pleaded, it is no replication for the issue to say that a *Precipe* dependeth brought by I. S. to evict the assets.

But the former case standeth upon the particular reason before mentioned.

Verta fortius accipiuntur contra

proferentem.

This rule that a mans deedes and his words shall be taken strongliest against himselfe, though it bee one of the most common grounds of the law, it is notwithstanding a rule drawn out of the depth of reason; for first it is a Schoole-Master of wisdome & diligence in making men watchfull in their owne businesse, next it is author of much quiet and certainty, and that in two sorts; first, because it favoureth acts and conveyances executed, taking them still beneficially for the grantees and possessors; and secondly, because it makes an end of many questions and doubts about construction of words: for if the labour were onely to picke out the intention of the parties, every Judge would have a severall sense, whereas this rule doth give them a sway to take the law

more certainely one way.

But this rule, as all other which are verie generall, is but a sound in the ayre, and commeth in sometimes to helpe and make up other reasons without any great instruction or direction, except it be duely concerned in point of difference, where it taketh place, and where not; and first we will examine it ingrants, & then in pleadings.

The force of this rule is in three things, in am-

Reg. 3.

biguity of words, in implication of matter, and deducing or qualifying the exposition of such grants as were against the law, if they were taken according to their words.

And therefore if I. S. submit himselfe to arbitrament of all actions and suites betweene him and I. D. and I. N. it rests ambiguous whether the submission shall bee intended collective of joint actions onely, or distributive of severall actions also; but because the words shall be taken strongliest against I. S. that speakes them, it shall bee understood of both: for if I. S. had submitted himselfe to arbitrament of all actions and suites which hee hath now depending, except it bee such as are betweene him and I. D. and I. N. now it shall bee understood collective onely of joint actions, because in the other case large construction was hardest against him that speakes, and in this case strict construction is hardest.

So if I graunt ten pounds rent to Baron and feme, and if the Baron dye that the feme shall have three pounds rent, because these words rest ambiguous whether I intend three pounds by way of encrease or three pounds by way of restraint and abatement of the former rent of ten pounds, it shall bee taken strongliest against mee that am the grauntor, that it is 3^{l}. addition to the ten; but if I had let land to Baron and feme for three lives, reserving 10^{l}. *per annum*, and if the

Baron dye reserving three pounds, this shall bee taken contrary to the former case, to abbridge my rent onely to three pounds.

So if I demise *omnes boscos meos in villa de dale* for years, this passeth the soil, but if I demise all my lands in dale *exceptis boscis,* this extendeth to the trees onely and not to the soile.

So if I sowe my lands with come, and let it for yeares, the corne passeth to my lessee, if I except it not. but if I make a lease for life to I. S. upon condition that upon request hee shall make mee a lease for yeares, and I. S. soweth the ground, and then I make request, I. S. may well make me a lease excepting his corne, and not breake the condition.

So if I have free warren in mine owne hand, and let my land for life not mentioning the warren, yet the leasee by implication shall have the warren discharged and extract during his lease: but if I let the land *una cum liber a warrenna,* excepting white acre, there the warren is not by implication reserved unto mee either to bee injoyed or extinguished, but the leasee shall have warren against mee in white acre.

So if I. S. hold of mee by fealty and rent only, yet the fealty by implication shall passe, be-

2. R. 3. 18.

21. H. 7. 29.

8. Ass. p. 10.

14. H. 8. 28. H. 8. D^{r} 19.

8. H. 7. 32. H. 6.

29. Ass. pl. 10.

cause my grant shall be taken strongly as of a rent service and not of a rent secke.

Otherwise had it been if the seigniory had bin by homage fealty and rent, because of the dignity of the service which could not have passed by intendment by the graunt of the rent, but if I be seised of the mannor of dale in fee whereof I. S. holds by fealty and rent, and I graunt the mannor excepting the rent, the fealtie shall passe to the grauntee, and I. S. shall have but a rent secke.

So in graunts against the law, if I give land to I. S. and his heires males, this is a good fee-simple; which is a larger estate than the words seeme to intend and the word (males) is voide: But if I make a gift entaile reserving a rent to me and the heires of my body, the words *(of my body)* are not voide, and to leave it a rent in feesimple; but the words (heires) and all are voide, and leanes it but a rent for life, except that you will say it is but a limitation to any my heire in fee-simple which shall bee heire of my body, for it cannot bee a rent entaile by reservation.

But if I give land with my daughter in francke marriage, the remaindor to I. S. and his heires, this graunt cannot bee good in all the parts, according to the words, for it is incident to the nature of a gift in francke marriage that the donee hold it of the donor, and therefore my deed shall

bee taken so strongly against my selfe* that rather than the remainder shall be voide the franck marriage though it bee first placed in the deede shall bee voide as a francke marriage.

But if I give land in francke marriage reserving to mee and my heires ten pounds rent, now the franke marriage stands good and the reservation is voide, because it is a limitation of a benefit to my selfe and not to a stranger.

So if I let white acre, blacke acre, and greene acre to I. S. excepting white acre, his exception is voide, because it is repugnant, but if I let the three acres, aforesaid, rendring twenty shillings rent, *viz.* for white acre ten shillings, and for black acre ten shillings, I shall not destraine at all in greene acre, but that shall bee discharged of my rent.

So if I grant a rent to I. S. and his heires out of my mannour of *dale & oblige manerium & omnia bona & catella mea super manerium prædictum existentia ad distringendum per Baliuum Domini Regis:* this limitation of the distresse to the Kings Baliffe is voide, and it is good to give a power of distresse to I. S. the grauntee and his Baliffes.

But if I give land intaile *tenend' de capitalibus Dominis per reditum viginti solidorum & fidelitatem;* this limitation of tenure to the Lord is

44. Ed. 3.19.

26. ass. pl. 66.

* Quære car le ley seble dee le contrary, entant que in un grant quant lun part del fait ne poit estoier oue lauter le darr: serra void, auterment in un devise et accordant suit lopin:de Sur Anderson et Owen Just: contra Walmesley Just: P. 40. Eliz. in le case de Coun[-]tesse de Warwicke et Sur Barkley in com. banco.

4. H. 6. 22. 26. ass. pl. 66.

46. Ed. 3.18.

2. Ed. 4. 5.

voide, and it shall not be good, as in the other case, to make a reservation of twenty shillings good unto my selfe, but it shall bee utterly voide as if no reservation at all had beene made; and if the truth bee that I that am the donor hold of the Lord paramount by ten shillings onely, then there shall bee ten shillings onely reserved upon the gift entaile as for ovelty.

So if I give land to I. S. and the heires of his

body, and for default of such issue *quod tenementum & prædictum revertatur ad I. N.* yet these words of reservation will carry a remainder to a stranger. But if I let white acre to I. S. excepting ten shillings rent, these words of exception to mine owne benefit shall never inure to words of reservation.

But now it is to bee noted, that this rule is the last to bee resorted to, and is never to bee relied upon but whereall other rules of exposition of words faile; and if any other come in place, this giveth place. And that is a point worthy to bee observed generally in the rules of the law, that when they encounter and crosse one anothe in any case, it bee understood which the law holdeth worthier, and to bee preferred; and it is in this particular very notable to consider, that this being a rule of some strictnesse and rigour, doth not as it were it's office, but in absence of other rules which are of more equity and humanity;

which rules you shall afterwards finde set downe with their expositions and limitations.

But now to give a taste of them to this present purpose, it is a rule that generall words shall

never bee stretched too farre in intendment, which the Civilians utter thus. *Verba generalia restringuntur ad habilitatem personæ, vel ad aptitudinem rei.*

Therefore if a man grant to another Common *intra metas & bundas villæ de dale,* and part of the ville is his severall, and part his waste and Common; the grantee shall not have Common in the Severall, and yet that is the strongest exposition against the grantor.

So it is a rule, *verba ita sunt intelligenda, ut res magis valeat quam pereat:* and therefore if I give land to I. S. and his heires *reddend' quinque libras annatim* to I. D. and his heires, this implies a condition to mee that am the grantor; yet it were a stronger exposition against mee, to say the limitation should bee voide, and the feoffement absolute.

So it is a rule, that the law will not intend a wrong, which the Civilians utter thus: *Ea est accipenda interpretatio, qua vitio caret.* And therefore if the executor of I. S. grant *omnia bona & catella sua,* the goods which they have as execu-

21. Ed. 3. 49. 31. &. 32. H. 8. Dyer 46. Plow. fo. 37.

35. H. 6. 34.

14. Ass. pl. 23.

Lit. cap. C^^^ dic.

10. Ed. 4. 80

3. H. 6. 20.

tors will not passe, because *non constat* whether it may bee a devastation, and so a wrong; and yet against the trespasser that taketh them out of their hand, they shall declare *quod bona sua cepit.*

So it is a rule, that words are so to bee understood, that they worke somewhat, and bee not idle and frivolous: *verba aliquid operari debent, verba cum effectu sunt accipienda.* And therefore if I buy and sell you the fourth part of my mannor of dale, and say not in how many parts to be divided, this shall bee construed foure parts of five, and not of 6. nor 7. &c. because that it is the strongest against mee; but on the other side, it shall not bee intended foure parts of foure parts, or the whole or foure quarters; and yet that were strongest of all,but then the words were idle and of none effect.

So it is a rule, *Deuinatio non interpretatio est, quæ omnino recedit à litera:* and therefore if I have a fee farme rent issuing out of white acre often shillings, and I reciting the same reservation

doe grant to I. S. the rent of five shillings *percipiend' de reddit' predict' & de omnibus terris & tenementis meis in dale* with a clause of distresse, although there bee atturnement yet nothing passeth out of my former rent, and yet that were strongest against mee to have it a double rent or grant of part of that rent with an enlargement of a distresse in the other land, but for that it is a-

gainst the words, because *copulatio verborum indicat acceptionem in eodem sensu,* and the word *de (anglice* out of) may be taken in two senses, that is, either as a greater summe out of a lesse, or as a charge out of land or other principall interest; and that the coupling of it with lands & tenements[-] *viz.* I reciting that I am seised of such a rent of ten shillings, doe grant five shillings *percipiend' de eodem reddit'* it is good enough without atturnment, because *percipiend de &c.* may well be taken for *parcella de &c.* without violence to the words, but if it had beene *de reddit' predict'* although I. S. bee the person that payeth mee the foresaid rent of ten shillings, yet it is voide, and so it is of all other rules of exposition of grants when they meet in opposition with this rule they are preferred.

Now to examine this rule in pleadings as wee have done in grants, you shall finde that in all imperfections of pleadings whether it bee in ambiguity of words and double intendments, or want of certainty and averments, the plea shall be strictly and strongly against him that pleads.

For ambiguity of words, if in a writ of entrie upon disseisin, the tenant pleads jointenancy with I. S. of the gift and feoffement of I. D. judgement[-] *de briefe* the demandant saith that long time before I. D. any thing had the demandant himselfe was seised in fee *quousque predict. I. D.*

super possessionem eius intrauit, and made a joint feoffement, whereupon he the demandant reentred and so was seised untill by the defendant alone hee was disseised; this is no plea, because the word *intrauit* may bee understood either of a lawfull entrie, or of a tortious, and the hardest against him shall bee taken, which is, that it was a lawfull entrie, therefore he should have alledged precisely that I. D. *disseisiuit*.

So upon ambiguities that grow by reference, If an action of debt bee brought against I. N. and I. P. Sheriffes of London upon an escape, and the plaintiffe doth declare upon an execution by force of a recoverie in the prison of Ludgate *sub custodia I. S. & I. D.* then Sheriffes in 1. K. H. 8. and that bee so continued *sub custodia I. B. & I. G.* in 2. King H. 8. and so continued *sub custodia I. N. & I. L.* in 3. K. H. 8. and then was suffered to escape: I. N. & I. L. plead that before the escape supposed at such a day *anno superius in narratione specificato* the said I. D. and I. S. *ad tunc vicecomites* suffered him to escape, this is no good plea, because there bee three yeares specified in the declaration, and it shall be hardest taken that it was 1. or 3. H. 8. when they were out of office, and yet it is neerely induced by the *ad tunc vicecomites* which should leave the intendment to be of that yeare in which the declaration supposeth that they were Sheriffes, but that sufficeth not, but the yeare must be alledged

in fact, for it may bee mislaid by the plaintiffe, and therefore the defendants meaning to discharge themselves

by a former escape, which was not in their time, must alledge it precisely.

For incertainty of intendment, If a warranty collaterall be pleaded in barre, and the plaintiffe by replication to avoide the warranty, saith, that hee entred upon the possession of the defendant, *non constat* whether this entrie was in the life of the ancestor or after the warranty attached: and therefore it shall bee taken in hardest sense, that it was after the warranty descended, if it bee not otherwise averred.

For impropriety of words, If a man pleade that his ancestor died by protestation seised, and that I. S. abated &c. this is no plea, for there cannot bee an abatement except there bee a dying seised alledged in fact, and an abatement shal not be improperly taken for disseisin in pleading *ear parols sont pleas.*

For repugnancie, if a man in avowrie declare that he was seised in his demesne as of fee of white acre, and being so seised did demise the said white acre to I. S. *habendum* the moitie for 21. yeares from the date of the deed, the other moity from the surrender, expiration, or determination of the estate of I. D. *qui tenet prædict' medietatem ad terminum vitæ suæ reddend'* xl. s.

3. Ed. 6. Dy. 66.

26. H. 8.

38. H. 6. 18. 39. H. 6. 5.

rent, this declaration is insufficient, because the seisin that he hath alledged in himselfe in his demeine as of fee in the whole, and the state for life or a moitie are repugnant, and it shall not bee cured by taking the last which is expressed to controll the former, which is but generall and formall, but the plea is naught, and yet the matter in law had bin good to have intituled him to have distrained for the whole rent.

But the same restraint followes this rule in pleading that was before noted in grants: for if the case bee such as falleth within another rule of pleading this rule may not be urged.

And therefore it is a rule that a barre is good to a common intent, though not to everie intent. As, if a debt be brought against five executors, and three of them make default, and two appeare and plead in barre a recoverie had against them two of 300[l], and nothing in their hands over and above that summe. If this barre should be taken strongliest against them, it should be intended that they might have abated the first suite, because the other three were not named, and so the recovery not duely had against them; but because of this other rule the barre is good: for that the more common intent will say that they two did onely administer, and so the action well considered, rather than to imagine that they would have lost the benefit and advantage of abating the writ.

So there is another rule, that in pleading a man shall not disclose that which is against himselfe: and therefore if it be matter that is to be set forth on the other side, then the plea shall not be taken in the hardest sense but in the most beneficall, and to bee left unto the contrarie partie to alleage.

And therefore if a man bee bound in an obligation that if the feme of the obligee doe decease before the feast of Saint Jonn the Baptist which shall bee in the yeare of our Lord God 1598. without isssue of her bodie by her husband lawfully begotten then living, that then the bond shall bee void, and in debt brought upon this obligation, the defendants plead that the feme died before the said feast without issue of her bodie then living: if this plea should bee taken strongliest against the defendant, then should it be taken that the feme had issue at the time of her death, but this issue died before the feast; but that shall not bee so understood because it makes against the defendant, and it is to bee brought in of the plaintiffes side, and that without traverse.

So if in a detinue brought by a feme against the executors of her husband for her reasonable part of the goods

of her husband, and her demand is of a moitie, and she declares upon the custome of the Realme by which the feme is to

9. Ed. 4.

4. Ed. 6. Plow.

28. H. 8. Dys. fol. 17.

have a moitie, if no issue bee had betweene her and her husband, and the third part if there bee issue had, and declareth that her husband dieth without issue had betweene them; if this count should bee hardliest construed against the partie, it should be intended that her husband had issue by another wife, though not by her, in which case the feme is but to have the third part likewise; but that shall not be so intended because it is matter of reply to be shewed of the other side.

And so it is of all other rules of pleadings, these being sufficient not onely for the exact expounding of these other rules, but *obiter* to shew how this rule which we handle is put by when it meetes with anie other rule.

As for Acts of Pa[r]liament, Virdicts, Judgements, &c. which are not words of parties: in them this rule hath no place at all, neither in devises and wils upon severall reasons; but more especially it is to bee noted, that in evidence it hath no place, which yet seemes to have some affinitie with pleadings, specially when demurrer is joined upon the evidence.

And therfore if land be given by will by H. C. to his sonne I. C. and the heires males of his bodie begotten; the remainder to F.C. and the heires males of his bodie begotten; the remainder to the heires males of the bodie of the devi-

sor, the remainder to his daughter S. C. and the heires of her bodie, with a clause of perpetuitie, and the question comes upon the point of forfeiture in an assize taken by default, and

evidence is given, and demurrer upon evidence, and In the evidence[-] given to maintain the entry of the daughter upon a forfeiture, it is not set forth not averred that the devisor had no other issue male, yet the evidence is good enough,and it shall bee so intended; and the reason hereof cannot bee, because a Jury may take knowledge of matters not within the evidence,and the Court contrariwise cannot take knowledge of any matters not within the pleas: for it is cleere, that if the evidence

had been altogether remote, and not proving the issue, there, although the Jury might find it, yet a demurrer might well bee taken upon the evidence.

But if I take the reason of difference to be betweene pleadings, which are but openings of the case, and evidences which are the proofes of an issue, for pleadings being but to open the veritie of the matter in fact indifferently on both parts, hath no scope and conclusion to direct the construction and intendment of them, and therefore must be certaine, but in evidence and proofs the issue which is the state of the question and conclusion shall encline and apply all the proofes as tending to that conclusion.

Another reason is, that pleadings must be certain, because the adverse party may know wherto to answer, or else he were at a mischief, which mischiefe is remedied by demurrer; but in

evidence if it be short, impertinent or incertaine, the adverse party is at no mischiefe, because it is to be thought that the Jury will passe against him;

yet neverthelesse the Jury is not compellable to supply the defect of evidence out of their owne knowledge, though it bee in their libertie so to doe, therefore the law alloweth a demurrer upon evidence also.

Quod sub certa forma concessum vel reseruatum est non trabitur ad valorem vel compensationem.

The Law permitteth every man to part with his owne interest, and to qualifie his owne graunt as it pleaseth himselfe, and therefore doth not admit any allowance or recompence if the thing be not taken as it is graunted.

So in all profiles *a prender*, if I graunt Common for ten beasts, or ten loads of wood out of my Copps, or ten loads of hay out of my Meads to be taken for three yeares, hee shall not have Common for thirty beasts, or thirty loads of wood or hay the third years if hee forbeare for

the space of two yeares; here the time is certain and precise.

So if the place be limitted, or if I graunt Estovers to bee spent in such a house, or stone towards the reparation of such a Castle, although the grauntee doe burne of his fuell and repaire of his owne charge, yet hee can demand no allowance for that he tooke it not.

So if the kinde be specified, as if I let my Park reserving to myselfe all the Deere and sufficient pasture for them, if I do decay the game whereby there is no Deere, I shall not have quantitie of pasture answerable to the feed of so many Deere as were upon the ground when I let it, but am without any remedy except I replenish the ground againe with Deere.

But it may be thought that the reason of these cases is the default and lachess of the grauntor, which is not so.

For put the case that the house where the Estovers should bee spent bee overthrown by the act of God, as by tempest, or burnt by the enemies of the King, yet there is no recompence to be made.

And in the strongest case where it is in default of the grauntor, yet he shall make void his owne

Regula 4.

37. H. 6. 10

graunt rather than the certain forme of it should be wrested to an equitie or valuation.

As if I graunt Common *ubicunque averia mea ierint*, the Commoner cannot otherwise entitle himselfe, except that hee averre that in such grounds my beasts have gone and fed, and if I never put in any but occupie my grounds otherwise, hee is without remedy; but it I put in, and after by poverty or otherwise I desist, yet the Commoner may continue; contrariwise, if the words of the graunt had beene *quandocunque averia mea ierint*, for there it depends continually upon the putting in of my beasts, or at least the generall seasons when I put them in, not upon every houre or moment.

But if I graunt *tertiam aduocationem* to I. S. if hee neglect to take his turne *ea vice*, hee is without remedy: But if my wife bee before intituled to dower, and I dye, then my heire shall have two presentments, and my wife the third, and my grauntee shall have the fourth; and it doth not impugne this rule at all, because the graunt shall receive that construction at the first that it was intended such an avoidance as may be taken and enjoyed: as if I graunt *proximam aduocationem* to I. D. and then graunt *proximam advocationem* to I. S. this shall be intended the next to the next, which I pay lawfully graunt or dispose. *Quære.*

But if I graunt *proximam aduocatinem* to I. S. and I. N. is Incumbent, and I graunt by precise words *illam aduocationem quam post mortem, resignationem, translationem, vel depriuationem I. N. immediate fore contigerit*, now the grant is meerely voide, because I had graunted that before, and it cannot bee taken against the words.

Necessitas inducit priuilegium quoad iura priuata.

The law chargeth no man with default where the act is compulsorie, and not voluntary, and where there is not a consent and election; and therefore if either there bee an impossibility for a man to doe otherwise, or so great a perturbation of the judgement and reason as in presumption of law mans nature cannot overcome, such necessity carrieth a priviledge in it selfe.

Necessity is of three sorts, necessity of conservarion of life, necessity of obedience, and necessity of the act of God or of a stranger.

First of conservation of life, If a man steale viands to satisfie his present hunger, this is no felony nor larceney.

So if divers bee in danger of drowning by the casting away of some boate or barge, and one of

29. H. 8. Dy. 38.

Regula 5.

4. Ed. 6. Cond

Stamf.

Stamf.

them get to some plancke, or on the boates side to keepe himselfe above water, and another to save his life thrust him from it, whereby hee is drowned; this is neither *se defendendo* nor by misadventure, but justifiable.

So if divers felons bee in a Jaile, and the Jaile by casualty is set on fire, whereby the prisoners get forth, this no escape, nor breaking of prison.

So upon the Statute, that every Merchant that setteth his merchandize on land without Satisfying the Customer or agreeing for it (which agreement is construed to bee incertainty) shall forfeit his merchandize, and it is so that by tempest a great quantity of the merchandize is cast over board, whereby the Merchant agrees with the Customer by estimation, which falleth out short of the truth, yet the over-quantity is not forfeited; where note that necessity dispenseth with the direct letter of a Statute law.

So if a man have right to land, and doe not make his entrie for terror of force, the law allowes him a continuall claime, which shall bee as beneficiall unto him as any entry; so shall a man save his default of appearance by *cretein de cau,* and avoide his debt by *duresse,* whereof you shall finde proper cases elsewhere.

The second necessity is of obedience, and ther-

fore where Baron and Feme commit a felony, the Feme can neither be principall nor accessary, because the law intends her to have no will, in regard of the subjection and obedience shee owes to her husband.

So one reason amongst others why Embassadors are used to bee excused of practices against the State where they reside, except it be in point of conspiracie, which is against the law of Nations, and society, is, because *non constat* whether they have it *in mandatis,* and then they are excused by necessity of obedience.

So if a warrant or precept come from the King to sell wood upon the ground whereof I am tenant for life or for yeares, I am excused in wast.

The third necessitie is of the act of God, or of a stranger, as if I bee particular tenant for yeares of a house,

and it be overthrowne by grand tempest, or thunder and lightning, or by sudden flouds, or by invasion of enemies; or if I have belonging unto it some Cottage which hath beene infected, whereby I can procure none to inhabite them, no workeman to repaire them, and so they fall down, In all these cases I am excused in wast: but of this last learning when and how the act of God and strangers doe excuse, there bee other particular rules.

Cond. 13. 6. per Brook. 15. H. 7. 2. per Keble.

14. H. 7. 29. per Reade.

4. Ed. 6. pl.

4. Ed. 6. 20. con-

dic.

Lit. pl. 4. 19. 12. H. 4. 20. 14. H. 4. 30. B. 38. H. 6.11.

28. H. 6. 8. 39. H. 6. 50.

Standf. 16. 2. Ed. 3. 160. cor Fitzh.

B. 42. Ed. 3. 6.

B. Wast. 31.

42. Ed. 3. 6.

19. Ed. 3. per

Th. Fitzh.Wast

30. 32. Ed. 3.

Fitzh. Wast.

105.

44. Ed. 3. 31.

But then it is to be noted, that necessitie priviledgeth onely *quoad iura priuata*, for in all cases if the act that should deliver a man out of the necessitie be against the Common-wealth, necessity excuseth not: for *priuilegium non valet contra Rempublicam;* and as another saith, *Necessitas publica maior est quam priuata*: for death is the last

and farthest point of particular necessitie, and the law imposeth it upon everie subject, that he preferre the urgent service of his Prince and Countrey before the safety of his life; As if in danger of ternpest those that are in the ship throw over other mens goods, they are not answerable: but If a man bee commanded to bring Ordnance or Munition to relieve any of the Kings towns that are distressed, then hee cannot for any danger of tempest justifie the throwing of them overboard, for there it holdeth which was spoken by the Romane when he alledged the same necessitie of weather to hold him from imbarquing, *Necesse est ut eam non ut viuam.* So in the case put before of husband and wife, if they joyne in committing treason, the necessity of obedience doth not excuse the offence as it doth in felony, because it is against the Common-wealth.

So if a fire be taken in a street, I may justifie the pulling down of the wall or house of another man to save the row from the spreading of the fire; but if I be assailed in my house in a Citie or

Towne, and distressed, and to save my life I set fire on mine owne house, which spreadeth and taketh hold upon other houses adjoyning, this is not justifiable, but I am subject to their action

upon the case, because I cannot rescue mine owne life by doing any thing which is against the Common-wealth: But if it had beene but a private trespasse, as the going over anothers ground, or the breaking of his inclosure when I am pursued for the safegard of my lift, it is justifiable.

This rule admitteth an exception when the Law doth intend some fault or wrong in the partie that hath brought himselfe into the necessitie: so that is *necessitas culpabilis.* This I take to bee the chiefe reason, why *serpsum defendendo* is not matter of Justification, because the law intends it hath a commencement upon an unlawfull cause, because quarrels are not presumed to grow without some wrongs either in words or deedes on either part, and the law that thinketh it a thing hardly triable in whose default the quarrell beganne, supposeth the partie that kils another in his owne defence not to bee without malice;

and therefore as it doth not touch him in the highest degree, so it putteth him to sue out his pardon of course, and punisheth him by forfeiture of goods: for where there cannot be anie malice nor wrong presumed, as where a man assailes mee to robbe mee, and I kill him that assaileth me; or if a woman kill him that assaileth

13. H. 8. 16. per

Shelley. 12. H. 8. 10.

per Brooke 12. Ass.. pl. 56.

6 Ed. 4. 7. per

52. 6.

4. H.7. 50.

her to ravish her it is justificable without anie pardon.

So the common case proveth this exception that is, if a mad man commit a felonie hee shall not lose his life for it, because his infirmity came by the Act of God; but if a drunken man commit a felonie, he shall not be excused because his imperfection came by his owne default; for the reason and losse of deprivation of will and election by necessitie and by infirmitie is all one, for the lacke of *(arbitrum solutum)* is the matter: and therefore as *infirmitas culpabilis* excuseth not, no more doth *necessitas culpabilis*

Corporalis iniuria non recipit æstimationem de futuro.

The law in many cases that concerne lands or goods doth deprive a man of his present remedie, and turneth him over to a further Cirquit of remedie, rather than to suffer an inconvenience: but if it bee question of personall paine, the law will not compell him to sustaine it and expect remedie, because it holdeth no damage a sufficient recompence for a wrong which is corporall.

As if the Sheriffe make a false returne that I

am summoned whereby I lose my land, yet because of the inconvenience of drawing all things to incertaintie and delay, if the Sheriffes returne should not be credited, I am excluded of my averment against it, and am put to mine action of deceit against the Sheriffe and Summoners; but if the Sheriffe upon a *Cap*. returne a

Cepi corpus & quod est languidus in prisona, there I may come in and falsifie the return of the Sheriffe to save my imprisonment.

So if a man menace me in my goods, and that he will burne certaine evidences of my land which he hath in his hand, if I will not make unto him a bond, yet if I enter into bond by this terror, I cannot avoid it by plea, because the law holdeth it an inco[n]venience to avoid a speciallitie by such matter of averrement, and therefore I am put to mine action against such a menacer: but if hee restraine my person, or threaten mee with a battery or with the burning of my house, which is a safetie and protection to my person, or with burning an instrument of manumission, which is an evidence of my enfranchisement; if upon such menace or duressse I make a deede, I shall avoid it by plea.

So if a trespasser drive away my beasts over anothers ground, I pursue them to rescue them, yet am I a trespasser to the stranger upon whose ground I came; but if a man assaile my person,

12. H. 7. 13.

Regula 6.

3. Ed. 4. 80.

3 H. 8. 3.

7. H. 4. 28.

13. H. 3. 33. 21. H. 7. 28.

and I fly over anothers ground, now am I no trespasser.

This ground some of the Canonists doe aptly inferre out of Christs sacred mouth; *Amen est corpus supra vestimentum,* where they say *vestimentum* comprehendeth all outward things appertaining to a mans condition, as lands and goods, which they say, are not in the same degree with that which is corporall, and this was the reason of the ancient *lex talionis, oculus pro oculo, dens pro dente,* so that by that law *corporalis iniuria de præterito non recepit æst mationem:* But our law when the injury is already executed and inflicted, thinketh it best satisfaction to the party grieved to relieve him in damage, and to give him rather

profit than revenge; but it will never force a man to tolerate a corporall hurt, and to depend upon that inferiour kind of satisfaction, *ut in damagijs.*

Excusat aut extenuat delictum in capitalibus, quod non operatur idem in ciuilibus.

In Capitall causes *in fauorem vitæ*, the law will not punish in so high a degree, except the malice of the will and intention appeare; but in Civill trespasses and injuries that are of an inferiour nature, the law doth rather consider the damage of the party wronged, than the malice of him that was the wrong doer; and therefore

The law makes a difference betweene killing a man upon malice fore thought, and upon present heate: But if I give a man slanderous words, whereby I damnifie him in his name and credit, it is not materiall whether I use them upon suddaine choler and provocation, or of set malice; but in an action upon the case, I shall render damages alike.

So if a man bee killed by misadventure, as by an arrow at Buts, this hath a pardon of course: but if a man bee hurt or maimed onely, an action of trespasse lieth, though it be done against the parties minde and will, and he shall bee punished in the law, as deepely as if hee had done it of malice.

So if a Surgeon authorized to practise, doe through negligence in his cure cause the party to dye, the Surgeon shall not bee brought in question of his life; and yet if hee doe onely hurt the wound whereby the cure is cast backe, and death ensues not, hee is subject to an action upon the case for his misfeisance.

So if Baron and Feme bee, and they commit felony together, the Feme is neither principall nor accessary, in regard of her obedience to the will of her husband; but if Baron and Feme joine in committing a trespasse upon land or otherwise, the action may bee brought against them both.

Regula 7.

Standf. 28

6. Ed. q. 7.

Standf. 76

So if an infant within yeares of discretion, or a mad- man kill another, hee shall not bee impeached thereof; but if they put out a mans eye, or doe him like corporall hurt, hee shall be punished in trespasse.

So in felonies the law admitteth the difference of principall and accessarie, and if the principall dye, or bee pardoned, the proceeding against the accessary faileth; but in a trespasse, if one comnand his man to beare you, and the servant after the battery dye, yet your action of trespasse stands good against the Master.

Æstimatio præteriti delicti ex postremo facto

nunquam crescit.

The law construeth neither penall lawes, nor penall facts by intendments, but considereth the offence in degree, as it standeth at the time when it is committed; so as if any circumstance or matter bee subsequent, which laide together with the beginning should seeme to draw to it a higher nature, yet the law doth not extend or amplifie the offence.

Therefore if a man bee wounded, and the percussor is voluntarily let go at large by the Jailor, and after death ensueth of the hurt, yet this is no felonious escape in the Jailor.

So if the Villein strike the heire apparant of the Lord, and the Lord dieth before, and the person hurt who succeedeth to be Lord to the Villeine dieth after, yet this is no pettie treason.

So if a man compasse and imagineth the death of one that after commeth to bee King of the Land, not beeing any person mentioned within the Statute of 25. Ed. 3. this imagination precedent is not high treason.

So if a man use slanderous words of a person upon whom some dignitie after descends that maketh him a Peere of the Realme, yet he shall have but a simple action of the case, and not in the nature of a *scandalum Magnatum* upon the statute.

So if John Stile steale 6^{d}. from mee in monie, and the King by his proclamation doth raise monies, that the weight of silver in the piece now of 6^{d}. should goe for 12^{d}. yet this shall remaine pettie larcenie and no felonie; and yet in all civill reckonings the alteration shall take place: as if I contract with a labourer to doe some worke for 12^{d}. and the inhaunsing of monie commeth before I pay him, I shall satisfie my contract with a sixepenny piece so raised.

So if a man deliver goods to one to keepe, and after retain the same person into his service,

25. H. 6. 11.

17. H. 4. 19.

Regula 8.

11. H. 4. 12.

who afterwards goeth away with his goods, this is no felony by the statute of 21. H. 8. because he was no servant at that time.

In like manner, if I deliver goods to the servant

of I. S. to keepe, and after die and make I. S. my executor, and before any new commandement of I. S. to his servant for the custodie of the same goods, his servant goeth away with them; this is also out of the same statute. *quod nota.*

But note that it is said *præteriti delicti;* for any accessory before the fact is subject to all the contingencies pregnant of the fact if they bee pursuances of the same fact: As if a man command or counsell one to robbe a man, or beate him grievously and murther ensue, in either case he is accessarie to the murther; *quia in crimnalibus præstantur accidentia.*

Quod remedio destituitur ipsa re valet si

culpa absit.

The benignitie of the law is such, as when to preserve the principles and grounds of law it depriveth a man of his remedie without his owne fault, it will rather put him in a better degree and condition than in a worse; for if it disable him to pursue his action or to make his

claime, sometimes it will give him the thing it selfe by operation of law without any act of his owne, sometimes it will give him a more beneficiall remedie.

And therefore if the heire of the disseisor which is in by discent make a lease for life, the remainder for life unto the disseisee, and the lessee for life die, now the franketenement is cast upon the disseisee by act in law, and thereby hee is disabled to bring his *Precipe* to recover his right, whereupon the law judgeth him in his ancient right as strongly as if it had beene recovered

and executed by action, which operation of law is by an ancient terme & word of law called a remitter; but if there may bee assigned any default or laches in him, either in accepting the free hold, or in accepting the interest that drawes the free hold, then the law denieth him anie such benefit.

And therfore if the heire of the disseisor make a lease for yeares the remainder in fee to the disseisee, the disseisee is not remitted, and yet the remainder is in him without his own knowledge or assent; but because the free hold is not cast upon him by act in law it is no remitter. *quod nota.*

So if the heire of the disseisor infeoffe the disseisee and a stranger, and make him liverie, al-

23. H. 8. pl. 2.

18. Eliz. 175.

Regula. 9.

Lit. pl. 683.

Lit. pl. 615.

though the stranger die before any agreement or taking of the profits by the disseisee, yet he is not remitted, because though a moitie bee cast upon him by survivor, yet that is but *Ius accrescendi*, and it is no casting of the freehold upon him by act in law, but hee is still as an immediate purchasor, and therefore no remitter.

So if the husband bee seised in the right of his wife, and discontinue and dieth, and the feme takes another husband, who takes a feoffement from the discontinuee to him and his wife, the same is not remitted; and the reason is, because shee was once sole, and so a laches in her for not pursuing her right: but if the feoffement taken backe had been to the first husband and her selfe, she had been remitted.

Yet if the husband discontinue the lands of the wife, and the discontinuee make a feoffement to the use of the husband and wife, shee is not remitted; but that is upon a speciall reason, upon the letter of the statute of 27. H. 8. of uses, that wisheth that the *cestuy que use* shall have the possession in qualitie and degree as he had the use; but that holdeth place onely upon the first vesting of the use; for when the use is absolutely executed and vested, then it doth insue meerely the nature of possessions; as if the discontinuee had made a feoffement in fee to the use of I. S. for

life, the remainder to the use of baron and feme, and lessee for life die, now the feme is remitted, *causa qua supra*.

Also if the heire of the disseisor make a lease for life, the remainder to the disseisee who chargeth the remainder, and the lessee: for life dies, the disseisee is not remitted; and the reason is, his intermeddling with the wrongfull remainder, whereby he hath affirmed the same to be in him, and so accepted it: but if the heire of the disseisor had granted a rent charge to the disseisee, and afterwards made a lease for life, the remainder to the disseisee, and the lessee for life had died, the disseisee had been remitted, because there appeareth no assent or acceptance of anie estate in the freehold, but onely of a collaterall charge.

So if the feme be disseised and intermarry with the disseisor, who makes a lease for life, rendring rent, and dieth leaving a sonne by the same feme, and the sonne accepts the rent of the lessee for life, and then the feme dies, and the lessee for life dies, the sonne is not remitted, yet the franketenement was cast upon him by act in law, but because hee had agreed to be in the tortious reversion by acceptance of the rent, therefore no remitter.

So if tenant intaile discontinue, and the discontinuee make a lease for life, the remainder to

Semble incest

tale l??ment le ley dene[-] contrarie.

Lit. pl. 666.

2. M. Condic. 3.

14. H. 8. Dyer 3 10.

6. Ed. 3. 120.

28. H. 8. pl. 203.

the issue intaile beeing within age and at full age, the lessee for life surrendreth to the issue intaile and tenant

intaile dies, and lessee for life dies, yet the same issue is not remitted; and yet if the issue had accepted a feoffement within age, and had continued the taking of the profits when hee came of full age, and then the tenant intaile had died, notwithstanding his taking of the profits he had beene remitted: for that which guides the remitter, is, if he be once in of the free hold without any laches: as if the heire of the disseisor enfeoffes the heire of the disseisee who dies, and it descends to a second heire upon whom the frank tenement is cast by discent, who enters and takes the profits, and then the disseisee dies, this is a remitter, *causa qua supra.*

Also if tenant intaile discontinue for life, and take a surrender of the leasee, now hee is remitted and seised againe by force of the taile, and yet hee commeth in by his owne act: but this case differeth from all other cases, because the discontinuance was but particular at first, and the new gained reversion is but by intendment and necessity of law; and therefore is but as it were *ab initio*, with a limitation to determine whensoever the particular discontinuance endeth, and the state commeth backe to the ancient right.

To proceed from cases of remitter, which is a great branch of this rule, to other cases; If exe-

cutors do redeeme goods pledged by their testator with their owne money, the law doth convert so much goods as doth amount to the value of that they hide forth, to themselves in property, and upon a plea of fully administred it shall bee allowed: the reason is, because it may hee matter of necessitie, for the well administring of the goods of the testator, and executing their trust that they disburst money of their owne: for else perhaps the goods would bee forfeited, and hee that had them in pledge would not accept other goods but money, and so it is a libertie which the law gives them, and they cannot have any suite against themselves; and therefore the law gives them leave to retaine so much goods by way of allowance: and if their bee two executors, and one of them pay the money, hee may likewise retaine against his companion if hee have notice thereof.

But if there bee an overplus of goods, above the value of that he shall disburse, then ought he by his chime to determine what goods hee doth elect to have in value,or else before such election if his companion doe sell all the goods, hee hath no remedy but in Spirituall Court: for to say he should bee tenant in common with himselfe and his companion *pro rata* of that hee doth lay out, the law doth reject that course for intricatenesse.

So if I have a lease for yeares worth 20^{l}. by

Lit. pl. 3. 6

6. H. 8. pl. 3.

Dy.

3. Eliz. 187. pl. 8.

the yeare, and graunt unto I. D. a rent of 10^{l}. a yeare, and later make him my executor, now I. D. shall be charged with assets ten pounds onely and the other ten pounds shall be allowed and considered to him; and the reason is, because the not refusing shall bee accounted no laches unto him, because an executorship is *pium officium*, and matter of conscience and trust, and not like a purchase to a mans owne use.

Like law it is, where the debtor makes the debtee his executor, the debt shall bee considered in the assets, notwithstanding it bee a thing in action.

So if I have a rent charge, and graunt that upon condition, now though the condition be broken, the grantees estate is not defeated till I have made my claime; but if after such grant my father purchase the land, and it descend to mee, now if the condition be broken, the rent ceaseth without claime: But if I had purchased the

land my selfe, then I had extincted mine owne condition, because I had disabled my selfe to make my claime, and yet a condition collaterall is not suspended by taking backe an estate; as if I make a feoffement in fee, upon condition that I. S. shall marry my daughter, and take a lease for life from my feoffee, if the feoffee breake the condition, I may claime to hold in by my fee-simple; but the case of the charge is otherwise, for it I have a

rent charge issuing out of 20. acres, and graunt the rent over upon condition, and purchase but one acre, the whole condition is extinct, and the possibilitie of the rent by reason of the condition, is as fully destroyed as if there had beene no rent in *Esse*.

So if the King graunt to mee the wardship of I. S. the sonne and heire of I. S. when it falleth, because an action of covenant lieth not against the King, I shall have the thing my selfe in interest.

But if I let land to I. S. rendring a rent, with a condition of reentry, and I. S. bee attainted, whereby the lease comes to the King, now the demand upon this land is gone, which should give mee benefit of reentrie, and yet I shall not have it reduced without demaund; and the reason of difference is, because my condition in this case is not taken away in right, but onely suspended by the priviledge of the possession: for if the King grant the lease over, the condition is revived as it was.

Also if my tenant for life graunt his estate to the King, now if I will graunt my reversion over, the King is not compellable to atturne, therefore it shall passe by graunt by deede without atturnment.

19. H. 8. pl. 7. in fine.

22. Ass. 52. F. Rec. in volume

13.

2. H. 4. 21. Cond. 185. 2. H. 7. 5. 37. H. 6. 32.

6. Ed. 6. coud. 133.

Lit. pl. 135.

20 H. 7. per Pol.

25. H. 6. Fitz. Barr. 162.

30. H. 6. pl.

Graunts 91.

7. H. 6. 40.

9 Ed. 2. Fitz.

Atturnments

18.

8. Ed. 6. Dy. 72.

Vide contra 2. E. 3. fo. 8. que per presentment[-] del feme l advowson est deveign disimpropriate a touts iours quel est agree in Snr Cok. Rep.7. fo. 8. a.

So if my tenant for life bee, and I graunt my reversion *per auter vie*, and the grantee dye, living *cei que vie*, now the privity betweene tenant for life and mee is not restored, and I have no tenant in *esse* to atturne, therefore I may passe my reversion

without atturnement. *quod nota.*

So if I have a nomination to a Church, and another hath the presentation, and the presentation comes to the King, now because the King cannot bee attendant, my nomination is turned to an absolute patronage.

So if a man bee seised of an advouson, and take a wife, and after title of dower given her, joine in impropriating the Church, and dieth, now because the Feme cannot have the turne because of the perpetuall incumbency, shee shall have all the turnes daring her life; for it shall not bee disimpropriated to the benefit of the heire contrary to the graunt of tenant in fee-simple.

But if a man graunt the third presentment to I. S. and his heires, and impropriate the advouson, now the grauntee is without remedy, for hee tooke his graunt subject to that mischiefe at first, and therefore it was his laches, and therefore not like the case of the dower; and this graunt of the third avoidance is not like *tertia pars aduocationis,* or *medietas advocationis* upon a tenancy in common of the advouson; for if two tenants in

common bee, and an usurpation be had against them, and the usurper doe impropriate, and one of the tenants in common do release, and the other bring his writ of right *de medietate aduocationis* and recover, now I take the law to bee that because tenants in common ought to joine in presentment which cannot now be, he shall have the whole patronage: for neither can there bee an apportionment, that he should present all the turnes, and his incumbent but to have a moitie of the profits, nor yet the act of impropriation shall not bee defeated. But as if two tenants in common be of a Ward, and they joine in a writ of right of Ward and one release, the other shall recover the entire Ward, because it cannot be

divided: so shall it bee in the other case, though it be an inheritance, and though he bring his action alone.

As if a disseisor be disseised, and the first disseisee release to the second dissseisor upon condition, and a descent be call, and the condition broken; now the meane disseisor whose right is revived shal enter notwithstanding this descent, because his right was taken away by the act of a stranger.

But if I devise land by the statute of 32. H. 8. and the heire of the devisor enters and makes a feoffement in fee, and the feoffee dieth seised, this descent bindeth, and there shall not bee a

45. Ed. 3.

Le contrary

suit resolu in Martin Trotts. case, pa. 32. Eliz. in Com. banco, & Pa. 1. Iac. ib. vide 7. R 2. Scire fac. 3. 41. E. 3. 14. per Finchden.

perpetual liberty of entry upon the reason that he never had seison whereupon he might ground his action, but hee is at a mischiefe by his owne laches; and like law is of the Kings Pattentee; for I see no reasonable difference betweene them and him in the remainder, which is *Littletons* case.

But note, that the Law by operation and matter in fact will never countervaile and supply a title grounded upon a matter of record, and therfore if I be entituled unto a writ of error, and the land descend unto mee, I shall never be remitted, no more shall I bee unto an attaint, except I may also have a writ of right.

So if upon my avowry for services, my tenant disclaime where I may have a Writ of right as upon disclaimer, if the land after descend to me, I I shall never be remitted.

Verba generalia restringuntur ad habilitatem rei vel personæ.

It is a rule that the Kings graunts shall not bee taken or construed to a speciall intent; it is not so with the graunts of a common person, for they shall be extended as well to a forrein intent as to a common intent; yet with this exception, that they shall never bee taken to an impertinent

or a repugnant intent: for all words, whether they bee in deedes or statutes, or otherwise if they be general and not expresse and precise, shall bee restrained unto the fitnesse of the matter or person.

As if I graunt common *in omnibus terris meis* in D. and I have in D. both open grounds and severall, it shall not bee stretched to my common in severall, much lesse in my Gardens and Orchards.

So if I graunt to a man *omnes arbores meas crescentes super terraa meas in* D. hee shall not have Apple trees or other fruit trees growing in my Gardens or Orchards if there bee any other trees upon my ground.

So if I graunt to I. S. an annuitie of x. l. a yeare *pro consilio impenso & impendendo,* if I. S. bee a Physitian, it shall bee understood of his counsell in Physicke; and if he bee a Lawyer, of his counsell in Law.

So if I doe let a tenement to I. S. neere by my dwelling house in a Burrough, provided that hee shall not erect or use any shop in the same without my licence, and afterwards I licence him to erect a shop, and I. S. is then a Miller, hee shall not by vertue of these generall words erect a Joiners shop.

25. H. 8. Dy. 1. 7.

Regula 10.

Perk. pl 108.

14. H. 8. 2.

41. Ed. 3. 6. 19.

So the statute of Chantries that willeth all lands to be forfeited, given or imployed to a superstitious use shall not bee construed of the glebe lands of Parsonages: nay further, if the lands be given to the Parson of D. to say a Masse in his Church of D. this is out of the statute, because it shall bee intended but as an augmentation of his glebe; but otherwise had it beene if it had beene to say a Masse in any other Church but his owne.

So in the statute of wreckes, that willeth that goods wrackt where any live domesticall creature remaines in a vessell shall be preserved to the use of the owner that shall make his claime by the space of one yeare doth not extend to fresh victuals or the like which is impossible to keepe without perishing or destroying it; for in these and the like cases generall words may bee taken, as was laid to a rare and forreine intent, but never to an unreasonable intent.

Iura sanguinis nulla iure ciuili

dirimi possunt.

They bee the very words of the Civill law, which cannot bee amended to explaine this rule. *Hares est nomen Iuris, filius est nomen Natura:* therefore corruption of bloud taketh away the privitie of the one, that is, of the heire. but not

of the other, that is, of the sonne; therefore if a man bee attainted and murthered by a stranger the eldest sonne shall not have the appeale, because the appeale is given to the heire, for the youngest sonnes who are

equal in bloud shall not have it; but if an attainted person bee killed by his sonne, this is pettie treason, for that the privitieof a sonne remaineth: for I admit the law to be, that if the sonne kill his father or mother it is pettie treason, and that there remaineth so much in our lawes of the ancient foote-steps of *Potestas patriæ* and naturall obedience, which by the law of God is the very instance itselfe, and all other goverment and obedience is taken but by equitie, which I had, because some have thought to weaken the law in that point.

So if land descend to the eldest sonne of a person attainted from his ancestour, of the mother held in Knights service, the guardian shall enter, and ouste the father, because the law giveth the father that prerogative in respect hee is his sonne and heire; for of a daughter or a speciall heire intaile hee shall not have it: but if the sonne be attainted, and the father covenant in consideration of naturall love to stand seised of land to his use, this is good enough to raise an use, because the privity ofa naturall affection remaineth.

So if a man be attainted and have a Charter of pardon, and bee returned of a Jury betweene his

l8. Eliz. 337. Dyer.

Regula 11.

36. H. 6. 57. 58.

21. Ed. 3. 17.

F. N. Br. fo. 143.

sonne and I. S. the challenge remaineth; for hee may maintaine any suite of his sonne, notwithstanding the bloud be corrupted.

So by the statute of 21. the Ordinary ought to commit the administration of his goods that was attainted, and purchase his Charter of pardon to his children, though borne before the pardon, for it is no question of inheritance: for if one brother of the halfe bloud dye, the administration ought to bee committed to his other brother of the halfe bloud, if there bee no neerer by the father.

So if the uncle by the mother be attainted, and pardoned, and land descend from the father to the sonne within age held in soccage, the uncle shall be guardian in soccage; for that savoureth so little of the privity of heire, as the possibility to inherit shutteth not.

But if a Feme tenant intaile assent to the ravisher, and have no issue, and her cousin is attainted, and pardoned, and purchaseth the reversion, hee shall not enter for a forfeiture. For though the law giveth it not in point of inheritance, but onely as a perquisite to any of the bloud so hee bee next in estate, yet the recompence is understood for the staine of his bloud, which cannot bee considered when it is once wholly corrupted before.

So if a villein bee attainted, yet the Lord shall have the issues of his villein borne before or after the attainder; for the Lord hath them *Iure naturæ* but as the increase of a flocke.

Quaræ whether if the eldest sonne bee attainted, and pardoned, the Lord shall have aide of his tenants to make him a Knight, and it seemeth hee shall; for the words of the writ hath *filium primogenitum,* and not *filium & hæredem,* and the like writ hath *pur file marrier* who is no heire.

Receditur à placitis iuris, potius quam iniu-

riæ, & delicta maneant impunita.

The law hath many grounds and positive learnings, which are not of the maximes and conclusions of reason, but yet are learnings

received with the law, set downe, and will not have called in question: these may bee rather called *placita iuris* than *regulæ iuris;* with such maximes the law will dispense, rather than crimes and wrongs should bee unpunished, *quia salus populi suprema lex,* and *salus populi* is contained in the repressing offences by punishment.

Therefore if an advouson be graunted to two, and the heires of one of them, and an usurpation bee had, they both shall joine in a writ of right of advouson; and yet it is a ground in law, that a

5. Ed. 6. Adm. 47.

33. H. 6. 55.

5. Ed. 4. 5.

F. N. br. 829

Register. fol.

87.

Regula 12.

writ of right lieth of no lesse estate than a feesimple; but because the tenant for life hath no other severall action in the law given him, and also that the jointure is not broken, and so the tenant in fee-simple cannot bring his writ of right alone, therefore rather than hee shall bee deprived wholly of remedy, and this wrong unpunished, hee shall joine his companion with him, notwithstanding the feeblenesse of his estate.

But if lands bee given to two, and to the heires of one of them, and they leese in a *Precipe* by default, now they shall not joine in a writ of right, because the tenant for life hath a severall action, *viz.* a *quod ei deforciat,* in which respect the jointure is broken.

So if tenant for life and his lessor joine in a lease for *y*eares, and the lessee commit waste, they shall joine in punishing this waste, and *locus vastatus* shall goe to the tenant for life, and the damages to him in reversion, and yet an action of waste lieth not for tenant for life, but because hee in the reversion cannot have it alone, because of the meane estate for life, therefore rather than the waste shall bee unpunished, they shall joine.

So if two coperceners bee, and they lease the land, and one of them dye, and hath issue, and the lessee commit waste, the aunt and the issue shall joine in punishing this waste, and the issue shall

recover the moity of the place wasted, and the aunt the other moity and the entire damages;

and yet *actio iniuriarum moritur cum persona,* but *in favorabilibus magis attenditur quod prodest, quam quod nocet.*

So if a man recovers by erroneous judgement, and hath issue two daughters, and one of them is attainted, the writ of error shall bee brought against the parceners, notwithstanding the privity

faile in the one.

Also it is a positive ground, that the accessary in felony cannot bee proceeded against untill the principal I bee tryed; yet if a man upon subtilty and malice set a mad man by some device to kill him, and hee doth so, now

forasmuch as the mad man is excused, because hee can have no will, nor malice, the law accounteth the incitor as principall, though hee bee absent, rather than the crime shall goe unpunished.

So it is a ground of the law, that the appeale of murther goeth not to the heire where the party murthered hath a wife, nor to the younger brother where there is an elder; yet if the wife murther her husband, becauses shee is the party offendor, the appeale leaps over the heire; and so if the sonne and heire murther his father, it goeth to the second brother.

45. Ed. 3. 21.

45. Ed. 3. 3. 22. H. 6. 24.

20. Ed. 2.

F. discent. 162.

33. Eliz.

Fitz. Corone.

459.

Ed. 4. M. 23. 6. Stamff. lib. 2. fol. 60.

But if the rule bee one of the higher sort of maximes, that are *regulæ rationales* and not *positiuæ,* then the law will rather endure a particular offence to escape without punishment, than violate such a rule.

As it is a rule that penall statutes shall not bee taken by equity, and the statute of 1. *Ed.* 6. enacts that those that are attainted tor stealing of horses shall not have their Cleargy, the Judges conceived, that this did not extend to him that should steale but one horse, and therefore procured a new act for it in 2. *Ed. 6. cap.* 33. and they had reason for it, as I take the law, for it is not like the case upon the statute of *Glost.* that gives the action of waste against him that holds *pro termino vitæ vel annorum.* It is true, that if a man holds but for a yeare, he is within the statute, for it is to bee noted, that penall statutes are taken strictly and literally onely in the point of defining and setting downe the fact and the punishment, & in those clauses that doe concerne them, and not generally in words that are but circumstances and conveyance in the putting of the case, and so see the diversity; for if the law bee, that for such an offence a man shall leese his right hand, and the offender hath had his right hand before cut off in the warres, hee shall not lose his left hand, but the crime shall rather passe without the punishment which the law assigned, than

the letter of the law should bee extended; but if the statute of 1. *Ed. 6.* had beene, that hee that should steale one horse should bee ousted of his Cleargie, then there had beene no question at all but if a man had stolne more horses than one, but that hee had beene within the statute, *quia omne maius continet in se minus.*

Non accipi debent verba in demonstrationem falsam qua competunt in limitationem veram,

Though falsitie of addition or demonstration doth not hurt where you give the thing a proper name, yet neverthelesse if it stand doubtfull upon the words, whether they import a false reference and demonstration, or whether they be words of restaint that limit the generality of the former name, the law will never intend error or falsehood.

Therefore if the Parish of Hurst do extend into the Counties of Wiltsh. and Barksh. and I graunt my Close called Callis, situate and lying in the Parish of Hurst in the countie of Wiltsh. and the troth is, that the whole Close lieth in the County of Barksh. yet the law is, that it passeth wellenough, because there is a certaintie

sufficient in that I have given it a proper name which the false reference doth not destroy, and not upon the reason that these words, in the Countie of

Plow. 467.

Lit. cap. 46. Ed. 3. 31.

Regula 13

12. Eliz. 6. 295 23. Eliz. Dyer

376. 7. Ed. 6. Dy. 56.

Wiltsh. shall be taken to goe to the Parish onely, and so to bee true in some sort, and not to the Close, and so to be false. For if I had graunted *omnes terras meas in Parochia de Hurst in Com. Wiltsh.* and I had no lands in Wiltsh. but in Barksh. nothing had past.

But in the principall case, if the Close called Callis had extended part into Wiltsh. and part into Barksh. then onely that part had passed which lay in Wiltsh.

So if I graunt *omnes & singulas terras meas in tenura I. D. quas perquesiui de I. N. in Indentura dimimissionis fact I. B. specificat.* If I have land wherein some of these references are true and the rest false, and no land wherein they are all true, nothing passeth: as if I have land in the tenure of I. D. and purchased of I. N. but not specified in the Indenture to I. B. or if I have land which purchased of I. N. and specified in the Indenture of demise to I B. and not in the tenure of I. D.

But if I have some land wherin all these demonstrations are true, and some wherin part of them are true and part false, then shal they be intended words of true limitation to passe only those lands wherein all those circumstances are true.

Licet dispositio de interesse futuro sit inutilis, tamen potest fieri declaratio præcedens qua sortiatur effectum interueniente nouo actu.

The law doth not allow of grants except there be a foundation[-] of an interest in the grantor; for the law that will not accept of graunts of titles or of things in action which are imperfect interests, much lesse will it allow a man to graunt or incumber that which is no interest at all but meerely future.

But of declarations precedent before any interest vested, the law doth allow but with this difference, so that there be some new act or conveyance to give life & vigour to the declaration[-] precedent.

Now the best rule of distinction[-] between graunts & declarations, is, that graunts are never countermandable not in respect of the nature of the conveyance or instrument, though somtime in respect of the interest granted they are, wheras declarations evermore are countermandable[-] in their natures

And therefore if I graunt unto you, that if you enter into an obligation to me of 100 [l]. and after doe procure mee such a lease, that then the same obligation shall be void, and you enter into such an obligation unto me, & afterwards do procure such a lease, yet the obligation is simple, because the defeisance was made of that which was not.

So if I graunt unto you a rent charge out of white acre and that it shall be lawfull for you to distraine in all my other lands wherof I am now seised, and which I shall hereafter purchase, al-

9. Ed. 4. 7. 21. Ed. 3. 18.

18. Eliz.

29. Reg.

Regula 14.

20. Eliz.

19. H. 6. 63.

27 Ed. 3.

29. Ed. 3. 6. 24. Eliz.

13. 14. Eliz. 20. 21. Eliz. 25. Eliz.

M 38. &

39. Eliz.

36. Eliz.

though this bee but a libertie of distresse, and no rent save onely our of white acre, yet as to the lands afterwards to bee purchased the clause is voyd.

So if a reversion bee graunted to I. S. and I. D. a stranger by his deede doe graunt to I. S. that if he purchase the particular estate, hee will atturne to the graunt, this is a void atturnment, notwithstanding hee doth afterwards purchase the particular estate.

But of declarations the law is contrarie; as if the disseisee make a charter of feoffement to I. S. and a letter of atturney to enter and make livery and seisme, and deliver the deede of feoffement, and afterwards liverie and seisme is made accordingly, this is a good feoffement and yet hee had no other thing than a right at the time of the deliverie of the charter, but because a deede of feoffement is but matter of declaration and evidence, and there is a new act which is the liverie subsequent, therfore it is good in law.

So if a man make a feoffement to I.S. upon condition to enfeoffe I. N. within certaine dayes, and there are deedes made both of the first feoffement and the second, and letters of atturney accordingly, and both those deedes of feoffrment, and letters of atturney are delivered at a time, so that the second deede of feoffement

and letters of atturny are delivered when the first

feoffee had nothing in the land, and yet if both liveries bee made accordingly, all is good.

So if I covenant with T. S. by indenture, that before such a day I will purchase the mannour of D. and before the same day I will levy a fine of the same land, and that the same fine shall bee to certaine uses which I expresse in the same indenture, this indenture to leud uses being but matter of declaration and countermandable, at my pleasure will suffice, though the land be purchased after; because there is a new act to bee done, *viz.* the fine.

But if there were no new act then otherwise it is; as if I covenant with my sonne, in consideration of naturall love, to stand seised unto his use of the lands which I shall afterwards purchase, yet the use is voide; and the reason is, because there is no new act, nor transmutation of possession following to perfect this inception; for the use must bee limited by the feoffor, and not the feoffee, and hee had nothing at the time of the covenant.

So if I devise the mannour of D. by speciall name, of which at that time I am not seised, and after I purchase it, except I make some new publication of my will this device is voide; and the reason is, because that my death which is the

25. Eliz. 27. Eliz.

Com. Plowd. Rigdens case.

consummation of my will is the act of God, and nor my act, and therefore no such act as the law

requireth.

But if I grant unto I. S. authority by my deed to demise for yeares, the land whereof I am now seised, or hereafter shall bee seised; and after I purchase the lands, and I. S. my Atturney doth demise them, this is a good demise, because the demise of my atturney is a new act, and all one with a demise by my selfe.

But if I morgage land, and after covenant with I. S, in consideration of money which I receive of him, that after I have entred for the condition broken, I will stand seised to the use of the same I. S. and I enter, and this deede is enrolled, and all within the six months, yet nothing passeth away, because this enrollment is no new act, but a perfective ceremony of the first deede of bargaine and sale; and the law is more strong in that case, because of the vehement relation which the enrollment hath to the time of the bargaine and sale, at what time hee had nothing but a naked condition.

So if two Jointments bee, and one of them bargaine, and sell the whole land, and before the enrollment his companion dieth, nothing passeth of the moity accrued unto him by survivor.

In criminalibus sufficit generalis malitia in-

tentionis cum facto paris gradus.

All crimes have their conception in a corrupt intent, and have their consummation and issuing in some particular fact; which though it bee not the fact at which the intention of the malefactor levelled, yet the law giveth him no

advantage of that error, if another particular ensue of as high a nature.

Therefore if an impoisoned apple bee laid in a place to poison I. S. and I. D. commeth by chance and eateth it, this is murther in the principall that is actor, and yet the malice *in indiuiduo* was not against I. D.

So if a thiefe finde the doore open, and come in by night and rob an house, and bee taken with the manner, and breake a doore to escape, this is burglary, yet the breaking of the doore was without any felonious intent, but it is one entire act.

So if a Caliver bee discharged with a murtherous intent at I. S. and the Peece breake, and strike into the eye of him that dischargeth it and killeth him, hee is *felo de se*, and yet his intention was not to hurt himselfe; for *felonia de se* and murther are *crimina paris gradus.* For if a man perswade another to kill himselfe, and bee

11. Eliz.

6. Ed. 6. Br.

Regula 15.

18. Eliz. Sanders case com. 474.

Cr. 1. peace. 30.

present when hee doth so, hee is a murtherer.

But *quære*, if I S. lay impoisoned fruit for some other stranger his enemy, and his father or mother come and eate it, whether this bee petty treason, because it is not altogether *crimen paris*

gradus.

Mandata licita recipiunt strictam interpreta-

tionem, sed illicita, latam & extensam.

In commiting of lawful authoritie to another a man may limit it as strictly as it pleaseth him, and if the partie authorized doe transgresse his authoritie, though it bee but in circumstance expressed, it shall be void in the whole act.

But when a man is author and monitor to another to commit an unlawfull act, then he shall not excuse himselfe by circumstances not pur-

sued.

Therefore if I make a letter of attorney to I. S. to deliver liverie and seisin in the capitall Messuage, and hee doth it in another place of the land, or betweene the houres of 2. and 3. and he doth it after or before; or if I make a Charter of feoffement to I. D.and I. B. and expresse the seisin to be delivered to I. D. and my attorney deliver it to I. B. in all these cases the act of the atturney

as to execute the estate., is void; but if I say generally to I. D. whom I meane onely to enfeoffe, and my atturney make it to his atturney, it shall be intended, for it is a livery to him in law.

But on the other side, If a man command I. S. to robbe I. D. on Shooters-hill, and hee doth it on Gads-hill, or to robbe him such a day, and he doth it not himselfe but procureth I. B. to do it;

or to kill him by poison, and hee doth it by violence; in all these cases notwithstanding the fact bee not executed, yet hee is accessary neverthelesse.

But if it be to kill I. S. and he killeth I. D. mistaking him for I. S. then the acts are distant in substance, and he is not accessary.

And be it that the facts be of differing degrees, and yet of a kinde.

As if a man bid I. S. to pilfer away such things out of a house, and precisely restraine him to doe it sometimes when he is gotten in without breaking of the house, and yet hee breaketh the house, yet hee is accessary to the burglarie: for a man cannot condition with an unlawfull act, but he must at his perill take heede how hee putteth himselfe into another mans hands.

But if a man bid one robbe I. S. as he goeth to

Cr. Iust. pesse.

H. 8. 19.

Regula 16.

10. H. 7. 19. 15.

16.

16. El. Dy. 337.

16. El. Dy. 337. 11. El. Dy. 283. 38. H. 8. 68. Dy.

18. El. Sander case. Com. 429.

Ibid. ??

Sturbridge-faire, and he robbe him in his house the variance seemes to be of substance, and he is not accessarie.

De fide & officio Iudicis non recipitur quæ-

stio, sed de scientia, siue error sit Iuris siue facti.

The law doth so much respect the certainetie of judgement, and the credit and authoritie of Judges, as it will not permit any error to bee assigned that impeacheth them in their trust and office, and in wilfull abuse of the same, but only in ignorance, and mistaking either of the law or of the case and matter in fact.

And therefore if I will assigne for error, that whereas the verdict parted for me, the Court

received it contrary, and so gave judgement against me, this shall not be accepted.

So if I will alledge for errour, that whereas I. S. offered to plead a sufficient barre, the Court refused it, and draue me from it, this errour shall not be allowed.

But the greatest doubt is where the Court doth determine of the veritie of the matter in fact; so that is rather a point of tryall than a point of

judgement, whether it shall bee re-examined in errour.

As if an appeale of Mayhem bee brought, and the Court, by the assistance of the Chirurgians adjudge it to bee a Mayhem, whether the partie grieved may bring a writ of error, and I hold the Law to be he cannot.

So if one of the Prothonotaries of the Common pleas bring an assize of his office, and alleage fees belonging to the same office in certaintie and issue is taken upon these fees, this issue shall be tried by the Judges by way of examination, and if they determine it for the plaintiffe, and he have judgement to recover arrerages accordingly, the defendant can bring no writ of errour of this judgement, though the fees in troth be other.

So if a woman bring a writ of dower, and the tenaunt plead her husband was alive, this shall bee tried by proofes and not by jurie, and upon judgement given on either side no error lies.

So if *nul tiel record* be pleaded which is to bee tried by the inspection of the record, and judgement be thereupon given, no error lieth.

So if in the assize the tenant faith, he is *Countee de dale & nient nosme Countee,* in the writ this

18. Eliz. in Sanders case. 4 Com. 475.

Regula 17.

F. N. br. fol. 21. 7. H. 7. 4.

3. H. 6. aff. 3.

M. Dy. 114.

1. Mar. 5.

28. ass. pl. 15.

21. H. 7. 40. 33.

8. H. 4. 3.

1. Mar. Dy. 89. 5. Mar. Dy. 163.

8. H. 6. 23.

2. El. 285. Dy.

43. ass. 26.

41. ass. 5.

39. ass. 9.

5. Ed. 4. 3.

9. H. 7. 2.

19. H. 6. 52.

22. ass. pl. 24. 19. Ed. 4. 6.

shall bee tried by the records of the Chancerie, and upon judgement given no errour lieth.

So if a felon demaund his cleargy, and read well and distinctly, and the Court who is judge thereof doe put him from his cleargie wrongfully, errour shall never bee brought upon this attainder.

So if upon judgement given upon confession for default, and the Court doe assesse damages, the defendant shall never bring a writ, though the damage bee outragious.

And it seemeth in the case of mayhem, and some other cases, that the Court may dismisse themselves of discussing the matter by examinadon, and put it to a Jury, and then the party grieved shall have his attaint; and therefore it seemeth that the Court that doth deprive a man of his action, should bee subject to an action; but that, notwithstanding, the law will not have, as was laid in the beginning, the Judges called in question in the point of their office when they undertake to discusse the issue, and that is the true reason; for to say that the reason of these cases should bee, because tryall by the Court should bee peremptorie as tryall by certificate, (as by the Bishop in case of bastardy, or by the Marshall of the King &c.) the cases are nothing alike; for the reason of those cases of certificate

is, because if the Court should not give credit to the certificate, but should re-examin it, they have no other

meane but to write againe to the same Lord Bishop, or the same Lord Marshall, which were frivolous, because it is not to bee presumed they would differ from their former certificate; whereas in these other cases of error the matter is drawne before a superiour Court, to re-examine the errors of an inferiour Court: and therfore the true reason, as was said, that to examine againe that which the Court had tryed, were in substance to attaint the Court.

And therefore this is a certaine rule in error, that error in law is ever of such matters as were not crossed by the record, as to alledge the death of the tenant at the time of the judgement given, nothing appeareth upon record to the contrarie.

So when the infant levies a fine, it appeareth not upon the record that hee is an infant, therefore it is an error in fact, and shall bee tried by inspection during nonage.

But if a writ of error bee brought in the Kings Bench, of a fine levied by an infant, and the Court by inspection and examination doth affirme the fine, the infant, though it bee during his infancy, shall never bring a writ of error in the Parliament upon this judgement; not but that error lies after error, but because it doth now ap-

9. Ass. 8.

F. N. Br. 21.

21. Ass. 24. 11. H. 4. 41. 7. H. 6. 37.

F. N. Br. 21.

2. R. 3. 20.

peare upon the record that he is now of full age, therefore it can bee no error in fact. And therefore if a man will assigne for error that fact, that whereas the Judges gave judgement for him, the Clerkes entred it in the roll against him, this error shall not bee allowed, and yet it doth not touch the Judges but the Clerkes; but the reason is, if it bee an error, it is an error in fact; and you shall never alledge an error in fact contrary to the record.

Persona coniuncta æquiparatur interesse proprio.

The law hath that respect of nature and conjunction of bloud, as in divers cases it compareth and matcheth neerenesse of bloud with consideration of profit and interest, yea, and in some cases alloweth of it more strongly.

Therefore if a man covenant in consideration of bloud, to stand seised to the use of his brother, or sonne, or neere kinsman, an use is well raised of this covenant without transmutation of possession; neverthelesse it is true, that consideration of bloud is not to ground a personall contract upon: as if I contract with my sonne, that in consideration of bloud I will give unto him such a summe of mony, this is a *nudum pactum*, and no *assumpsit* lieth upon it; for to subject mee to an

action, there needeth a considerition of benefit but the use the law raiseth without suite or action; and besides, the law doth match reall considerations with reall agreements and covenants.

So if a suite bee commenced against mee, my sonne, or brother, I may maintaine as well as bee in remainder for his interest, or his Lawyer for his fee, and if my brother have a suite against my nephew or cousin, yet it is at my election to maintaine the cause of my nephew or cousin, though the adverse party bee neerer unto mee in bloud.

So in challenges of Juries, challenge of bloud is as good as challenge within distresse, and it is not materiall how farre off the kindred bee, so the pedegree can bee conveyed in a certainty whether it bee of the halfe bloud or whole.

So if a man menace mee, that hee will imprison, or hurt in body my father, or my childe, except I make such an obligation, I shall avoide this duresse, as well as if the duresse had beene to nine owne person: and yet if a man menace me, by taking away or destruction of my goods, this is no good duresse to pleade, and the reason is, because the law can make mee reparation of that losse, and so it cannot of the other.

So if a man under the yeares of 21, contract

F. N. Br. 21.

9. Ed. 4. 3.

Regula 18.

7. & 8. Eliz.

19. Ed. 4. 9.

19. Ed. 4. 22. 22. H. 6. 35.

21. H. 6. 17. 10.

22. H. 6. 5. 20. H. 6. 14. H. 6. 6. 14. H. 7. 2.

14. & 15. Ibid.

21.Ed. 4. 75. Com. 415.

15. H. 6. 17.

39. H. 6. 50.

21. Ed. 4. 13. 13. H. 6. 21. 15. Ed. 4. 11.

39. H. 6. 91.

7. Ed. 4. 21. 20. Ass. 14.

for the nursing of his lawfull childe; this contract is good, and shall not bee avoided by infancy no more than if hee had contracted for his owne aliments or erudition.

Non impedit clausula derogatoria, quo minus ab eadem potestate res dissoluantur a quibus constituuntur.

Acts which are in their natures revocable cannot by strength of words be fixed or perpetuated, yet men have put in ure two meanes to binde themselves from changing or dissolving that which they have let downe, whereof one is *clausula derogatoria,* the other *interpositio iuramenti,* whereof the former is onely pertinent to this present purpose.

This *clausula derogatoria* is by the common practicall terme called *clausula non obstante de futuroesse*, the one weakening and disanulling any matter past to the contrarie, the other any matter to come, and this latter is that only whereof we speake.

The Clausula de non obstante de futuro, the law judgeth to be idle and of no force, because it doth deprive men of that which of all other things is most incident to humane condition, and that is alteration or repentance.

Therefore if I make my will, and in the end thereof doe adde such like clause, [Also my will is if I shall revoke this present will, or declare any new will, except the same shall bee in writing, subscribed with the hands of two witnesses, that such revocation or new declaration shall be utterly void, and by these presents I doe declare the same not to bee my will, but this my former will to stand] any such pretended will to the contrarie notwithstanding; yet neverthelesse this clause or any the like never so exactly penned, and although it do restraine the revocation but in circumstance and not altogether, is of no force or efficacie to fortifie the former will against the second, but I may by paroll without writing repeale the same will, and make a new.

So if there bee a statute made that no Sheriffe shall continue in his office above a yeare, and if any Pattent be made to the contrarie, it shall bee voide, and if there be any *Clausula de non obstante* contained in such Pattent to dispence with this present act, that such clause also shall be void; yet neverthelesse a Pattent of the Sheriffes office made by the King with a *non obstante* will bee good in law, contrary to such statute, which pretendeth to exclude *non obstantes,* and the reason is, because it is an inseparable prerogative of the Crowne to dispence with politicke statutes and of that kinde, and then the derogatory clause hurteth not.

Perk. 4.

D. cap. 28.

Regula 19.

28. Ed. 3. cap. 7. 24. Ed. 3. cap. 9 2. H. 7. 6.

So if an act of Parlament bee made wherein there is a clause contained, that it shall not bee lawfull for the King by authoritie of Parliament during the space of seven yeares to repeale and determine the same act, this is avoid clause, and such act may be repealed within the seven yeares, and yet if the Parliament should enact in the nature of the ancient *Lex Regia,* that there should bee no more Parliaments held, but that the King should have the authoritie of the Parlament; this act were good in Law, *quia potestas suprema seipsum dissoluere potest, legare non potest:* for as it is in the power of a man to kill a man, but it is not in his power to save him alive and to restraine him from breathing or feeling; so it is in the power of a Parliament to extinguish or transfer their own authoritie, but not whilst the authoritie remaines entire to restraine the functions and exercises of the same authoritie.

So in the 28. of K. H. 8. chap. 17. there was a statute made, that all acts that passed in the minority of Kings, reckoning the same under the years of 24. might be annulled and revoked by their letters patents when they came to the same years; but this act in the first of K. Ed. 6. who was then between the years of 10.& 11 . ca. 11. was repealed, and a new law surrogate in place thereof, wherein a more reasonable libertie was given: and wherein, though other lawes are made revocable according to the provision of the former law

with some new forme prescribed, yet that verie Law of revocation, together with pardons, is made irrevocable and perpetuall; so that there is a direct contrarietie betweene these two lawes: for if the former stands, which maketh all latter lawes during the minoritie of Kings revocable without exception of anie law whatsoever, then that very law of repeale is concluded in the generalitie, and so it selfe made revocable: on the other side, that law making no doubt of the absolute repeale of the first law, though it selfe were made during the minoritie, which was the verie case of the former law in the new provision which it maketh, hath a precise exception, that the law of repeale shall not be repealed.

But the law is, that the first law by the impertinency of it was void *ab initio & ipso facto* without repeale, as if

a law were made, that no new statutes should be made during 7. yeares, and the same statute be repealed within the 7. yeares, if the first statute should bee good, then the repeale could not bee made thereof within that time; for the law of repeale were a new law, and that were disabled by the former law, therefore it is void in it selfe, and the rule holds, *perpetua lex est nullam legem humanum as positinam perpetuam esse, & clausula que abrogationem excludis initio non*

males.

Neither is the difference of the civill law so

14. El. Dy. 313. P. C. * 563.

reasonable as colourable, for they distinguish and say that a derogatorie clause is good to disable any latter act, except you revoke the same clause before you proceed to establish any later di[s]position, or declaration; for they say, that *clausula derogatoria ad alias sequentes voluntates posita in testamento (viz. si testator dicat qd' si contigerit eum facere aliud testamentum non vult ibud valere) operatur quod sequens dispositio ab ipsa clausula reguletur & per consequens quod sequens dispositio duretur sine voluntate & sic quod non sit attendendum.* The sense is, that where a former will is made, and after a later will, the reason why without an expresse revocation of the former will it is by implication revoked, is because of the repugnancie betweene the disposition of the former and the later.

But where there is such a derogatorie clause, there can bee gathered no such repugnancy, because it seemeth that the testator had a purpose at the making of the first will to make some shew of a new will, which neverthelesse his intention was should not take place: but this was answered before . for if that clause were allowed to be good untill a revocation, then would no revocation at all be made, therefore it must needs be void by operation of law at first. Thus much of *Clausula derogatoria.*

Actus inceptus cuius perfectio pendet ex voluntate partium reuocari potest, si autem pendet ex voluntate tertiæ persona vel ex contigenti non potest.

In acts that are fully executed and consummate, the law makes this difference, that if the first parties have put it in the power of a third person, or of a contigency, to give a perfection to their acts, then they have put it out of their owne reach and liberty; therefore there is no reason they should revoke them: but if the consummation depend upon the same content, which was the inception, then the law accounteth it in vaine to restraine them from revoking of it, for as they may frustrate it by omission, and *non feisance*, at a certaine time or in a certaine sort, or circumstance, so the law permitteth them to dissolve it by an expresse consent, before that time, or without that circumstance.

Therefore if two exchange land by deede, or without deede, and neither enter, they may make a revocation or dissolution of the same exchange by mutuall consent, so it bee by deede, but not by paroll, for as much as the making of an exchange needeth no deede, because it is to be perfected by entry, which is a ceremony notorious in the nature of a liverie; but it cannot bee dissolved but by deede, because it dischargeth that which is but title.

Regula 20.

F. N. Br. 36.

13. H. 7. 13. 14.

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13. H. 7. 19.

2. R 2. Parliament 8.

So if I contract with I. D. that if hee lay mee

into my seller three tunnes of wine before Mich. that I will bring into his Garner 20. quarters of wheat before Christmas, before either of these dayes the parties may by assent dissolve the contract; but after the first day there is a perfection given to the contract by action on the one side, and they may make crosse releases by deede or paroll, but never dissolve the contract; for there is a difference betweene dissolving the contract and release or surrender of the thing contracted for: as if lessee for 20. yeares make a lease for 10. yeares, and after he take a lease for 5. yeares, yet this cannot inure by way of surrender: for a pettie lease derived out of a greater cannot bee surrendred backe againe, but inureth onely by dissolution of contract; for a leaseof land is but a contract executorie from time to time of the profits of the land, to arise as a man may sell his corn or his tythe to spring or to be perceived for divers future yeares.

But to return from our digression, on the other side, if I contract with you for cloath at such a price as I. S. shall name; there if I. S. refuse to name, the contract is void, but the parties cannot discharge it, because they have put it in the power of the third person to perfect.

So if I graunt my reversion, though this be an imperfect act before atturnement, yet because the

atturnment is the act of a stranger, this is not simply revokable, but by a policie or circumstance in law, as by levying a fine, or making a bargaine and sale, or the like.

So if I present a Clerke to the Bishop, now can I not revoke this presentation, because I have put it out of my selfe, that is the Bishop by admission to perfect my act begunne.

The same difference appeareth in nominations and elections; as if I enfeoffe such a one as I. D. shall name within a yeare, and I. D. name I. B. yet before the feoffement and within the yeare I. D. may countermand his nomination and name againe, because no interest passeth out of him. But if I enfeoffe I. S. to the use of such a one as I. D. shall name within a yeare, then if I. D. name I. B. it is not revocable, because the use passeth presently by operation of law.

So in judiciall acts the rule of the civill law holdeth, *sententia interlocutoria reuocari potest;* that is, that an order may be revoked, but a judgement cannot; and the reason is, because there is a title of execution or barre given presently unto the partie upon judgement, and so it is out of the Judge to revoke in Courts ordered by the common law.

31. Ed. 1. F. Q.

Imp. 185. 14. Ed. 4. 2. 38. Ed. 3. 35.

Clausula vel dispositio inutilis per presumptionem remotam vel causam, ex post facto non fulcitur.

Clausula vel dispositio inutilis are said, when the act or the words doe worke or expresse no more than the law by intendment would have supplied; and therefore the doubling or iterating of that and no more, which the conceit of law doth in a sort prevent and preoccupate, is reputed nugation, and is not supported and made of substance either by a forreine intendment of some purpose, in regard whereof it might bee materiall, nor upon any cause emerging afterwards, which may induce an operation of those idle words.

And therefore if a man demise land at this day to his sonne and heire, this is a voide devise, because the disposition of law did cast the same upon

the heire by descent, and yet if it be Knights service land, and the heire within age, if hee take by the devise

hee shall have two parts of the profits to his owne use, and the guardian shall have benefit but of the third; but if a man devise land to his two daughters, having no sonnes, then the devise is good, because hee doth alter the disposition of law, for by the law they shall take in copercenarie, but by the devise they shall take jointly, and this is not any forreine collaterall purpose, but in point of taking of estate.

So if a man makes feoffement in fee, to the use of his last will and testament, these words of speciall limitation are voide, and the law reserveth the ancient use to the feoffor and his heires: and yet if the words might stand, then might it bee authority by his will to declare and appoint uses, & then though it were Knights service land, hee might dispose the whole. As if a man make a feoffement in fee, to the use of the will and testament of a stranger, there the stranger may declare an use of the whole by his will, notwithstanding it bee Knights service land, but the reason of the principall case is, because uses before the statute of 27. *H.* 8. were to have beene disposed by will, and therefore before that statute an use limited in the forme aforesaid, was but a frivolous limitation, in regard of the old use that the law reserved was devisable; and the statute of 27. altereth not the law, as to the creating and limiting of any use, and therefore after that statute, and before the statute of wills, when no land could have beene devised, yet was it a voide limitation as before, and so continueth to this day.

But if I make a feoffement in fee, to the use of my last will and testament, thereby to declare an estate taile and no greater estate; and after my death and after such estate declared shall expire, or in default of such declaration then to the use of I. S. and his heires, this is a good limitation,

Regula 21.

32. H. 8. Goord. 39. Ber. 2. M.

Br. devises 41.

39. H. 8. Dy. 12.

19. H. 8. 11.

5. Ed. 4. 8.

and I may by my will declare an use of the whole land to a stranger, though it bee held in knights service, and yet I have an estate in fee simple by vertue of the old use during life.

So if I make a feoffement in fee to the use of my right heires, this is a void limitation and the use reserved by the law doth take place, and yet if the limitation should be good the heire should come in by way of purchase, who otherwise commeth in by descent, but this is but a circumstance which the law respecteth not, as was proved before.

But if I make a feoffement in fee to the use of my right heires, and the right heires of I. S. this is a good use, because I have altered the disposition of law; neither is it void for a moitie, but both our right heires when they come in beeing shall take by joint purchase, and hee to whom the first falleth shall take the whole subject, neverthelesse to his companions titles, so it have not descended from the first heire to the heire of the heire: for a man cannot bee joint tenant claiming by purchase, and the other by descent, because they be severall titles.

So if a man having land on the part of his Mother make a feoffement in fee to the use of himselfe and his heires, this use though expressed, shall not goe to him and the heires of the part of

his Father as a new purchase, no more than it should have done if it had beene a feoffement in fee nakedly without consideration, for the intendment is remote. But if baron and feme bee, and they joine in a fine of the

femes land, and expresse an use to the husband and wife and their heires: this limitation shall give a joint estate by intierties to them both, because the intendment of law would have conveyed the use to the feme alone. And thus much touching forreine intendments.

For matter *ex post facto*, if a lease for life bee made to two, and the survivor of them, and they after make partition: now these words (and the survivor of them should seeme to carry purpose as a limitation, that either of them should bee stated of his part for both their lives severally; but yet the law at the first construeth the words but words of dilating to describe a joint estate; and if one of them dye after partition there shall bee no occupant, but his part shall revert.

So if a man graunt a rent charge out of 10. acres, and grant further that the whole rent shall issue out of everie acre, and distresse accordingly, & afterwards the grauntee purchase an acre: now this clause should seeme to be material to uphold the rent; but yet neverthelesse the law at first accepteth of these words but as words of explana-

29. H. 8. 11. 6. Ed. 4. 8.

32. H. 8. 43. Dy. 20. H. 8. 8. Dyer. 7. Eliz. 237. Dy.

20. E1. 274. Dy.

2. Ed. 3. 29.

30. E. 1. Fitz.

Devise. 9.

4. M. 133.

pl. 6. Dyer.

5. Ed. 4. 8.

29. H. 8. 28.

30. aff. 8. Fitz. part. 16.

31. H. 8. 46. P. 7. D.

4. E. 6. Com. 33.

per Hinde.

27. H. 8. 6.

tion, and then notwithstanding the whole rent is

extinct.

So if a gift intaile be made upon condition, that,

if tenaunt intaile die without issue it shall be lawfull for the donor to enter and the donee discontinue and die without issue: now this condition should seeme materiall to give him benefit of entrie, but because it did at the first limit the estate according to the limitation of law, it worketh nothing upon this matter emergent

afterward.

So if a gift intaile bee made of lands held in Knights service with an expresse reservation of the same service, whereby the land is held over, and the gift is with warrantie, and the land is evicted, and other land recovered in value against the donor held in soccage, now the tenure which the law makes betweene the donor and donee shall be in soccage, and not in knights service, because the first reservation was according to the oweltie of service, which was no more than the law would have reserved.

But if a gift intaile had beene made of lands held in soccage with a reservation of knights

service tenure, and with warrantee, then because the intendment of law is altered the new land shall be held by the same service the last land was, without any regard at all to the tenure para-

22. Aff. pl. 52.

mount: and thus much of matter *ex post pacto.*

This Rule faileth where that the law saith as much as the partie, but upon forreine matter not pregnant and appearing upon the same act, and conveyance, as if lessee for life be, and bee lets for 20. yeares, if he live so long; this limitation (if he live so long) is no more than the law saith, but it doth not appear upon the same conveyance or act, that this limitation is nugatorie, but it is forreine matter in respect of the truth of the state whence the lease is derived: and therefore if lessee for life make a feoffement in fee, yet the state of the lease for yeares is not enlarged against the feoffee, otherwise had it beene if such limitation had not beene but that it had beene left onely to the law.

So if tenant after possibility make a lease for yeares, and the donor confirmes to the lessee to hold without impeachment of waste during the life of tenant intaile, this is no more than the law saith, but the priviledge of tenaunt after possibilitie is forreine matter, as to the lease and confirmation: and therefore if tenant after possibilitie doe surrender, yet the lessee shall hold dispunishable of waste; otherwise had it been if no such confirmation at all had beene made.

Also heede must be given that it be indeed the same thing which the law intended, and which

16. H. 7. 4.

per Keble.

24. Ed. 3. 28. Fitz. pl. 98.

the partie expresseth, and not like or resembling, and such as may stand both together: for if I let land for life rendring a rent, and by my deede warrant the same land, this warranty in law and warrantie in deed are not the same thing, but may both stand together.

There remaneth yet a great question on this rule.

A principall reason wherupon this rule is built, should seeme to bee because such acts or clauses are thought to be but declaratorie & added upon ignorance and *ex consuitudine Clericorum* upon observing of a common forme, and not upon purpose or meaning, and therefore whether by particular and precise words a man may not controule the intendment of the law.

To this I answer, that no precise or expresse words will controule this intendment of lawbut as the generall words are void, because they say contrary to that the law saith; so are they which are thought to bee against the law: and therefore if I demise my land beeing knights

service tenure to my heire, and expresse my intention to be, that the one part should descend to him as the third appointed by statute, and the other he shall take by devise to his owne use, yet this is void; for the law saith hee is in by discent of the whole, and I say, he shall be in by devise,

which is against the Law.

But if I make a gift intaile, and say upon condition, that if tenant intaile discontinue and after die without issue it shall bee lawfull for me to enter; this is a good clause to make a condition, because it is but in one case, and doth not erode the law generally: for if the tenant intaile in that case bee disseised and a descent cast, and dye without issue, I that am the donor shall not enter.

But if the clause had beene provided, that if tenant intaile discontinue, or suffer a descent, or doe anie other fact whatsoever, that after his death without issue it shall bee lawfull for mee to enter: now this is a voyd condition, for it importeth a repugnancy to law: as if I would overrule that where the law saith I am put to my action, I neverthelesse will reserve to my selfe an entrie.

Non videtur consensum retinuisse si quis ex præscripto minantis aliquid immutauit.

Although choise and election bee a badge of consent, yet if the first ground of the act bee duresse, the law will not construe that the duresse doth determine, if the party duressed doe make any motion or offer.

20. Ed. 2. Fitz. 7 21. Ed. 1. zouch. 289.

Lit. pl. 362..

Regula 22.

Therefore if a party menace mee, except I make unto him a bond of 40. l. and I tell him that I will nor do it, but I will make unto him a bond of 20. l. the law shall not expound this bond to be voluntarie, but shall rather make construction. that my minde and courage is not to enter into the greater bond for any menace, and yet that I enter by compulsion, notwithstanding, into the lesser.

But if I will draw any consideration to my selfe, as if I had said, I will enter into your bond of 40. l. if you will deliver me that piece of Plate, now the duresse is discharged, and yet if it had beene moved from the duressor, who had said at the first, you shall take this piece of Plate, and make me a bond of 40. l. now the gift of the Plate had beene good, and yet the bond shall bee avoided

by duresse.

Ambiguitas verborum Latens verificatione suppletur, nam quod ex facto oritur ambiguum verificatione facfi tollitur.

There bee two sorts of ambiguities of words, the one is *Ambiguitas Patens*, and the other *Latens. Patens* is that which appeares to bee ambiguous upon the deed or instrument, *Latens* is that which seemeth certaine and without ambiguitie, for any thing that appeareth upon the

deed or instrument, but there is some collateral matter out of the deed, that breedeth the ambiguity.

Ambiguitas Patens is never holpen by averrement, and the reason is, because the law will not couple and mingle matter of specialty, which is of the higher account, with matter of averrement, which is of inferiour account in law; for that were to make all deedes hollow, and subject to averrements, and so in effect, that to passe without deede, which the law appointeth shall not passe but by deed.

Therefore if a man give land to *I. D. & I. S. & haredibus*, and doe not limit to whether of their heires, it shall not bee supplied by averrement to whether of them, the intention was, the inheritance should bee limitted.

So if a man give land intaile, though it bee by will, the remainder intaile, and adde a *Proviso*, in this manner: Provided that if hee or they or any of them doe any &c. according to the usuall clauses of perpetuities, it cannot be averred upon the ambiguities of the reference of this clause, that the intent of the devisor was, that the restraint should goe onely to him in the remainder, and the heires of his body; and that the tenant intaile in possession, was meant; to bee at large.

Regula 23.

Of these, infinite cases might be put, for it holdeth generally that all ambiguitie of words by matter within the deed, and not out of the deed, shall bee holpen by construction, or in some case by election,but never by averrement, but rather shall make the deed voide for uncertainty.

But if it be *Ambiguitas Iatens*, then otherwise It is: as if I graunt my mannour of S. to I. F. and his heires, here appeareth no ambiguitie at all; but if the truth be that I have the mannours both of South S. and North S. this ambiguity is matter in fact, and therefore it shall bee holpen by averrement, whether of them was that the party intended should passe.

So if I set forth my land by quantity, then it shall bee supplied by election, and not averment.

As if I graunt ten acres of wood in sale, where I have an hundred acres, whether I say it in my deed or no that I graunt out of my hundred acres, yet here shall be an election in the grauntee, which ten hee will take.

And the reason is plaine, for the presumption of the law is, where the thing is onely nominated by quantity, that the parties bad indifferent intentions, which should be taken, and there being no cause to helpe the uncertainty by intention, it shall bee holpen by election.

But to the former case the difference holdeth, where it is expressed and where not; for if I recite, Whereas I am seised of the mannour of North S. and South S. I lease unto you *unum manerium de S.* there it is clearely an election: so if I recite, Where I have two tenements in St. *Dunstans*, I lease unto you *unum tenementum*, there it is an election, not averment of intention, except the intent were of an election, which may be specially averred.

Another sort of *Ambiguitas latens* is correlative unto these: for this ambiguitie spoken of before, is when one name and appellation doth denominate divers things, and the second, when the same thing is called by divers names.

As if I give lands to Christ Church in Oxford, and the name of the Corporation is *Ecclesia Christi in Vniuersitate Oxford*, this shall be holpen by averrement, because there appeares no ambiguitie in the words: for this variance is matter in fact, but the averment shall not bee of intention, because it doth stand with the words.

For in the case of equivocation the generall intent includes both the speciall, and therefore stands with the words: but so it is not in variance, and therefore the averrement must be of matter, that doe endure quantitie, and not intention.

As to say of the precinct of Oxford, and of the universitie of Oxeford is one and the same, and not to say that the intention of the parties was, that the graunt should bee to Christ-Church, in that Universitie of Oxeford.

Licit a bene miscentur, formula nisi iuris

obstet.

The law giveth that favour to lawfull acts that although they bee executed by severall authorities, yet the whole act is good.

As when tenant for life is the remainder in fee, and they joine in a liverie by deede or without, this is one good entire liverie drawne from them both, and doth not inure to a surrender of the particular estate if it be without deede or confirmation of those in the remainder, if it bee by deede, but they are all parties to the livery.

So if tenant for life the remainder in fee bee, and they ioine in graunting a rent, this is one solid rent out of both their estates, and no double rent, or rent by confirmation.

So if tenant intaile be at this day, and he make

a lease for three lives, and his owne, this is a good lease and warranted by the statute of 32. H. 8. and yet it is good in part by the authoritie which tenant intaile hath by the common law, that is, for his own life, and in part by the authoritie which he hath by the statute, that is, for the other three lives.

So if a man seised of lands deviseable by custome, and of other land held in knights service, and devise all his lands, this is a good devise of all the land customarie by the common law, and of two parts of the other land by the statutes.

So in the Starchamber a sentence may bee good, grounded in part upon the authority to

given the Court by the statute of 3. H. 7.and in part upon that ancient authoritie which the Court hath by the common law, and so upon severall commissions.

But if there be any forme which law appointeth to bee observed, which cannot agree with the diversities of authorities, then this rule faileth.

As if three Coparceners be, and one of them alien her purpartie, the feoffee and one of the sisters cannot joine in a writ *de part' facienda*, *be*cause it behooveth the feoffee to mention the statute in his writ.

Regula 24.

Semble cleerement le ley d'estre contrary in ambideux cases, car lou est sans fait est livery solement decestui in le rem' & surr' de partie' ten' auterment sor-

ra forfeiture de son estate, & iou est per fait le liverie passa solement de tenant, car ??

ad le franketenement, vide accordat. Sur' Co. lib. 1. 76. b. 77. a. Com. Plow. 59. A. 140.

2. H. 5. 7. 13. H. 7. 14. 13. E. 4. 4. 2. 27. H. 8. 13. M. 16. & 17. El. Dy. 339.

Quære.

Vide 1. Instit. 166. b.

Præsentia corporis tollit errorem Nominis,

& veritas nominis tollit errorem Demonstrati-

onis.

There be three degrees of certaintie. 1. Presence.

2. Name.

3. Demonstration or Reference. Whereof the Presence the law holdeth of greatest dignitie, the Name in the second degree, and the Demonstration or Reference in the lowest, and alwayes the errour or falsitie in the lesse worthy.

And therefore if I give a horse to I. D. being present, and say unto him, I. S. take this, this is a good gift, notwithstanding I call him by a wrong name; but so had it not beene if I had delivered him to a stranger to the use of I. S. where I meant I. D.

So if I say unto I. S. here I give you my ring with the Ruby, and deliver it with my hand, and the Ring beare a Diamond and no Rubie, this is a good gift notwithstanding I name it amisse.

So had it beene if by word or writing without the deliverie of the thing it selfe, I had given the Ring with the Ruby, although I had no such, but only one with a Diamond which I meant, yet it would have passed.

So if I by deede graunt unto you by generall Words, all the lands that the King hath passed unto me by letters pattents dated 10. May unto this present Indenture annexed, and the Pattent annexed have date 10. July, yet if it bee proved that that was the true Pattent annexed, the presence of the Pattent maketh the error of the date recited not materiall; yet if no Pattent had been annexed, and there had beene also no other certaintie given, but the reference of the Pattent, the date whereof was mis-recited, although I had no other Pattent ever of the King, yet nothing would have passed.

Like law is it, but more doubtfull, where there is not a presence but a kinde of representation, which is lesse worthie than a presence, and yet more worthie than a Name or Reference.

As if I covenant with my Ward, that I will tender unto him no other marriage, than the gentlewoman, whose picture I delivered him, and that picture hath about it *Ætatis sua anno. 16.* and the gentlewoman is seventeene yeares old, yet neverthelesse if it can bee proved that the picture was made for that gentlewoman, I may notwithstanding this mistaking, tender her well enough.

So if I graunt you for life a way over my land according to a plot intended betweene us, and

Regula 25.

after I graunt unto you and your heires a way according to the first plot intended, whereof a table is annexed to these presents, and there bee some speciall variance betweene the table and the originall plot, yet this representation shall be certaintie sufficient to lead unto the first plot, and you shall have the way in fee neverthelesse, according to the first plot, and not according to the table.

So if I graunt unto you by generall words the land which the King hath graunted mee by his letters pattents, *Quarum tenor sequitur in hæc verba, &c.* and there bee some mistaking in the recitall and variance from the originall pattent, although it bee in a point materiall, yet the representation of this whole pattent shall bee as the annexing of the true pattent, and the graunt shall not be void by this variance.

Now for the second part of this rule touching the Name and the Reference, for the explaining thereof, it must bee noted what things sound in demonstration or addition: as first in lands, the greatest certaintie is, where the land hath a name proper, as the manner of Dale, Grandfield, &c. the next is equall to that, when the land is set forth by bounds and abuttals, as a close of pasture bounding on the East part upon Emsdenwood, on the South upon, &c. It is also a sufficient name to lay the generall boundarie, that is,

some place of larger precinct, if there be no other land to passe in the same precinct, as all my lands in Dale, my tenement in S. Dunstans parish, &c.

A farther sort of denomination is to name land by the attendancy they have to other lands more notorious, as parcell of my manour of D. belonging to such a Colledge lying upon Thames banke.

All these things are notes found in denomination of lands, because they be signes to call, and therefore of propertie to signifie and name a place; but these notes that sound only in demonstration and addition, are such as are but transitorie and accidentall to the nature of the place.

As *modo in tenura & occupatione,* of the proprietorie tenure or possessor is but a thing transitorie in respect of land; *Generatio venit, generatio migrat, terra autem manet in æternum.*

So likewise matter of conveyance, title, or instrument,

As, *quæ perquisiui de I. D. quæ descendebant à I. N. patre meo,* or, *in prædicta Indentura dimissionis,* or, *in prædictis literis patentibus specificat.*

So likewise *continent' per æstimationem 20. acras,* or if *(per astimationem)* be left out, all is one,

for it is understood, and this matter of measure, although it seeme locall, yet it is indeede but opinion and observation of men.

The distinction beeing made, the rule is to bee

examined by it.

Therefore if I graunt my close called Dale in in the parish of Hurst, in the Countie of Southhampton, and the parish likewise extendeth into the Countie of Barkshire, and the whole close of Dale lieth in the Countie of Barkshire, yet because the parcell is especially named, the falsitie of the addition hurteth not, and yet this addition is found in name, but (as it was said) it was lesse worthie than a proper name.

So if I graunt *tenementum meum,* or *omnia tenementa mea* (for the universall and indefinite to this purpose are all one) *in parochia Sancti Butolphi extra, Aldgate* (where the veritie is *extra Bishopsgate) in tenura Guilielmi,* which is true, yet this grant is void, because that which sounds in denomination is false which is the more worthy, and that which sounds in addition is true which is the lesse; * and though *in tenura. Guilielmi,* which is true had beene first placed, yet it had beene all one.

But if I graunt *tenementum meum quod perquisiui de K. C. in Dale,* where the truth was T.C. and

I have no other tenements in D. but one, this graunt is good, because that which soundeth in name (*viz.* in Dale) is true, and that which sounded in addition *(viz. quod perquisiui &c.* is onely false.

So if I graunt *Prata mea in Sale continentia 10. acras,* and they containe indeede 20 acres, the whole 20. passe.

So if I graunt all my lands, being parcels *manerij de D. in prædictis literis patentibus specifcat',* and there bee no letters pattents, yet the graunt is good enough.

The like reason holds in demonstrations of persons that have beene declared in demonstration of lands and places, the proper name of everie one is in certaintie worthiest, next are such appellations as are fixed to his person, or at least of continuance, as sonne of such a man, wife of such a husband; or addition of office, as Clerke of such a Court, &c. and the third are actions or accidents, which sound no way in appellation or

name, but onely in circumstance, which are lesse worthie, although they may have a poore particular reference to the intention of the graunt.

And therefore if an obligation be made to I. S. *filio & hæredt G. S.* where indeede he is a bastard, yet this obligation is good.

* Semble icy le grant ust este assets bon, cone[-] fuit resolu per Cur'. Co lib. 3. To. 10. a vide 33 H. 8. Dy. 50. b. 12. Eliz. ib. 292. b. & Co. lib. 2. fo. 33. a.

Vide ib. quæ contraria est lex, car icy aux i le primer certainty est faux..

So if I grant land *Episcopo nunc Londinensi qui me erudiuit in pueritia,* this is a good graunt, although he never instructed me.

But *è conuerso,* if I grant land to I. S. *filio & hæredi G. S.* and it bee true that hee is sonne and heire unto G. S. but his name is Thomas, this is a void grant.

Or if in the former graunt it was the Bishop of Canterburie who taught mee in my childhood, yet shall it be good (as was said) to the Bishop of London, and not to the Bishop of Canterburie.

The same rule holdeth of denomination of times, which are such a day of the Moneth, such a day of the weeke, such a Saints day or Eave, To day, to morrow; these are names of times.

But the day that I was borne, the day that I was married; these are but circumstances and addition of times.

And therefore if I binde my selfe to doe some personall attendance upon you upon Innocents day being the day of your birth, and you were not borne that day, yet shall I attend.

There resteth two questions of difficultie yet upon this rule: first, of such things whereof men take not so much note as that they shall faile of

this distinction of name and addition.

As my boxe of Ivorie lying in my study sealed up with my seale of armes, my suite of Arras with the storie of the Nativitie and Passion; of such things there can be no name, but all is of description, and of circumstance, and of these I hold the law to bee, that precise truth of all recited circumstances is not required.

But in such things *ex multitudine signorum colligitur identitas vera,* therefore though my boxe were sealed, and although the arras had the stotie of the nativitie and not of the passion, if I had no other boxe nor no other suite, he gifts are good, and there is certaintie sufficient, for the law doth not expect a precise description of such things as have no certaine denomination.

Secondly of such things as doe admit the diistinction of name and addition, but the notes fall out to bee of equall dignitie all of name or addition.

As, prata mea iuxtacommunem fossam in D. wherof the one is true, the other false, or, *tenementum meum in tenura. Guilielmi quod per qui siui de R. C. in predict' Indent' specificat'* whereof one is true and two are false, or two are true and one false.

So *ad curiam quam tenebat die mercurii tertio*

Vide liuirs a-

uantditpur

ceit uxi.

die Martii, wherof the one is true the other false.

In these cases the former rule *ex multitudine signorum, &c.* holdeth not, neither is the placing or the falsitie or veritie first or last materiall, but all must be true, or else the graunt is void, alwayes understood, that if you can reconcile all the words, and make no falsitie, that is quite out of this rule, which hath place onely where there is a direct contrarietie, or falsity not to be reconciled to this rule.

As if I graunt all my land in D. *in tenura I. S.* which I purchased of I. N. specified in a devise to I. D. and I have land in D. whereof in part of them all these circumstances are true, but I have other lands in D. wherein some of them faile, this graunt will not passe all my land in D. for there these are references and no words of falsitie or error but of limitation and restraint.

FINIS.

THE USE
OF
THE LAW.

Provided for Preſervation
OF
Our { *Perſons,* / *Goods,* and / *Good Names.*
According to the Practiſe
OF
The { *Lawes* / and / *Cuſtomes* } *of this Land.*

By the R. Honorable Francis Bacon Lord Verulam Viſcount of S. *Albans* &c.

LONDON,
Printed by the Aſſignes of IOHN MOORE Eſquire. 1630.

Cum Priuilegio.

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Cum Privilegio.

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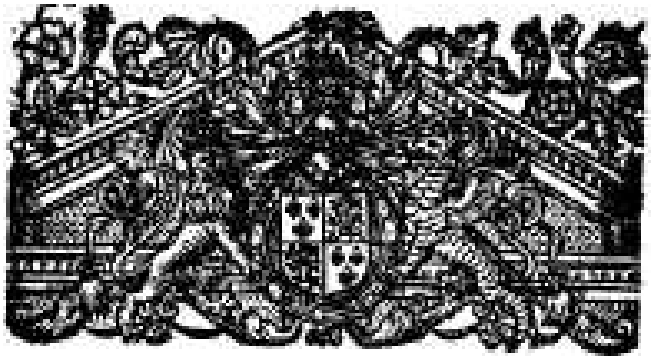

THE

USE OF THE

LAW,

And wherein it Principally

Consisteth.

The Use of the Law, consisteth principally in these Three things:

1 To secure Mens persons from Death

and Violence.

2 To dispose the propertie of their

Goods and Lands.

3 For preservation of their good

Names from shame and Infamie.

For safetie of persons, the Law provideth, that any man standing in feare of another,

Surety to keep the Peace.

may take his Oath before a Justice of Peace, that hee standeth in feare of his life, and the Justice shall compell the other to be bound with Suerties to keepe the Peace.

If any man Beate, wound or maime another, or give false scandalous words that may touch his Credit, the Law giveth thereupon an action of the Case, for the slaunder of his good name; and an Action of Batterie,or an appeale of Maime, by which recompence shall be recovered, to the value of the hurt, damage or danger.

If any man kill another with malice, the Law giveth an appeale to the wife of the dead, if hee had any, or to the next of kinne that is Heire in default of a Wife, by which appeale the Defendant convicted is to suffer

Death, and to lose all his Lands and Goods; But if the Wife or Heire will not sue or bee compounded withall, yet the King is to punish the offence by Indictment or Presentment of a lawfull inquest & tryall of the Offenders before competent Judges; whereupon being found guiltie, hee is to suffer Death, and to lose his lands and goods.

If one kill another upon a suddain quarrell, this is Man slaughter, for which the Offender must dye, except he can reade; and if hee

can reade, yet must hee lose his goods, but no lands.

And if a man kill another in his owne defence, hee shall not lose his Life, nor his Lands, but he must lose his Goods, except the partie slaine did first assault him, to kill, robbe, or trouble him by the High-way side, or in his owne House, and then he shall lose nothing.

And if a man kill himselfe, all his Goods and Chattels are forfeited, but no Lands.

If a man kill another by misfortune, as shooting an Arrow at a Butt or Marke, or casting a Stone over an house, or the like, this is losse of his goods and Chattels, but not of his lands, nor life.

If a Horse, or Cart, or a Beast, or any other thing doe kill a man, the Horse, Beast or other thing is forfeited to the Crowne, & is called a *Deodand,* and usually graunted and allowed by the King to the Bishop Almner, as goods are of those that kill themselves.

The Cutting out of a mans Tongue, or putting out his Eyes maliciously, is Felonie; for which the offender is to suffer Death, and lose his lands and goods.

Action of the Case, for Slaunder, Batterie, &c.

Appeale of Murther given to the next of kinne.

Man slaughter, and when a forfeiture of Goods, and when not.

Felon: de Se.

Felony by mischance.

Deodands.

Cutting out of Tongues and putting out of Eyes, made Felonie.

But, for that all Punishment is for Examples sake; it is good to see the meanes whereby Offenders are drawne to their punishment; and first for matter of the peace.

The auncient Lawes of England planted heere by the Conquerour, were, that there should be Officers of two sorts in all the parts of this Realme to preserve the Peace:

1. *Constabularÿ* } 2. *Conseratores* } *Pacis.*

The Office of the Constable was, to arrest the parties that hee had seene breaking the Peace, or in furie ready to breake the peace, or was truely informed by others, or by their owne confession, that they had freshly broken the peace; which persons he might imprison in the Stockes, or in his owne house, as his or their quality required, untill they had become bounden with sureties to keepe the peace; which obligation from thenceforth, was to be sealed and delivered to the Constable to the use of the King. And that the Constable was to send to the Kings Exchequer or Chancery, from whence Processe should bee awarded to leavy the

debt, if the peace were broken.

The Office of the Constable.

But the Constable could not arrest any, nor make any put in Bond upon complaint of threatning onely, except they had seene them breaking the peace, or had come freshly after the peace was broken. Also, these Constables should keepe watch about the Towne for the apprehension of Rogues and Vagabonds, and Night-walkers, & Evesdroppers, Scouts, and such like, and such as goe Armed. And they ought likewise to raise hue and cry against Murtherers, Manslayers, Theeves and Rogues.

Of this Office of Constable there were high Constables, two of every Hundred; Pettie Constables one in every Village, they were in ancient time all appointed by the Sheriffe of the Shiere yearely in his Court called the Sheriffes Tourne, and there they received their oath. But at this day they are appointed eyther in the Law day of that Precinct wherin they serve, or else by the high Constable in the Sessions of the peace.

The Sheriffes Tourne is a Court very ancient, incident to his Office. At the first, it was erected by the Conquerour, and called the Kings-Bench, appointing men studied in the Knowledge of the Lawes to execute Justice, as substitutes to

First, High Constables,

2.ly, Pettie Constables.

2. High Constables for every hundred.

1. Pettie Constable for every village.

The Kings Bench first instituted, and in what matters they anciently had Jurisdiction.

Court of Marshalsee erected, and its Jurisdiction within 12. miles of the chiefe Tunnel of the King, which is the full extent of the Virge.

him in his name, which men are to be named, *Justiciary ad placita coram Rege assignati*. One of them being *Capitalis Justiciarius* called to his fellowes, the rest in number as pleaseth the King, of late but three *Justiciary*, holden by Patent. In this Court every man above twelve yeares of age, was to take his Oath of Allegeance to the King, if hee were bound, then his Lord to answere for him. In this Court the Constables were appointed and sworne; breakers of the peace punished by fine and imprisonment, the parties beaten or hurt recompenced upon complaints of damages, All appeales of Murther, Maime, Robberie decided, contempts against the Crowne, publique annoyances against the people, Treasons and Felonies, and all other matters of wrong, betwixt partie and partie for Lands and goods.

But the King seeing the Realme grow daily more and more populous, and that this one Court could not dispatch all; did first ordain that his Marshall should keepe a Court, for Controversies arising within the *Virge*. Which is within xii. miles of the chiefest Tunnell of the Court, which did but ease the Kings Bench in matters onely concerning debts, Covenants, and such like, of those of the Kings houshold onely, never dealing in breaches of the Peace, or concerning the

Crowne by any other persons, or any pleas of Lands. Insomuch, as the King for further ease having divided this Kingdome into Counties, and committing the Charge of every Countie to a Lord or Earle; did direct, that those Earles within their limits should looke to the matter of the peace, and take charge of the Constables, and reforme publike annoyances, and sweare the people to the Crowne, & take pledges of the Freemen for their Allegeance, for which purpose the Countie did once every yeare keep a Court, called the Sheriffes Tourne. At which all the Countie (except Women, Clergie, Children under 12. and not aged above 60.) did appeare to

give or renew their pledges for Allegeance. And the Court was called, *Curia Franci plegÿ.* A view of the pledges of Free-men; or, *Turnus Comitatus.*

At which meeting or Court, there fell by occasion of great Assemblies much bloudshed, scarcitie of Victuals, Mutinies, and the like mischiefes; which are incident to the Congregations of people, by which the King was moved to allow a subdivision of every Countie into Hundreds, and every Hundred to have a Court, whereunto the people of every Hundred should be assembled twice a yeare for surveigh of Pledges, and use of that Justice which was formerly executed in that

Sheriffes Tourne instituted upon the division of England into Counties, the charge of this Court was committed to the Earle of the same Countie; this was likewise called *Curia Visus sra. pleg.*

Subdivision of the Countie Court into Hundreds.

The charge ot the Countie taken from the Earles, and committed yearly to such persons as it pleased the King.

The Sheriffe is Judge of all Hundred Courts not given away from the Crowne.

grand Court for the Countie; and the Count or Earle appointed a Bayliffe under him to keepe the hundred Court. But in the end, the Kings of this Realme found it necessarie to havea ll execution of Justice immediately from themselves, by such as were more bound then Earles to that service, and readily subject to correction for their negligence or abuse; and therefore, tooke to themselves the appointing of a Sheriffe yearely in every Countie, calling them *Vicecomites,* and to them directed such writs and precepts for executing Justice in the Countie, as fell out needfull to have beene dispatched, committing to the Sheriffe *Custodium Comitatus;* by which the Earles were spared of their toyles and labours, and that was layd upon the Sheriffes. So as now, the Sheriffe doth all the Kings businesse in the Countie, and that is now called, the Sheriffs Tourne; that is to say, he is Judge of this grand Court for the Countie, and also of all Hundred Courts not given away from the Crowne.

Hee hath another Court, called the Countie Court, belonging to his office, wherein men may sue monethly for any debt or damages under 40 [1]. and may have writs for to replevie their cattell distrained and impounded by others, and there try the cause of their distresse; and by a writ called *Justicies,*

County Court kept monethly by the Sheriffe.

a man may sue for any summe, and in this Court the Sheriffe by a writ, called an Exigent, doth proclaime men sued in Courts above,

to render their bodies, or else they be Out-lawed.

This Sheriffe doth serve the Kings writs of Processe, be they Sommons, Attachments to compell men to answer to the Law, and all writs of execution of the Law, according to Judgements of Superiour Court, for taking of Mens Goods, Lands, or Bodies, as the cause requireth.

The Hundred Courts, were most of them granted to Religious Men, Noble men, and others of great place. And also many men of good quality have attained by Charter, and some by usage within Mannors of their owne liberty of keeping Law dayes, and to use there Justice appertaining to a Law day.

Whosoever is Lord of the Hundred Court, is to appoint two high Constables of the Hundred, and also is to appoint in every Village, a pettie Constable with a Tithing, man to attend in his absence, and to be at his Commandement when hee is present in all services of his office for his assistance.

There hath beene by use and Statute Law

The Office of the Sheriff.

Hundred Courts to whom they were at first granted.

Lord of the Hundred to appoint two High Constables.

(besides surveying of the Pledges of Freemen, and giving the oath of Allegeance, and making Constables,) many additions of powers and authority given to the Stewards of Leets and Law dayes to be put in ure in their Courts; as for example, they may punish Inne keepers, Victuallers, Bakers, Butchers, Poulterers, Fishmongers, and Tradesmen of all sorts, selling with under weights or measures or at excessive prizes, or things unwholsome, or ill made in deceipt of the people. They may punish those that do stop, straiten or annoy the high wayes, or doe not

according to the provision enacted, repaire or amend them, or divert water courses, or destroy frey of Fish, or use engines or nets to take Deere, Conies, Phesants or Partridges, or build Pigeon houses; except he be Lord of the Mannor, or Parson of the Church. They may also take presentment upon Oath of the xii. sworne Jury before them of all felonies; but they cannot try the Malefactors, onely they must by Indenture deliver over those presentments of felonie to the Judges, when they come their circuits into that Countie. All those Courts before mentioned are in use, and exercised as Law at this day, concerning the Sheriffes Law dayes and Leets, and the offices of High Constables, pettie Constables, and Tithingmen; howbeit, with some further additions by Statute lawes, laying

Conservators of the Peace called by the Kings writ for terme of their lives, or at the Kings pleasure.

charge upon them for taxation for poore, for Souldiers, and the like, and dealing without corruptions and the like.

Conservators of the Peace were in ancient times certaine, which were assigned by the King to see the Peace maintained, and they were called to the Office by the Kings writ, to continue for terme of their lives, or at the Kings pleasure.

For this Service, choise was made of the best men of calling in the Countrie, and but few in the Shire. They might bind any man to keepe the peace and to good behaviour, by Recognizance to the King with suerties, and they might by Warrant send for the partie, directing their warrant to the Sheriffe or Constable, as they please, to arrest the partie, and bring him before them. This they used to doe, when complaint was made by any that he stood in feare of another, & so tooke his Oath; or else, where the Conservator himselfe did without oath or complaint, see the disposition of any man inclined to quarrell and breach of the Peace, or to misbehave himselfe in some outragious manner of force or fraud, There by his owne Discretion he might send for such a fellow, and make him finde Suerties of the peace or of his good behaviour, as he should see cause; or

Of what matters they enquire of in Leets and Law dayes.

Conservators of the Peace, and what their Office was.

else commit him to the Goale if he refused.

The Judges of either Bench in *Westminster,* Barons of the Exchequer, Master of the Rolles, and Justices in Eire and Assizes in their circuits, were all without writ Conservators of the Peace in all Shires of England, and continue to this day.

But now at this day, Conservators of the Peace are out of use; And in lieu of them, there are ordained Justices of Peace, assigned by the Kings Commissions in every Countie, which are moveable at the Kings pleasure;

but the power of placing and displacing Justices of the Peace, is by use Deligated from the King to the Chancellor.

That there should be Justices of Peace by Commissions, it was first enacted by a Statute made 1. *Edw.* 3. and their Authoritie augmented by many statutes made since in every Kings reigne,

[a] They are appointed to keepe foure Sessions every yeare; That is, every Quarter one. These Sessions are a sitting of the Justices to

dispatch the affaires of their Commissions. They have power to heare and determine in their Sessions, all Felonies, breaches of the Peace, Contempts and trespasses, so farre as to fine the Offender to the Crowne, but not

to award recompence to the partie grieved.

They are to suppresse Ryots, and Tumults, to restore Possessions forcibly taken away, to examine all Felons apprehended & brought before them; To see impotent poore people, or maimed Souldiers provided for, according to the Lawes. And Rogues, Vagabonds, and Beggers punished. They are both to Licence and suppresse Alehouses, Badgers of Corne and Victuals, and to punish Forestallers; regrators, and engrossers.

Through these in effect; runne all the Countie services to the Crowne, as Taxations of Subsidies, Mustring men, Arming them, and leavying Forces, that is done by a speciall Commission or Precept from the King. Any of these Justices by Oath taken by a man that hee standeth in feare that another man will beate him, or kill him, or burne his House, are to send for the partie by warrant of Attachment directed to the Sheriffe or Constable, and then to bind the party with Suerties by Recognizance to the King to keepe the peace, and also to appeare at the next Sessions of the Peace; at which next Sessions, when every Justice of Peace hath therein delivered all their Recognizances so taken, then the parties are called and the cause of binding to the Peace examined, and both parties being heard, the whole Bench is

Conservators of the Peace by vertue of their Office.

Justices of Peace ordained in lieu of Conservators. Power of placing and displacing Justic. of Peace by use deligated from the King to the Chanchellor.

[a] The power of the Just. of Peace, to fine the Offenders to the Crowne, and not to recompence the partie grieved. Parle Statut. 17 R. 2. Cap. 10. &

v. *Dier*. 69. b. Ils cunt poiar d'inquier de murder car. ce Felon.

Authority of the Justices of Peace, through whom run all, the Countie services unto the Crowne.

Beating, kil-

ling, burning

of Houses.

Attachments

for suretie of

the Peace.

Recognisance of the Peace delivered by the Justices at their Sessions.

Quarter Sessions held by the Justices of the Peace.

to determine as they see cause, either to continue the partie so bound, or else to discharge him.

The Justices of Peace in their Sessions, are attended by the Constables and Bayliffes of all Hundreds and liberties within the Countie, and by the Sheriffe or his Deputy, to bee employed as occasion shal serve in executing the precepts and directions of the Court. They proceed in this sort, The Sheriffe doth Summon 24. Free-holders, discreet men of the said County, wherof some 16. are selected and sworne, and have their charge to serve as the Grand Jury; The partie indicted is to traverse the indictment, or else to confesse it, and so submit himselfe to bee fined as the Court shall thinke meet (regard had to the offence) except the punishment be certainly appointed (as often it is) by speciall Statutes.

The Justices of Peace are many in everie Countie, & to them are brought all Traitors, Felons, and other malefactors of any sort upon their first apprehension, and that Justice to whom they are brought, examineth them, and heareth their accusations, but judgeth not upon it; onely if hee find the suspicion but light, then hee taketh bond with sureties of the accused, to appeare either at the next Assizes, if it be a matter of Treason or Felo-

nie; or else at the quarter Sessions, if it bee concerning Ryot or mis-behavior or some other small offence. And he also then bindeth to appeare those that give testimonie and prosecute the accusation, all the accusers and witnesses, and so setteth the partie at large. And at the Assizes or Sessions (as the case falleth out) he certifieth the Recognizances taken of the Accused, Accusers, and Witnesses, who being there are called, and appearing, the cause of the accused is debt, according to Law for his clearing or condemning.

But if the partie accused, seeme upon pregnant matter in the accusation and to the Justice to bee guilty, and the offence heinous, or the Offender taken with the manner, then the Justice is to commit the partie by his warrant called a *Mittimus* to the Goaler of the common Goale of the Countie, there to remaine untill the Assizes. And then the Justice is to certifie his Accusation, Examination, and Recognizance taken for the appearances and prosecution of the witnesses, so as the Judges may, when they come, readily proceed with him as the Law requireth.

The Judges of the Assizes as they bee now become into the place of the ancient Justices in Eyre, called *Justiciarij itinerantes*, which in the prime Kings after the Conquest untill

The authority of Justices of the Peace out of their Sessions.

Judges of Assize come in place of the ancient Judges in Eyre about the time of R. 2.

H. 3. time especially, and after in lesser measure even to *R.* 2.time, did execute the

Justice of the Realme; they began in this sort.

The King not able to dispatch busines in his owne person, erected the Court of Kings Bench, that not able to receive all, nor meet to draw the people all to one place, there were ordained Counties, and the Sheriffes Tournes, Hundred Courts, and particular Leets, and Law-dayes, as before mentioned, which dealt onely with Crowne matters for the publique; but not the private titles of Lands or Goods, nor the tryall of grand offences of Treasons and Felonies, but all the Counties of the Realme were divided into Six Circuites. And two learned men well read in the Lawes of the Realme, were assigned by the Kings Commission to every Circuit, and to ride twice a yeare through those shires allotted to that Circuit, making Proclamation before hand,

a convenient time in every Countie, of the time of their comming, and place of their sitting, to the end the

people might attend them in every Countie of that Circuit.

They were to stay 3.or 4. dayes in every Countie, and in that time all the causes of that Countie were brought before them by the parties grieved, and all the Prisoners of the said Goale in every Shire, and whatsoever controversies arising concerning Life, Lands or Goods.

The authoritie of these Judges in Eyre, is in part translated by Act of Parliament to

Justices of Assize; which be now the Judges of Circuits, and they doe use the same Course that Justices in Eyre did, to proclaime their comming every halfe yeare, and the place of their sitting.

The businesse of the Justices in Eyre, and of the Justices of Assize at this day is much lessened, for that in *H.* 3. time there was erected the Court of Common-pleas at Westminster, In which Court have beene ever since and yet are, begun and handled the great suits of Lands, debts, benefices and contracts, fines for assurance of Lands and

recoveries, which were wont to bee either in the Kings Bench, or else before the Justices in Eyre. But the Statute of *Mag. Char. Cap.* 11. 5. is negative against it, *Viz. Communia placita non sequantur, Curiam nostram sed teneantur in alique loco Certo;* which *locus Certus* must be the Common-pleas; yet the Judges of Cir-

1. Kings Bench

2. Marshals

Court.

3. Countie

Court.

4. Sheriffes Tournes.

5. Hundred Leets & Law-dayes. All which dealt only in Crown matters, but the Justice in Eyre dealt in private titles of lands or goods, and in all Treasons and Felonies, of whom there were 12. in number, the whole Realme being divided into six Circuits.

England divided into six Circuits, & two learned men in the Lawes,

assigned by the Kings Commission to ride twice a yeare

through those Shires allotted to that Circuit, for their tryall of private titles to lands and goods, and all Treasons and Felonies, which the Countie Courts meddle not in.

The authoritie,

of Tourns, Leets,

Hundreds, and Law-dayes, as it was confirmed to some speciall causes touching the publike good.

The authority translated by Parliament to Justices of Assize.

The authority of the Justices of Assizes much lessened by the Court of Comrnon Pleas, erected in H. 3. time. The Justices of Assize have at this day 5. Commissions[-] by which they sit

1 Oyer and Termin.

2 Goale Delivery.

3 To take Assizes.

4 To take Nisi Prius. 5 Of the Peace.

Oyer and Terminer, in which the Judges are of the Quorum, and this is the largest Commission they have.

cuits have now five Commissions by which they sit.

The first is a Commission of Oyer and Terminer, directed unto them, and many others of the best accompt, in their Circuits; But in this Commission the Judges of Assize are of the *Quorum,* so as without them there can be no proceeding.

This Commission giveth them power to deale with Treasons, Murthers, and all manner of Felonies and Misdemeanours whatsoever; and this is the largest Commission that they have.

The second is a Commission of Goale Delivery; That is only to the Judges themselves, & the Clearke of the Assize associate: And by this Commission they are to deale with every Prisoner in the Goale, for what offence soever he be there. And to proceed with him according to the Lawes of the Realme, & the quality of his offence; And they cannot by this Commission doe any thing concerning any man, but those that are Prisoners in the Goale. The course now in use of Execution of this Commission of Goale Delivery, is this. There is no Prisoner but is committed by some Justice of Peace,

Goale delivery directed onely to the Judges

themselves,

and the Cleark of the Assize.

who before he committed him tooke his examination, and bound his accusers and witnesses to appeare and prosecute at the Goale delivery. This Justice doth certifie these examinations and bonds, and thereupon the Accuser is called solemnely into the Court; and when he appeareth he is willed to prepare a Bill of indictment against the Prisoner, and goe with it to the grand-Jury, and give evidence upon their oathes, he and the witnesses; which he doth: and then the Grand Jury write thereupon either *Billa vera*, & then the Prisoner standeth indicted,

or else *Ignoramus,* and then he is not touched. The Grand Jury deliver these Bils to the Judges in their Court, and so many as they find indorsed *Billa vera,* they send for those Prisoners, then is every mans indictment put and read to him, and they aske him whether hee be guilty or not, if he saith guilty, his confession is recorded; if hee say not guilty, then hee is asked how hee will bee tryed; hee answereth, by the Countrey. Then the Sheriffe is commanded to returne the names of 12. Freeholders to the Court, which Freeholders be sworne to make true delivery betweene the King and the Prisoner, and then the indictment is againe read and the witnesses sworne, to speake their knowledge concerning the fact,

and the Prisoner is heard at large, what de-

The manner of the proceedings of the Justices of Circuits in their Circuits

The course now in use with the Judges for the execution of the Commission of Goale delivery.

fence hee can make, and then the Jury goe together and consult. And after a while they come in with a verdict of guilty or not guiltie, which verdict the Judges doe record accordingly. If any Prisoner plead not guilty upon the indictment, and yet will not put himselfe to tryall upon the Jury, (or stand mute) he shall be pressed.

The Judges when many prisoners are in the Goale, doe in the end before they goe,

peruse every one. Those that were indicted by Grand Jury, and found not guiltie by the select Jury, they judge to be quitted, and so deliver them out of the Goale. Those that are found guilty by both Juries they Judge to death, and command the Sheriffe to see execution done. Those that refuse tryall by the Countrie, or stand mute upon the indictment, they judge to be pressed to death, some whose offences are pilfring under twelve pence value, they judge to be whipped. Those that confesse their indictments, they judge to death, whipping or otherwise, as their offence requireth. And those that are not indicted at all, but their bill of indictment returned with *Ignoramus* by the Grand Jury, and all other in the Goale against whom no bils at all are preferred, they doe acquit by proclamation out of the Goale; That one way or other they ridde the Goale of all the prisoners in it. But because some

prisoners have their bookes, and be burned in the hand and so delivered, It is necessary to shew the reason thereof. This having their bookes is called their Clergies which in ancient time began thus.

For the scarcity of the Clergie in the Realme of England, to be disposed in Religious houses, or for Priests, Deacons and Clerkes of parishes, there was a prerogative allowed to the Clergie, that if any man that could reade as a Clerke, were to be condemned to death, the Bishop of the Diocesse, might if he would, clayme him as a clerke, & he was to see him tryed in the face of the Court.

Whether he could read or not the booke was prepared and brought by the Bishop,

and the Judge was to turne to some place as he should thinke meete, and if the prisoner could reade, then the Bishop was to have him delivered over unto him to dispose of in some places of the Clergie, as hee should thinke meete. But if either the Bishop would not demand him: or that the Prisoner could not read, then was hee to be put to death.

And this Clergie was allowable in the ancient times and Law, for all offences whatsoever they were, except Treason and robbing of Churches of their goods and or-

Books allowed to Clergie for the scarcitie of them to be disposed in Religious Houses.

Concerning the allowing of the Clergie to the Prisoner.

Clergy allowed in all offences except Treason and Robbing of Churches, and now taken away by many Statutes. 1. In Treason. 2. In Burglarie. 3. Robberie.

4. Purse-cutting 5. Horse stealing, and in divers other offences particularized in severall Statutes. By the Stat. of 18. Eliz. the Judges are appointed to allow Clergie,

& to see them burned in the hand, and to discharge the Prisoners without delivering them to the Bishop.

naments. But by many Statutes made since,

the Clergie is taken away for Murther, Burglarie, Robberie, Purse-cutting, horsestealing, and divers other felonies particularized by the Statutes to the Judges; and lastly, by a Statute made 18. *Elizabeth,* the Judges themselves are appointed to allow Clergie to such as can read, being not such offenders from whom Clergie is taken away by any Statute,

And to see them burned in the hand, and so discharge them without delivering them to the Bishop, howbeit the Bishop appointeth the deputy to attend the Judges with a booke to trie whether they could reade or not.

The third Commission that the Judges of Circuits have, is, a Commission directed to themselves onely and the Clerke of Assize to take Assizes, by which they are called

Justices of Assize, & the Office of those Justices is to doe right upon Writs called Assizes,

brought before them by such as are wrongfully thrust out of their Lands. Of which number of writs there was farre greater store brought before them in ancient times than now, for that mens seizons & possessions are sooner recovered by sealing Leases upon the ground, and by bringing an *Ejectione firme*, and trying their title so, than by the long suites of Assizes.

The fourth Commission, is a Commission

to take *Nisi Prius* directed to none but to the Judges themselves and their Clerkes of Assizes, by which they are called Justices of *Nisi Prius.* These *Nisi Prius* happen in this sort,

When a suit is begun for any matter in one of the three Courts, the Kings Bench, Common Pleas, or the Exchequer here above, and the parties in their pleadings doe varie in a point of fact; As for example. If in an action of Debt upon obligation the defendant denies the obligation to be his debt, or in any action of trespasse growne for taking away goods,

the Defendant denieth that hee tooke them,

or in an action of the Case for slaunderous words, the Defendant denieth that hee spake them, &c.

Then the Plaintiffe is to maintaine and prove that the obligation is the Defendants deed, that he either tooke the goods, or spake the words; upon which deniall and affirmation the Law saith, that Issue is joyned betwixt them, which issue of the Fact is to be tried by a Jurie of Twelve men of the Countie where it is supposed by the Plaintiffe to be done, & for that purpose the Judges of the Court do award a writ of *Venire fac:* in the Kings name to the Sheriffe of that Countie, Commanding him to cause foure and twentie descreet Freeholders of his Countie at a certaine day to try this issue so joyned, out of which foure and twenty, only Twelve are chosen to serve.

4. Commission is to take Nisi Prius: and this is directed to two Judges & the Clerke of the Assize,

Nisi Prius.

Ven. fac. pr. 24,

Free-holders.

The manner of proceeding of Justices of Circuits in their circuits.

The course the Judges hold in their Circuits in the execution of their Commission concerning the taking of Nisi prius.

Postea.

And that doable number is returned, because some may make default, and some bee challenged upon kindred, alliance, or partiall dealing.

These foure and twentie, the Sheriffs doth name and certifie to the Court, and withall that he hath warned

them to come at the day according to their writ. But because at his first summons there falleth no punishment upon the foure and twentie if they come not,

they very seldome or never appeare upon the first Writ, and upon their default there is another Writ* returned to the Sheriffe, commaunding him to distraine them by their Lands to appeare at a certaine day appointed by the writ, which is the next terme after, *Nisi prius Justiciary nostri ad Assizas capiendas Venerint, &c.* or which words the writ is called a *Nisi prius* and the Judges of the circuit of that Countie in that vacation and meane time before the day of appearance appointed for the Jurie above here by their Commission of *Nisi prius* have authority to take the appearance of the Jury in the County before them, and there to heare the Witnesses & proofes on both sides concerning the issue of fact, and to take the verdict of the Jury, and against the day they should have appeared above, to returne the verdict read in the Court above, which returne is called a *Postea.*

And upon this verdict clearing the matter in Padrone way or other, the Judges above give judgement for the partie for whom the verdict is found, and for such damages and costs as the Jury doe assesse.

By those tryals called *Nisi prius,* the Juries,

and the parties are eased much of the charge they should bee put to, by comming to London with their Evidences & Witnessses,

and the Courts of Westminster are eased of much trouble they should have, if all the Juries for tryals should appeare and try their causes in those Courts; for those Courts above have little leisure now; though the Juries come not up, yet in matters of great weight or where the title is intricate or difficult, the Judges above, upon information to them, doe retaine those causes to bee tryed there, and the Juries doe at this day in such causes come to the Barre at *Westminster.*

The fift Commission that the Judges in their Circuits doe sit by, is the Commission of the Peace in every Countie of their circuit. And all the Justices of the Peace having no lawfull impediment, are bound to be prelent at the Assizes to attend the Judges, as occasion shall fall out: if any make default, the Judges may set a fine upon him at their pleasure and discretions. Also the Sheriffe in

every shire through the Circuits to attend in

5. Commission is a Commission of the Peace.

The Justices of the Peace and the Sheriffe are to attend the Judges in their Countie.

* Distringas.

person, or by a sufficient deputie allowed by the Judges, all that time they be within the Countie, and the Judges may fine him if hee faile, or for negligence or misbehaviour in his Office before them; and the Judges above may also fine the Sheriffe for not returning or not sufficient retourning of Writs before them.

Propertie in Lands, is gotten and transf erred by one to another, by these foure manner of wayes.

1 By Entry. 2 By Discent.

3 By Escheat.

4 Most usually by Conveyance.

I Propertie by Entry is, where a man findeth a piece of Land that no other possesseth or hath title unto, and

hee that so findeth it doth enter, this Entry gaineth a Propertie; this Law seemeth to be derived from this text, *Terra dedit filÿs hominum,* which is to be understood, to those that will till and manure it, and so make it yeeld fruit; and that is he that entreth into it, where no man had it before. But this manner of gaining

Lands was in the first dayes & is not now of use in England, for that by the cõnquest, all the Land of this Nation was in the Conquerours hands, & appropriated unto him; except Religious and Church lands, and the lands in Kent, which by composition were left to the former owners, as the Conquerour found them, so that no man but the Bishopricks,

Churches, and the men of *Kent,* can at this day make any greater title then from the Conquest to any Lands in England; And Lands possessed without any such title, are in the Crowne, and not in him that first entreth; as it is by Land left by the Sea, this Land belongeth to the King and not to him that hath the Lands next adjoyning, which was the ancient Sea Bankes; This is to bee understood of the inheritance of Lands: viz.That the inheritance cannot bee gained by the first entry. But an estate for an other mans life by out-Lawes, may at this day be gotten by entrie. As a man called *A.* having land conveyed unto him for the life of *B.* dyeth without making any estate of it,

there, whosoever first entreth into the Land after the decease of *A.* getteth the propertie in the Land for time of the continuance of the estate which was granted to *A.* for the life of *B.* which *B.* yet liveth, and therefore the said Land cannot revert till *B.* die. And to the heire of *A.* it cannot goe, for

Of propertie of Lands to be

gained by

Entrie.

All Lands in England were the Conquerours and appropriated to him upon the Conquest of England, and held of him,

except 1. Religious and Church-lands.

2. The lands of the men of Kent.

Land left by the Sea belongeth to the King.

that it is not any state of inheritance, but only an estate for another mans life; which is not dependable to the heire, except he be specially named in the grant: *viz.* To him and his heirs. As for the Executors of *A.* they cannot have it, for its not an estate testamentory, that it should goe to the Executors as goods and Chattels should, so as in truth no man can intitle himselfe unto those Lands; and therefore the Law preferrerh him that first entreth, and he is called *Occupans,* and shall hold it during the life of *B.* but must pay the rent, performe the conditions, and doe no wast. And he may by deed assigne it to whom he please in his life time. But if he die before he assigne it over, then it shall go againe to whomsoever first entreth and holdeth. And so all the life of *B.* so often as it shall happen.

Likewise if any man doth wrongfully enter into another mans possession, and put the right owner of the freehold and inheritance from it, he therby getteth the freehold & inheritance by disceisin, & may hold it against all men, but him that hath right, & his heires,

& is called a disseisor. Or if any one die seised of lands, and before his heire doth enter, one that hath no right doth enter into the Lands, and holdeth them from the right heire, hee is called an Abator, and is lawfull owner against all men, but the right heire.

And if such person Abator, or disseisor (so as the disseisor hath quiet possession five yeares next after the disseisin) doe continue their possession, and die seised, and the land discend to his heire, they have gained the right to the possession of the Land against him that hath right till he recover it by fit action reall at the common law. And if it be not sued for at the common law within

three score yeares after the disseisin, or abatement committed, The right owner hath lost his right by that negligence. And if a man hath divers Children, and the elder being a Bastard doth enter into the land and enjoyeth it quietly during his life, and dieth therof so seised, his heires shall hold the land against all the lawfull Children and their issues.

Propertie of Lands by discent is, where a man hath Lands of inheritance and dyeth not disposing of them, but leaving it to goe (as the Law casteth it) upon the heire. This is called a discent of Law, and upon whom the discent is to light, is the question. For which purpose the Law of inheritance preferreth the first Child before all others, and amongst childrên[-] the male before the female; and amongst males the first borne. If there be no Children, then the Brother, if no Brothers, then sisters, if neither Brothers nor Sisters, then Unckles, & for Jacke of Unckles Ants, if none of them, then Couzens in the

Occupancie..

Propertie of Lands by discent.

Of discent three rules.

Brother or sister of the halfe bloud shall not inherit to his Brother or Sister but only as a child to his Parents

Discent.

neerest degree of consanguinity, with these three rules of diversities. 1. That the Eldest male shall solely inherit; but if it come to females, then they being all in an equall degree of neerenesse shall inherit altogether, and are called Parceners, and all they make but one heire to the Ancestor. 2. That no brother nor sister of the halfe blood shall inherit to his brother or sister, but as a Child to his Parents, as for example. If a man have two wives, and by either wife a sonne, the eldest son overliving his Father is to be preferred to the inheritance of the Father being Fee-simple; But if he entreth & dyeth without a child,

the Brother shall not be his heire, because he is of the halfe bloud to him, but the Uncle of the eldest Brother or Sister of the whole bloud, yet if the eldest Brother had dyed or had not entred in the life of the Father,

either by such entry or conveyance, then the youngest Brother should inherit the Land that the Father had, although it were a child by the second wife, before any daughter by the first. The third rule about discents. That land purchased so by the partie himselfe that dyeth, is to be inherited; first, by the heires of the Fathers side, then if he have none of that part, by the heires of the Mothers side. But Land descended to him from his father or mother, are to goe to that side onely from which they came, and not to the other side.

Those Rules of discent mentioned before are to be understood of Fee-simples, and not of entailed Lands, and those rules are restrained by some particular customes of some particular places: as namely, the custome of *Kent,* that every male of equall degree of Childhood, Brotherhood or kindred, shall inherit equally, as daughters shall being Parceners, and in many Borough Townes of England, and the Custome alloweth the youngest sonne to inherit, and so the youngest Daughter. The Custome of *Kent* is called *Gavelkind.* The Custome of Boroughes *Burgh English.*

And there is another note to bee observed in Fee-simple inheritance, and that is, that everie heire having fee-simple Land or inheritance, be it by common Law or by Custome of either gavelkind or burgh English, is chargeable so farre forth as the value thereof extendeth with the binding acts of the Ancestors from whom the

inheritance descendeth; and these acts are colaterall encombrances, and the reason of this charge is, *Qui sentit commodum[] sentire debet & incommodum sive onus.* As for example, if a man bind himselfe and his heires in an obligation, or doe Covenant by writing for him and his heires,

or do grant an Annuity for him & his heires,

or do make a warranty of Land binding him

Customes of certaine places

Every Heire having land is bound by the binding Acts of his ancestors if hee bee named.

Dyer 114. Plowden.

and his heyres to warrantie; in all these cases the Law chargeth the heyre after the death of the Ancestor with this obligation,

Covenant, Annuity & Warrantie; yet with these three cautions: first, That the partie rnust by speciall name binde himselfe & his heires, or covenant, grant and warrant for himselfe and his heires; otherwise the heire is not to be touched. Secondly, That some action must bee brought against the heire whilest the land or other inheritance resteth in him unaliened away: for if the Ancestor dye, & the heire, before an action be brought against him upon thole Bonds, Covenants,

or Warranties doe alien away the land, then the heire is cleane discharged of the burthen,

except the land was by fraud conveyed away, of purpose, to prevent the suit intended against him. Thirdly, that no heire is further to be charged than the value of the land descended unto him from the same ancestor that made the Instrument of charge, and that land also, not to bee sold out-right for the debt, but to be kept in extent and at a yearely value, untill the debt or damage bee run out. Neverthelesse if an heire that is sued upon such a debt of his ancestor doe not deale clearely with the Court when he is sued, that is, if he come not in immediately, & by way of confession set downe the true quantitie of his inheritance descended, and so submit

Dyer 149.

Plowden.

Dny & Pepps

case.

himselfe therfore, as the Law requireth, then that heire that otherwise demeaneth himself, shall be charged of his owne other lands and goods, and of his money, for this Deed of his ancestor. As for example: If a man binde himselfe and his heires in an Obligation of one hundred pounds, and dyeth leaning but ten acres of land to his heire, if his heire bee sued upon the Bond, and commeth in, and denieth that hee hath any lands by discent,

and it is found against him by the verdict that he hath ten acres, this heire shall be now charged by his falle plea of his owne lands, goods & body, to pay the hundred pounds, although the ten acres be not worth ten pound.

Propertie of lands by Escheat, is where the owner dyed seised of the lands in possession without childe or other heyre, thereby the land for lacke of other heire is said to escheat to the Lord of whom it is holden. This

lacke of heire happeneth principally in two cases: first, where the lands owner is a Bastard. secondly, where hee is attainted of Felonie or Treason. For neither can a Bastard have anie heire except it bee his owne childe, nor a man attainted of Treason, although it be his owne childe.

Upon attainder of Treason the King is to

Heire charged

for his false

plea.

Propertie of lands by Es-

cheat.

Two causes

of Escheat. 1. Bastardy.

2. Attainder of Treason, felonie.

Attainder of Treason enti-

tleth the King, though the lands be not holden of him, otherwise in attainder of felonie &c. for there the King shall have but *Annum diem & vastum.*

have the land, although hee be not the Lord of whom it is held, because it is a royall Escheat. But for Felonie it is not so, for there the King is not to have the Escheat, except the land be holden of him: and yet where the land is not holden of him, the King is to have the land for a yeare and a day next ensuing the judgement of the attainder, with a libertie to commit all maner of wast all that yeare in houses, gardens, ponds, lands and woods.

In these Escheats, two things are especially to be observed; the one is, the tenure of the lands, because it directeth the person to whom the Escheat belongeth, viz. the Lord of the Mannor of whom the Land is holden. 2.The manner of such attainder which draweth with it the Escheat. Concerning the Tenures of Lands, it is to be understood, that all lands are holden of the Crowne either mediately or immediately, and that the Escheat appertained to the immediate Lord,

and not to the mediate. The reason why all land, is holden of the Crowne immediatly or by Mesne Lords, is this.

The Conquerer got by right of Conquest all the land of the Realme into his owne hands in demeasne, taking from every man all estate, Tenure, propertie and libertie of

the same, (except Religious and Church lands, and the Land in *Kent*) and still as hee gave any of it out of his owne handle reserved some retribution of rents, or services,

or both, to him and to his heires; which reservation, is that, which is called the tenure of Land.

In which reservation, hee had foure Institutions, exceeding politique and sutable to the state of a Conquerer.

1 Seeing his people to be part *Normans,*

and part *Saxons*, the *Normans* hee brought with him, the *Saxons* he found heere: he bent himselfe to conjoyne them by marriages in amitie, and for that purpose ordaines, that if those of his nobles, Knights and Gentlemen to whom hee gave great rewards of Lands should dye, leaving their heire within age, a Male within 21. and a female within 14. yeares, and unmarried, then the King should have the bestowing of such heires in marriage in such family, and to such persons as he should thinke meete,

which interest of marriage went still imployed, and doth at this day in every tenure called Knights service.

In Escheat two things are to be observed.

1. The tenure. 2.The manner of the Attainder.

All lands are holden of the Crowne immediatly or mediately by Mesne Lords, the Reason. Concerning the tenure of Lands.

The Conque-

rer by right of

Conquest get

all the Lands

of the realme

into his hands,

and as hee gave it he still reserved rents and services. Knights service in

Capite first instituted.

The reservati-

ons in Knights

service tenure

was 4.

1. Marriage of

theWards male

and female.

2. Horse for

service.

3. Homage and

fealty.

4. Primer Sei-

sin.

The policie of

the Conque-

rour in the re-

servation of

services

constituted in

foure particu-

lars, was to

have the mar-

riage of his

Wards both

Male and Fe-

male.

Interest of marriage goeth employed in every tenure by Knights service.

Reservation that his tenant shall keepe a horse of Service, and serve upon him himselfe when the King went to warres, which is a part of that service called Knights service.

The second was, to the end that his people should still bee conserved in warlike exercises and able for his defence; when therefore hee gave any good Portion of Lands, that might make the partie of abilities or strength, hee withall reserved this service, That that partie and his heires

having such Lands, should keepe a horse of service continually, and serve upon him himselfe when the King went to wars, or else

having impediment to excuse his owne person,

should find an other to serve in his place;

which service of horse and man, is a part of that tenure called Knights service at this day.

But if the Tenant himselfe bee an Infant,

the King is to hold this Land himselfe untill he come to full age, finding him meat, drinke,

apparell, and other necessaries, and finding a horse and a man, with the overplus, to serve in the warres as the Tenant himself should do if he were at full age.

But if this inheritance descend upon a woman, that cannot serve by her sex, then the King is not to have the

Lands, she being of 14. yeares of age, because shee is then able to have an husband, that may do the service in person.

The third Institution, that upon every guift of Land the King reserved a vow and an Oath to bind the partie to his faith & loyaltie, that vow was called *Homage,* the oath *Fealtie,* Homage is to be done kneeling, holding his hands betweene the knees of the Lord, saying in the French tongue; I become your man of Life and limbe, and of earthly honour. Fealtie, is to take an oath upon a booke, that hee will be a faithfull Tenant to the King, and doe his service, and pay his rents according to his tenure.

The fourth Institution, was that for Recognizon of the Kings bounty by every heire succeding his ancestor in those Knights service lands, the King should have *Primer seisin* of the lands, which is one yeares profit of the lands,

and untill this be paid the King is to have possession of the land, and then to restore it to the heire; which continueth at this day in use, and is

Ayd money to make the Kings eldest Son a Knight, or to marry his eldest Daughter, is likewise due to his Majestie from every one of his Tenants in Knights service, that hold by a whole fee 20 s. and from every Tenant in Soccage if his land be worth 20. pound *per ann.* 20. s.

vide N. 3. fol. 82

Escuage was likewise due unto the King from his Tenant by Knights service:when his Majestie made a voyage royail to warre against another Nation, those of his Tenants that did not attend him there for 40. dayes with Horse and furniture fit for service, were to be assessed in a certaine summe by Act of Parliament,

to bee payed unto his Majesty, which assessement is called Escuage.

3. Institution of the Conquerour was, that his tenants by Knights service vow unto loyaltie, which he called Homage, and make unto him oath of his faith which was called Fealtie.

1. Homage.

2. Fealtie.

4. Institution was for Recognizon of the Kings bounty, to be payd by every heire upon the death of his ancestor,

which it one yeares profit of the Lands,

called, *Primer seissin.*

Knights Service in Capite,

is a Tenure *de*

persona Regis.

Tenants by

Grand Serieantie, were to pay reliefe at the full age of every heire, which was one yeeres value of the lands so held *ultra Repriss.*

Grand Serieantie.

Pettie Serieantie.

the very cause of suing Liverie, and that as well where the heire hath bin in ward as otherwise.

These before mentioned be the rights of the tenure, called Knights service in *Capite,* which is as much to say, as tenure *de persona*

Regis, & *Caput,* being the chiefest part of the person, it is called a Tenure in *Capite,* or in Chiefe. And its also to be noted, that as this tenure in *Capite* by Knights service generally was a great safetie to the Crowne, so also the Conquerour instituted other tenures in Capite necessary to his estate; as namely, he gave divers lands to be holden of him by some speciall Service about his person, or by bearing some speciall Office in his house,

or in the Field, which have Knights service and more in them, And these hee called Tenures by *Grand Serieantie.* Also he provided upon the first gift of Lands, to have Revenues

by continuall Service of Ploughing his Land, repairing his Houses, Parkes pales,

Castles and the like. And sometimes to a yearely provision of Gloves, Spurres,

Hawkes, Horses, Hounds and the like; which kind of reservations are called also tenures in Chiefe or in Capite of the King,

but they are not by Knights service, because they required no personall service, but such things as the Tenants may hire another to

doe or provide for his money. And this Tenure is called a tenure by Soccage in Capite,

the word *Soccagium* signifying the Plough,

howbeit in this later time, the Service of Ploughing the land is turned into mony rent,

and so of Harvest workes, for that the Kings doe not keepe their Demeasne in their owne hands as they were wont to doe, yet what Lands were *De antiquo Dominico Corona,* it well appeareth in the Records of the Exchequer called the booke of Doomesday. And the Tenants by ancient Demeasne, have many immunities & priviledges at this day, that in ancient times were granted unto those Tenants by the Crowne, the particulars whereof are too long to set downe,

These Tenures in *Capite,* as well that by *Soccage,* as the others by *Knights service,* have this propertie; that the Tenants cannot alien their Lands without licence of the King: if he do, the King is to have a Fine for the contempt, and may seize the land, and retaine it untill the fine be paid. And the reason is,

because the King would have a libertie in the choyce of his Tenant, so that no man should presume to enter into those Lands and hold them (for which the King was to have those speciail services done him) without the Kings leave; This licence and fine as it is now disgefted is easie and of course.

The institutoon of Soccage

in Capite, and what it is now turned into monies rents, Ancient Derneasne Tenure, what?

There is an office called the office of *Alienation,* where any man may have a licence at a reasonable rate, that is, at the third part of one yeares value of the Land moderately rated. A Tenant in *Capite* by Knights service or grand Serieantie, was restrained by ancient Statute, that hee should not give nor alien away more of his Lands, than that with the rest he might be able to doe the service due to the King; and this is now out of use.

And to this Tenure by Knights Service in chiefe, was incident that the King should have a certaine summe of money, called *Aid*; due to bee ratably levied amongst all those Tenants proportionably to his Lands,

to make his eldest Sonne a Knight, or to marry his eldest Daughter.

And it is to bee noted, that all those that hold Lands by the Tenure of Soccage in *Capite* (although not by Knights service) cannot alien without licence, and they are to sue livery, and pay Primer Seisin, but not to be in Ward for bodie or Land.

By example and resemblance of the Kings policie in these Institutions of Tenures, the Great men and Gentlemen of this Realme

did the like so neere as they could; as for example, when the King had given to any of them two thousand Acres of Land, this party purposing in this place to make his dwelling,

or (as the old word is; his Mansion house, or his Mannor house: did devise how he might make his Land a compleat habitation to supply him with all manner of necessaries,

and for that purpose, hee would give of the outtermost parts of those two thousand Acres, 100. or 200. Acres, or more or lesse, as he should thinke meet, to one of his most trustie Servants, with some reservation of rent to find a horse for the Warres, and goe with him when hee went with the King to the Warres,

adding vowe of Homage, and the Oath of Fealtie, Wardship, Marriage, and reliefe. This Reliefe is to pay five pound for every Knights Fee, or after the rate for more or lesse at the entrance of everie Heire; which Tenant so created and placed, was and is to this day called a Tenant by Knights Service, & not by his own persone, but of his Mannors; of these he might make as many as he would. Then this Lord would provide that the Land which he was to keepe for his own use, should be ploughed, & his Harvest brought home, his House repayred, his Parke pailed, and the like: and for that end he

Office of Alienation.

A licence of alienation is the third part of one yeeres value of the land moderately rated.

Aid a summe of mony ratably levied according to the proportion of the lands. every Tenant by Knights service in Capite,

had to make the Kings eldest Son a Knight, or to marry his eldest daughter. Tenants by Soccage in Cap. must sue liverie and pay Primer Seisin,

and not to bee in Ward for bodie or land. How Mannors were at first created. Mannors created by great men in imitation of the policie of the king in the institutions of tenures.

Knights Service Tenure created by the Lord is not a Tenure by Knights service of

the person of the Lord,

but of his Mannor.

A manere, the word Mannor.

Knights service tenure reserved to common persons.

Reliefe is

five pound to be paid by eve-

ry Tenant by Knights service to his Lord upon his entrance respectively for every Knights fee descended.

Soccage Tenure reserved by the Lord.

would give some lesser parcels to sundry others, of twentie, thirtie, fortie or fiftie Acres; reserving the service of ploughing a cerraine quantitie, or so many dayes of his Land, and certaine Harvest workes or dayes in the Harvest to labour, or to repaire the House, Parke pale, or otherwise, or to give him for his Provision Capons, Hens,

Pepper, Commin, Roses, Gilliflowers;

Spurres, Gloves, or the like; or to pay him a certaine rent, and to be sworne to be his faithfull Tenant, which Tenure was called a soccage Tenure, & is so to this day, howbeit most of the ploughing and harvest services,

are turned into mony rents.

The Tenants in Soccage at the death of every Tenant were to pay reliefe, which was not as Knights service is, five pound a Knights fee. But it was, and so is still, one yeares rent of the Land; and no wardship or other profit to the Lord. The remainder of the two thousand Acres he kept to himselfe, which he used to manure by his bondmen, and appointed them at the Courts of his Mannor how they should hold it, making an entrie of it into the Roll of the Remembrances of the Acts of his Court, yet still in the Lords power to take it away: and there-

fore they were called Tenants at will, by Coppie of Court Roll; being in truth bondmen at the beginning, but having obtained freedome of their persons, and gained a custome by use of occupying their Lands,

they now are called Coppie-holders, and are so priviledged. that the Lord cannot put them out, and all through Custome. Some Coppie-holders, are for lives, one, two, or three successively: & some inheritances from heire to heire by custome, and custome ruleth these estates wholly, both for widdowes estates, fines, harriots, forfeitures, and all other things.

Mannors being in this sort made at the first,

reason was that the Lord of the Mannor should hold a Court, which is no more then to assemble his Tenants together, at a time by him to be appointed; in which Court,

he was to be informed by oath of his Tenants, of all such duties, rents, reliefes,

Wardships, Copie-holds or the like, that had hapned unto him; which information is called a presentment, and then his Bailife to seize and distraine for those duties if they were denied or with holden, which is called a Court Baron, and herein a man may sue for any debt or Trespasse under 40[1] value, and the Freeholders are to judge of the cause upon proofe produced upon both sides. And

Reliefe of Tenant in Soccage, one years rent and nowardship or other profit upon the dying of the Tenant.

Ayd mony and Escuage mony is likewise due unto the Lords of their Tenants, *vide* N. 3. fol. 82. and 83.

Villenage or Tenure by Coppie of Court Roll.

Court Baron,

with the use of it.

Suit to the Court of the Lord incident to the Tenure of the Free-

holders.

therfore the Free-holders of these Mannors, as incident to their Tenures, doe hold by suit of Court, which is to come to the Court, & there to judge betweene partie and partie in those pettie actions; and also to informe the Lord of duties of rents and services unpaid to him from his Tenants. By this course it is discerned who be the Lords of lands, such as if the Tenants dye without heire, or be attainted of felonie or Treason, shall have the Land by Escheat.

Now concerning what attainders shall give the Escheat to the Land, it is to be noted, that it must eyther bee by judgement of Death given in some Court of Record against the Felon found guiltie by Verdict, or confession of the Felonie, on it must bee by Out-lawry of him.

The Out-lawrie groweth in this sort, a man is Indicted for Felonie, being not in hold, so as he cannot be brought in person to appeare & to be tryed, insomuch that Processe of *Capias* is therfore awarded to the Sheriffe, who not finding him returneth *Non est inventus in Balliva mea;* and thereupon another *Capias* is awarded to the Sheriffe, who likewise not finding him maketh the same returne, then a Writ called an *Exigent* is directed to the Sheriffe, commanding him to Pro-

claime him in his Countie Court five severall Court dayes to yeeld his body, which if the Sheriffe doe, and the party yeeld not his body, he is sayd by the Default to be Out-lawed, the Coroners there adjudging him Out-lawed, and the Sheriffe making the returne of the Proclamations and of the judgement of the Coroners upon the backside of the writ. This is an attainder of Felonie, whereupon the Offender doth forfeit his Lands by an Escheat to the Lord of whom they are holden.

But note, that a man found guilty of Felonie by verdict or confession, and praying his Cleargie, and thereupon reading as a Clerke, and so burnt in the hand and discharged, is not attainted, because he by his Cleargy preventeth the judgement of death, and is called a Clerke convict, who loseth not his Lands, but all his Goods, Chattels, Leases and Debts.

So a man indicted that will not answer nor put himselfe upon tryall, although he be by this to have judgement of Pressing to Death, yet he doth forfeit no Lands, but Goods, Chattels, Leases and Debts, except his offence be Treason, and then he forfeiteth his Lands to the Crowne.

What attainders shall give the Escheat to the Lord. Attainders, 1. By judgement, 2. By verdict or confession. 3. By outlawry, give the Lands to the Lord.

Of an Attainder by Outlawrie.

Prayer of

Cleargie.

He that standeth mute forfeiteth no lands, except for Treason.

So a man that killeth him-selfe shall not lose his Lands, but his Goods, Chattels, Leases and Debts. So of those that kill others in their owne defence, or by misfortune.

A man that beeing pursued for Felonie, and flyeth for it, loseth his Goods for his flying, although hee returne and is tryed, and found not guiltie of the

Fact.

So a man Indicted of Felonie, if hee yeeld not his body to the Sheriffe untill after the Exigent of Proclamation is awarded against him, this man doth forfeit all his goods for his long stay, although hee be found not guiltie of the Felonie, but none is attainted to lose his lands, but onely such as have Judgements of Death by tryall upon verdict or their owne confession, or that they be by Judgement of the Coroners out-lawed as before.

Besides the Escheats of lands to the Lords of whom they be holden for lacke of heires, and by attainder for Felony (which onely doe hold place in Fee-simple lands) there are also forfeiture of Lands to the Crowne by attainder of Treason; as namely, if one that hath entailed Lands commit Treason,

he forfeiteth the profits of the lands for his life to the Crowne, but not to the Lord.

And if a man having an estate for life of himselfe or of another, commit Treason or Felonie, the whole estate is forfeited to the Crowne, but no Escheat to the Lord.

But a Coppie-hold, for Fee-simple, or for life, is forfeited to the Lord and not to the Crowne; and if it be entailed, the Lord is to have it during the life of the offender onely, and then his heire is to have it.

The Custome of *Kent* is, that Gauilkind land is not forfeitable nor Escheatable for Felonie, for they have an old saying; The Father to the Bough, & the Son to the plough.

If the Husband was attainted, the Wife was to lose her thirds in cases of Felonie and Treason, but yet she is no offender, but at this day it is holden by Statute Law that shee loseth them not, for the Husbands Felony. The relation of these forfeits are these.

1. That men attainted of Felonie or Treason by verdict or Confession, do forfeit all the Lands they had at the time of their offence committed, and the King or the Lord who-

He that killeth himselfe forfeiteth but his Chattels.

Flying for Felony, a forfeiture of Goods.

He that yeeldeth his body upon the Exigent for Felonie forfeiteth his goods.

Lands entaild, Escheat to the King for Treason.

Of the Relation of Attainders, as to the Forfeiture of Lands and goods with the diversity.

Stat. 26. H. 8.

Tenant for life commiteth Treason or Felony, there shal be no Escheat to the Lord.

The wife loseth no power not with standing the husband be attainted of Felonie.

Attainder in Felony or treason by verdict, confession, or outlawry, forfeiteth all they had from the time of the offence committed.

And so it is upon an attainder of outlawry, otherwise it is in the attainder by verdict, confession and outlawrie, as to their relation for the forfeiture of goods and Chattels.

The Kings Officers upon the apprehension of a Felon are to seize his goods and Chattels.

soever of them hath the Escheat or forfeiture, shall come in and avoid all Leases, Statutes, or conveyances

done by the offender, at any time since the offence done. And so is the Law cleare also if a man bee attainted for Treason by outlawry; but upon attainder of felonie by outlawry, it hath beene much doubted by the Law-bookes whether the Lords title by escheat shall relate backe to the time of the offence done, or onely to the date or teste of the writ of Exigent for Proclamation, whereupon he is outlawed; howbeit at this day it is ruled, that it shall reach backe to the time of his fact:, but for goods, chattels, and debts, the Kings title shall looke no further backe then to those goods, the partie attainted by verdict or confession, had at the time of the verdict & confession given or made, And in outlawries at the time of the Exigent as well in Treasons as Felonies: wherein it is to be observed, that upon the

parties first apprehension, the Kings Officers are to seize all the goods and Chattels, and preserve them together, dispending onely so much out of them as is fit for the sustentation of the person in prison, without any wasting, or disposing them untill conviction, and

then the propertie of them is in the Crowne, and not before.

It is also to bee noted, that persons attainted of Felonie or Treason, have no capacitie in them to take, obtaine or purchase, save onely to the use of the King, untill the partie be pardoned.Yet the partie giveth not backe his Lands or Goods without a speciall Patent of Restitution, which cannot restore the bloud without an Act of Parliament. So if a man have a Sonne, and then is attainted of Felonie or Treason & pardoned, and purchaseth Lands, and then hath issue another son, and dyeth; the Sonne he had before he had his pardon, although he be his eldest Sonne, and the Patent have the words of restitution to his Lands, shall not inherit, but his second Sonne shall inherit them, And not the first; because the bloud is corrupted by the Attainder, and cannot be restored by Patent alone, but by Act of Parliament. And if a Man have two Sonnes; and the eldest is attainted in the life of his Father, and dyeth without issue, the Father living, the second sonne shall inherit the Fathers Lands; but if the eldest Son have any issue, though he die in the life of his Father, then neither the second Son, nor the issue of the eldest, shall inherit the Fathers Lands, but the Father shall there be accompted to dye without Heire, & the Land shall Escheate, whether the eldest Sonne have issue or not afterward or before, though he be pardoned after the death of his Father.

A person attainted may purchase, but it shall be to the Kings use. There can be no restitution in Bloud without Act of Parliament, but a pardon enableth a man to purchase, and the heire begotten after shall inherit those Lands.

Propertie of Lands by Conveyance, is first distributed into estates, for Yeares, for Life, in Tayle, and Fee-simple.

Propertie of Land by conveyance divided into, 1. Estates in Fees.

2. In Tayle. 3. For Life. 4. For Yeeres.

Lease for yeares they go to the Executors and not to the Heire.

These Estates are created by word, by writing, or by record. For Estates of Yeares, which are commonly called Leases for Yeares, they are this made; where the owner of the Land agreeth with the other by word of mouth, that the other shall have, hold, & enjoy the Land.to take the profits therof for a time certaine of Yeares, Moneths, Weekes or Dayes, agreed betweene them; and this is called a lease Paroll; such a lease may be made by writing Pole or Indented of devise grant and to farme let, and so also by fine of Record, but whether any Rent be reserved or no, it is not materiall. Unto these leases there may bee annexed such exceptions, conditions and Covenants, as the parties can agree on. They are called Chattels Reall, and are not inheritable by the heires, but goe to the Executors and Administrators, and be saleable for debts in the life of the owner, or in the Executors or

Lease by writing Pole or indented.

Administrators hands by Writs of Execution upon Statutes, Recognizances, Judgements of Debts or Damages. They be also forfeitable to the Crowne by Outlawry, by Attainder for Treason, Felonie, or Premunire, killing himselfe, Flying for Felonie, although not guilty of the fact, standing out or refusing to be tryed by the Country, by Conviction of Felonie, by verdict without Judgement, Pettie larcenie, or going beyond the Sea without licence.

Country. 7. By Conviction. 8. Pettie larcenie. 9. Going beyond out License,

They are forfeitable to the Crowne, in like manner as Leases for Yeares, or interest gotten in other mens Lands, by extending for debt upon Judgement in any Court of Record, Stat. Merchant, Stat. Staple, Recognizances, which being upon Statutes are called Tenants by Stat. Merchant, or Staple, the other Tenants by Elegit, and by Wardship of Body and Lands, for all these are called Chattels Reall, and goe to the Executors and Administrators, and not to the heires, and are saleable and forfeitable as Leases for yeares are.

A rent need not to be reserved.

By what meanes they are forfeitable.

Leases are to be forfeited by attainder. 1. In Treason. 2. Felonie.

3. Premunire.

4. By killing hiimselfe.

5. For flying. 6.Standing out or mute, or refusing to be tryed by the

the Sea witb-

Extents upon Stat. Staple. Marchant, Elegit, Wardship of Bodie and Lands are Chattels, and forfeitable in the same manner as leases for years are.

Lease Paroll.

Lease for life is not forfeitable by outlawry except in cases of Felonie or Premunire, and then to the King and not to the Lord by Escheat; and it is not forfeited by any of the meanes before mentioned of leases for yeares,

What Livery of Seisin is, and how it is requisite to every Estate for life.

Leases for lives are also called Freeholds, they may also be made by Word or writing, there must be Liverie and Seisin given at the making of the Lease, whom we call the Lessor; who commeth to the doore, backside or Garden if it be a house, if not, then to some part of the Land, and there he expresseth, that hee doth grant unto the taker called the Lessee, for tearme of his life: and in Seisin thereof, hee delivereth to him a Turfe, twig, or Ring of the doore; and if the Lease bee by writing, then commonly there is a note written on the backeside of the Lease, with the names of those witnesses who were present at the time of the Liverie of Seisin made; This estate is not saleable by the Sheriffe for Debt, but the Land is to be extended for a yearely value, to satisfie the Debt. It is not forfeitable by Outlawrie, except in cases of Felonie, nor by any of the meanes before mentioned, of Leases for yeares; saving in an Attainder for Felonie, Treason, Premunire, and then onely to the Crowne, and not to the Lords by Escheat.

And though a Noble man or other, have liberty by Charter, to have all Felons Goods;

yet a Tenant holding for tearme of life, being attainted of Felonie, doth forfeit unto the King and not to this Noble man.

If a man have an Estate in Lands for another mans life, and dyeth; this Land cannot goe to his Heire, nor to his Executors, but to the partie that first entreth; and he is called an Occupant as before hath beene declared.

A Lease for yeares or for life may be made also by fine of Record, or bargaine and sale, or Covenant to stand seized upon good considerations of Marriage, or Bloud, the reasons whereof, are hereafter expressed.

Entayles of Lands are created by a gift, with Liverie and Seisin to a man, and to the heires of his body; this word (Body) making the entaile, may be demonstrated and restrained to the Males or Females, heires of their two bodies, or of the body of either of them, or of the body of the Grand father or father.

Entayles of Lands began by a Statute made in *Ed*. I. time, by which also they are so much strengthened, as that the Tenant in Tayle could not put away the Land from the heire by any Act of conveyance or Attainder, nor let it, nor incumber it, longer then his own Life.

Indorsement of Liverie upon the Backe of the deed and witnesse of it.

Lease for life not to be sould by the Sheriffe for debt but extended yeer-

ly

A man that

hath bona

Felon. by

Charter, shall not have the meanes if leaser for life bee attainted.

Occupant.

Of estate talies, and how such an estate may be limited

By the Stat, of West. I. made in *E*. I. time, estates in tayle were so strengthened they were not forfeiable by any attainder.

But the inconvenience thereof was great, for by that meanes, the Land being so sure tyed upon the heire as that his Father could not put it from him, it made the Sonne to bee disobedient, negligent, and wastfull; often marrying without the Fathers consent, and to grow insolent in vice knowing, that there could be no checke of disinheriting him. It also made the owners of the land lesse fearefull to commit Murthers, Felonies, Treasons, and Manslaughters; for that they knew, none of these acts could hurt the Heire of his inheritance. It hindred men that had intayled lands, that they could not make the best of their lands by fine and improvement, for that none upon

so uncertaine an estate as for terme of his own life would give him a fine of any valew nor lay any great stocke upon the land that might yeeld rent improved.

Lastly, those Entailes did defraud the Crowne, and many Subjects of their Debts; for that the land was not lyable longer then his owne life-time; which caused that the King could not safely commit any office of accompt to such, whose land were entailed nor other men trust them with loane of

money.

These inconveniences were all remedied by Acts of Parliament; as namely, by Acts of Parliament later then the Acts of Entailes, made, 4. *H.* 7. 32. *H.* 8. A Tenant in taile may disinherit his Sonne by a fine with Proclamation, and may by that meanes also, make it subject to his Debts and Sales.

By a Statute made, 26. *H.* 8. A Tenant in taile doth forfeite his lands for Treason; and by an other Act of Parliament, 32. *H.* 8.He may make leases good against his heire for 21. yeares, or three lives; so that it be not of his chiefe Houses, Lands, or demeasne, or any lease in Reversion, nor lesse rent reserved then the Tenants have payed most part of 21. yeares before, nor have any manner of discharge for doing wasts and spoiles: by 2 Statute made 33. *H.* 8. tenants of Entayled lands are lyable to the Kings debts by Extent, and by a Stat. made 13. & 39. *Eliz.* they are saleable for the arrerages upon his accompt for his Office; So that now it resteth, that Entailed Lands have two priviledges only, which be these First, not to be forfeited for Felonies. Secondly, not to bee extended for Debts after the parties death, except the Entailes be cut off by Fine and Recoverie.

his death: *Proviso*, not to put away the Land from his next heyre. forfeit his owne Estate, and that his next heyre must enter.

The great inconvenience that ensued thereof.

The prejudice the Crowne received therby.

The Stat. 4. *H.* 7 and 22. *H.* 8. 10.

bar estates taile by fine.

26. *H.* 8.

33. *H.* 8.

33. *H.* 8.

13. &. 39. *Eliz.*

Entailes two priviledges. First, Not forfeitable for Felonie.

Secondly, Not extendable for the Debts of the partie after If he doe, to

Of the new device called a Perpetuitie, which is an Entayle with an addition.

These Perpetuities would bring in all the former in conveniencies of Estates tailes.

The inconveniencies of those Perpetuities.

But it is be noted that since these notable Statutes, and remedies provided by Statutes, doe dock Entayles, there is start up a device called Perpetuitie, which is an Entayle with an addition of a *Proviso* Conditionall, tyed to his Estate, not to put away the Land from his next heyre; and if he doe, to forfeit his owne estate. Which Perpetuities if they should stand, would bring in all the former inconveniences subject to Entayles, that were cut off by the former mentioned Statutes, and farre greater; for by the Perpetuitie, if he that is in possession start away never so little, as in making a Lease, or selling a little quillet, forgetting after two or three Discents, as often they doe, how they are tyed, the next Heyre must enter; who peradventure is his Sonne, his Brother, his Uncle or kinsman, and this raiseth unkind Suites, setting all that kindred at jarres, some

taking one part, some another, & the principal parties wasting their time and mony in suites of law. So that in the end, they are both constrained by necessitie to joyne both in a Sale of the land, or a great part of it, to pay their Debts, occasioned through their Suites; And if the chiefest of the Family for any good purpose of well seating himselfe, by selling that which lyeth farre off is to buy that which is neere, or for the advancement of his Daughters or younger Sonnes, should have reasona-

ble cause to sell, this Perpetuitie, if it should hold good, restraineth him. And more then that where many are owners of inheritance of land not Entayled, may during the minoritie of his Eldest sonne, appoint the profits to goe to the advancement of the younger Sons and Daughters, and pay Debts by Entayles and Perpetuities: the owners of these lands cannot doe it, but they must suffer the whole to discend to his eldest Sonne, and so to come to the Crowne by Wardship all the time of his Infancie.

Wherefore seeing the dangerous times and utowardly Heyres, they might prevent those mischiefes of undoing their Houses by conveying the Land from such heyres, if they were not tyed to the stake by those Perpetuities, and restrained from Forfeiting to the Crowne, and disposing of it to their owne or to their Childrens good; Therefore it is worthy of consideration, whether it be better for the Subject and Soveraigne to have the lands secured to mens Names & Blouds by perpetuities, with all inconveniences above-mentioned, or to be in hazzard of undoing his House by unthriftie posteritie.

The last and greatest Estate of Lands is Fee-simple, and beyond this there is none of the former for Lives, Yeares or Entayles;

Quere whether it be better to restraine men by these Perpetuities from alienations, or to hazard the undoing of houses by unthrifty Posteritie.

The last and

greatest Estate in Land is

Fee-simple.

A remainder cannot be limitted upon an estate in Fee-simple.

The difference betweene a remainder and a Reversion.

A Reversion

cannot bee granted by word.

Atturnement must be had to the grant of the Reversion.

The tenant not compellable to atturne but where the Reversiori is granted by fine.

but beyond them is Fee-simple. For it is the greatest, last and uttermost degree of Estates in Land; therefore hee that maketh a Lease for life, or a gift in tayle, may appoint a remainder when he rnaketh another for life or in tayle, or to a third in Fee-simple; but after a Fee-simple he can limit no other estate. And if a man doe not dispose of the Fee-simple by way of remainder, when he maketh the gift in tayle, or for lives, then the Fee-simple resteth in him self as a Reversion.The difference between a Reversion & a Remainder, is this, The Remainder is alwayes a succeeding Estate, appointed upon the gifts of a precedent Estate, at the time when the Precedent is appointed. But the Reversion is an estate left in the giver, after a particular estate made by him for Yeares, Life, or Entaile; where the remainder is made with the particular estates, then it must bee done by Deeds in writing, with Liverie and Seisin, and cannot be by words; And if the giver will dispose of the Reversion after it remaineth in himselfe, he is to doe it by writing, and not by word; and the Tenant is to

have notice of it, and to atturne it, which is to give his assent by word or paying rent, or the like; and except the Tenant will thus atturne, the partie to whom the Reversion is granted cannot have the Reversion, neither can he compell him by any Law to atturne, except the grant of the Re-

version be by fine; and then hee may by writ provided for that purpose:and if he doe not purchase that writ, yet by the fine, the Reversion shall passe; and the Tenant shall pay no rent, except he will himselfe, nor be punished for any wastes in houses, woods &c. unlesse it be granted by bargaine and Sale by Indenture inrolled; These Fee simple estates lye open to all perrils of Forfeitures, Extents, Incumbrances and sales.

What a

Feofment of land is.

Lands are conveyed by these 6. means; First, by Feofment, which is, where by Deed Lands are given to one and his heires, and Liverie and Seisin made according to the forme and effect of the deed; if a lesser estate then Fee-simple bee given, and liverie of seisin made, it is not called a Feofment, except the Fee-simple be conveyed, but is otherwise called a lease for life or gift intaile as above mentioned.

A Fine is a reall agreement, beginning thus, *Hæc est finalis Concordia, &c.* This is done before the Kings Judges in the Court of Common Pleas, concerning lands that a man should have from another to him and his Heires, or to him for his Life, or to him and the heires males of his body, or for yeares certaine, whereupon rent may bee reserved, but no Condition or Covenants. This Fine

Lands may be

conveyed six

manner of

wayes.

1 By Feofment.

2 By Fine.

3 By Recovery

4 By Use.

5 By Covenant

6 By Will.

What a Fine is, and how lands may be conveyed hereby.

is a Record of great credit, and upon this Fine are foure Proclamations made openly in the Common Pleas; that is, in every Terme one for foure Termes together; and if any man having right to the lame, make not his claime within five yeares after the Proclamations ended, he loseth his right for ever, except hee be an Infant, a Woman covert, a Mad-man, or beyond the Seas, and then his right is saved; so that hee claime within five yeares after the death of her husbands full age, recoverie of his wits, or returne from beyond the Seas. This Fine is called a Feofment of Record, because that it includeth all that the Feofment doth, and worketh further of his own nature, & barreth Intailes peremptorily, whether the heire doth clayme within five yeares or not, if he claime by him that levied the Fine.

Recoveries are where for assurances of lands the parties doe agree, that one shall begin an Action reall against the other, as though he had good right to the land, and the other shall not enter into Defence against it, but alleadge that hee bought the land of *I. H.* who had warranted unto him, and pray that *I.H.* may bee called in to defend the Title, which *I.H.* is one of the Cryers of the Common Pleas, & is called the *Common Voucher*. This *I.H.* shall appeare and make as if he

would defend it, but shall a pray day to be assigned him in his matter of Defence; which being granted him at the Day, hee maketh Default, and thereupon the Court is to give judgement against him; which cannot be for him to lose his lands because he hath it not, but the partie that he hath sold it to, hath that who vouched him to warrant it.

Therefore the Demandant who hath no defence made against it, must have Judgement to have the land against him that hee sued (who is called the Tenant) and the Tenant is to have Judgement against *I.H.* to recover in value so much Land of his, where in truth he hath none, nor never will. And by this Device grounded upon the strict Principles of Law, the first Tenant loseth the land, and hath nothing for it; but it is by his owne agreement for assurance to him that bought it.

This Recoverie barreth Entayles, and all Remainders and reversions that should take place after the Entayles, saving where the king is giver of the Entayle and keepeth the Reversion to himselfe; then neither the Heire, nor the Remainder, nor Reversion, is barred by the recoverie

Five yeares non Clayme barreth not. 1 An Infant. 2 Feme Covert

3 Mad-man.

4 Beyond Sea.

Fine is a Feofment of Re-

cord.

What Recoveries are.

Common Voucher one of the Criers

of the Court.

Judgement for the Demaun. dant against the Tenant in taile.

Judgement for the Tenant to recover so much land in value of the Common voucher.

A recovery barreth an Escheat taile and all reversions and remaindments thereupon.

The reason why a Common Recovery barreth those in Remainder & Reversions.

The many inconveniencies of estates in tayle brought In these Recoveries, which are made now common conveyances and assurances for Land.

Upon Fines, Feofments, & Recoveries, the estate doth settle according to the intent of the parties.

The reason why the Heires, Remainders, and Reversions are thus barred, is because in strict Law the recompence adjudged against the Cryer that was Vouchee, is to goe in succession of Estate as the Land should have done, and then it was not reason to allow the Heire the libertie to keepe the Land it selfe, and also to have recompence; and therefore he loseth the Land, and is to trust to the Recompence.

This sleight was first invented, when Entayles fell out to be so inconvenient as is before declared, so that men made no Conscience to cut them off, if they could finde Law for it. And now by use, those Recoveries are become common assurances against Entailes, Remainders, and Reversions, and are the greatest security Purchasers have for their monies; for a Fine will barre the Heire in tayle, and not the Remainder, nor Reversion, but a common Recovery will barre them all.

Upon Feofments and Recoveries, the estate doth settle as the use and intent of the parties is declared by word or writing, before the Act was done; As for example. If they make a writing, that one of them shall levie a Fine, make a Feofment, or suffer a common Recoverie to the other; but the use

and intent is, that one should have it for his life, and after his decease, a stranger to have it in Tayle, and then a third in Fee-simple. In this case the land setleth in an estate according to the use & intent declared. And that by reason of the Statute made 27. HENRY 8. conveying the Land in possession to him that hath interest in the use, or intent of the Fine, Feofment, or Recoverie, according to the use and intent of the parties.

Upon this Statute is likewise grounded the forth and fifth of the six Conveyances, *viz.* Bargaines, Sales, Covenants, to stand seized to uses; For this Statute, wheresoever it findeth an use, conjoyneth the possession to it, and turneth it into like quality of Estate, Condition, Rent and the like, as the use hath.

The use is but the equity and Honestie to hold the Land *in Conscientiai boni viri.* As for example. I and you agree that I shall give you money for your Land, and you shall make me assurance of it. I pay you the money, but you made me no assurance of it. Here although the estate of the Land bee still in you, yet the equitie and Honestie to have it is with me; and this equity is called the Use, upon which I had no remedy but in

Bargainee, Sales and Covenants to stand seized to a use, a reall grounded upon one Statute

What a use is.

Before 27. *H.* 8. there was no remedie for a use, but in Chancerie.

Chancerie, untill this Statute was made of 27. *Henry.* 8. and now this Statute conjoyneth and containeth the Land to him that hath the use. I for my money paid to you, have the Land it selfe, without any other Conveyance from you; and it is called a Bargains and Sale.

But the Parliament that made that Statute did foresee, that it would be mischievous that mens Lands should so sodainly upon the payment of a little money be convayed from them, peradventure in an Alehouse or a Taverne upon straineable advantages, did therefore gravely provide an other Act in the same Parliament, that the Land upon payment of this money should not passe away, except there were a Writing Indented, made betweene the said two Parties, and the said Writing also within six Moneths Inrolled in some of the Courts at Westminster, or in the Sessions Rolles in the Shire where the land lyeth; unlesse it be in Cities or Corporate Townes where they did use to Enroll Deeds, and there the Statute extendeth not.

The fifth Conveyance of a Fine, is a Conveyance to stand seized to uses: it is in this sort. A man that hath a Wife and Children Brethren and kinsfolkes, may by writing

The Stat. of 27.*H.* 8.doth not passe Land upon the payment of mony without a deed indented and Enrolled.

The Stat. of 27. of *H.* 8. extendeth not into Cities and Corporate Townes where they did use to Enroll Deeds.

A conveyance to stand seized to a use.

under his Hand and Seale, agree, that for their or any of their preferment hee will stand seized of his Lands to their uses, either for life in tayle or Fee, so as he shall see cause; upon which agreement in Writing, there

ariseth an Equitie or Honestie, that the land should goe according to those agreements; Nature and Reason allowing these provisions; which Equitie and Honestie is the use. And the use being created in this sort, the Statute of 27. *Henry* the Eight beforementioned, conveyeth the Estate of the land, as the use is appointed.

And so this Covenant to stand seized to uses, is at this day since the said Statute, a Conveyance of land, and with this difference from a Bargaine and sale; in that this needeth no Enrollment as a Bargaine and Sale doth, nor needeth it to be in writing Indented, as Bargaine and Sale must: and if the partie to whose use he agreeth to stand seized of the land, be not Wife, or Child, Couzen, or one that he meaneth to marry, then will no use rise, and so no Conveyance; for although the Law alloweth such weightie Considerations of Marriage and bloud to raise uses, yet doth it not admit so trifling Considerations, as of Acquittance, Schooling, Services, or the like.

Upon an agreement in writing to stand seized to the use of any of his kindred, a use may be created, and the estate of the land thereupon executed by 27. *H.* 8.

A Covenant to stand seized to a use needeth no Enrolment as a Bargaine and Sale to a use doth, so it be to the use of Wife, Child, or Cozen, or one hee tneaneth to marry.

Upon a Fine, Feofment or Recoverie a man may limit the use to whom he listeth, without Consideration of bloud, or money. Otherwise, in a Bargaine and Sale, or Covenant.

Of the continuance of land by will.

The not dispo-

sing of Lands

by will, was

thought to bee

a defect at the

Common

Law.

But where a man maketh an estate of his land to others, by Fine, Feofment or Recovery, he may then appoint the use to whom hee listeth, Without respect of Marriage, kindred, or other things; for in that case his owne Will and declaration guideth the equity of the Estate. It is not so when hee maketh no estate, but agreeth to stand seized, nor when he hath taken any thing, as in the cases of Bargaine, and sale, and Covenant, to stand to uses.

The last of the six Conveyances, is a Will in writing; which course of Conveyance was first ordained by a Statute made 32. *H.* 8. before which Statute no man might give land by will, except it were in a Borrough-Town, where there was an especiall custome that Men might give their lands by will; as in London, and many other places.

The not giving of Land by Will, was thought to bee a defect at Common Law, that men in the wars, or suddainely falling sicke, had not power to dispose of their lands, except they could make a Feofment, or levie a Fine, or suffer a Recovery; which lacke of time would not permit: and for men to doe it by these meanes, when they could not undoe it againe, was hard; besides, even to the last houre of death, mens minds might alter

upon further proofes of their Children or Kindred, or encrease of Children or debt, or defect of servants or friends, to be altered.

For which cause, it was reason that the Law should permit him to reserve to the last instant the disposing of his lands, and to give him meanes to dispose it, which seeing it did not fitly serve, men used this devise.

They conveyed their full estates of their lands in their good health, to friends in trust, properly called Feoffees in trust; and then they would by their wils declare how their Friends should dispose of their lands; & if those Friends would not performe it, the Court of Chancery was to compell them, by reason of the trust; & this trust was called, the use of the land, so as the Feoffees had the land and the party himselfe had the use, which use was in equity, to take the profits for himselfe, & that the feoffees should make such an estate as he should appoint them; and if he appointed none, then the use should goe to the heire, as the estate it selfe of the land should have done; for the use was to the Estate like a shadow following the body.

The Course that was invented before the Stat, of 32. *H*. the 8. first

gave power to devise Lands by Will, which

was a Conveyance of Lands to Feoffeers in trust, to such persons as they should declare in their Will.

By this course of putting lands into use, there were many Inconveniences, (as this use which grew first fora reasonable cause.) *viz*. To give men power and libertie to dispose of their owne, was turned to deceive many of their just and reasonable rights; As namely, a man that had cause to sue for his land, knew not against whom to bring his action, nor who was owner of it. The wife was defrauded of her thirds.The Husband of being Tenant by curtesie. The Lord of his Wardship, Reliefe, Heriot, and Escheat.The Creditor of his Extent for debt.The poore Tenant of his lease; for these rights and duties were given by Law from him that was owner of the land, and none other; which was now the Feoffee of trust, and so the old owner which wee call the Feoffor should take the profits, and leave the power to dispose of the land at his discretion to the Feoffee, and yet he was not such a Tenant as to bee seized of the land, so as his Wife could have Dower, or the lands bee extended for his Debts, or that he could forfeit it for Felonie or Treason, or that his Heire could be Ward for it, or any duty of Tenure fall to the Lord by his Death, or that he could make any leases of it.

Which frauds by degrees of time as they encreased, were remedied by divers Statutes; as

namely, by a Statute of the 1. *Henry*, 6. and 4. *Henry*, 8. it was appointed that the action may bee tryed against him which taketh the profits, which was then *Cestuy que use* by a Statute made 1. *Richard*, 3. Leases and Estates made by *Cestuy que use* are made good, & Estat. by him acknowledged. 4 *Henry*, 7. the Heire of *Cestuy que use* is to be in Ward: 16. *Henry*, 8. the Lord is to have reliefe upon the death of any *Cestuy que use*. Which frauds neverthelesse multiplying daily, in the end 27. *Henry*, 8. the Parliament purposing to take away all those uses, and reducing the Law to the ancient forme of con veying of Lands by publike Livery of Seisin, Fine, and Recoverie; did ordaine, that where lands were put in trust or use, there the possession and estate should be presently carryed out of the Friends in trust, and settled and invested on him that had the Uses, for such tearrne and Time as he had the Use.

By this Statute of 27. *Henry*, 8. the power of disposing lands by Will, is clearely taken away amongst those frauds; whereupon 32. *Henry*, 8. another Statute was made, to give men power to give Lands by Will in this sort. First, it must be by Will in writing. Secondly, hee must be seized of an Estate in

The inconveniecces of putting Land into use.

The frauds of conveyances to use by degress of time, as they encreased, were remedied by the Statutes.

1. *H*. 8

4. *H.* 8. Stat. binding Cestay que use.

1. *R.* 3.

4. *H.* 7.

16. *H.* 8.

27. *H.*8, taking away all uses reduceth the Law to the ancient forme of Conveyances of Land, by Feofment, Fine, and Recoverie.

In what manner the Stat. of 32. *H.* 8. giveth power to dispose of Lands by will.

Fee-simple; For Tenant for an other mans Life, or Terme in Tayle, cannot give Land by Will, by that Statute 3. [ ] he must

be solely seized, & not joyntly with another; and then beeing thus seized, for all the Land he holdeth in Soccage Tenure, hee may give it by Will, except he hold any peece of land in *Capite* by Knights service of the King: and then laying all his lackes together, hee can give but two parts by Will; for the third part of the whole, as well in Soccage as in *Capite*, must descend to the Heire, to answer Wardship, Liverie and primer Seisin, to the Crowne.

And so if he hold lands by Knights service of a Subject, he can devise of the land but two parts, and the third the Lord by Wardship, and the Heire by descent is to hold,

And if a man that hath three Acres of Land holden in *Capite* by Knights service, doe make a joynture to his Wife of one, and convey an other to any of his Children, or to Friends, to take the profits, and to pay his Debts or Legacies, or Daughters Portions, then the third Acre or any part thereof he cannot give by Will, but must suffer it to descend to the Heire, and that must satisfie Wardship.

Yet a Man having three Acres as before, may convey all to his Wife or Children by Conveyance in his Life time, as by Feofment, Fine, Recoverie, Bargaine and sale, or Covenant to stand seized to uses and to dis-inherit the Heire. But if the heire be within age when his Father dyeth, the King or other Lord shall have that Heire in Ward, and shall have one of the three Acres during the Wardship.and to sue Liverie and Seisin. But at full age the Heire shall have no part of it, but it shal go according to the Conveyance made by the Father:

It hath beene debated how the thirds shall be set forth. For it is the use that all Lands which the Father leaveth to descend to the Heire, beeing Fee-simple, or in tayle, must be part of the thirds; and if it be a full third, then the King, nor Heire, nor Lord, can intermeddle with the rest; If it be not a full third, yet they must take it so much as it is, and have a supply out of the rest.

This supply is to be taken thus; If it be the Kings Ward, then by a Commission out of the Court of Wards, whereupon a Jury by oath, must set forth so much as shall make up the thirds, except the Officers of the Court of Wards can otherwise agree with the

If a Man be seized of *Capite* Lands and Soccage, he cannot devise but two parts of the whole.

The third part must descend to the Heire to answer Guardship, Liverie and Seisin to the Crowne. A Conveyance by devise of *Capite* Lands to the Wife for her Joynture, or to his Children for their good, or to pay Debts is void for a third part, by 32, *H.* 8.

Afflictis

afflictione

addere.

But a Conveyance by Act executed in the life-time of the partie of such Lands to such uses is not void, but a third part: but if the heire be within age, he shall have one of the Acres to be in Ward.

Entailed lands part of the thirds.

The King not lord cannot intermeddle if a full third part be left to descend to the Heire.

The manner of making supply when the part of the heire is not a full third,

The Statutes give power to the Testator to set out the third himselfe, and if it be not a third part, yet the King or Lord must take that in part, and have a supply out of the Rent.

parties. If there be no Wardship due to the King, then the other Lord is to have this supply by a Commission out of the Chancerie, and Jury thereupon.

But in all those cases the Statutes doe give power to him that maketh the Will to set forth and appoint of himselfe, which Lands shall goe for thirds, and neither King nor Lord can refuse it. And if it be not enough, yet they must take that in part, and only have a supply in manner as before is mentioned out of the rest.

Propertie in Goods.

Of the severall wayes whereby a man may get Propertie in Goods or Chattels.

1. By Gift.

2. By Sale.

3. By Stealing.

4. By Wayving.

5. By Straying.

6 By Shipwracke.

7. By Forfeiture.

8. By Executorship.

9. By Administration. 10. By Legacie.

1. *Propertie by gift*

By gift the property of goods may be passed by word or writing; but if there be a generall Deed of Gift made of all his Goods, this is suspitious to be done upon fraud, to deceive the Creditors.

And if a man who is in Debt, make a Deed of gift of all his Goods to protract the taking of them in Execution for his debt, this Deed of Gift is void, as against those to whom he stood indebted; but as against himselfe, his owne Executors or Administrators, or any man to whom afterwards he shall sell or Convey them, it is good.

2. *By Sale.*

Propertie in Goods by Sale. By Sale any man may convey his owne Goods to another; and although he may feare Execution for Debts, yet he may sell them out-right for money at any time before the Execution served, so that there be no reservation of trust be

A deed of gift of goods to deceive his Creditors is void against them, but good: against the Executors, Administrators, or Vender of the partie himselfe.

What is a Sale *bona fide* and what not, when there is a private reservation of trust betweene the parties.

tweene them, paying the money, he shall have the goods againe; for that trust in such case, doth prove plainely a fraud to prevent the Creditors from taking the goods in Execution.

3. *By Theft or taking in Jest.*

Propertie of Goods by Theft or taking in Jest. If any Man steale my Goods or Chattels, or take them from me in Jest, or borrow them of me, or as a Trespasser or Felon carry them to the Market or Faire, and sell them, this Sale doth barre me of the propertie of my goods, saving that if hee be a horse be must be ridden two houres in the Market or Faire, betweene ten and five a clocke, and Tolled for in the Toll-Booke, & the seller must bring one to avouch his sale, knowne to the Toll-booke-keeper, or else the sale bindeth me not. And for any other goods, where the Sale in a Market or faire shal barre the owner being not the seller of his Propertie, it must be sale in a Market or Faire where usual things of that Nature are sold. As for example: if a man steale a Horse, & sell him in Smithfield, the true owner is barred by this Sale; but if he sell the Horse in Cheapeside,

Newgate or Westminster market, the true owner is not barred by this Sale; because these Markets are usuall for Flesh, Fish, &c. and not for Horses.

So wheras by the Custom of *London* every Shop there is a Market all the dayes of the weeke, saving Sundayes and Holy dayes; Yet if a peece of Plate or Jewell that is lost, or Chaine of Gold or Pearle that is stolne or borrowed, be sold in a Drapers or Scriveners shop, or any others but a Goldsmith, this sale barreth not the true owner, *Et sic in similibus.*

Yet by stealing alone of Goods, the Thiefe getteth not such propertie, but that the owner may Seize them againe wheresoever he findeth them; except they were sold in Faire or Market, after they were stolne; and that *bona fide* without fraud.

But if the Thiefe be condemned of the Felonie, or outlawed for the same, or outlawed in any personall Action, or have committed a forfeiture of Goods to the Crowne, then the true owner is without remedie.

Neverthelesse if fresh after the goods were stolne, the true owner maketh pursuit after the Thiefe and goods, and taketh the Goods

How a Sale in Market shall be a barre to the owner.

Of Markets and what Markets such a Sale ought to be made in.

The owner may Seize his goods after they are stolne

If the Thiefe be condemned for Felonie, or outlawed, or forfeit the stolne goods to the Crowne, the owner is without remedie.

But if he make fresh pursuit he may take his goods from the thefe.

Or if he prosecuted the law against the Thiefe and convict him of the same Felonie, he shall have his goods againe by a writ of Resti-

tution.

with the Thiefe, hee may take them againe;

And if he make no fresh pursuit, yet if he prosecute the Felon, so farre as Justice requireth, that is, to have him Arraigned, Indicted, and found guilty (though hee be not hanged, nor have Judgement of Death) or have him outlawd upon the indictment; in all these cases he shall have his goods againe, by a writ of Restitution to the partie in whose hands they are.

4. *By Wayving of Goods.*

By Wayving of Goods, a propertie is gotten thus. A Thiefe having stolne goods, being pursued flyeth away and leaveth the goods. This leaving is called Wayving, and the propertie is in the King; except the Lord of the Mannor have right to it, by Custome or Charter.

But if the Felon be Indicted, adjudged, or found guiltie, or outlawed at the suit of the Owner of these goods, he shall have Restitu-

tion of these goods, as before.

5. *By Straying.*

By Straying, propertie in live Cattell is thus gotten. When they come into other

mens grounds straying from the owners, then the partie or Lord into whose grounds or Mannors they come, causeth them to be seized, and a With put about their neckes, and to be cryed in three Markets adjoyning, shewing the markes of the Cattell; which done, if the true owner claymeth them not within a yeare and a day, then the propertie of them is in the Lord of the Mannor whereunto they did stray, if he have all strayes by Custome or Charter, else to the King.

6. *Wracke, and when it shall be said to bee.*

By Shipwracke, property of Goods is thus gotten. When a Ship loaden is cast away upon the Coasts, so that no living Creature that was in it when it began to sinke escapeth to Land with life, then all those Goods are said to be wracked, and they belong to the Crowne if they be found; except the Lord of the Soyle adjoyning can intitle himselfe unto them by Custome, or by the Kings Charter.

7. *Forfeitures.*

By Forfeitures, Goods and Chattels are thus gotten. If the Owner be outlawed,

if he be indicted of Felonie, or Treason, or either confesse it, or be found guilty of it, or refuse to be tryed by Peeres or Jury, or be attainted by Judgement, or flye for Felony; although he be not guilty, or suffer the Exigent to goe foorth against him; although he be not outlawed, or that he go over the Seas without license, all the goods hee had at the Judgement, hee forfeiteth to the Crowne; except some Lord by Charter can claime them. For in those cases prescripts will not serve, except it be so ancient, that it hath had allowance before the Justices in Eyre in their Circuits, or in the Kings Bench in ancient time.

8. *By Executorship.*

By Executorship goods are gotten. When a man possessed of Goods maketh his Last Will and Testament in writing or by Word, and maketh one or more Executors thereof; These Executors have by the Will and death of the parties, all the propertie of their Goods, Chattels, Leases for Yeares Wardships and Extents, and all right concerning those things.

Those Executors may meddle with the Goods, and dispose them before they prove the Will, but they cannot bring an action for any Debt or duety before they have proved the Will.

The proving of the Will is thus.They are to exhibite the Will into the Bishops Court, and there they are to bring the witnesses, and there they are to be sworne, and the Bishops Officers are to keepe the Will Originall, and certifie the Copie thereof in Parchment under the Bishops Seale of Office, which Parchment so sealed, is called the Will proved.

9. *By Letters of Administration.*

By Letters of Administration propertie in goods is thus gotten. When a man possessed of goods dyeth without any Will, there such goods as the Executors should have had if he had made a Will, were by ancient Law to come to the Bishop of the Diocesse, to dispose for the good of his soule that dyed, he first paying his Funerals and Debts, and giving the rest *Ad pios usus.*

This is now altered by Statute Lawes, so as the Bishops are to grant Letters of Admi-

Executors may

before *probat* dispose of the goods, but not bring an action for any debt.

What *probat* of the Will is, and in what manner it is made.

Pÿ Usus.

nistration of the goods at this day to the Wife if shee require it, or Children, or next of kin; If they refuse it, as often they doe, because the debts are greater then the estate will beare, then some Creditor or some other will take it as the Bishops Officers shall thinke meet. It groweth often in question what Bishop shall have the right of proving Wills, & granting Administration of goods.

In which Controversie the rule is thus, That if the partie dead had at the time of his Death *Bona notabilia* in divers Diocesses of some reasonable value, then the Arch-bishop of the Province where he dyed is to have the probat of his Will, and to grant the Administration of his goods as the case falleth out; otherwise, the Bishop of the Diocesse where he dyed is to doe it.

If there be but one Executor made, yet he may refuse the Executorship comming before the Bishop, so that hee hath not entermedled with any of the goods before, or with receiving Debts, or paying Legacies.

And if there be more Executors then one, so many as list may refuse; and if any one take it upon him, the rest that did once refuse may when they will take it upon them, and no Executor shall bee further charged with

Debts or Legacies, then the value of the goods come to his hands; So that he fore-see that he pay Debts upon Record, first debts to the King, then upon Judgements, Statutes, Recognizances, then Debts by Bond and Bil sealed, Rent unpayed, Servants wages, payment to head workmen, and lastly, Shopbookes, and Contracts by Word. For if an Executor, or Administrator pay debts to others before to the King, or debts due by Bond before those due by Record, or debts by Shop-bookes and Contracts before those by Bond, arrerages of Rent, and Servants, or work mens wages, he shall pay the same over againe to those others in the sayd degrees.

But yet the Law giveth them choyce, that where divers have Debts due in equall degree of Record or specialty, hee may pay which of them hee will, before any suite brought against him; but if suite be brought he must first pay them that get Judgement against him.

Any one Executor may convey the Goods, or release Debts without his companion, and any one by himselfe may doe as much as all together; but one mans releasing of Debts or selling of Goods, shall not charge the other to pay so much of the Goods, if there be not, enough to pay debts; but it shall charge the

Where the Intestate had *Bona notabilia* in divers Diocesses, then the Archbishop of that Province where he dyed is to commit the Administration.

Executor may refuse before the Bishop, if he have not intermedled the goods.

Executor

ought to pay,

1 Judgements.

2 Stat. Recogn.

3 Debts by

bonds and bills

sealed. 4 Rent

unpayed. 5 Ser-

vants wages. 6 Head workmen 7 Shop-booke and Contracts by word.

Debts due in equall degree of Record, the Executor may pay which of them he please before suit commenced.

Any one Exe-

cutor may doe as much is all together, but if a debt be released and Assets wanting, he shall only be discharged.

party himselfe that did so release or convey. But it is not so with Administrators, for they have but one authoritie given them by the Bishop over the goods, which authoritie being given to many is to be executed by all of them joyned together.

And if an Executor dye making an Executor, the second Executor is Executor to the first Testator.

But if an Administrator die intestate, then his Administrator shall not bee Executor or Administrator to the first. But in that Case the Bishop, whom we call the Ordinary, is to commit the Administration of the first Testators goods to his Wife, or next of kinne, as if hee had dyed intestate; Alwayes provided, that that which the Executor did in his life-time, is to bee allowed for good. And so if an Administrator dye and make his Executor, the Executor of the Administrator shall not bee Executor to the first intestate; But the Ordinarie must new commit the Administration of the goods of the first Intestate againe.

If the Executor or Administrator pay Debts, or Funerals, or Legacies of his owne money, he may retaine so much of the goods in kind, of the Testator or intestate, and

shall have propertie of it in kind.

10. *Propertie by Legacie.*

Propertie by Legacie, is where a man maketh a Will and Executors, and giveth Legacies, he or they to whom the Legacies are given must have the assent of the Executors or one of them to have his Legacie, and the propertie of that Lease or other goods bequeathed unto him, is sayd to bee in him; but hee may not enter nor take his Legacie without the assent of the Executors or one of them; because the Executors are charged to [] pay Debts be fore Legacies. And if one of them assent to pay Legacies, hee shall pay the value thereof of his owne purse, it there bee not otherwise sufficient to pay debts.

But this is to be understood, by debts of Record to the King, or by Bill and Bond sealed, or arrerages of Rent, or Servants or Workmens wages; and not debts of Shop-bookes, or Bills unsealed, or Contract by word. for before them Legacies are to bee payed.

And if the Executors doubt that they shall not have enough to pay every Legacie, they may pay which they list first; but they may not sell any speciall Legacie which they will

Otherwise of

Administra-

tors.

Executor dieth making his Executor, the second Executor shall be Execu-

tor to the first

Testator.

But otherwise, if the Administrator die making his Executor, or if Administration be committed of his goods, In both cases, the Ordinarie shall commit Administration of the goods of the first Intestate.

Executors or Administrators may retaine.

Executors or Administrators may retaine; because the Executors are charged to pay some debts before Legacies.

Legacies are

to be payed before debts by Shop-bookes, Bill unsealed, or Contracts by word.

Executor may pay which Legacie he will

first.

to pay Debts, or a Lease of goods to pay a money Legacie. But they may sell any Legacie which they wil to pay Debts, if they have not enough besides.

If a man make a Will and make no Executors, or if the Executors refuse, the Ordinarie is to commit Administration *Cum Testamento annexo,* and take bonds of the Administators to perfome the Will, and hee is to doe it in such sort, as the Executor should have done if he had beene named.

FINIS.

If the Executors doe want they may sell any Legacie to pay Debts.

When a Will is made and the Executor named, Administration is to be committed *Cum Testamento annexo.*