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Reports of Cases in the Court of Chancery in the Middle Ages

William Hamilton Bryson
University of Richmond - School of Law, hbryson@richmond.edu

REPORTS OF CASES IN THE COURT OF CHANCERY IN THE MIDDLE AGES

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EDITED BY

W. H. BRYSON

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This book is dedicated to

DAVID J. SEIPP

without whose scholarly analysis
of the English yearbooks
this book would not have been feasible.

INTRODUCTION

If the history of the law is to be properly written, it must be based upon the primary legal sources. One of the primary source materials of the law is the reports of cases. These are particularly important because here is the best evidence of the judges' legal reasoning. The court records kept by the clerks of the courts do not give this information as, indeed, it is not their purpose to do any more than record the results of a particular lawsuit for future use.[1] They primarily serve the purpose of *res judicata*; their value as judicial precedent is secondary and tangential. The main purpose of the law reports, on the other hand, is to record the judges' opinions, both holding and *dicta*, for future use as legal precedents. Note that the records are official documents, but the reports are mere private compilations.

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[1] Note that 147 pleadings in cases on the equity side of the Court of Chancery dating from 1364 to 1471 have been edited by W. P. Baildon, in *Select Cases in Chancery* (1896), Selden Society, volume 10. There are also some examples of medieval Chancery pleadings dating from the reigns of Richard II through Henry VII in J. W. Bayley, ed., *Calendars of the Proceedings in Chancery in the Reign of Queen Elizabeth* (1827, 1830), vol. 1, pp. i-cxxvi, vol. 2, pp. i-lxxvi; and G. Wrottesley, ed., `Early Chancery Proceedings, Richard II to Henry VII [1377-1509]', *Collections for a History of Staffordshire*, new series, vol. 7, pp. 240-293 (1904).

The major problem for historians of the medieval Court of Chancery is that its official records of orders and decrees do not begin until 1534,[1] in the middle of the reign of Henry VIII, the first renaissance king of England.[2] Thus, the law reports of cases in the medieval Court of Chancery are of particular value. Therefore, this book presents an English edition of them, and it is hoped that these primary sources of the law in this court will be useful to the future scholars who may pursue the history of the English Court of Chancery.

It is to be noted that many of the cases here are not of arguments and judgments in the Court of Chancery itself but are discussions of Chancery cases that occurred in the Exchequer Chamber, where the judges and lawyers assembled to argue about points of law. However, this is the same in substance as when common law judges were invited into the Court of Chancery to assist the Lord Chancellor by advising him on points of law. In both situations, the cases are cases pending in the Court of Chancery.

It is a tenet of the law of England that the king wills that no wrong be done in his name.[3] However, if one of the king's officers, agents, or servants acting on the king's behalf committed a wrong, there was no remedy in the common law courts, because no writ lay against the king in his own courts. This is a fundamental principle of royal or governmental prerogative or privilege, which is necessary to prevent the disruption of the efficient operation of the government. The result, however, was a wrong without a remedy; this is unconscionable. Thus, the wronged party was permitted to petition the Chancellor for a remedy as a matter of the king's grace, the king being the fount and origin of the administration of justice to his people. The kings of England, in their coronation oaths, swore to do `equal law and justice with discretion and mercy'.[4] This principle of access to the Court of Chancery became so well settled as to be expressed as a maxim, *i.e. nullus recedat e*

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1 The Chancery decree rolls, C.78; *Guide to the Contents of the Public Record Office* (1963), vol. 1, p. 30.

2 While the periodization of history is arbitrary, the craft of the historian would be impracticable without it.

3 This maxim is sometimes misstated as the king can do no wrong.

4 *Statutes of the Realm* (*SR*), vol. I, p. 163, and so in 1689, Stat. 1 Will. & Mar., c. 6 (*SR*, VI, 57), and so up to the present day.

Curia Cancellariae sine remedio.[1] The most frequent remedies in the Court of Chancery in the middle ages were the petition of right, *scire facias*, *monstrans de droit*, and traverse of office.[2]

These petitions regarding common law rights and wrongs were handled on the Latin side of the Court of Chancery as a matter of general conscience. This, then, is the origin of the jurisdiction of the Court of Chancery. There are no religious or theological issues involved. When the court expanded its jurisdiction to private acts of wrong where the common law courts did not grant a complete and adequate remedy to do justice, this was an easy and logical progression, and, thus, the Latin side of the court was the origin of the equity or English side of the Court of Chancery.[3] Thus, the equity side of the court is seen to have grown out of the common law side as extraordinary also, where the ordinary remedy of the common law courts was inadequate or incomplete. Likewise, this is to remedy an unconscionable legal situation. And again, there is no theology involved. In only a few cases is there any reference at all to God,[4] but there is much discussion of what is good in conscience with no reference to theology, with only three exceptions.[5] These

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1 *E.g.* YB Hil. 4 Hen. VII, f. 4, pl. 8 (1489), see below, Case No. 120; *Cook v. Fountain* (1676), 73 Selden Soc. 362, 371, 3 Swanston 585, 601, 36 E.R. 984, 990; T. Branch, *Principia Legis et Aequitatis* (1818), p. 92; *Heiskell v. Galbraith* (Tenn. App. 1900), 59 S.W. 346.

2 W. S. Holdsworth, `The History of Remedies against the Crown', *Law Quarterly Review*, vol. 38, pp. 141-164, 280-296 (1922).

3 *Acherley v. Vernon* (Ch. 1732) (*per* Lord King), Forrester 40; F. W. Maitland, *Equity* (rev. ed. 1936), p. 6; A. D. Hargreaves, `Equity and the Latin Side of Chancery', *Law Quarterly Review*, vol. 68, pp. 481-499 (1952).

4 The only cases herein where God is even mentioned at all are *Earl of Kent's Case* (Ch. 1405), Case No. 45 (gift of God); *Anonymous* (Ch. 1452), Case No. 57 (defines conscience in reference to God); *Anonymous* (Ch. 1468), Case No. 79 (*Deus est procurator fatuorum*.); *Barrowwick v. Hawes* (Ch. 1471), Case No. 85 (`in conscience and before God'); *Skrene's Case* (Ch. 1474-1476), Case No. 90 (a gift was given to God and the Church); *Anonymous* (Ch. 1489), Case No. 120 (`right ought to be in accord with the law of God'); *Rede v. Capel* (Ch. 1492), Case No. 123 (act of God, i.e. unavoidable accident).

5 *Anonymous* (Ch. 1452), Case No. 57; *Barrowwick v. Hawes* (Ch. 1471), Case No. 85; *Anonymous* (Ch. 1489), Case No. 120.

latter three cases are not sufficient, in my opinion, to undergird the theory that equity in the English courts is a matter of theology. If the Chancellor was a bishop, he could keep his court jurisdictions separate, just as he kept his Latin and English jurisdictions separate. In the Chancery cases reported herein, there is no serious discussion of theology. Thus, the medieval judges well understood the distinction drawn by Sir Francis Bacon (1561-1626) and by Lord Nottingham (1621-1682) between a personal conscience and a civic or public conscience.[1] Lord Nottingham's comment was not his own innovation, but an observation of a timeless truism.

The relationship with the common law courts was close and mutually supportive. Where there was a question of fact to be decided, the case was sent by an issue out of Chancery into the King's Bench for a trial by a jury with the verdict to be sent back into the Chancery. But they are Chancery cases, and the judgments were rendered by the Chancellors. This procedure was copied later on for the equity cases where the evidence in the written depositions was conflicting or unclear. Also, it was frequent that common law judges were asked to come into the Chancery to advise the Chancellor on questions of common law, and difficult issues of law were adjourned for debate in the Exchequer Chamber by all of the judges and the leading lawyers. Both of these procedures remained common throughout the seventeenth century at least.

In contrast, in the Court of Exchequer, which was a common law court, the court itself could send a writ to a sheriff to empanel a jury, whether for a trial at common law or for an advisory verdict to inform the conscience of the court in an equity case. Thus, there was no need for the Court of Exchequer to request a judge of the Common Pleas or the King's Bench to come and advise or to order an issue out of the court.

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1 'Uses . . . are guided by conscience, either by the private conscience of the feoffee or the general conscience of the realm, which is Chancery.' J. Spedding, *et al., The Works of Francis Bacon*, `Reading on the Statute of Uses', vol. 7, p. 401 (1872); `With such a conscience as is only *naturalis et interna*, this Court [of Chancery] has nothing to do; the conscience by which I [the Lord Chancellor] am to proceed is merely *civilis et politica* and tied to certain measures.' *Cook v. Fountain* (Ch. 1676), 73 Selden Soc. 362, 371, 3 Swanston 585, 600, 36 E.R. 984, 990.

It has been argued that the equity jurisdiction of the English Court of Chancery, which was later copied by the Court of Exchequer, was derived from the Roman law or the canon law of medieval Europe. However, to the best of my knowledge and belief, I assert that it was an outgrowth and a further development of the English common law. The original jurisdiction of the Court of the Chancery was to administer the common law of England. Because the protections of the English common law could not be boldly demanded in the king's common law courts against the king himself or his agents, it had to be humbly requested as a matter of the king's grace and favor in the Court of Chancery. The common law was administered there against the officers and agents of the crown because the king willed that no wrong should be done, or should have been done, in his name. Since the Chancery gave remedies where the jurisdiction of the common law courts did not, would not, and was unable to do so, then the Chancery began, later, to give remedies where, in disputes between two or more private persons, the common law courts were unable to do complete justice for some rule of procedure, evidence, or common law right. This latter is the system of remedies called conscience in the middle ages and, today, called equity. But note that, if the common law courts granted an adequate and complete remedy in their ordinary course of proceeding, then an extra-ordinary remedy in Chancery was unneeded and thus unavailable.[1]

In the middle ages, the main needs by private parties in private disputes for resort to the extraordinary jurisdiction of the Court of Chancery were created by the clumsy and dilatory common law rules of civil procedure and evidence. However, the Court of Chancery, being of more recent vintage, used more modern procedures that were adopted in part from the Romano-canonical practices of the continental courts, such as written pleadings and written evidence. But these modest borrowings were not a wholesale reception and incorporation of the practice and procedure of the civil and canon law courts, and certainly not of the substantive law of those courts. In the fifteenth century, the doctors of the civil and the canon laws were occasion-

[1] *E.g. Walwin v. Brown* (Ch. 1460), Case No. 67; *Rede v. Capel* (Ch. 1492), Case No. 123.

ally consulted in reference to litigation, but it was much more frequent in the common law courts than in the Court of Chancery.[1]

Thus, the foundation of the law in the Court of Chancery is the English common law as found and developed by the judges. The judges in the Chancery, the Chancellors and the Masters of the Rolls, were voices that were heard in this process, but their individual contributions were perhaps not so great in the middle ages, as they were not at that time trained at the bar in the law. However, in the eighteenth century, some of the best legal minds in England sat in the courts of equity, and their opinions were then heard and reported.

This collection of cases includes all of the cases from the medieval Court of Chancery that I could identify. There are undoubtedly many more. Most of the reports in this collection are from the Latin side of the Court of Chancery, *i.e*. they are common law cases. This book does not include cases from the other courts which comment on the jurisdiction of the Court of Chancery, nor which contain dicta on equitable procedures and remedies.[2] These cases are important to demonstrate the development of equity, but yet this book is only a collection of Chancery cases.

The headnotes are of this editor's own composition. They are brief, being designed only to point out some of the points of law that were adjudicated. However, the thorough scholar will give the reports themselves a close and careful reading in order to appreciate their full value.

I would like to thank Sir John Baker, Carol F. Lee, David J. Seipp, and the Selden Society for their kind and generous permissions to use their translations of these reports.

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1 The only two known examples where doctors appeared in the Court of Chancery are *Anonymous* (Ch. 1428), Case No. 55, and *Corbet v. Corbet* (Ch. 1482), Case No. 106, where experts on the canon law of marriage came into court. (In the first of these cases, the reporter thought it noteworthy that the doctor argued in Latin.)

2 Some of these cases can be found in A. Fitzherbert, *La Graunde Abridgement* (1577), in title `Sub pena', and R. Brooke, *La Graunde Abridgement* (1573), in titles `Conscience & Subpena & Injunctions' and `Feffements al Uses'.

TABLE OF NAMED CASES REPORTED

[These references are to case numbers, not page numbers.]

REPORTS OF CASES IN THE COURT OF CHANCERY IN THE MIDDLE AGES

1

Prior of Hatfield's Case
(Ch. 1325)

The Court of Chancery has the power to hear and determine disputes over tithes.

1 Eagle & Younge 11,
Rot. Parl., 19 Edw. II, vol. 1, p. 433

To our lord the king and his council, pray his devout chaplains the prior and convent of Hatfield Brodok, parsons of the church of Hatfield Brodok, that whereas they have all manner of tithes, as well of the young of animals and other small tithe, as great, within the bounds of all the parish of the church aforesaid, and, now of late, our lord the king has established a breed of mares in the park of Hatfield, which belonged to Humphrey de Bohun, earl

of Hereford,[1] and which is within the bounds of the aforesaid parish, that it would please His Majesty to command his keeper of the said stud to deliver to the said prior and convent the tithes of foals of the said stud, as the right of Holy Church requires.

Let it be inquired in Chancery in the presence of the keeper etc. if the park be within the bounds of the parish and whether tithes have been used to be paid of animals depastured in the said park heretofore and from what time etc. and of what else shall be necessary etc., and upon return of the inquisition into Chancery, if it accord with the petition, let justice be further done in the premises.

2

Blund v. Farmual
(Ch. 1328)

Heiresses should receive equal shares of their ancestors' estate.

Where a valuation of an inheritance was made without the participation of all parties concerned, it will be remade.

YB Hil. 2 Edw. III, f. 20, pl. 5

Teoband of Veron held certain tenements in chief of the king and died seised, after whose death, this heritage descended to four daughters as to one heir, who were underage. The king seized the wardship into his hand and got hold of the wardship of the body of the eldest, who let herself be married by permission of the king to Thomas Farmual. They proved her age and sued to have her part out of the hand of the king, and to value the heritage, which was valued. And the manor of Alveton was delivered to them, which was valued at £21, to hold for her portion of the whole heritage. Then, the middle sister let herself be married by permission of the king to William Blund, and the third married Bartholomew of Burthwelch, and the fourth still remained underage.

[1] J. S. Hamilton, `Bohun, Humphrey (VII) de, fourth earl of Hereford (c. 1276-1322)', *Oxford Dictionary of National Biography*, vol. 6, pp. 444-445.

William Blund and his wife, when she was of full age, perceiving that the heritage was not legally valued, sued a writ to garnish Thomas Farmual and his wife, if they knew anything, to say why the whole heritage should not be taken back into the hand of the king and valued.

And it was returned in the Chancery on the 15th of St. John, on which day the parol demurred without day by the protection [of the king]. And, nevertheless, they commanded the Escheator to revalue, where it was found that the manor of Alveton, which had been valued at £21 by the first valuation, was worth £24 and 10 marks *per annum* by a good valuation. And this valuation was returned in the Chancery, so that, at another time, William Blund and his wife sued a garnishment against Thomas of Farmual and his wife, returned on the 15th of St. Hilary, on which day the parties came.

Russell: We had heard how Thomas of Farmual and his wife had sued to have their portion out of the hand of the king and how the manor of Alveton had been delivered to them so that they did not think that they should be ousted from this freehold, of which they were seised in such manner by livery of the king, without a writ at the common law.

Aldburgh: As to William Blund and his wife, who sued this suit, we do not think that they should be answered, because there were two sisters, the wife of William, who is of full age, [and] the wife of Sir Bartholomew of Burthwelch, to whom this suit was also given, as well as to you, and you take this suit in common, so that etc., and, on the other hand, if we are compelled to answer to you at another time, she would come and deny that which is now done, so that we do not think that we need now to answer it, where the judgment could [not] be final without all being named by way of action or by way of tenancy.

Toutheby: When the heritage was seised into the hand of the king after the death of Teoband to hold until their age and to save the right forever to the youngest as well as the eldest, therefore, if half of the heritage or more than she should have by right were delivered to one of them by inquest of office, to which the other was not party, the king could find by inquest that the heritage had not been legally valued by the first inquest, it is for him to take back the land into his hand and to deliver so that each one would have her proportionate part.

The Chancellor [Hotham]: This is a place of equity, where we will grant a writ to each who comes to demand the heritage, according to that

which was found we should return etc., but, now, it was found that the four daughters were the heirs of Teoband, so that of these, each one should have her reasonable part. Therefore, if the king, who is bound to do right to all, had delivered more to one than she should have by right, it is for him to take it back. And, for this reason, will you say anything else?

Russell: When the parol demurred without day by the protection of the king and, notwithstanding this, they went to make a valuation without the presence of the party where the suit was without day by the protection of the king, it seemed to us that such valuation should not harm us.

The Chancellor [Hotham]: Then, do you want the heritage to be valued again.

Aldburgh: Yes, Sir.

The Chancellor [Hotham]: Sue a writ to take back the heritage into the hand of the king.

3

Flatt's Case
(Ch. 1328)

Scire facias *does not lie where the original writ was sued in the time of another king*.

YB Hil. 2 Edw. III, f. 21, pl. 9

Roger At Flatt brought an assize of novel disseisin before Sir William Herle [C.J.C.P.] and others, his companions, in the country, against Richard of Holland and A. of B., who made default, so that the assize was taken, where it was found that A. of B. had disseised him and had enfeoffed Richard of Holland, which Richard was of the band of the earl of Lancaster[1] against the King Edward, father of the present king. And he was attainted for this, by which he was imprisoned, and his lands were seized into the hand of the king's father etc., by which the justices surceased to render judgment etc.

[1] J. R. Maddicott, `Thomas of Lancaster, second earl of Lancaster (c. 1278-1322)', *Oxford Dictionary of National Biography*, vol. 54, pp. 288-295.

And, afterwards, in the time of our lord the present king, all those of the faction of the earl of Lancaster were restored to their lands, so that Richard of Holland sued and had the same lands back, which had been seized for the reason *ut supra*.

Roger sued in the Chancery a writ to Sir William Herle [C.J.C.P.], that he should send the tenor of the record into the Chancery, and he did this, by which the Chancery sent the same record before the king, *quatenus inspecto tenore recordi etc. vocatis etc. ulterius fieri facias*.

Roger Flat prayed judgment.

Scrope [C.J.K.B.]: We have only the tenor of the record, upon which we cannot render judgment, as upon the record, by which [you should] sue to cause the record to come before the court or, otherwise, we can do nothing.

Roger sued anew and caused the record to come [before the court], by which he prayed judgment *ut supra*. And he said that Richard was tenant and had the tenements out of the hand of the king.

Afterwards Scrope [C.J.K.B.] [said that] it is found by a verdict that the king was seised, and we cannot oust the king from his land, for which the seisin be rightful or otherwise. And this was the reason for which Sir William Herle [C.J.C.P.] had surceased.

Roger said that Richard of Holland was tenant, and he was ready to aver it by whatever the court awarded.

Scrope [C.J.K.B.]: Because the land had been taken into the hand of the king, where he had a writ to the Sheriff to inform the court whether the land was in the hand of the king or in the hand of Roger, that [thus] no garnishment issued against Roger, because the original [writ] was in the time of another king etc.

4

Marshall v. Bamburghe
(Ch. 1339)

When the king records on the information of others, that record may be defeated by a suit upon a scire facias.

YB Hil. 13 Edw. III,
Rolls Series 31b, vol. 2, p. 96, pl. 12

[An action of] *scire facias* [was brought] in the Chancery for David Mareschal against Thomas Bamburghe and Michael Presfene, reciting how the Escheator had seized a certain manor into the king's hand by reason of the forfeiture of one D., who now brings this writ, and how the king, by his charter, had given it to Michael, and that, afterwards, Thomas had entered on the said manor, to know with certainty why the manor should not be re-seized into the king's hand and be delivered to him who now sues as to one who has forfeited nothing, but has always been faithful to the king, as he says, etc.

Parving: You see clearly how this writ supposes that Thomas is tenant and that he entered after the demise by the king etc., which entry might be by judgment or by a feoffment, whereof he has a warrantor. And this place is only a place of office. Wherefore we do not think that, without a writ at common law, you will put us to answer.

Willoughby [C.J.K.B.]: What writ at common law would serve?

Parving: A writ of right, by which his warranty would be saved to him, or perhaps an assize of novel disseisin, if it so be that the Escheator has ousted him without a writ or a warrant.

Willoughby [C.J.K.B.]: A writ of right is too high a remedy and involves too much delay. And, as to the warranty, you well know that a *scire facias* which issues out of a judgment or a fine is maintainable as well against a purchaser who has warranty as against any other, and, if he cannot vouch, still he can have his writ of *warrantia cartae*, and so can you here.

Parving: It is more reasonable that he should be put to his writ of right, which only puts the party to delay, than that I should be ousted of my warranty, for, upon judgment given in this place, I shall never have to the value.

Shardelow [J.C.P.]: When the forfeitures of those who were of the party of the earl of Lancaster[1] were repealed, it was adjudged that all should be restored to their inheritances and then it was suggested in Parliament on account of the injustice in respect of warranty that they should be put to the writ of right etc., and, on account of the injustice of the delay, it was agreed that they should have their suit in this way.

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1 J. R. Maddicott, `Thomas of Lancaster, second earl of Lancaster (c. 1278-1322)', *Oxford Dictionary of National Biography*, vol. 54, pp. 288-295.

Parving: That was a judgment of Parliament. And also, the first judgment was annulled. But, in this case, there is still in force the king's charter, which cannot be tried without him, and, in this suit, he cannot be made a party etc.

Sharshull [J.C.P.]: When one commits a re-disseisin and then aliens over, the writ of re-disseisin does not lie, but the proper course is to bring the assize.

Parving: And you have there by the king's writ, which you have there before you, that the king himself records that David Mareschal levied war against him and so forfeited, by reason of which forfeiture, the king seized etc., and so he is out of the protection of the law. [We pray] judgment whether an answer ought to be made to him.

Birton: It is ordained by Statute[1] that the king never ought to record except by due process. And this record is not by due process, but upon a suggestion; wherefore we sued to the king to be restored to the law. And the king, by his commission, assigned R. Talbot, the warden of Berwick, to enquire of this matter. And, by inquest, which is returned into the Chancery and sent here, it is found that, against the king, we never did anything etc. And, thus, we are restored to the law.

Willoughby [C.J.K.B.]: When the king records anything of his own view, that record shall never be annulled. But, when he records on the information of others, that record may be defeated by such suit as the plaintiff has made, and not otherwise; wherefore it seems that the plaintiff has a right to an answer.

Parving: This inquest does not give him a right to an answer, for it was taken without warrant, for the inquest was taken by others than R. Talbot, and not by him, whereas no one but he had a warrant; wherefore etc.

Birton: The king directed him to cause enquiry to be made. And that he could do as well by another as by himself. And, if the king directed the Escheator to take an inquest, although the Sub-Escheator took it, it would be good enough, and yet he is not named in the warrant etc.

Adjornantur.

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1 Stat. 25 Edw. I, Magna Carta, c. 29 (*SR*, I, 117).

5

Anonymous
(Ch. 1339)

A person may have both a fee simple and also a fee tail in the same land.

YB Mich. 13 Edw. III,
Rolls Series 31b, vol. 3, p. 166, pl. 68

[An action of] *scire facias* [was brought] in the Chancery upon a recognizance.

The tenant showed that the recognizor had only a fee tail and that A. was issue in tail; [and he prayed] judgment.

To this, it was replied that he had a fee simple.

And it was said that this was not a plea without traversing the tenancy in tail, for it was possible that the recognizor had both estates, by the release of the donor or in some other way, and then the issue would hold discharged.

Willoughby [C.J.K.B.]: He may have a fee simple and a fee tail also, *simul et semel*; wherefore, if you will acknowledge this, he shall have execution.

Wherefore the tenant did not dare to abide judgment, but he traversed by saying that the recognizor had a fee tail and not a fee simple.

Quod fuit mirum.

6

Rex v. Praers
(Ch. 1342)

The king can sue in whichever court he chooses.

YB Hil. 16 Edw. III,
Rolls Series 31b, vol. 7, p. 28, pl. 8

A writ issued to the king's Treasurer etc. to certify the king, in the Chancery, in which king's time the manor of T. was in the hands of his pro-

genitors and how it came out. And they certified that it was in the hand of King Henry the elder and that the kings were answered as to the farm until the ninth year of King Richard, when the Sheriff was discharged of the farm, because the king had given it to one B. And, upon that certificate, a *scire facias* issued against W. Praers and others, tenants of the manor, to show whether they could say anything wherefore the manor ought not to be seized into the king's hand and they be ousted.

R. Thorpe: We do not understand that, in this court of office, you will hold a plea of a freehold.

Parving [Lord Chancellor]: The king shall be answered in whatever court he will choose his suit; wherefore answer.

R. Thorpe demanded oyer of the record upon which this writ issued, and the certificate from the Treasury was read, which purported as above.

R. Thorpe: This writ, in its nature, ought to issue upon a record which should be the king's gift, of which we pray oyer, for this certificate is only a supposition of a gift.

Parving: We have it of record by the certificate that there was a gift, and that is sufficient.

R. Thorpe: It is not, for a gift may be for term of life or in fee tail or in fee simple, as to which you cannot know unless you see the gift. And, if the gift was in fee simple, as it might be, notwithstanding the record which you have, this writ is not warranted by the record.

Parving: When the king gave the manor to B., as the certificate records, and no larger estate is limited over, for anything that we know, then, by common right, nothing passed but a freehold, the reversion being saved to the king. And, if any other estate passed, show you that.

R. Thorpe: Still, [we pray] judgment of the writ, for the writ supposes that the manor ought to revert, and does not suppose it after the death of any particular person. [We pray] judgment of the writ.

Parving: If you will not answer in your tenancy, the Escheator will be commanded to seize, because you do not show how you entered the king's fee.

R. Thorpe: I have not pleaded as tenant, nor have I a day to answer to this by a writ.

Parving: Even without a writ, we can be apprised of it.

And he ordered a writ to the Escheator to seize in case he found that B. to whom the gift was made was dead.

And, afterwards, for that cause, the king sued another writ of *scire facias* supposing the death of the tenant for term of life, which was abated on the ground of the several tenancy, whereas their tenancy was supposed to be in common by the writ.

And, afterwards, another writ was brought, when an exception was taken to the writ as not being warranted by the record. And, upon that, they went to judgment.

7

Rex v. Burgesses of Wells
(Ch. 1342)

Where a royal patent was granted in deceit of the crown, the king can sue in scire facias *in the Court of Chancery to have the patent revoked.*

The king cannot make a grant that will prejudice the rights of third persons.

YB Hil. 16 Edw. III,
Rolls Series 31b, vol. 7, p. 108, pl. 38

The king, by his charter, granted franchises to the burgesses of Wells, that is to say, that they might elect and make one of themselves to be mayor and that they might have cognisance of pleas within the borough and several other franchises. And afterwards, at the suit of the king, a *scire facias* issued against the burgesses of Wells to the effect that they should be before the king in his Chancery to show why the said charter, granted to the damage of the king and of the people of the same county, as appears by evidences shown to the king and his Council and which charter was sued out in deceit of the king's court without the process *si sit ad damnum*, ought not to be annulled and repealed.

The burgesses came by attorney, and exception was first taken to the Sheriff's return, and it was in the words *scire feci, etc., quod sint coram rege ad ostendendum etc.*, and did not state in what court, that is to say, in the Chancery or in the King's Bench.

This exception was not allowed.

And the damages caused to the king were assigned, that, whereas the king, in the time of the vacancy of the bishopric of Bath and Wells, was accustomed to be answered for the issues of the perquisites of the court of Wells to the amount of £160, the king suffered a decrease to that amount by means of this grant, because the burgesses have cognisance and also have the issues, fines and amercements, and ransoms which would be the king's if the grant did not exist, and the same profit is lost to the bishop when the see is full and other damages.

R. Thorpe: This charter whereby the franchises are granted to us is of record, which is equivalent to a judgment. And we do not understand that you have any warrant to repeal this charter, which issued by the will and command of the king, for no one can do that without a commission from the king or else in Parliament, for, by the suit, it is supposed that the grant was erroneous because without process and error committed in this court cannot be redressed in the same court.

Parving: This suit is taken for the king, and the king shall not sue by petition in Parliament about a matter which concerns himself. And, if we can issue a commission to someone else to try this matter touching the king, *a fortiori* we can try it ourselves.

R. Thorpe: In the case which there was between Little Yarmouth and Great Yarmouth, the suit was made in Parliament to reverse the grant and the king's charter.

Parving, Chancellor: That was between party and party, and it was sued by petition in Parliament and was adjourned into the King's Bench. But the king shall sue in his own court where he pleases; therefore, answer.

R. Thorpe: You see clearly how this suit takes its origin from a deceit, in that the charter was granted without the process *si sit ad damnum* having been sued, in which a case, a *venire facias* would lie and not a *scire facias*.

Parving: A *scire facias* lies on a writ of error.

R. Thorpe: That is true, and is law. Error shall be assigned in respect of a matter which may appear by record, and not in respect of a matter enquirable outside the record. But, in this case, you can never prove error by anything which can appear from the record, for the charter is good and full enough.

Parving: The suit of *si sit ad damnum* when made and the charter granted are all one record, and, if the process which should be the foot and foundation of the grant be wanting, all is error.

R. Thorpe: It is not so, for, even though a *si sit ad damnum* never issued, if it cannot be shown that it was to the king's damage, the charter shall never be repealed, and this damage must be made to appear by surmise, and that must be tried, and the trial must be on the mise of the parties and not otherwise. And, if we were to make default, you would not be able of yourselves to defeat this charter without other information or apprising. And, heretofore, in a like case between the people of Little Yarmouth and Great Yarmouth, a *venire facias* issued.

W. Thorpe: The court is apprised by matter of record in the Exchequer that it is to the king's damage, of which matter the king was not apprised at the time of the grant. And, therefore, go from the bar and you will see what will be done in your absence. And, in this court, issues are never forfeited, wherefore, by that suit of *venire facias*, they shall never come in answer.

And the point was touched upon that, where judgment is given against a party who is dead, a writ of deceit lies. But this was denied, and a writ of error in the King's Bench was said to lie. And, if the tenant do not come upon a *scire facias*, it shall be enquired whether he be dead or not. *Quaere*.

Parving: Answer; we adjudge the writ to be good.

R. Thorpe: We tell you that the burgesses have a mayor, who is possessed of the franchise as much as they are and who is their head, and, in his mouth, a defence lies to save the franchise, and he is not named in this writ; [we pray] judgment of the writ.

W. Thorpe: The franchise was granted to the burgesses only, and, although they have made a mayor by force of the charter which it is our object by this suit to repeal and so to prove that they ought not to have a mayor, there is no necessity in law that any others should be named besides those to whom the grant was made, for, if I be disseised of my freehold by you and you make of it a hospital, I shall bring the assize against you and the tenant and shall not call him warden, because my object is to defeat his title.

R. Thorpe: The reverse was taken for the cause of the judgment in the reversal of the judgment in the case of the Chapel of Bedford in the King's Bench.[1]

[1] YB Trin. 13 Edw. III, Rolls Ser. 31b, vol. 2, p. 370, pl. 60 (1339), and YB Trin. 15 Edw. III, Rolls Ser. 31b, vol. 6, p. 202, pl. 20 (1341).

W. Thorpe: What you say is wrong. The cause there was that, in the suit *de procedendo ad judicium*, one supposed and styled himself warden when he was not in the original writ styled warden.

R. Thorpe: Will not a [writ of] *quo warranto* in respect of the franchise be brought against the mayor and burgesses?

W. Thorpe: That writ is taken on a claim and must be in accordance with the claim.

R. Thorpe: If a woman purchase a franchise and, afterwards, become *covert baron*, and such a suit has to be brought against the woman, her husband must be named.

Parving: The case is not similar, for, if he were now to bring a writ against the mayor and burgesses, the suit would affirm that there is a mayor when there ought not to be one, and no one shall be a party but those to whom the grant was made, and the grant was not made to the mayor; wherefore, he shall not be named. Therefore, answer.

R. Thorpe: The king is not apprised of the cause upon which he founds this suit, that is to say, of his damage and that of the people by suit of a party or by an indictment; wherefore, we do not understand that the king will be answered.

Parving: You have been told that the king is apprised by a record of the Exchequer, which shall be caused to come if you will deny it; therefore, answer.

R. Thorpe: As to the point that the king has granted to us that we may choose a mayor and coroners and have cognisance of pleas and that we may enclose and crenelate the vill, this matter lies solely in the king's will and grace, and the profit is casual, and not an annual profit, which could be subject to extent. And, in this case, the suit of *si sit ad damnum* is not to be made; wherefore, as to that, [we pray] judgment whether the charter ought to be repealed. And as to the other point, that is to say, that he has granted to us to be quit of toll, murage, picage, pontage, stallage, etc., we and our ancestors and predecessors, burgesses of Wells, have had it from time whereof there is no memory, so that this grant is not to the damage of the king or of anyone else. And as to the point, that the king has granted to us to have a gaol and the keeping thereof, that is only for the keeping of the peace and sounds rather in charge than in profit; [we pray] judgment.

W. Thorpe: As to the first point, the king is put to damage if you have cognisance of pleas which belong to the bishop, as the king is certified by record, and in respect of which the king, in time of vacancy, has been answered as to amercements and issues. And, also, if you shall not come out of the vill before the king's justices to be on juries, as the charter purports, the king will lose issues. And, as to the other point, as to being quit of toll, murage, etc., you say that you were quit before this grant. And that, perchance, was because you did not pay them, and non-payment does not acquit anyone unless he was exempted by rightful title, because *in negatis non est usus*. And as to the third point, when you say that the keeping of a gaol is not a profit but a charge, that is not so, for it is found of record in the Exchequer that, for the keeping of the gaol in that county, the king is answered yearly for £24 and, if you had the keeping thereof in that vill, the farm would be diminished by so much. And since you claim these things on the ground of a bargain and a fine, in which case the king, if he be deceived in his bargain and covenant, can legally repeal it, [we pray] judgment for the king, and we pray that the franchise may be re-seised and the charter repealed.

Parving *ad idem*: One would say that the king cannot grant a franchise to the tenants of anyone except himself or to some lord, and you are the tenants of the bishop.

R. Thorpe: All that is assigned for damage is damage to another person, who does not complain, and, therefore, it is strange. And suit of *si sit ad damnum* has not been seen in such a case as this, where the king grants a franchise which is a regality, any more than in a grant of a warren. And I well know that the king cannot give anything except to his own damage, but, nevertheless, he ought not to repeal it.

They were adjourned.

At another day, the arguments being rehearsed, Parving said, if you be the tenants of another person, the king ought not to grant to you a franchise to the prejudice of your lord, and so the charter is void, and especially inasmuch as it is to his own damage, of which he was not apprised. And, if you are the king's tenants, we will know what you pay to him, and, if you do not pay anything, we will cause that which you hold to be extended and valued, and you shall answer for the time past, for you have been the king's approvers, since you show nothing from the king enabling you to hold quit, and you had

the charter of King John, by which he made you burgesses, and that can only be understood to mean his burgesses.

Afterwards, by a judgment in Michaelmas term in the sixteenth year [1342], the charter was repealed.

8

Archbishop of Canterbury's Case
(Ch. 1342)

As to the right of wardship of one's tenant's lands, the archbishop of Canterbury is exempt from the prerogative rights of the crown.

YB Hil. 16 Edw. III,
Rolls Series 31b, vol. 7, p. 130, pl. 44

The archbishop of Canterbury sued in the Chancery after the death of Nicholas Menylle, his tenant, to have out of the king's hand the lands of Nicholas by reason of wardship. And, in respect of those lands, the inquest taken on a *diem clausit extremum* in the County of York was returned. And it purported that Nicholas held nothing of the king in the said county except an assart and that he held Whorlton etc. of the archbishop by knight service.

Parving, Chancellor: A writ has issued to the Sheriff of Northumberland, which is not returned, and it cannot be known what may be found for the king by that inquest.

Pole: At common law, before the king had the prerogative, which was granted by the community to the king in the time of his father, everyone had the wardship of the lands which were held of him and the king had only the wardship of the land which was held of himself. And, although it be granted to the king by the Statute *Praerogativa Regis*[1] to have the wardship of all lands of whomsoever they are held in case any of the lands be held of him by knight service *ut de corona*, the fees of the archbishop are excepted in the same Statute *Praerogativa Regis*; so he is at the common law; wherefore nothing

1 *SR*, I, 226-227.

which may be found for the king by the other inquest can be an impediment such that these lands should not be delivered to the archbishop.

Parving [Chancellor]: We cannot execute the office or the livery by parcels. And, in the case of dower and partition in this court, nothing is ever done until all the inquests are returned. And it is not yet known according to what law the wardship is to be delivered to you, whether because the ancestor did not hold anything of the king in chivalry, in which case only the king will withdraw his hand, or because, although he held other lands of the king by knight service, livery should be made to you as a person exempted in the Statute *Praerogativa Regis*. And you will be nothing the worse, for you will have the wardship with the issues if you are right.

Pole: At least, no impediment can be supposed by reason whereof the archbishop shall not have the wardship of the lands. But, as to the body of the heir, perhaps an obstacle may be found. And, therefore, we demand only that which is clear etc.

Parving [Chancellor]: We will not make the livery by parcels. And suppose that this seignory was purchased since the Statute *Praerogativa Regis* by the archbishop, as may be pleaded when the time comes; the exemption will not hold good.

And then the archbishop showed how his predecessor St. Edmund had in a like case restitution by an award of the King's Council and how others of his predecessors since had wardships out of the king's hand and how his predecessors had always been seised, except in time of absence from England or vacancy of the see or when the king occupied, at which time his predecessors had by award restitution out of the hands of the kings together with the issues, and, if the king wishes to be aided by the Statute *Praerogativa Regis*, then we are exempt.

Parving [Chancellor]: By which do you wish to be aided, by the Statute *Praerogativa Regis*, by which exemption is made of you, or by prescription?

Pole: By both.

Parving [Chancellor]: Although you have not a right, such as the law requires, shown on your behalf, nevertheless, the king is pleased that you should have restitution etc. And the archbishop will have it together with the issues.

9

Rex v. Gauger
(Ch. 1342)

A public officer can be removed from his office for misfeasance in office.
A party will be bound by his own pleadings.

YB Trin. 16 Edw. III,
Rolls Series 31b, vol. 8, p. 216, pl. 63

Note that William Gauger was indicted before certain justices for excess and trespass in his office. The inquisition was returned into the Chancery, and garnishment was sued on behalf of the king for the officer to show why he should not be removed etc.

And he came and showed by the king's charter that the office was his freehold by gift from the king for his life, and he showed how, for a certain time, to wit for three years, he was ousted and the king appointed another to execute the office, and, afterwards, he sued for and had restitution. And he did not understand that he should be put to answer for the time when another occupied the office.

Parving [Chancellor]: You suppose that, during all that time, it was your office and that you were rightfully officer, so that, whoever did wrong in the office, it will be accounted your act, since you claim the office by a title.

Pole did not dare to abide judgment, but pleaded not guilty.

They were adjourned into the King's Bench.

And the inquest was taken at *nisi prius* in the absence of the party, because he did not come. And it passed against the defendant.

Thorpe prayed judgment for the king on the defendant's default and also on the verdict.

Shardelow [J.C.P.]: It is a strong measure to oust a man from his freehold for an excess found etc.

Parving [Chancellor]: By law, he cannot have the office except during good behavior.

And, afterwards, the court adjudged that he should be ousted and taken etc.

10

Bishop of Winchester v. Prior of the Carmelites
(Ch. 1343)

A patent of the crown can be revoked on the ground of fraud by a scire facias *in the Court of Chancery*.

YB Mich. 17 Edw. III, f. 59, pl. 58,
Rolls Series 31b, vol. 10, p. 262, pl. 58

The king purchased of J. Meriet ten acres of meadow near Winchester, which were held of the bishop of Winchester. And the king, through covin previously arranged, gave them to the Carmelite Brethren to dwell there. And, against them, the bishop sued out of the Chancery a *scire facias*, reciting how this purchase was a fraud for the purpose of depriving him of his seignory and also of depriving the king of the advantage of the seignory in time of vacancy, to show cause why the king's charter should not be revoked and the tenements re-seized into the king's hand. And, thereupon, he had a writ under the targe, together with a bill including the matter, directed to the Chancellor. And the writ purported that the Prior of the Carmelites with two Brethren should be warned, but it did not determine of what place he was prior or provincial or anything else. And an exception was taken thereon. Afterwards, the Brethren made default.

R. Thorpe: We will move you on behalf of the Brethren. You see plainly how it is supposed by this suit that the king shall be restrained from purchasing in his own realm; besides, no one but the king himself can judge as to the manner of his purchase.

Sadington, Chancellor: The king has sent us the bishop's petition etc.; wherefore we adjudge that the land be seized into the king's hand and the charter revoked.

W. Thorpe: The Brethren shall be distrained to give up the charter etc.

11

Rex v. Abbot of Pershore
(Ch. 1344)

The question in this case was whether a scire facias *lies in the Court of Chancery in reference to a right of corody.*

YB Hil. 18 Edw. III, f. 2, pl. 8,
Rolls Series 31b, vol. 10, p. 436, pl. 8

The king commanded the abbot of Pershore to admit Thomas Colley, his yeoman, to sustenance, as others had been admitted on the king's command in the same abbey, by an *alias* writ, *vel causam*.

The abbot returned his cause to the effect that he held quit in pure frankalmoign by deed and confirmation of kings and also that the person who was previously admitted into the Abbey was so admitted on the prayer of Queen Isabella.

Thereupon, a writ issued commanding the abbot to come into the Chancery with his deeds and confirmations to show his reason wherefore he should not be charged. And it was also commanded by another writ that he should be warned to be in the Chancery to show cause.

And now he is warned, and he appeared by *R. Thorpe* and demanded oyer of the record upon which the *scire facias* issued.

W. Thorpe: Your own answer, which is of record in this court, together with the king's grant, which is of record, can warrant this writ.

R. Thorpe: The king's grant cannot be a cause for which a *scire facias* shall be warranted, nor can our answer to the *alias* writ warrant this writ, any more than a *scire facias* lies with respect to a sheriff or other officer if he makes an insufficient return.

Shardelow [J.C.P.]: Such a writ would lie in respect of a return touching his own person.

R. Thorpe: You see plainly how this writ is taken on a contempt committed against the king and his command, which is a suit given by common law and which cannot be put in execution by reason of any default, in which case, a [writ of] *venire facias* and distress would lie, and not a *scire facias*, and

that is pleadable in another court. [We pray] judgment whether you will take cognisance in this court.

W. Thorpe: This suit is taken for the king, who ought to be answered in what court he may please.

R. Thorpe: The king can possibly have a writ of right, but it does not, therefore, follow that he shall sue in this court and, in the ordinary course, the like pleas of contempt are pleadable in the Common Bench or in the King's Bench.

W. Thorpe: If the king grants anything, cannot a *scire facias* be sued in this court for one to answer wherefore his grant should not be put in execution?

R. Thorpe: The king has not granted anything in this case, for he supposes that the abbot has to grant.

W. Thorpe: But, in effect, it is in the king's right, for, if I grant you a corody for your horse or servant, to whom does the freehold belong, as meaning to say to the person to whom he granted; so in the matter before us.

R. Thorpe: Besides, we tell you that a writ came to us to certify our cause and to be before the king *ubicunque* etc., which writ, with our cause, is returned into the King's Bench.[1] And so, we have a day there, wherefore you ought not to take cognisance in this court. And this we say to move you that we ought not to answer in this court.

Stouford: Do you think to oust the king from his suit in this court by reason of the plea pending in another court in respect of the same matter, which you do not allege to be settled?

Pole: No, not in case you ought to have cognisance in this court. But we tell you this to move you that the plea may be held in another court. But our plea is that you will not hold a plea in this court in respect of this plea pleadable in another court, and not in this. And, if you adjudge that you will, we are ready to answer.

Sadington [Chancellor]: Then will you not answer without a judgment on the point?

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1 The record of this case in the Court of King's Bench is printed at Rolls Series 31b, vol. 10, p. 643.

R. Thorpe: No, Sir, we will speak in the affirmative, that, if you so adjudge, we will answer. But the negative, that we will not answer without a judgment, you will never have from us.

Postea concordati sunt etc.

12

***In re* Estate of Haket**
(Ch. 1344)

A petition of right can be grounded on an office found.

YB Pas. 18 Edw. III, f. 15, pl. 14,
Rolls Series 31b, vol. 11, p. 44, pl. 14

Note that direction was given by a writ to enquire of what lands John Haket died seised in the County of Wilts. An inquisition was returned to the effect that he died seised of no lands in the said County. Then, afterwards, on a suggestion made by the king, direction was given to enquire whether he died seised of certain tenements in the same County, and it was certified that he died seised and that his son was a lunatic. Therefore, the king seized the tenements, whereupon, a woman, who said she had been enfeoffed by John, the ancestor, sued by petition to the king, and the petition, endorsed to the effect that right should be done, was sent into the King's Bench. And, there, she offered to aver her petition against the office which was in the king's favor. And, thereupon, a writ was sent to proceed to the taking of the verdict. And, afterwards, the matter was delayed there by a letter under the privy seal. And, thereupon, a writ of *procedendo* was prayed in the Chancery.

Thorpe: By law, she shall not be heard to traverse this office until that which is contained in her petition be found by inquest of office. And, inasmuch as an inquest of office has been in the king's favor and the reverse has not been found by any inquest of office at her suit, you ought not to grant any writ to take an averment before she has sued another inquest of office.

Pole: We have an inquest of office in general terms, which serves for us, that is to say, that the ancestor died seised of no lands in the county, which is

contrary to the office that is in the king's favor; wherefore, that ought in law to avail for us and for anyone else who will sue.

Thorpe: Your right is not found by that office, but it is negative and will not serve for anyone and will no more serve for you than for me.

Pole: When direction was given to enquire in general terms whether he died seised of any land, even though our right had been found by that inquest, it would have been without warrant. But, since it was found that he died seised of no land, that serves for everyone who can show title of right in himself.

Sadington [Chancellor]: We do not so understand. And, therefore, sue, if you will, an inquest of office on your petition.

13

In re Estate of Lord Clifford
(Ch. 1345)

A condition to further convey in a conveyance that is broken will be specifically enforced by the Court of Chancery.

YB Hil. 19 Edw. III, Lib. Ass., f. 60, pl. 18,
Rolls Series 31b, vol. 12, p. 492, pl. 30

The king gave a license to Robert, lord of Clifford,[1] to enable him to enfeoff certain chaplains of a great part of his inheritance and of the sheriff-dom of Westmoreland, so that they, being in plenary seisin thereof, might be able to re-enfeoff the same lord, to hold to him and the heirs male of his body, and, failing issue, with remainder over, in virtue of which license, the chaplains were enfeoffed. And, before they had re-enfeoffed, Robert died. And, through the nonage of Robert's heir and by reason of some other lands, the king seized the rest of the inheritance by a *diem clausit extremum*.

[1] H. Summerson, `Clifford, Robert, first Lord Clifford (1274-1314)', *Oxford Dictionary of National Biography*, vol. 12, pp. 107-109.

The feoffment made to the chaplains on condition as above was found, upon which and upon the charter of license as above, a *scire facias* issued against the chaplains, returnable in Chancery, to show cause wherefore the land so occupied by them to the disherison of the heir and in such a manner as to deprive the king of his wardship, should not be seized into the king's hand.

And the chaplains came and said that they were the king's tenants by his license, as above, and that, by their forfeiture, the king would have the escheat and other profits of the seignory and that, as to the license given to them by the king's charter to re-enfeoff, it was only at their pleasure to make the re-enfeoffment, moreover, they had been at all times ready to re-enfeoff Robert during his life, but he wished to have the settlement by a fine, as would appear by record, for he sued a writ of covenant in the Common Bench in respect of the same matter, which was pending until his death. And because the sheriffdom was not delivered to them and certain of the tenants had attorned to them so that they could not when the writ of covenant was returnable on the first day have made an estate to him by fine with his consent, there was a continuance. And, after his death, they endowed his wife. And, at all times since his death, they had been ready if they had had the king's license to re-enfeoff Robert's heir and still were ready in accordance with the form etc. And they demanded judgment whether the king would maintain this writ against them, who were his tenants in this manner.

Sadington [Chancellor]: They had nothing except upon condition, for, suppose that Robert had been living and that the chaplains had forfeited and would not afterwards make a re-enfeoffment, Robert could have entered into his first estate and nobody would have had an escheat.

Haverington: If the king now causes the lands to be seized, it must be in his own right, and Robert's heirs will suffer disherison, because they cannot enter upon the chaplains contrary to the conveyance.

Stouford: Through the king's seizure, the heir will have the fee simple, and the chaplains, who have no title to their own use, can release, and, then, the right of everyone will be saved.

Blaykeston: What would then become of the estate tail?

Stouford: It would be lost through your default, because you would not make a re-enfeoffment to Robert.

Sadington [Chancellor]: Because by the king's license, which is of record, and by inquisition returned into this court on the *diem clausit extremum*, it is expressly proved that you had no other estate than one upon condition to re-enfeoff, and you have admitted in your answer that you had time during Robert's life after the feoffment made to you, during which you could have re-enfeoffed Robert, and you did not do so, so that your tenancy is no other than in disherison of the heir, who is in the king's wardship, whose right the king is bound to save.

The court adjudges, by advice of the King's Council, that the tenements be seized into the king's hand and that he be answered as to the issues since Robert's death. And let whosoever will sue to the king by petition etc.

14

Abbot of La Roche v. Queen Philippa
(Ch. 1347)

The Court of Chancery has the power to hear and determine disputes over modus*es in lieu of tithes*.

1 Gwillim 116, 1 Eagle & Younge 15,
Rot. Parl., 21 & 22 Edw. III, vol. 2, p. 205, no. 5

To our lord the king and his council, his poor chaplains, the abbot and convent of La Roche, parsons of the church of Haytfield, pray that, whereas they ought to have yearly one heifer in the park or woods of Haytfield and also yearly sixteen great beasts in the park or woods aforesaid in lieu of tithe of herbage and, likewise, to have all their pigs within the said parish fed in the woods of Haytfield aforesaid without paying any pannage for the same in lieu of the tithe of pannage and, also, for the tithe of the fishery of Braythemer and Newflet, a bind of eels yearly to be taken as of the right of their church of Haytfield whereof the said abbot and convent have been seised time immemorial until the manor of Haytfield came into the hands of our lord the

king after the death of John, late earl of Warren,[1] and is now in the hands of Madam the Queen Philippa [d. 1369], who holds it of the grant of the king, wherefore may it please our said lord the king to ordain a remedy in this case.

Answer: Let proper persons be assigned in Chancery to inquire in the presence of the queen's keeper there of the matters contained in the petition, and, the inquest being returned into Chancery, let the Chancellor call before him the said queen's counsel and the king's serjeants and any others whom he shall think proper to call and, having heard the reasons which the parties can allege, let him further do law and right.

15

Anonymous
(Ch. 1348)

A plea to the merits in a suit in the Court of Chancery will be sent to the Court of King's Bench for a trial by a jury.

YB 22 Edw. III, Lib. Ass., f. 101, pl. 75,
1 Eagle & Younge 17

Our lord the king granted certain tithes to the provost of C., of the new assarts in the Forest of Rock[ingham], wherefore he sued out a *scire facias* in the Chancery against divers parsons of Holy Church, who held the tithes, to have execution of the tithes aforesaid, who came and alleged that the court ought not to take conusance of such a plea, which belonged to the ecclesiastical court.

But it was said that it did not if the tithes were not demanded of those who ought to pay tithes. And, afterwards, they pleaded to the inquest in the Chancery, wherefore the Chancery sent the whole process against all the parsons into the King's Bench, as is meet where a man pleads to the country in the Chancery.

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[1] S. L. Waugh, `Warenne, John de, seventh earl of Surrey (1286-1347)', *Oxford Dictionary of National Biography*, vol. 57, pp. 399-403.

And, afterwards, the defendants made default, wherefore the plaintiff prayed execution for their default.

Thorpe: We do not know whether we can do that, for it used to be law, when there was a certain place which was extra parochial, as in Englewoode and such like, in such case, the king had and ought to have the tithes of such place, and not the bishop of the place, to grant to whom he pleased, as he has granted to you etc. Nevertheless, the archbishop of Canterbury, this year, has petitioned the Parliament of our lord the king to have such tithes, which remains in Parliament yet to be tried, and, wherefore, before it is tried, we will not grant you execution.

And, upon this, they granted time etc.

16

Anonymous
(Ch. 1352)

The right of corody is inseparable from the patronage of a priory.

YB 26 Edw. III, Lib. Ass., f. 130, pl. 53

The king was seised of the patronage of a priory, and he was seised of a corody for a man in the same priory, of which patronage the king divested himself without making mention of the corody.

And, afterwards, in the Chancery, it was debated if the king would have the corody or the grantee of the patronage.

All the justices agreed that, since the king had the corody by reason of patronage and, properly, the king could not grant nor give the corody by express words, because it could not remain to the king, although it was reserved by express words, therefore, the corody was adjudged to the one who had the patronage.

17

Rex v. J.
(Ch. 1352)

Where, because of the forfeiture of third person, the king seizes an infant heir who is in the wardship of that third person, when the ward comes of age, he must sue out a writ to the king to be admitted to his inheritance.

YB 26 Edw. III, Lib. Ass., f. 131, pl. 57

A *scire facias* was sued for the king in the Chancery against one J., stating that A., his father, held a manor of the king by homage and other services, and he died while J. was within age, which J. wrongfully intruded within age etc., if he knew anything to say why he should not make satisfaction to the king for the issues after this time until now.

Finchden: A., the father of J., held the same manor of B. by knight's service, as of the honor of H., which A. died while B. was living, by which B. sold the wardship of J. to one E., that he made satisfaction for the marriage and the wardship, and, afterwards, the honor came into the king's hand by the forfeiture of B. [We pray] judgment.

Thorpe: Since you did not deny that you were of full age when the honor came into the king's hand etc., [we pray] judgment etc. And, because, at all times after the king came to the lordship, J. was his very tenant, thus, the king did not have cause to seize etc. Therefore, he was discharged of this etc.

But by *Thorpe*: If the king seized one within age where he belonged to another etc., the heir could not enter at his full age without suing to the king.

Et hoc concessum fuit per curiam etc.

And, by another office, it was found that one W., mother of J., was endowed of the same manor etc. by B. etc. before his forfeiture and that she was seised of other land by purchase to her and to her husband, the father of J., of which estate W. died seised after the forfeiture of B. etc., and, because W., after the forfeiture etc., was tenant of the king etc., therefore, by judgment, the joint purchase and the dower of W. were seized into the king's hand, notwithstanding that W. was seised before the forfeiture of B. etc.

18

Rex v. Newton
(Ch. 1355)

A grant made by the king through the deceit of the grantee is void.

If the king is disseised for over a year, he must sue out a writ of scire facias *in order to recover.*

YB 29 Edw. III, Lib. Ass., f. 163, pl. 30

It was found by [a writ of] *diem clausit extremum* that one W.B., tenant of the king, had alienated to J. Newton without permission, for which, J. Newton made a fine for this purchase etc. And, by permission, he divested himself of the same lands and retook an estate to himself and to his wife and his son etc. And, then, by another *diem clausit extremum*, it was found that this same W.B. had died seised and that his son was within age in the wardship of the king etc., by which a *scire facias* issued against J. Newton to show if he knew anything to say why the tenancy should not be seized back again and the king answered for the issues.

And, then, J. Newton came, and the king's serjeants prayed, since his estate was by wrongful intrusion etc., that the land be seized into the king's hands.

And Greene [J.C.P.] said that, if it were still within the year since the king's title had accrued, that the land would be seized without a suit of *scire facias*, but not now, inasmuch as it was after the year.

To which the other justices, then in Chancery, agreed. Query.

And J. alleged the matter, *ut supra, scil.* the alienation, and the office, and the fine made by him, and that he had a warranty against W.B., and, further, the joint tenancy with his wife and the son. And he did not understand that he should be compelled to answer without them etc. and, notwithstanding, because his estate should be not adjudged except for the wrongful intrusion, if he did not maintain the alienation, because the licence by the king was not material, because the king was deceived etc.

Therefore, it was said by all the justices that he should answer.

He said that W. had enfeoffed him, *ut supra*. Ready etc.

19

Digle v. Partifield
(Ch. 1355)

A writ of scire facias *does not lie where no office has been found.*

YB 29 Edw. III, Lib. Ass., f. 163, pl. 31

It was found by a *diem clausit extremum* that one who held certain land of the king in London died seised without an heir, by which the king gave the lands to Piers Partifield for the term of his life. Piers Partifield sued a writ to the Mayor of London to put him into seisin, and, by this writ, nothing was done. Therefore Partifield sued a *sicut alias vel causam nobis significes*.

And the mayor returned that the same tenant of the king had devised the land to his wife for her life, who was now the wife of J. Digle, so that the said wife or the wife's executors should sell the reversion for the soul of the testator and that the devise was enrolled before him, and, thus, J. and his wife were now in by the devise etc., by which he could not make the livery.

And, then, Piers Partifield, by force of his patent from the king, entered upon J. and his wife, upon which J. and his wife had a *scire facias* against Piers Partifield if he knew anything to say why J. and his wife should not be restored.

Piers Partifield came and demanded judgment of the writ, because he held for his life, the reversion to the king, in which case the whole suit should be made against the king etc., and also since an office was found for the king, by which J. and his wife would not have this suit before another office was found for him etc.

To this it was said for J. and his wife that, since they were seised of a freehold and that this matter that was returned by the Mayor etc. served them for an office etc., inasmuch as, by the office, it is found for the king, the reverse of his matter was not found, by which etc.

And, notwithstanding, by the judgment of all the justices in the Chancery, because no office was found for him etc., this writ of *scire facias* was abated. And it was said that they should sue to the king for an office that could serve him etc.

And it was said by some that they should have the assize etc., since the king was not seised etc. *Quaere*.

And the suggestion that Piers Partifield made to the king was that his tenant was a bastard and died intestate without an heir, by which a writ was sent to inquire of which tenements he died seised tenant of the king and if he died without heir or not. And it was found that he died seised tenant of the king of the same lands without heir etc., but the verdict said nothing of the devise etc.; so this was not contrary to the statement of J. Digle, now plaintiff.

And this matter was touched for him, *sed non allocatur*.

20

Anonymous
(Ch. 1355)

An Escheator can seize on behalf of the crown any lands alienated without the license of the king.

YB 29 Edw. III, Lib. Ass., f. 165, pl. 38

It was found by inquest of office that one Thomas of H. purchased a manor that was held of the king in chief and had alienated it without permission, by which, the Escheator seized it.

Upon this, T. came and sued in the Chancery, and he had a writ out of the Exchequer witnessing that this manor was found by the Domesday Book[1] to be held of the honor of Pickering etc., which honor belonged to the duke of Lancaster, by which, he prayed a writ to the Escheator to remove his hand.

Whereas it seemed to all the justices, because it could be that this manor now was held of the king in chief, they would not have regard to it etc.

Therefore, he tendered to aver that the manor was not held of the king in chief.

[1] Public Record Office, E.31.

To this, it was said that it was of record that one, who had enfeoffed his father, purchased a charter from the king to alienate etc., by which, he should not be admitted etc.

Nevertheless, it seemed to the court that he would be admitted notwithstanding etc.

Therefore, it was alleged that R.B., earl of Mar', of which county the manor was parcel, had surrendered his county to the king, saving this manor to himself, and that the said R.B. had purchased a license to alienate to the said T.'s father, which matter is of record, by which, he would not come to have the averment etc., without showing how etc. or deny that this was parcel of the county etc.

And this appeared to the court.

Therefore, he denied etc.

Et alii e contra.

21

Anonymous
(Ch. 1355)

The question in this case was whether lands that were sold to the defendant belonged to him or to a certain person under a disability who was in the wardship of the crown.

YB Trin. 29 Edw. III, f. 43, pl. [34]

Where, by force of a writ that came to the Escheator, he inquired and found that the husband and his wife were seised of the manor of A. and alienated by a fine and retook an estate in tail. And they had issue, one Jo., who was a natural fool. The husband died. The wife took another husband, who alienated, and, afterwards, the husband and the wife acknowledged the manor to be the right of the alienee, as that which he had of their gift, and retook an estate in tail. The wife died. The husband alienated to C., against whom the king sued upon this inquest a *scire facias* to garnish C. if he knew

anything to say why the manor should not be seized into the king's hand to hold for the life of the natural fool.

And note that the writ was returned into the Chancery.

Fifhide: Sir, by the second tail, the first was discontinued and, consequently, the heir was put to his [writ of] formedon.

And, further, it was found that the estate of C. was by a feoffment, in which case he had his warranty, which could not be used except at an action at the common law.

And he demanded judgment if he should be compelled to answer here.

Th.: And [we pray] judgment, since another action is not given for the king except such as it is here. And he prayed execution, because he said that, in such case, the fool could not use an action, because he cannot know his right, and, thus, the right belongs to the king, who could not have another action than this.

And it was further touched that, by the second retaking of the estate by the fine, the wife was in her first estate, *quod negabatur*, because she and her husband acknowledged the right of another, in which case she was divested of her preceding right.

Et sic pendet etc.

22

Amy v. Fisher
(Ch. 1359)

In a petition of right sent into the Court of Chancery, the issue between the claimants can be adjudged upon a scire facias.

YB 33 Edw. III, Lib. Ass., f. 200, pl. 10

One John Amy, chaplain, previously made a suit by a petition in Parliament, by which he alleged that, whereas the king had seized certain tenements as his escheat by reason of the felony of one W., who held these same tenements of the king, which tenements the king had granted to Esteven of Wertule and to his heirs, and that the land had descended after the death

of Esteven to one R. as to his son and heir, and that this same W., who had forfeited, had nothing in the lands but as husband of one Alice, mother of the said John, who now sued. And he prayed to the king that right be done to him.

The petition was endorsed that right should be done to him and sent into the Chancery, where a *scire facias* was awarded against R., if he knew anything to say etc., who was garnished and came.

Wirc': From the hour that it is supposed by your petition, which is the basis of this suit, that our ancestor had this land of the king's gift and that we are afterwards come to this land after his death by descent of heritage, we do not understand that we should be compelled to answer without a writ at the common law, in which we could have our warranty.

Lud': We cannot have a writ of entry against you alleging that you did not have an entry except by your ancestor, to whom the king had leased, who had wrongfully disseised our ancestor of it etc.

Shareshull [C.J.K.B.]: By the award in the Parliament, it was awarded that such suit was given by the law, and, if such suit could not be maintained by the law, it would be said to him that he did not sue at the common law. And a similar suit was maintained by David Marshall against Michael of Pristene and Thomas of Bamburghe and several others in a similar case.[1] Therefore, [he told the defendant to] answer.

Burton: Our lord the king, by his charter, which is here, has given the same land to our ancestor etc. And he did not understand that, the king not consulted, etc.

Upon this, the aid was counterpleaded, *causa ut supra*.

And Shareshull [C.J.K.B.] wanted to adjourn them upon this on the difficulty of the law.

Therefore, Fisher had the aid.

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1 *Marshall v. Bamburghe* (Ch. 1339), see above, Case No. 4.

23

Anonymous
(Ch. 1362)

A claimant against the king, as heir to the person who died seised, cannot traverse the office found unless another office be found for him, but a stranger shall have a traverse to the office found if he be ousted by the office, although no office be found for him.

2 Statham, Abr., *Traverse*, pl. 14, p. 1168

Easter 36 Edw. III.

If it be found by an office that one F. held of the king in chief and died seised and that one J. is his heir etc. and is of full age and it is found by another office that another is heir to F. and is underage, who comes into court and prays that the lands remain in the king's hand until his full age and the other who was found heir says he is the same heir and that he who is underage is by another marriage or that he is younger, in that case, he shall be put to answer, notwithstanding he is underage, for each of them is an actor against the king. And so note that the claimant, as heir to the person who died seised, cannot traverse the office unless another office be found for him, but a stranger shall have a traverse to the office if he be ousted by the office, although no office be found for him etc., for he can say that he, whom it was alleged by the office died seised, enfeoffed him, without this that he died seised etc., or he can say that a stranger was seised and enfeoffed him, without this that he died seised etc.

24

Anonymous
(Ch. 1363)

Where a husband has a statute merchant in the right of his wife, he can sue upon it alone or with his wife.

YB 37 Edw. III, Lib. Ass., f. 218, pl. 11

It was presented before the Escheator of the king that one William of C., who held certain land of our lord the king in chief, had alienated the same land to one J. of B. without licence, who had alienated it to H. of T. and to the heirs of his body engendered, the remainder to A. of M. to him and his heirs forever. And it was found that H. of T. had died without heir etc. and that A. of M. had issue, one B., and died, and that B. was within age. And it was found that one Thomas of F. and his wife, A., held the same land. Therefore, by the same office, they were ousted, upon which, our lord the king, by his patent, had leased the same land to one J. of W. until the [full] age of B.

Upon this, T. of F., who was ousted, came into the Chancery and showed how he was ousted from the land and prayed by petition that right be done to him there. And, upon this, his petition was endorsed and sent into the Chancery.

And T. of F. came and traversed the office, *scil.* that William of C. was never seised of the land that was held of the king, but of another. And, upon this, a writ issued to inquire, by which it was found that this same J. of B., to whom alienation was supposed, held the land of one T.C., which T.C. held over of the king and that the land had always been held of T.C. and of his ancestors. And the alienation to H. of T. in tail was further found, and further A. of M. in fee, *ut supra*. And it was found that the tenant in tail made a statute merchant to this same A., the wife of Thomas F., upon which she had sued execution, and thus she was seised until she took as husband this same Thomas F., without this that William of C. had alienated to J.B. or that the land was held immediately of the king. And it was found that the tenant in tail had died without issue, *ut supra*, and that A. of M. had died while his heir was within age, *ut supra*.

And this matter was sent into the King's Bench.

Upon this, a *scire facias* issued to J. of W., who was the lessee of the king, to garnish him, why Thomas F. should not be restored to his possession.

He came and prayed aid of the king. The aid was granted, and, upon this, they surceased. And then a writ of *procedendo* was sued.

Fyncheden: Inasmuch as it was found by the office that the said Thomas of F. had nothing except in the right of his wife and he himself had made his suit alone without naming his wife, [we pray] judgment of this suit.

Greene [C.J.K.B.]: He could devise it as his term as another chattel. Thus, he could elect to have his suit alone or for himself and his wife in common. Therefore, [he told the defendant to] answer.

Fyncheden: Since the said J.W. is to charge the freehold of the heir, we understand that the said J.W., who held of the right of the heir, should not be compelled to answer without the heir. And, because the heir was not garnished, he demanded judgment of this suit.

Ingleby [J.K.B.]: This was only to oust the possession of the king, who had no right, and, when the king's hand is removed, if wrong was done to the heir, he will have his recovery at the common law. Therefore, h[e told the defendant to] answer.

Fyncheden: By the office that the plaintiff himself had sued, it was found that the one who made the recognizance had nothing except a fee tail, and, although he had traversed that the land was not held of the king, nevertheless, when the king had the possession at one time for cause, he will not be ousted by a stranger who did not have right, and, by the office, it was found that the said Thomas F. did not have right. Therefore, without traversing the right of the king and proving his right, he will not have restitution, because, if the king's tenant charged and died while his heir was within age, the king would hold discharged, and now he showed that the land is discharged against the king and against the heir, and, *per consequentem*, he did not have right.

Fulthorpe: When it is found that we have been ousted without cause and the king had no right, it is reasonable that we have restitution, and then the matter will be discontinued between the heir and us.

Greene [C.J.K.B.]: You will never have restitution if you cannot show that you have right and, also, that the king did not have right.

Fulthorpe: This same H. of T., who was supposed tenant in tail, who was seised at the time the recognizance was made, was seised in his demesne as of fee simple, without this that J. of B. gave to him in fee tail. Ready etc. And we pray restitution.

Fyncheden: By the jury at your own issue, it was found that the one who had made the statute had a fee tail. Therefore, it seems that he will not have this averment.

Fulthorpe: Since the office was at the suit of the king and not to try our right, and, by the new Statute,[1] we are aided to traverse the office. And we have done this, and they refused it. Therefore, [we pray] judgment, and we pray restitution. And also we could not have challenged the jurors on the office, in which case, it could not be accounted our issue. And we are aided by the new Statute. Therefore, [we pray] judgment.

And the king's serjeants *e contra. Et sic ad judicium*.

Greene [C.J.K.B.]: When he had traversed the title of the king, *scil.* that the tenant did not hold of him, although the tenant in tail charged it, it is to be discussed by another suit. Thus, the king did not have cause to hold this land etc.

25

Anonymous
(Ch. 1366)

The Court of Chancery has the jurisdiction to vacate a royal patent that was granted through the fraud of the grantee.

YB 40 Edw. III, Lib. Ass., f. 245, pl. 26

In an office, it was found before Adam Bury, the mayor of London, that one R. of E. was seised of certain tenements in Wood Street in the City of London in his demesne as of fee and died seised and that, on his deathbed, he devised the tenements to H.C. to him and to his heirs forever, to pay annually 12 marks to find two chaplains to sing for his soul forever etc. at the church of St. Alban in Wood Street. And the words were thus: *ad inveniendum 12 markas pro duo capellanis*. And, further, he devised *rectori ejusdem ecclesiae qui pro tempore fuit 6s. 8d. ad inveniendum praedictis capellanis vestimenta, calicem unam, candelam, et alia necessaria ejusdem capellanum celebrant*'.

[1] Stat. 34 Edw. III, c. 14 (*SR*, I, 368); Stat. 36 Edw. III, stat. 1, c. 13 (*SR*, I, 374-375).

And upon this office, for the devise thus made in mortmain, a *scire facias* issued from the Chancery returnable there (because the office was returned there) to the said two chaplains as tenants of the said 12 marks, *si quid dicere sciant quare praedicti 12 marcae quae quil' earum clam' proportione sua rex habere non debeat*. And, also, the parson was garnished as tenant of the 6s. 8d. And they appeared and demanded judgment of the writ, inasmuch as it was false Latin. *Et non allocatur*. But it was amended immediately in the presence of the Chancellor there etc.

And then *Leic[ester]* demanded judgment of the writ, because, in their writ, it is supposed that certain tenements were devised to H.C. to pay 12 marks to two chaplains etc., and the chaplains are garnished as tenants of the same 12 marks, where, by the matter contained in the writ, it will not be paid to them except as their wages, so the writ supposes a contrary in itself. [We pray] judgment etc.

Cavendish, ad idem: If H.C. had paid this by the week, or by the month, or by the half year, he had performed the testament, and it seems that he could pay to one chaplain one week and to the other another [week], and, by this, he had performed the testament. Therefore, it seems, by the matter comprised in the writ itself, it is abated. [We pray] judgment of the writ.

Thorp [C.J.C.P.]: Then, you disclaim in the freehold for the chaplains or, otherwise, you must say for matter in fact that they are not tenants.

Cavendish: There, where a writ supposes me a tenant, there I could disclaim, but, by the matter comprised in this writ, the chaplains could not be supposed tenants. Therefore, it was not necessary to disclaim, nor show other matter.

Thorp [C.J.C.P.]: Answer by award as to this challenge.

Fitzjohn, for the chaplains, generally, said that, by the office upon which this *scire facias* is warranted, and also by the writ, it is supposed that R.E. was supposed to have devised to H.C. and to his heirs certain tenements *ad inveniendum 12 marcas pro duo capellanos*, that this devise was made to a temporal person and payable at his will as well by the week as by the month or by the year, and, thus, this devise was made to no chaplain in perpetuity. Judgment if the king in this case could have execution etc.

Lodelow [C.B.Ex.]: How do you answer, either because the chaplains are tenants of the rent or otherwise?

Fitzjohn: Not as tenants, but, because they are brought in to answer by the writ; therefore, the same cause gave them their answer, and the writ does not allege that they are tenants, and they could not plead this matter in abatement of the writ, inasmuch as there was never any perpetual chaplain and still is not etc.

Chelre: Then, this plea does not lie except for the tenant etc. And we say, in this case, that, if the chaplains forfeited, the king would have this rent by way of escheat.

Cavendish [sic]: He would not have it, but it would be given to another at the will of H.C. or of his heirs.

Cavendish: If the tenant of tenements forfeited and the king were in by way of escheat, would this rent not be payable by the king?

Cavendish: It would not be, but extinguished forever.

Lodelow [C.B.Ex.]: By the usage of the City, when a devise is thus made, it is leviable by the ministers of the City at the suit of him who is parson and of the parishioners, and, *per consequens*, that which is leviable in perpetuity is an alienation in mortmain in this case.

Cavendish: I say that this rent will never be levied if it were not to some person in whom it could vest, and, inasmuch as in this case, there is no person in certain to whom it is due, by which etc. And this writ is not founded on the usage. And this matter is also made anew in the time of the present king, which could not be restrained nor bound by usage, because he could pay the seisin to a Franciscan, who could have no freehold.

Lodelow [C.B.Ex.]: When a chantry is devised at a time when it is vacant and there is no person who could take it, nevertheless, it was leviable, *ut supra*.

Cavendish: There, the ordinary or the bishop could present by the devise, and he will be instituted, in which case, it is not similar to this matter.

Fitzjohn: If a man devise certain land to a man and to his heirs to find annually in perpetual alms to a house of religion a certain rent out of the devised lands, this is only a rent service, and not alienation in mortmain, no more is this only a rent charge payable at the will of the tenant etc. And, as to that which was devised to the parsons, we say that this is only an accessory of the principal, and, since the principal is not vested in any perpetual person, we demand judgment if the king could not have execution of this etc. *Et alii ut supra. Et sic ad judicium*.

And afterwards, in Easter term, the testament was made to come into the Chancery.

And, there, for the king, the serjeant of the [king] alleged that, by the usage of the City, although the tenant wanted to restrain the chaplain, nevertheless, he will be compelled to find him, and thus he is perpetual. And, also, in the testament, it is specified that the parishioners should elect the chaplain and distrain in the land for the rent if it be withheld, and thus [it was] an alienation into mortmain.

To which *Cavendish* said that he had answered to the office, and, because the testament is further or what are the usages are not material, inasmuch as it is not comprised in the office nor in the *scire facias*. Therefore, no law compelled us to answer. And, even if it were a matter to which we will be compelled to answer, nevertheless, I say that, in this case, the rent is granted for a secular person, who can release the chantry, and, thereby, it would be annulled forever.

Knyvet [C.J.K.B.]: The office alleges an alienation in mortmain, and the testament and the usage affirmed it, by which it seems that it was necessary that you answer to it.

Therefore, *Cavendish* said that, although he did not acknowledge the usages to be such, he said that, by the testament, it was proved that he had devised the tenements *pro servitia ad inveniendum duo capellanos*, which matter was not as a thing reserved to a secular person in charge which could be an alienation into mortmain, and, there, where, in the testament, it is said that two parishioners should elect the chaplain, they are also secular persons, which is not an alienation in mortmain. And, although the chaplain was elected, still he could not continue, but he would be removable, if he were not in by deed. Thus, on all this matter, it seemed that there was not a forfeiture. [We pray] judgment etc.

Belknap, for the king, *e contra*: Inasmuch as the devise is to find a chaplain, whom the devisee, by the usage, will be compelled to find, and also that the chaplain could distrain for the rent, this is an alienation in mortmain. Therefore, we demand judgment and we pray execution. *Et sic ad judicium*.

Cavendish recited how the usage of the City was not comprised in the office, nor in the *scire facias*, and, although the king was certified by a *certiorari volumus* of the tenor of the testament, nevertheless, this is only a service, to which we do not understand that the law compels us to answer. Although

the law wills that we should be charged in the distraint, which is limited in the testament to the parson and two parishioners and to the chaplains to distrain, nevertheless, no estate is limited to them. Thus, this distraint is not a cause of alienation in mortmain, nor could the usage adjudge it, because, in another case, if I grant to you a rent out of my land and, in case the rent were in arrears, a stranger could distrain, to whom no rent would be granted, the distraint would be of no value; no more as it seemed in this case. Therefore, he demanded judgment etc.

Knyvet [C.J.K.B.]: This surmise that you allege is to enforce the office for the king. Therefore, as to this, it was reasonable that you answer.

And the king's serjeants demanded judgment, as before. Below etc.

And afterwards, Knyvet [C.J.K.B.] [said], because you have not denied that the rent was devised to find a chaplain, in which testament it is comprised that the parishioners and the parson of the church could distrain for it perpetually in the event that it was in arrears, which is maintained by the usage, which usage you have not denied, and which parsons are perpetual and that they could remove the chaplain for a sufficient cause and put another in his place, which is an alienation in mortmain in the law, therefore, the Court awarded that the king have execution of this rent, and, nevertheless, in one chantry, there was not comprised any distraint etc.

And, in the same testament, 6s. 8d. were devised for the sustenance of a lamp in the same church, which was adjudged by the Court no alienation in mortmain, so, as to this, the party went acquitted by judgment etc.

26

Rex v. Anonymous
(Ch. 1366)

A patent from the crown that was made by a fraud upon the king is void.

Where a husband has a license to alienate land that is void for fraud upon the king, the wife does not forfeit her dower rights in that land.

Where a husband dies seised, the widow can recover her dower with interest from the whole time after her husband's death, but, if he does not die seised, after

her demand and the refusal to assign her dower, she can recover interest only from the time of the refusal.

YB 40 Edw. III, Lib. Ass., f. 248, pl. 36

A suggestion was made in the Chancery of our lord the king that the progenitor of the king had given certain tenements to Roger Clifford, grandfather of the present Lord of Clifford, in fee tail, and how Robert,[1] father of the present lord, had purchased a license to enfeoff certain chaplains of the same land, and he took an estate back to himself and Isabel [d. 1362], his wife, in tail, the remainder to his right heirs, upon which suggestion a *scire facias* issued to Thomas Musgrave, knight,[2] who had married Isabel, the wife of Robert, if he knew anything to say why the king should not be restored to the issues of the land for the time that he had occupied the same lands during the life of the said Isabel and during the nonage of the Lord of Clifford,[3] who now being within age etc.

He came and alleged how this *scire facias* was not warranted by any record nor of office but by a suggestion. And he did not understand that any law compelled him to answer to such writ. *Et non allocatur*. And, then, he said how the ancestor of him who is now lord had enfeoffed the chaplains of the same lands in fee simple, by force of which the wife, who took the estate, was warranted and that the issue had assets by descent, in which case, on account of the warranty, he was barred. And he did not understand, since the issue was barred, that, in this case, the king would be received.

And the serjeants of the king demanded judgment, inasmuch as this license was purchased in deceit of the king, and the king was not aware of his right, which could not discontinue the reversion of the king, and, *per consequens*, he had cause to have the wardship and thus [be] answered for the issues. And he demanded judgment etc.

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1 H. Summerson, `Clifford, Robert, first Lord Clifford (1274-1314)', *Oxford Dictionary of National Biography*, vol. 12, pp. 107-109.

2 R. R. Baxter, `Musgrave, Thomas, Lord Musgrave', *Oxford Dictionary of National Biography*, vol. 40, p. 23.

3 H. Summerson, `Clifford, Roger, fifth baron Clifford (1333-1389)', *Oxford Dictionary of National Biography*, vol. 12, pp. 110-111.

Fitzjohn put [the case] that R. had alienated certain other lands in fee with warranty and the tenant was impleaded and vouched R., who entered, and did not have other tenements except these lands entailed of the king; yet the tenant would recover these tenements to the value and would have a fee simple in them; yet the reversion was to the king. But, for the life of the issue, the king would not have any advantage of it; no more in this case.

Lodelow [C.B.Ex.]: I say in your case that the king will have the wardship of the issue in tail, being within age.

Fitzjohn: If a divorce were made between Thomas Musgrave and Isabel, the king would not have the issues against the wife from all time, notwithstanding the occupation of the husband, and after he had made a fine to the king, because she was a widow [in the wardship] of the king, and he did not have another estate except occupation for the life of the wife, and he was not party to any deceit. It is a greater reason to charge the heirs of the wife and the executors than to charge you, because one joint tenant, although he be a debtor to the king, did not charge the possession of his companion except for the portion that belonged to him.

Thorp [C.J.C.P.]: If one had nothing, the other would answer.

And, by the opinion of all the justices, it was awarded that, in right of the two parts of the land, he will be charged for the time that he had occupied, and, in right of the third part, of which she had cause to have dower, she was discharged of it. And, nevertheless, he said against the king that, because the wife was party to the forfeiture, she had forfeited her dower in whole etc.

Query.

Jenkins 44, 145 E.R. 33

[There was a] tenant in tail general, the reversion to the king, this tenant in tail takes a wife; this tenant holds of the king *in capite*. He has the king's licence to alien this land to two chaplains in fee and to take back from them a new estate to him and his said wife in tail, which is done accordingly. The tenant dies. His heir general in tail enters; he is remitted. The wife takes another husband, who enters and ousts the heir and takes the profits of the lands; he dies. A *scire facias* issues for the king to seize the land for the alienation without licence, for it appears by the patent that he was a tenant in tail and the king was deceived, and so the patent is void, and, of consequence,

the alienation was without licence, and the estate in tail of the wife is avoided by the said remitter.

[It was] resolved that the second husband shall not answer for the third part of the profits of the land, because the wife was dowable of the third part, although there had been no alienation. And this was allowed although the wife neither sued for her dower nor required this to be allowed to her.

Note that the heir in tail is remitted, for there is no discontinuance in the case because of the reversion to the king.

By all the justices in the Chancery.

Judex aequitatem semper spectare debet.

Regularly, where a husband dies seised, the wife shall recover her dower with damages for the whole time after her husband's death. But, if he does not die seised, after her demand and the tenant's refusal to assign dower to her, she shall recover damages from the time of the refusal.

27

Masters of Canterbury Hall v. Anonymous
(Ch. 1369)

In a petition of right in the nature of a quare impedit *in regard to the claims of the king's ward, the suit is not stayed until the ward comes of age*.

YB 43 Edw. III, Lib. Ass., f. 272, pl. 21

The Masters and Scholars of Canterbury Hall sued by a petition to the king, and they made the suggestion that, whereas one Marie, countess of Pembroke, was seised of an acre of land and of the advowson of the church of Tilney in her demesne as of fee of the gift and grant of J. of B. as appendant to the same acre in Tilney by a fine that was levied in the court with warranty, whose estate he had, etc., and that our said lord the now king by reason of the nonage of W., son and heir of the said J., underage and being in the wardship of the king, had presented one W. of H. to the same church, who, at his presentment, was received and instituted by the bishop, praying, since they were thus ousted from their advowson and from their presentment without an

answer, which was absolutely against Magna Carta[1] and other various statutes made of this, so that they prayed restitution of the said advowson and that the presentments of the king be revoked. The bill was delivered for the king to the Chancery and commanded that right be done.

Upon this, it was alleged for the king that the ancestor had nothing except in fee tail.

And the other parties came into the Chancery and there alleged the fine as before and showed this forth and said further that the heir who was in the wardship of the king had assets by descent in fee simple from this same J. in a certain county, so he was barred by the warranty with the descent in case that he was at his action. Wherefore [they prayed] judgment, and they prayed that the presentment of the king be revoked.

Belknap: We cannot answer to this matter of descent, which is a matter in fact, during the nonage of the heir, who was in the king's wardship, no more than the heir would be if he were a party, and the heir will not be charged to answer to the descent, which was alleged during his nonage, because, thereby, the circumstances of the fine would be as not denied, by which the heir could be aided if he were of full age, such as to say not comprised or other matter upon which the heir, if he were of full age, could avoid the fine, which could not be now. Therefore, we pray that the parol demur until the full age of the heir, Because in a writ of formedon, which is brought in the Common Pleas by an infant within age, the deed of the infant's ancestor with descent is pleaded in bar, and the parol demurs notwithstanding the matter that can be alleged for the infant.

Thorp [C.J.C.P.]: It is not similar, because this suit is brought in the nature of a *quare impedit*, in which no age is given, nor other delay for the lapse of time by protection, essoin in the king's service, nor other such delays, and also those who made this suit after the purchase of the advowson never had a presentment, so that, if they did not have a recovery by this suit, they will be without a recovery, and the heir is not a party to this suit, so that whatever happens between the king and those who made the suit, the heir is at large when he comes to his full age. Therefore, it was not reasonable that the parol demur.

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1 Stat. 25 Edw. I, Magna Carta, c. 29 (*SR*, I, 117).

Wichingham [J.C.P.]: This is an action of *quare impedit* in effect, which will be lost if it not be decided within the six months, and where the action would perish, the parol would never demur. Therefore, [the defendant is to] answer.

And,afterwards, he tendered to aver for the king that the infant, who was in the king's wardship, had nothing by descent.

Cavendish: There are various inquests returned in this court out of various counties, *scil*. upon a writ of *diem clausit extremum*, by which it was found that lands and tenements in A., B., and C. belong to the heir in the king's wardship and the same ancestor to the value of 1000 marks. Wherefore, [the plaintiffs] do not understand that, in conscience, he will maintain this averment to the contrary of the said offices.

And then the presentee of the king was questioned privately if he wanted to maintain the averment, who said 'no'. Therefore, it was awarded etc. that the presentment of the king be revoked.

And note, a *scire facias* issued against the presentee of the king *ad informandum dominum regem etc*. before any plea was pleaded etc.

[Related cases: Barling v. Bardoff (1370), YB Mich. 44 Edw. III, f. 35, pl. 24.]

28

Anonymous
(Ch. 1369)

A question of fact upon a traverse of office will be tried by a jury in the Court of King's Bench.

YB 43 Edw. III, Lib. Ass., f. 274, pl. 28

It was found by an office in the Chancery that one W. of Herlington, who was seised of certain lands in the County of York, was an aider of Gilbert of M., who was an enemy of our lord the king, by which the lands were seized into the king's hand. Upon this, this W. came into the Chancery and said that he was not an aider. And he prayed that he could have restitution of his lands

by sufficient mainprise to the king to answer to him for the issues if the right of the king was found.

And, while this issue was pending, one Thomas of Spaine came upon a letter of privy seal and prayed that he could have livery of the same lands by a patent of the king. And he said how this same W. was an aider etc., and the said Thomas of Spaine, upon this, had the lands. And pending this issue, this same Thomas had feigned a feoffment, by which this same W. had made to two chaplains in fee before the office was taken, which chaplains had leased the same lands to him for the term of his life, and then released in his possession.

And the issue taken above was sent into the King's Bench and there tried against T. Wherefore, afterwards, W. was adjudged to have restitution.

29

Blaunch v. Anonymous
(Ch. 1369)

Where a widow's dower is defeated by the action of a third party, she can sue to be re-endowed.

The Court of Chancery cannot award damages.

YB 43 Edw. III, Lib. Ass., f. 274, pl. 32

Thomas Blaunch, who had married Marie, the daughter of Walter Withors, who held certain lands of the king, died. And the lands were descended to an infant within age as relative and heir, who was in the king's wardship. And, upon this, the said Marie came and sued for her dower in the Chancery. And certain tenements were assigned there. And, then, the heir died, and one J.B., knight, who had lost the same tenements previously by verdict of an assize against the said Thomas, the husband of the said Marie, brought an attaint against this same Marie, where she prayed in aid one S.W., to whom the reversion of the same tenements belonged. And he was summoned in aid of her and did not come, by which she lost by attaint.

Upon this she caused the record of this attaint to come into the Chancery. And upon this record and the first record of assignment of dower,

a *scire facias* issued, reciting the first assignment and the loss against this S.W. if he knew anything to say why the inheritance should not be received into the king's hand and the woman endowed from the other two parts, where the tenant put forward a protection, *quod non allocatur* by the justices, *quia placitum dotis*. And, then, it was alleged that, inasmuch as the two parts which she had lost were discharged, still she would not have another action except a writ of right of dower.

Tauke said that, in a writ of dower, where the heir is vouched in the same court and came, that the judgment would be that the woman recover from the lands of the heir and, if, afterwards, the woman lost in a higher action, she would have a *scire facias* against the tenant to be endowed of this land upon the first judgment; therefore, not in this case. And it is not a mischief when the same one to whom the reversion belonged is tenant, because there was no mischief of warranty.

Knyvet [C.J.K.B.] said that, in the case put, it was not a marvel, because the judgment was conditional.

Tauke: It was so when the woman is endowed in the Chancery etc.

And, because the tenant did not say anything in discharge of execution, it was awarded by the Chancery that the land be re-seised and dower delivered to the woman, but nothing of damages, because damages are not awarded in Chancery etc.

30

Anonymous
(Ch. 1369)

When the king's presentee to a church has the possession for his entire life in peace by virtue of a judgment, if anything be done in prejudice of it, it would be done to the bishop and not to the king.

YB 43 Edw. III, Lib. Ass., f. 275, pl. 35

One W. of F., chaplain, put forward a bill in the Chancery, comprising such matter directed to the Chancellor and the King's Council, *scil.* if it

pleased him, W.F., chaplain, showed how our lord the king had recovered the prebend of N. against R., bishop of C., and M., clerk, by a [writ of] *quare impedit*, and, upon this, presented one W. Derby, who, at his presentment, was instituted and inducted, and, upon this, the said M. sued in the [Court of] Arches for the prebend, supposing by his libel that, whereas he had been provided by the pope to the same prebend, instituted, and inducted to the same prebend, that the said W. Darby, at the time when M. was in prison, wrongfully intruded upon his possession and committed spoliation against him, pending which suit, the said W. Derby had a [writ of] prohibition to the Dean of the Arches, and, upon certain matter, the said M. had a [writ of] consultation upon condition that he would not attempt nor pursue anything in defeasance of the judgment of the king and, then, the said M. had judgment in the Court Christian to be restored, and that the presentee of the king would hold for his whole life, so that the judgment for the king was not impeded. And the said W. Derby said that this matter was pursuant to the first judgment for the king, and he prayed that M. could be made to come into the Chancery with all his libels and acts touching this matter, so that nothing would be done in defeasance of the king's judgment.

Upon this, the Chancellor [Wykeham] assigned the Monday in the third week of St. Michael to the one party and the other to bring into the Chancery their whole counsel, and there right would be done.

Upon this, it was sent to the Dean of the Arches to certify to the court the matter of the judgment and the acts. And he showed to the court how, by the libels of this same M., it was comprised that he had a rightful possession and that he had been despoiled by this W. Derby of the collation of the bishop of B. And upon this proven matter, the plaintiff had judgment to be restored, not calling into question the king's judgment, because his presentee would hold for his whole life, and if we had restored him to the possession upon the first title, we would have restored him to all the issues and damages in the meantime, which matter we have not done.

Belknap: In the libel of the said plaintiff, it was comprised that the pope had granted him the vacancy *hac vice*, and, when the king had recovered this time, he was wholly ousted in fact by the king's recovery, so that this cause *hac vice* was wholly annulled.

And the Dean of the Arches, *scil*. Master *Nicholas*, said that the contrary was their law, because these words '*hac vice*' would have relation and would hold good for the whole life of the one who was purchaser.

And the Justices all said that, when the king's presentee had the possession his whole life in peace, if anything would be done in prejudice, it would be to the bishop and not to the king. And the bishop, in this case, would plead in the Court Christian upon this title, and not here, and, although he sued there to prove his possession, this was nothing in prejudice of the king. Wherefore he was dismissed from the Chancery etc.

31

Percy's Case
(Ch. 1370)

When an heir in the wardship of the king comes of age, he must sue out a writ of livery in each county in which he claims land.

YB Pas. 44 Edw. III, f. 12, pl. 17

In the Chancery, they hold for law that, if the heir sues livery of lands out of the king's hand, which had been seized by reason of his nonage and he sues an inquest in one county but not in all the counties where the lands are and, by reason of the inquest of this suit, he has livery of lands in that county, if, without inquest or livery, he enters into the lands in another county, the king can re-seize all the lands, by reason of his wrongful intrusion upon the possession of the king in the parcel. And he will be charged with the issues in the meantime.

And the lord of Percy was in such a case, and he put himself upon the grace of the king and made a fine for it.

32

Anonymous
(Ch. 1370)

The Court of Chancery can control an advowson where the king has seized it, it being the property of an enemy alien.

YB Trin. 44 Edw. III, f. 16, pl. 3

The king seized the possessions of a priory by reason of war, because it was alien. And then, he gave the same possessions to one A., rendering a certain rent *per annum*. Then, a vicarage became vacant, being part of the same possessions, and the king made a presentment of this to one of his clerks.

And, before the ordinary had received him, the prior came to the Chancellor, counsellor of the king, and sued by a petition, and he showed that, from all times, one of his monks had always been sent there to serve as the said vicar, of whatever belonged to the said vicarage, who should be received, instituted, and inducted by the ordinary, so that no Englishman was received there as vicar. And he prayed that the presentment of the king made to the other etc. be repealed.

33

de la Pole's Case
(Ch. 1370)

Where a parson is disappropriated, his remedy is a writ of right of advowson in the king's court and not a suit for lost tithes in an ecclesiastical court.

YB Mich. 44 Edw. III, f. 33, pl. 19,
YB 44 Edw. III, Lib. Ass., f. 296, pl. 37

The Abbot of Cristen, an alien, was seised of certain manors in England, to which several advowsons of churches were appendant, among which he had the parsonage of Norton, which was appropriate from ancient times.

And, then, by the license of our lord the king, he alienated all his manors with fees and advowsons for the term of a thousand years to Tidman, a Lombard, which Tidman alienated his whole estate to Thomas de la Pole and to his heirs. And, then, the said T. took the tithes of the same parsonage of Norton. Thus, the property of the abbot at farm, of which the tithes were, after the lease made to Tidman, were continually in the hands of the abbot until the grant made to Thomas. And then, T., by permission between him and the bishop, presented to the same parsonage the one who was then vicar of the same church and made a union of the parsonage and the vicarage, which vicar, thus an intruder, had continued for seven years and more, until the abbot became aware of this.

And now he sued a spoliation against this same vicar for his tithes etc.

Upon this, Michael de la Pole,[1] who had the estate of Thomas, came and made his suggestion in the Chancery that he was the patron, and he purchased a [writ of] *indicavit*.

Upon this, the counsel of the abbot came and showed this whole matter to the court, and how the possession of the tithes had always belonged to them until the grant made to T., and so what was done had been only a spoliation. And upon this, he prayed a [writ of] consultation, because it would not be reasonable to disappropriate the patronage by the machination of one who had nothing in this except the tithes.

To this it was said that the abbot had divested himself of fees and advowsons. And, by the presentment made by Thomas, it was supposed the church to be vacant, and so the patronage was disappropriated. For which, [we pray] judgment.

Fitz-John said that the abbot could not have a [writ of] *quare impedit*, because, by this, he would suppose a vacancy, which there was not, because the tithes always continued in the parsonage of etc. and [it was] not disappropriated.

Tauke: If I were patron and present and my presentee is received and another who does not have good title ousts him and the parson does not want to sue a spoliation, yet, I were not ousted from possession, but, after the death of my presentee, I will have the presentment. Also, in this case, since the

[1] A. Tuck, `Pole, Michael de la, first earl of Suffolk (c. 1330-1389)', *Oxford Dictionary of National Biography*, vol. 44, pp. 709-713.

abbot himself is the patron and parson, although another presented, still the abbot remained seised of the parsonage as parson imparsonee, and he could sue spoliation when he wanted to, as he thought. Therefore, it is reasonable to grant him a consultation as parson.

Fyncheden [J.C.P.] thought that the case was wholly different here, than where the patron and the parson are different persons, because, where they were different persons, it is not reasonable that the act of the parson will be a prejudice to the patron, where no action was given to the patron. But, in the case here, it is the default of him who is patron, because he could have had this suit immediately after the tort was committed, because he is patron and parson.

Knyvet [C.J.K.B.]: If he be a lay parson and he had usurped your tithes, which is your chattel, you could have an action of trespass. But, by the continuance of such a long time, the patronage was disappropriated until it be recovered by a writ of right of advowson, which suit is not given in a court Christian. Therefore, you would not have a consultation on this matter. But sue your writ of right if you will etc.

Quod nota, by a grant of the manors, fees, and advowsons, that the advowson of the parsonage did not pass, but this remained in the abbot as patron and parson, but the advowson of the vicarage passed, so that Thomas de la Pole had the tithes of the parsonage and was patron of the vicarage, and, then, he presented the vicar to the parsonage, who was instituted, admitted, and inducted, and took the profits for seven years, and, on account of this, the parsonage was disappropriated and the abbot put to the right of advowson.

34

In re **Estate of Dalby**
(Ch. 1370)

If one holds of the king and his rent is in arrears, the king can distrain for it in any of the lands and tenements held by the tenant of anyone.

When the king grants a farm to hold of him by the services due, it will be understood to be by the services which fell more to the king's advantage and, thus, by knight's service.

YB Mich. 44 Edw. III, f. 45, pl. 59,
YB 44 Edw. III, Lib. Ass., f. 288, pl. 22

Note that the king had granted a fee farm of a vill to Sir John Dalby for the term of his life and further confirmed his estate to him and to his heirs *tenendum de nobis per servitia inde debita et consueta*. And now, Sir John was dead, his heir underage. And it was found by the Escheator that Sir John held such rent in socage and died while his heir was underage.

Now came the wife of Sir John Dalby, *scil*. the mother of the infant, into the Chancery and prayed the livery of the rent as next friend etc. because the fee farm was held in socage.

The Chancellor [Wykeham]: The king had granted the farm to Sir John *tenendum ut supra*, so to that which he thought that the king would have the wardship and marriage, so that they wished to advise what should be done.

And then, all the justices of the one and of the other bench were made to come into the Chancery. And this matter was debated between them. There, it was said by the justices that, if one held of the king and his rent were in arrears, that the king could distrain for this in all of his lands and tenements, *scil*. as well in the lands and tenements which he held of another person as the lands and tenements held of himself. And also it was said by them that, for this farm in arrears, the king could distrain in all the lands of the said Sir John.

And also it was touched by some of the justices that a lord, before the Statute,[1] could grant the services of his tenant to hold of himself. And some said not, because, if he could grant the services and this to hold of himself, then the tenancy would be charged with distraint twice, which would be contrary to reason. And the others said that the beasts of the grantee would be distrained and not the beasts of the tenant, *et sic in diversis opinionibus, ideo quaere*.

And then, the opinion of all the justices was that, when the king granted the farm to hold of him by the services due that it would be understood to be by the services which fell more to the king's advantage and thus by knight's service, which gave wardship and marriage, so that the grantee had charged himself to the king to hold by knight's services, by the taking of the grant.

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1 Stat. 18 Edw. I, c. 1 (*SR*, I, 106).

And then *propter opinionem*, the wife made a fine to the king for the wardship and also for the marriage and had them etc.

35

Margaret of Chisceldon's Case
(Ch. 1371)

The king is bound by the warranties of his ancestors.

YB 45 Edw. III, Lib. Ass., f. 298, pl. 6

It was found by office before an Escheator and returned into the Chancery that King Henry, great-grandfather of our lord the present king, was seised of the manor of C., and he gave the same manor to Edmund, earl of Cornwall,[1] and to the heirs of his body, saving the reversion to himself and to his heirs for default of issue, and that Edmund was dead without heir of his body, so that the said manor was revertible to our lord the king by reason of reversion.

Upon this came one Margaret, who was the widow of William of Chisceldon, and she said that she did not acknowledge the fee tail, but that this same Edmund, earl of Cornwall, by his charter, which was shown, with a clause of warranty had given the same manor to one William Chenduit to have and to hold to him and his heirs forever in exchange for another manor, which the said William gave to the said Edmund and to his heirs. And she said that the said Edmund, earl of Cornwall, was ancestor of Edward, grandfather of our lord the present king, *scil.* relative, and she showed how he was a relative, and she said that assets had descended to the said Edward, grandfather of our lord the king, from this same Edmund in fee simple, *scil.* the manors of A., B., and C. in the County of Somerset. And she demanded judgment if, against the said charter, which comprised a warranty, and the said descent to the grandfather of our lord the king, by which the right of

[1] N. Vincent, `Edmund of Almain, second earl of Cornwall (1249-1300)', *Oxford Dictionary of National Biography*, vol. 17, pp. 770-773.

the reversion was extinguished in the father of the said Edmund, grandfather of our lord the king, she should be impeached of the said manor by our lord the king. And she showed how she was in of the estate of William Chenduit.

Belknap, not acknowledging the feoffment made by Edmund, demanded judgment if the king in the case that it is not denied that Edmund (who had alienated) had only fee tail, so the said alienation was to the disinheritance of the king, if the king in such a case will be barred.

And then there was made a search. And it was found of record that Edmund had died seised of the manors in fee simple, which descended to Edward I, grandfather of our lord the king, as was alleged.

Wherefore, Margaret had restitution of the said manor.

36

Anonymous
(Ch. 1371)

A writ can be amended in the Chancery.

YB Pas. 45 Edw. III, f. 6, pl. 5

In an [action of] *quare impedit* for the king, where the writ was `*quod permittat nos praesentare*', etc., where it should be `*praesentare*', it was challenged for that reason,

And, by the advice of the Chancellor [Thorp] and the justices of King's Bench, the writ was amended in the Chancery, to which the defendant was compelled to answer by the award etc.

37

Anonymous
(Ch. 1371)

A writ of supersedeas *lies from the Court of Chancery to the Court of Common Pleas in order to stay execution of a judgment where the king has priority of execution.*

YB Trin. 45 Edw. III, f. 19, pl. 15

Previously, one John sued a writ of false imprisonment against N.C., who said that the plaintiff was his villein. And, upon this, the issue was taken, which passed against the defendant to the damages of the party of £100, by which, he sued a [writ of] *fieri facias*, where the Sheriff of Gloucester returned *nihil habet etc*., so that he sued a [writ of] *capias*. And after the *capias* was returned, a [writ of] *exigent* was returned the day after St. Martin [11 November].

And, because he had sued an *exigent*, and the king had also sued a *capias* to the Sheriff of Essex for his fine, the defendant came into the Chancery and showed his case *ut supra*, on account of the mischief.

Thorp [Chancellor]: Then the Chancery will grant a [writ of] *supersedeas*.

And he found four mainpernors in the same Chancery for 400 marks, and also for the fine to the king, *et habuit*. And the *supersedeas* recited the whole matter. And, because the other *capias* was also in the Common Bench, he also will have a *supersedeas* there to the justices, that they not do anything further in this process until it was determined, which *supersedeas* recited all of this matter.

It was said that the other *supersedeas* which was granted from the Chancery was granted contrary to law, so that, although this was done contrary to law, the justices did not surcease by that process, which was done by law.

Fyncheden [C.J.C.P.]: Although they had made an error, it was a higher court than this was, so that it does not belong to us to impugn their command, which was a warrant to us, so that he commanded the clerks that no *capias* nor *exigent* would issue upon such cause.

And, afterwards, he came into court and paid the damages and found mainprise for the fine to King Edward four mainpernors who undertook for his good behavior towards the party who recovered upon the penalty of £400 that he would not have harm by him nor by another. So the other recognizance was drawn in this court.

Fyncheden [C.J.C.P.] said that he sent to the Chancery that it would be drawn there etc.

38

Anonymous v. Grey
(Ch. 1373)

In an action for a debt for a condition broken, the party alleging the breach has the burden to allege and to prove it.

A protection does not protect a plaintiff, but a defendant.

YB Trin. 47 Edw. III, f. 5, pl. 12

A man sued an *audita querela* in the Chancery against one Hamon Grey. And, in the writ, there was a *scire facias* against the party and also a *supersedeas* to the sheriff of the taking of his body and of execution of his lands. And he showed certain indentures comprising various conditions, which were recited in the writ, which he said that he had kept completely.

Perle: Show in certain which of the conditions you have kept and what they are.

Belknap: Certainly, I will not do this, but you show for your part which are broken, so to give you matter to have execution, and thus it is necessary that you do it.

Fyncheden [C.J.C.P.] and Cavendish [C.J.K.B.]: Yes, certainly, and this is the common course, so that etc.

And then a protection was put forward by the plaintiff.

Fyncheden [C.J.C.P.]: A protection does not well lie for you, who are the plaintiff, because you are the *actor* to recover your damages, in case he had sued execution contrary to his indenture, and also you could be nonsuited, so, in each regard, you are the plaintiff, so that a protection does not lie for you by any law.

Percy, ad idem: Who will sue a resummons in case the protection were allowed, and the proceeding were put without day?

Quasi diceret nemo.

Cavendish [C.J.K.B.]: The statute would not be well pleadable if it had not been at your suit by this *audita querela*, because he could have an execution upon the statute against you without an answer, in which case you could not well have advantage of the protection, so that although you have sued a writ, upon which you had a day to interplead, and this at your own suit, it is not reasonable that the protection be allowed to you.

And the next day, the protection was disallowed by an award. *Et vide* Hil. 38, *adjudicatum fuit*[1] that the protection does not well lie for the one against whom the *audita querela* was brought. And the reason is because he was the *actor* in the suit until the money be paid etc. See before, 4.[2]

39

Anonymous
(Ch. 1388)

Where earth in a mine fell upon a person and killed him, nothing is forfeited as deodand except the earth that fell.

YB Trin. 12 Ric. II, Ames Found., vol. 6, p. 19, pl. 10

Note that an office was returned in the Chancery by the Escheator of M. that, in a tin mine in the said County of Cornwall, a certain mass of land

1 YB Hil. 38 Edw. III, f. 1, pl. [4] (1364).

2 YB Trin. 47 Edw. III, f. 3, pl. 6 (1373).

fell upon a certain man and crushed him, by reason of which crushing he died etc., and the king, by his patent, gave all the mine to A. and T., two of the officers of his household, supposing that the entire mine should be forfeited.

And then, certain persons, who had their mine at that place, came into the said Chancery and showed all of this matter, how it was found by an office that there was only a certain weight of land and a certain quantity of land which fell by reason of mining beneath the land, *scil.*, a certain mass of land etc., so that nothing should be forfeited except that which fell and which was the cause of the death. And upon this, a *scire facias* was granted against A. and T. if they know anything to say wherefore their patent should not be repealed, returnable to a certain day in the said Chancery etc.

And, after the writ sued, they came and demanded judgment and prayed that all the mine be forfeited.

And this matter was a long time debated between the serjeants and the justices and barristers as well.

And, at the last, it was awarded by the Chancery by the advice of all the justices that their patent should be repealed and a writ granted of *ouster le main* and also to make restitution of the issues so that nothing should be forfeited, except that which fell, *scil.*, the said mass of land. *Quod nota*.

Bellewe 196, 72 E.R. 84

Note that an office was returned into the Chancery, by which it was found that there was a work place of a stannary in the County of Cornwall at L. and a certain mass of earth fell in the same upon a certain man and *ipsum oppressit* and that he died, by which the king gave all the work place of the said stannary to one B. understanding that the entire work place will be forfeited.

And, afterwards, a certain person came who would have their work place back, showing all that was found by the office, it was but one piece and a certain quantity of earth that fell and was the cause of the death etc. And upon this, a *scire facias* was granted against B. if he knows [anything] to say for which his patent should not be repealed, who came and showed that all of the work place be forfeited.

At the end, by the advice of all of the justices, it was awarded by the Chancellor [Arundel] that the patent of the king will be repealed and a writ of *ouster le main* [be granted] and also to make restitution of the issues, as that nothing was forfeited except what fell, *scil.* the mass of earth, *quod nota etc*.

40

Anonymous
(Ch. 1388)

The question in this case was, if a tenant of the king is underage at the death of his ancestor and sues livery out of the king's hand as to part of the land and not as to another part, whether all will be re-seized into the king's hand.

YB Trin. 12 Ric. II, Ames Found., vol. 6, p. 20, pl. 11,
Bellewe 235, 72 E.R. 102

Note of an office found before the Escheator returned in bank in the Chancery, that one A., who was tenant-in-chief of the king, died seised of certain tenements and a manor, who had issue a daughter, who was within age and espoused a husband of full age, and that, after the death of the tenant, the land and the manor were seised into the hand of the king, which manor the husband of full age and his wife within age sued out of the hands of the king and had livery, and how, after the death of their ancestor, a stranger abated in certain lands and tenements, of which the husband and his wife did not sue livery, wherefore the Escheator had seised the tenements now in the hands of the king, by reason of this office. And all this matter was returned into the Chancery.

And the husband and the wife came and showed all of this matter in the Chancery, *scil*. how the ancestor of the wife held of the king etc. [in chief] and how it was found by the office that a stranger abated, and, besides, since the wife was within age, in which case, neither laches nor any folly nor prejudice should be found in her etc., because the infant was within age etc. And [they] prayed livery out of the hand of the king of these tenements and that the king be rendered an account of the issues against the abator, wherefore the serjeants of the king were prayed that, inasmuch as it was found and also was of record that the husband and wife had sued livery of a parcel of the tenements of which the tenant of the king died seised as heir to him, *scil*. of a manor etc. and the tenant died seised of other lands of which no livery was sued, as it is found by the office, wherefore, they prayed that the manor and

the lands should be re-seized in the hand of the king and that they should recover the issues of the manor at the same time and sue a new livery of the whole etc.

And this matter was a long time debated in the Chancery, whether all should be re-seized or not or whether they should have livery of such portion.

And it was said by Charleton, C.J., that, if the tenant of the king died seised of certain tenements which are seized into the hand of the king and, afterward, sued a writ of *diem clausit extremum* as heir of the same tenant and has livery out of the hands of the king and, afterward, another came and sued another writ of *diem clausit extremum* by suggestion and it be found for him that he is the true heir etc., upon which, a *scire facias* is issued against the other if he know anything to say wherefore all should not be re-seized in the hands of the king, so that all shall be re-seized and that he who first sued a *scire facias* should be charged with the issues to the king.

Notwithstanding, this was denied by many, *scil*. that if he were of full age that it should never be re-seized and that this has often been adjudged in the same place and it was said that, if he were within age, that there might be some color [to the argument], which query.

And *Hill* said that, if the tenant of the king died seised of certain tenements and a stranger abated in the same tenements after the death of the tenant and continued his possession until the full age of the heir of the said tenant and, afterward, the heir, on coming of full age, brought the assize of *mort d'ancestor* against the abator and recovered, that it would never be seized in the hand of the king.

Which was denied by the justices. And they said that all in this case should be seised in the hands of the king and that the heir should have livery and should do homage, but the abator in this case should be charged with all the issues, *quod nota*.

And, afterward, *Gascoigne*, for the variance, whether all should be re-seized or not, prayed that they might make an easy fine to the king and that they should have livery of the land and that nothing more should be re-seized.

Whereupon the justices said that they would advise etc.

Bellewe 301, 72 E.R. 132

A tenant of the king died, his heir within age. And a stranger abated in part the tenements. And the heir, at full age, sued livery of the rest. And, afterwards, the abatement is found by an office.

And there was a great doubt whether the king will re-seize or not.

However, [it was thought] by many, if the heir had been of full age *tempore mortis antecessoris sui*, then there will not be any re-seizure, but *e contra* where he is within age.

Query this diversity, because in one case, the king will have the land until he makes livery and, in the other case, the king will have the primer seisin, which will be *de toto, ut in altero casu, ut videtur mihi*.

And it was agreed that the abator will be charged with all of the issues.

41

Bromeflete's Case
(Ch. 1400)

An Escheator does not have the power to take an inquest of an outlawry without a paramount warrant and a certification by a writ of the record.

YB Mich. 2 Hen. IV, f. 5, pl. 17

Bromeflete came into the Chancery and showed to the Chancellor of England, by his counsel, that, as he stood seised etc. of certain lands etc. in such a county etc. until the Escheator of the said county, by color of an office taken before him, by which it was supposed that one J.B. was seised of the same lands, *et quod praedictus J.B. diversas felonias fecit, pro quibus utlagatus fuit etc*., had ousted him. And he prayed for restitution.

And the inquest taken before the Escheator was seen, which did not make any mention of what time the said J.B. committed the felony, neither the year nor the day, nor at what time he was outlawed.

And it was said by the justices in the Chancery that the Escheator did not have any power to take any inquest of outlawry, which is of so high a record, without a paramount warrant and without a certification by a writ of

record that he was outlawed etc. And also all that which the Escheator had done by force of his office was without warrant.

Vide Statute 37 Edw. III, c. 2, of writs of *indemnitate nominis*.[1]

42

Talbot's Executors v. Tutbury
(Ch. 1400)

Where the king seizes for cause, one must sue for it by a traverse of office, but, where the king seizes without showing any cause, one must sue to the king by a petition of right.

YB Mich. 2 Hen. IV, f. 10, pl. 47

[A writ of] *scire facias* was sued in the Chancery by the executors of My Lord Thomas Talbot against one Tutbury for the possessions of an alien priory. And the writ rehearsed how the possessions of the said priory were seized into the hands of the king for a certain cause and livery was made and, afterwards, the king had taken the same possessions into his hand by such word *resumpsimus* and he had committed them to the defendant named in the writ and no cause [was] declared of the second seisin in the writ.

Skrene [demanded] judgment of the writ, because, where the king seizes for cause, a man can have a traverse to the cause and a response to it by the Statute. But, where the king takes into his hand and it does not determine any cause for certain, one must sue to the king by a petition, for which [he demanded] judgment of this writ, which comprised that the king had retaken the possessions and did not determine any cause.

Thirning [C.J.C.P.], Rickhill [J.C.P.], and Hankford [J.C.P.] and all the other justices in Chancery held the same [that] it was a good plea etc. *Et pendet etc*.

Et postea, the executors sued a new petition to the king, and they had a new *scire facias*.

[1] Stat. 37 Edw. III, c. 2 (*SR*, I, 378).

43

Noon's Case
(Ch. 1401)

The question in this case was whether the legal proceedings taken by the debtor were a delay of payment in violation of a contract.

YB Trin. 2 Hen. IV, f. 25, pl. 21

Edmond Noon, knight, had made a recognizance in the Chancery to another knight in a certain sum. And it was agreed by an indenture between them that Edmond Noon should not make any delay etc.

And the other alleged that he had sued a *quid juris clamat* against Edmond and process was sued against him until a distress and he was put to issue of 12d., which he lost, and, thus, was he delayed; ready etc.

And the other said that he was not distrained; ready etc.

And now upon this, whether it should be received to this general averment against the return of the sheriff or not, they were adjourned out of the Chancery before the justices of the King's Bench.

44

Anonymous
(Ch. 1405)

The question in this case was whether a person not a party to a scire facias *can come into court and assert a right against one of the parties in the suit.*

YB Mich. 7 Hen. IV, f. 31, pl. 12

Formerly, a man sued [a writ of] *scire facias* against another in the Chancery, who had sued to have the execution of a statute staple. And in the *scire facias*, it was comprised how certain indentures were made between the parties, which the plaintiff surmised that he had performed. And, upon the

garnishment of a witness, they were at issue in the Chancery for the performance of the conditions.

And on the same day, they came into the Chancery, a man and his wife and others, and they alleged how they held a certain quantity of land for the term of their lives of the grant of him who sued the *scire facias*, which was extended to a certain sum etc. by a writ of extent and said that he who sued the *scire facias* had enfeoffed him, who sued the execution of certain land, which was in his hand the day of the recognizance and afterwards to him and his heirs in fee, of which land, he is now seised, in which case the recognizance aforesaid against the same husband and his wife and all others lands [and] tenements as to the execution sued is extinct. And they demanded judgment whether execution etc.

And he who sued execution demanded judgment inasmuch as the husband and the wife are not named in the *scire facias*, nor did they pursue any other *scire facias* against him, and [he demanded] judgment whether, by their plea, he should be ousted from execution.

And the others demanded judgment forasmuch as he was present in court, in which case, he need not pursue a *scire facias*, and they demanded judgment etc.

And, this term, the record was brought out of the Chancery before the king and enrolled etc. *Quaere judicium*.

45

Earl of Kent's Case
(Ch. 1405)

The questions in this case were whether a writ of mandamus *lay for a tenant in tail to recover against a seizure by the king and whether the king held by right of a forfeiture by the ancestor or by a wardship of the heir*.

YB Mich. 7 Hen. IV, f. 32, pl. 19

The earl of Kent sued in the Chancery to have livery of certain lands and tenements seized into the hands of the king by color of an ordinance

made in Parliament, by which Parliament it was ordained that all the lands and tenements of which Thomas Holland, former earl of Kent,[1] father[2] of the present earl,[3] was seised in fee simple at a certain day that he made an insurrection against the king (which Thomas was killed doing the said treason without a judgment) will be forfeited, because of which ordinance, the king has seized the lands of which he demands livery, which were given by the King Richard to an earl of Kent in tail to hold by knight's service, of which the said Thomas was seised by the form of the said entail the day aforesaid, which lands and tenements have been in the hands of the king during the nonage of the said earl, who now sues to have livery, who is now come to his full age. And he has sued in the Chancery a writ of *mandamus*, by which it was found that the lands and tenements were given in tail *ut supra* to hold by knight's service and that the said earl was heir by the form of the said entail. And thus, he prays livery.

Tyrwhit: You should not have livery because, in every case where a man forfeits, the king will seize and have the possession until it be sued out of his hand and no writ of *diem clausit extremum* will issue by law in this case, but only where the tenant of the king dies by the gift of God. Thus, when the king seized because of the forfeiture aforesaid, the king will have the fee in the tenements, because, in every case when the king [is] seised in his own right by way of forfeiture, of which estate he who forfeited was seised the day of the forfeiture, the king will seize by his prerogative all his lands and, by such seisin, he will have the fee, as in the case that a life tenant commits treason of which he is attained and the king seizes, by his seizure, the king will have the fee simple and he in the reversion is put to sue to the king by petition. Thus it is necessary that the earl sue to the king by a petition in this case and not by this manner, by which etc.

Tildesley, ad idem: There is a great difference [between] when the king is seised in his own right and where he is seised in another right, as in the case where he is seised because of wardship etc., because when he is seised in his

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1 J. L. Gillespie, `Holland, Thomas, sixth earl of Kent (c. 1374-1400)', *Oxford Dictionary of National Biography*, vol. 27, pp. 696-697.

2 *Rectius* brother.

3 M. M. N. Stansfield, `Holland, Edmund, seventh earl of Kent (1383-1408)', *Oxford Dictionary of National Biography*, vol. 27, pp. 657-658.

own right, as the case is here, the king was seised of a fee simple, and, when the king is so seised of a fee simple, his possession will never be divested out of his person without suing to him by a petition. But, where he is seised in another right because of wardship, in such a case, he need not sue by a petition. But, when the king is seised by a *diem clausit extremum* and one is found the heir who is not the heir, the one who is the heir does not sue by a petition, but he will have a [writ of] *mandamus* to find him the heir and to have livery, because the king was seised in his right, because he is the heir.

Skrene, ad idem: Before the Statute *de Donis Conditionalibus*,[1] the heir would have such a possession [by] the *mort d'ancestor* and the king would have the land by the forfeiture and, by the committing of treason of such tenant, the blood is thus corrupt, that his issue cannot be the right heir to him, but he is the right heir to him by the form of the gift, and, at common law, the king must seize; thus, inasmuch as, the king seized in this case and his seizure is not taken away by the Statute and, at common law, he will have the fee by such seizure, it is necessary that the earl sue to the king by a petition and prove himself the heir by the gift, as he must against a stranger tenant after the tail discontinues; by which etc.

Norton: He thought that he will have livery, because there is a great difference when the king is seised in the lifetime of him who committed the treason and where he is seised after his death where the land is held of the king by knight's service, because, when he is seised in the lifetime of the tenant in tail, by this seisin, the descent is interrupted so that the king is seised as in his own right. But, in the case where the earl was dead before the seisin, then, after his death, the land was descended to the earl who now sues, who was then underage. And, inasmuch as the king was seised thereafter, after which the land was in tail, and it could not be forfeited and it was held of the king by knight's service, this seisin will be said [to be] because of the wardship in the right of him who is the earl, because the king has no other right to seize, and, inasmuch as we are heir by the form of the gift, it is reasonable that we should have livery.

Horton, ad idem: At common law, in this case, the king should not have seized, because the earl was killed before he was adjudged by the Parliament, by which his act was adjudged as treason, it was ordained that his lands of fee

[1] Stat. 13 Edw. I, Westminster II, c. 1 (*SR*, I, 71).

simple, and no others, should be forfeited. Thus, inasmuch as the king seized the land in tail where he should not have seized, because the Statute did not extend to them, this seisin will be said because of the best right of the king for the seizure, and this was because the land was held of him by knight's service. *Ergo*, he thought that, from the hour that he is found heir by the *mandamus*, that he will have livery.

Tremaine, ad idem: If he will be put to sue to the king by a petition, it will be to the intent to be tried between the king and him whether the land were entailed or not, and there is no need of this, because we put it that one of his paramount ancestors had forfeited and these same lands had been seized into the hand of the king and the same earl, who formerly forfeited, had sued to the king by a petition and it should have been found between the king and him that the lands were entailed. It should not have been necessary that it was formerly an enquiry any more is it necessary in this case, because the same land was given to his ancestor by King Richard in tail by a patent, which patent is of record in the Chancery. *Ergo*, it is not necessary to enquire whether it be an entail or not. And, inasmuch as the land was given to hold by knight's service of the king and he who is earl is found [to be the] heir by the *mandamus* and there has been nothing to be tried between the king and him, he thought that he will have livery.

Huls [J.K.B.], *ad idem*: If he who is the earl that now was, when he was underage, had sued to the king by a petition to have the land because of the entail *ut supra*, in this case, the earl would be rejected during his nonage, because his own petition would prove that the king had cause to have the land because of the wardship during his nonage. Thus, inasmuch as he would be rejected to have the livery underage because of the possession of the king as guardian, *ergo*, at full age, it is not reasonable to make him sue by a petition to the king by the manner as he did.

Hankford [J.C.P.], *ad idem*: When the king seized his possession, it could not be said because of two divers rights; [he is] in only by one right. Thus, as the king was seised, his possession will be adjudged by law according to his better right. And the better right that the king has in this case for the seizure was because of the wardship for the nonage of the earl. *Ergo*, it will be said his possession is of this right and not because of the forfeiture because the land could not be forfeited. And, in this case, I say that he could by no way have a petition, as Huls has said, because inasmuch as he holds of the king by

knight's service, he must do his homage to the king before livery or otherwise that the homage be respited. And also, he will be agreeable to the king for his marriage, by which he should sue for the livery according to his case, because if he will sue by a petition, his own petition would prove that he should not by this way have livery; by which etc.

Thirning [C.J.C.P.], *ad idem*: If a man hold of a stranger land in tail and commits a felony for which he is attained and the lord enters, the heir will oust him, because the entail is not discontinued, and he will not be put to sue by a petition to the king but where he will be put to sue by [a writ of] formedon against a stranger, for which etc.

Markham [J.C.P.]: When the king seizes any land because of a forfeiture or, by another cause, claims the fee, even though one who claims a right in the land comes into the Chancery to have a writ of *mandamus*, those of the Chancery will not grant it, by which even though a *mandamus* issues in this case where it must not by law, because the king has seized the land as a fee because of the forfeiture; yet, upon this matter, it is not reasonable that he should have livery.

And, afterwards, he had a day further in the Chancery. *Vide residuum postea*, fol. 46.

YB Trin. 7 Hen. IV, f. 46, pl. 6

Thirning [C.J.C.P.]: When the earl died seised and the judgment was given after his death, there was mesne time between the death and the judgment, in which time, a freehold accrued to the heir by force of the entail and, if the land had been charged by the ancestor, by this possession, the charge was defeated. Thus, this judgment rendered *ex post facto* will not change the estate of the heir, which he once had by the entail. And when the king seized his possession, it will be adjudged because of his nonage; by which etc.

Cokayn [C.B.Ex.]: This judgment is not the same as a common judgment, because by the common law, when a man commits a felony and is attained, the judgment is none other but that he be hanged, but the judgment given in Parliament was by words, that he should forfeit his land. Thus, it is stronger than a common judgment. And to that which is said that he will have a mesne time between the death and the judgment given, yet, after it, the judgment will have relation to the felony committed; by which etc.

Tildesley: If a stranger commits a felony or treason and, by such cause, my lands are seized into the hand of the king, I will sue by a petition.

Cokayn [C.B.Ex.]: It could be that the land was given in tail, the remainder to his right heirs, in which case, by the forfeiture, the fee simple was in the king. And it is not reasonable that he should have livery out of the hand of the king before this that the king be apprised by his counsel of his better right.

Thirning [C.J.C.P.]: He should have livery of all. Nothing passes from the king, because, in such case, after the entail ends, the reversion is in him.

Markham [J.C.P.]: When a man commits high treason, all his land in fee simple or in fee tail is seizeable and, by such seisin, the king has the fee and the inheritance. And, if a man have right, he will have it by a petition etc.

Gascoigne [C.J.K.B.]: The lands of no one will be seized before he be attainted. And this has been always the law.

Markham [J.C.P.]: In levying war against the king, if he who levied the war be dead in the battle, his lands are seizeable and, likewise, if a man, after he commits treason, flees beyond the sea, his land will be seized.

Gascoigne [C.J.K.B.]: It is not [good] law that you speak, because, in such a case, process will be made against him until he be attained by outlawry and, thus, the land will be seized; by which etc.

Norton: When the king will have a possession after the death of the ancestor, the heir underage and no judgment was given upon the ancestor, still the possession of the king will be adjudged as the law wills, and this was because of the nonage of the heir.

Tyrwhit: The king records in his writ that he was seised because of the forfeiture.

Curia: This is only a recital in the writ, and nothing is supposed by that.

Hankford [J.C.P.]: The king, by his prerogative, will have the primer seisin after the death of his tenant, and he will have the seisin *donec facta fuerit inquisitio prout nos est, et rex ceperit homagium huiusmodi haeredis*; by which, in this case, when the tenant of the king dies seised, he will have cause to have seisin and [a writ of] *mittimus* that the land had been held of another than the king and the heir of full age had entered after the death of his ancestor, he will not be ousted of his possession for any judgment given afterwards. And he being underage in the wardship of the king, no suit could have served him,

because the king, by the law, has cause to have the land during his nonage. *Ergo*, by this cause, his possession will be adjudged etc.

Rikhill [J.C.P.]: Before the Statute, the tenant in tail could have forfeited, and nothing is a remedy except an alienation. And [a writ of] formedon in the descender is given by the express words of the Statute, by which from the hour that he who is tenant in tail forfeits and the king is seised, he will not be put to sue to the king. *Sic hic*.

Hankford [J.C.P.]: It is true that, before the Statute, after issue, he has a fee simple and he could forfeit and alienate, upon which now [a writ of] formedon is given. But, by the words in the Statute, the tenant in tail has another manner of estate than he had before the Statute, because, now, he will have only a fee tail at any time; by which etc.

Gascoigne [C.J.K.B.]: All the matter in this case is whether the writ of *mandamus* issues out of the Chancery well or not etc.

46

Anonymous
(Ch. 1410 x 1411)

Before a tenant of the king can have a livery of seisin, he must have a writ to do homage, then do homage, and then get a writ to the Escheator.

2 Statham, Abr., *Liveree*, pl. 10, p. 854

Before the tenant of the king shall have livery, he should have a writ of the Clerk of the Rolls to the Keeper of the Privy Seal, witnessing this etc., and a [writ of] privy seal to the Chamberlain of the king to receive his homage. And when he has done his homage, he shall have a writ from the Chamberlain to the Chancellor, and then he shall have a writ to the Escheator to have livery. And this [was said] by *Skrene* in the Chancery.

47

Stuckley v. More
(Ch. 1411)

A bond can be proved by oral testimony to be conditional even though the condition is not in writing.

YB Mich. 13 Hen. IV, f. 8, pl. 24,
51 Selden Soc. 20

A statute merchant was made by J. Stucle to the dean and chapter of Saint Paul's of London and delivered to Laurence Althorpe to keep upon certain conditions. And, after the death of the said Laurence, the said statute came into the possession of Thomas More [d. 1421], the said dean's successor, who sued a writ of execution, by which writ, the said J. Stucle was taken. And, afterwards, he came into the Chancery by a writ directed to the Sheriff, and, there, he prayed that he might have a writ directed to the dean to come and be examined as to whether the conditions were fulfilled or not.

And now, in the Chamber joined to the Exchequer, it was said for the dean that Laurence Althorpe was one of the chapter at the time that the deed was delivered to him, in which case he was a party to the deed, by which the delivery made to him cannot be taken to be conditional if there was not any deed concerning the condition.

Huls [J.K.B.]: Yes, it can be, because, if Laurence were now alive and in possession of this statute, if a writ of detinue for this statute were brought against him, he would be able to say that the deed was delivered to him by the plaintiff and the dean upon certain conditions and to pray that they should be garnished, and this would be granted by the court.

Gascoigne [C.J.K.B.] confirmed this saying of Huls.

48

Rex v. Cobham
(Ch. 1418)

An inquest by laymen cannot find the fact of a divorce, but this must be certified by a bishop.

YB Hil. 5 Hen. V, f. 2, pl. 5,
51 Selden Soc. 23

A commission issued out of the Chancery to certain persons to enquire on the king's behalf of escheats, wardships, and reliefs, etc. in the County of Surrey, where it was found that one Reginald Cobham [1348-1403] was seised of certain lands and tenements which he held of the king in chief, and he took to wife one Elizabeth, who was a cousin to the said Reginald and within the degrees of marriage, which they knew at the time. And they had issue between them, one Reginald [1381-1446], and then a divorce took place between them at their own suit in the County of Kent. And then, afterwards, they purchased a licence from our Holy Father, the pope, to marry one another. By virtue of which licence, they were married and had issue, one Elizabeth. And then, afterwards, Reginald, the father, died seised of the aforesaid tenements. And the king seized the tenements.[1]

And Reginald sued to the king to have livery as son and heir, and he had [livery], by virtue of which the aforesaid Reginald, the son, is seised of the tenements etc. And, thus, the aforesaid Elizabeth is daughter and heir to the said Reginald, the father, etc. And this office was returned in the Chancery, and a *scire facias* issued out of the Chancery for the king against the said Reginald, the son, to know if he has anything to say why the tenements shall not be re-seised into the king's hand and he be answerable for the issues in the meantime.

Whereupon, Reginald came and had a day to appear in the Exchequer Chamber before the Chancellor. On which day, Reginald, the son, appeared

1 P. Fleming, `Cobham Family', *Oxford Dictionary of National Biography*, vol. 12, pp. 289-291.

before all the justices being then in the same chamber. And the king's serjeants prayed that the tenements be re-seised [into the king's hand].

Martin, for Reginald, the son, prayed judgment inasmuch as the commission which was directed requires that the commissioners should enquire about things in the County of Surrey, and so, without warrant, they have enquired about a divorce obtained in the County of Kent. And, also, a divorce is a thing which does not lie within the cognisance of laymen, by which etc.

Strangeways, for the king, demanded judgment inasmuch as, by the aforesaid office, it is found that the aforesaid Elizabeth is daughter and heir to the aforesaid Reginald, the father, which is not denied by them, and also because of the divorce, *ut supra*, which is warranted by the commission etc., he prayed that the tenements may be re-seised into the king's hand and the issues in the meantime etc.

Babington: It seems to me that the tenements shall be re-seised into the king's hand. And as to what is said that they ought to have enquired only of things in the County of Surrey, and not of things outside, it seems to me that they shall be able to do so, for they can make enquiry there where the land is, touching both things which are annexed to the freehold and things which are in another county, as, in a *diem clausit extremum* of tenements in Middlesex, the jurors can safely say that such a one, who is in the County of Hertford, is son and heir. And the reason is because it is a thing to have cognisance of which properly belongs to those who live where the land is. And also, if an issue shall be taken as to the nearest heirs, it shall be tried where the land is, notwithstanding that birth in another county is alleged. And, thus, it seems to me it is in this case.

Askham, to the same effect: For I put it that an office of tenements in tail was taken in this county, and the inquest has said that the king's tenant had issue one J., the elder son, and one E., the younger, and that the elder son killed a man during his father's lifetime etc., and thus E., the younger son, became heir etc., and this was in the County of Devon. This verdict would be good, and yet this felony was committed in another county.

Strangeways: It seems to me to the same intent, for I put it that a man brings a writ of right of tenements in the County of Middlesex and the tenant pleads a release which bears date in another county and, thus, that he has the better right because of this release, and, upon this, he joins the *mise*; yet the

right shall be tried where the land is, notwithstanding that the deed bears date in another county. So it is in this case.

Hals: It seems to me that the tenements shall be re-seised in the king's hand. When an office is found to which the king is party, it shall be most favorably interpreted for the king. Hence, when it is found that the said Elizabeth is daughter and heir to the aforesaid Reginald, the father, this is more favorable for the king, for, by it, it is found that Elizabeth is heir; then, if she be heir, the other shall be answerable for the issues in the meantime. So it seems to me that the tenements shall be re-seised etc.

Juyn, to the same intent: For as to what is said that a divorce is a thing which does not lie within the cognisance of laymen and also that the divorce was obtained in another county, certainly, I grant you that it may be the law, yet the tenements shall be re-seised, for, when the verdict is a matter in law and concludes on matter in fact, that matter in fact is receivable, as, in the case where I bring assize against you and you plead to the assize; and, thereupon, the assize is taken, which declares that such a one was seised etc. and enfeoffed so and so etc., which is a matter in law, and then it concludes that the plaintiff was seised and disseised, this conclusion, which is matter in fact, shall be taken, and, on that, the plaintiff shall recover. Here also the divorce etc. is a matter in law and the conclusion, *viz*. that Elizabeth is daughter and heir etc. is a matter in fact. Therefore etc. And also, when anything is found by a verdict, which does not lie within their cognisance but in the record, the record shall be viewed, and [it shall be] adjudged in accordance with that. Hence, when a divorce is found, if it does not lie within their cognisance, it shall be tried by the record, for the bishop shall certify that the divorce was obtained etc., and it is of record here. Therefore, it seems to me that this record shall be viewed, and it shall be adjudged in accordance with that; especially, where the king himself is party and this record is in the court of our lord the king.

Hull: I put it that an office was found that one J. held of the king certain tenements for term of his life and, after his decease, the remainder to one A. by the king's patent and that the said A. made a release to the said J., the tenant, for a term of life in fee and this in another county and that the said J. died seised etc., this office would have been good, yet this release was made

in a county other than that where the enquiry was made. And also, if it had been found that two hold of the king and that one has made a release to the other, although the release be made in another county, yet the office is good. So it is here.

Martin, for Reginald, the son, said that nothing more can be found by an office of laymen than can be tried between parties. And this divorce, if it had been pleaded, ought not to be tried by the country but by the bishop, for it is a thing which lies in the record of spiritual judges. Therefore, when they have accepted notice of a thing which does not lie within their cognisance, one shall not pay heed to it. Hence, nothing has been found except that Reginald, the father, and Elizabeth, his wife, had issue Reginald, the son, and Elizabeth, daughter and heir, for we pay no heed to the divorce. And this, in itself, is repugnant, for it is against the law of England that a daughter shall inherit, when there is a son alive. So, if they had said that they had issue J. and A., a bastard son and heir, this will avail nothing, for a bastard cannot be heir nor can the daughter, the son being alive.

Westbury, to the same intent: Though the commission was directed to the commissioners of the County of Surrey, men of Surrey cannot have cognisance of a thing done in the County of Kent. Hence, the divorce, which they found granted in the County of Kent, is void, for otherwise, in an assize, if the tenant pleads in bar a release which bears date in another county, it will be useless to adjourn the assize, a wrong consequence. And, if an assize was taken by default, if the tenant, afterwards, wished to sue a certification because of a release which was made in a county other than that where the assize was taken, the deed shall be tried by men of the county where the deed was made. So in this case.

Hankford [C.J.K.B.]: I put it that an inquest had found that a fine had been levied and this returned here, we ought to ask the Treasurer to certify us of this fine, yet the fine does not lie within the cognisance of laymen. In like manner, we should cause the bishop to be asked to certify us of this divorce, because it does not lie within their cognisance. And about this, [we will] be advised whether you wish to demur on this point or not.

49

Anonymous
(Ch. 1420 x 1421)

The remedy for a person ousted by an office found for the crown is a petition of right and not a traverse of office.

The crown does not have a right of forfeiture against a reversioner for the acts of a life tenant after the death of the life tenant.

2 Statham, Abr., *Traverse*, pl. 17, p. 1169

When an office is found by which the king shall have the fee or the freehold, he who is ousted by the office shall not have a traverse to that, but he is put to his petition. By Babington [C.B.Ex.] in the Exchequer Chamber, which no one denied etc.

And it was held at the same time that, where the king had cause to seize by matter which was found, that a tenant for life had forfeited his estate and the tenant for life died before the king seized, he who is in the reversion could enter, and the king could not seize afterwards, because he had overpassed his time etc.

50

Anonymous
(Ch. 1421)

A writ of audita querela *does not lie before a final judgment.*

YB Pas. 9 Hen. V, f. 1, pl. 2

A man came into the Chancery of our lord the king and showed how a man sued a writ of trespass against him, the process continued until *nisi prius*, at which day, it was found for the plaintiff to the damages of £10, and he paid it and he had an acquittance, which he showed to the court. And,

also, he showed how the plaintiff is about to pursue the judgment against his acquittance.

And, upon this, *Cottesmore* prayed [a writ of] *audita querela* for the defendant.

Hals: You will not well have it, because a man has not seen an *audita querela* before a judgment, as after the day of a statute merchant or a recognizance, because every statute merchant or recognizance is a judgment in itself etc.

Paston: It will be inconvenient in law to grant him an *audita querela*, because he cannot plead this acquittance to escape from the judgment, because it is not movable to delay the plaintiff nor does the law suffice.

Hankford [C.J.K.B.], to the same intent: Because, if he will now have an *audita querela* and the plaintiff has died, his executors will never have execution, because no judgment was given, and to grant an *audita querela* against him where he will not be executor, he will never have execution nor any judgment; this will be inconvenient.

Paston: The law would rather suffer a delay than an inconvenience, because it will be inconvenient that he will not answer now to his acquittance, because, if a man had an acquittance or a release and pleads and he does not plead before judgment, he will never have an advantage of it, as in the case that I bring a writ of trespass against you and we are at issue and, after issue, you make me a release or acquittance, it acquits notwithstanding the issue I pleaded, and the plaintiff will be delayed by his plea, because, if I do not plead now, I will never have the advantage of it. Thus, it seems to me in this case.

Quod quaere etc.

51

Anonymous
(Ch. 1422)

Where a husband and wife hold jointly of the crown in capite *and the wife dies, the king will not seize the moiety, but it is otherwise in the case of all other joint tenants*.

YB Pas. 10 Hen. V, Rogers, p. 55, pl. 5,
34 Law Library Journal 328

Hill [J.C.P.] held in the Chancery that, if it be found by a *diem clausit extremum* before an Escheator that a wife who held jointly with her husband died so seised and that this land was held of the king, that, for so much, the king ought not seize nor the husband sue an *ouster le main* because this case is not the same as where one joint tenant who held of the king died, for he who survived must not sue an *ouster le main*, because, there, the seizure of the king is rightful, because his tenant had a new right there as to the moiety. But it is otherwise of the husband and his wife, for, by the death of one, the other had no new right, because, in the life of both, neither could alien any part unless as joint tenants.

They can thus notwithstanding that one be dead. The king has always his tenant in the same wardship as he had in their two lives. And, if the Escheator seize, in this case, the husband will have an assize, because he did it by color of his office, because it is a matter shown in the Exchequer. [And] the Escheator will be discharged of the issues without a writ.

52

Beauchamp's Case
(Ch. 1426)

When a patentee of the crown defaults upon a scire facias *upon his patent, the patent is annulled.*

When a patentee of the crown sues a traverse of office and is nonsuited, his patent is annulled.

When a petition of right or a traverse of office is dismissed without a trial, the party can sue again for the same right.

YB Hil. 4 Hen. VI, f. 12, pl. 9,
51 Selden Soc. 27

Cottesmore, in the Exchequer Chamber, rehearsed before the Chancellor [Kemp] and all the justices of both benches how, by inquest of office, it was

found that one Richard was seised of certain land and held the said land from the king in chief, and he died seised, his heir underage. And, by force of this office, the king seised etc. and committed the wardship by his letters patent to Thomas Beauchamp, knight, during the nonage. And then came one W.C. and H.T. and traversed the office etc. whereupon they had a *scire facias* against the said Thomas Beauchamp. The same Thomas was garnished and did not come. The king, therefore, committed the wardship to the said W. and H., who tendered the traverse, until there had been discussion etc. Then, on this traverse, the record was sent into the King's Bench to try the issue taken on the traverse. And, there, those who tendered the traverse were nonsuited.

And, now, the question asked by *Cottesmore* was this, whether those who were nonsuited on the traverse tendered at one time should be received to a new traverse or not and whether or no the first patent made to Thomas Beauchamp is annulled and void by his default on the *scire facias* and whether the last patent made to W. and H., on account of their nonsuit on their traverse, is annulled or whether it shall still be in force.

Cheyne [C.J.K.B.]: To speak of the letters patent made to Thomas Beauchamp, whether they shall be annulled or not, this is not, it seems to me, much matter for discussion, for, when he was garnished and did not come, there is no question, nor ever was, but that, by his default, his patent is annulled and void. (To which the whole court agreed.) And, as to the last letters patent made to the said W. and H., who tendered the traverse, I say that, when they came and tendered the traverse and, upon the traverse, letters patent were made out to them until there had been discussion etc., I say that this shall be understood until there had been discussion between the king and those who tendered the traverse at that time, in which case, when they were afterwards nonsuited, I say that then there had been discussion between them and the king on this traverse, and, thus, the patents were void and annulled by their nonsuit. And so, as it seems to me, both letters patent are void etc. And as to the third point, whether the said W. and H. shall be received to have a new traverse or no, to this, I say that they shall rightly be received etc., for the traverse which is given is given by Statute,[1] for, at common law, if a

[1] Stat. 34 Edw. III, c. 14 (*SR*, I, 268); Stat. 36 Edw. III, stat. 1, c. 13 (*SR*, I, 374-375).

man's lands were seized into the king's hand by an office found, he to whom the lands belonged would be put to his petition to recover his land and no other remedy would he have; and, if he had been nonsuited in this petition, I say that, afterwards, on the following day, he could have a new petition. Thus, he shall be received to a new traverse, which is given in place of this petition, by which etc.

Hals [J.K.B.]: To speak to the letters patent, which of them is good and which not, it seems to me that my master Cheyne has said rightly of them, that they are both void and annulled, *viz*. the first because of his default made on the *scire facias* when he was garnished. And the second was also void, because it was granted to them on their traverse until there had been discussion, and, then, when they were nonsuited, the traverse was discussed, and, thus, the patent was terminated and so annulled and void etc. But to speak to the third point, *viz*. whether they shall be received to have a new traverse etc., I say that they shall not be received to that, for the traverse is given by Statute and only one traverse is given, in which case, when they tender a traverse once and do not demur on this but are nonsuited, I say that never shall they have another traverse, for then they might cause vexation to the king indefinitely, for, if they could be received to this new traverse, for the same reason, they might have another, and so on indefinitely, which the law would not suffer. Therefore, when they brought their traverse once and then were nonsuited etc., it should be said to be their folly that they had not demurred upon that until the end of the traverse. Therefore etc.

Ideo quaere etc. quia non adjudicatur.

53

Champernon v. Regem
(Ch. 1426)

There cannot be two tenants holding the same land by different tenures.

In this case, it was held that the land in issue was not in the wardship of the crown, and the hand of the king was ordered to be removed.

YB Pas. 4 Hen. VI, f. 19, pl. 6,
51 Selden Soc. 29

It was found by an office that one Richard Champernon was seised of certain manors, *scil. etc*. in his demesne as of fee and held the said manors of the king as of his duchy of Cornwall. And he had issue, one H., underage, and died etc. Then, by force of this office, the king seized the wardship of the body and of the land. And, thereupon, came one Alexander Champernon into the Chancery and traversed the office and showed special matter in his traverse, upon which the king's serjeants demurred in judgment on the king's behalf.

And now, in the Exchequer Chamber before the Chancellor [Kemp] and all the justices of both benches, *Babthorpe*, the King's Attorney, rehearsed the case briefly. And this was the gist of the case. One Richard Champernon, knight, was seised of the said manors in his demesne as of fee and held them of the king in chief, and he had issue three sons, *scil*. Alexander, the eldest, who now tenders the traverse, J., the middle one, and Richard, the youngest. And he leased the said manors to certain persons, to John Jabyn and others, to them for the term of his own life, to hold of the chief lord of the fee by the services due etc., the remainder to Richard Champernon, his youngest son, in tail, to be held of the chief lord, etc., and, in default of issue, the remainder to J. Champernon, his brother, in tail and, in default of issue, the remainder to Alexander Champernon, the eldest son, in tail, and, in default of issue, the remainder to the right heirs of Richard Champernon, the father, by force of which lease the said John Jabyn and others were seised. And then, Richard Champernon, the father, died seised, after whose death, the reversion descended to the said Alexander as son and heir, and Richard, the youngest son, entered as in his remainder, by force of which he was seised. And [he rehearsed] how the king has the whole time been seised of his service by the hands of Alexander and not by the hands of Richard at any time. And then, Richard had issue one H., underage, and died. And now the case was whether the wardship of the said manors and of the body should belong to the king, because it was `to be held of the chief lord', or to Alexander Champernon, the son and heir of Richard Champernon, the father, to whom the reversion was reserved etc.

Babthorpe: It seems to me that the king shall have the wardship, for, in substance, the case is the same as where the king's tenant gives his land to

another in tail to hold of the chief lord of the fee saving the reversion to himself and, then, the tenant in tail has issue underage and dies. Shall the king have the wardship of this [infant] or the donor, who has the reversion, and his heirs? And, as it seems to me, the king shall have it, for the deed is `to hold of the chief lord', by which the donor has restrained himself from having any seignory, but has given the seignory to the king. And to have an advantage now by the tenant's death when he was restrained from any seignory during his lifetime, will be against reason and law, *scil.* to have the wardship of one when, in his [the tenant's] lifetime, he had no seignory. Therefore, because the donor himself shall be estopped from having the wardship counter to his own deed, so here consequently, shall you be who are his heir. Therefore etc.

Cottesmore, to the same effect: And, Sir, at common law, before the Statute *Quia emptores terrarum etc.*,[1] if any man had aliened his land to another in fee and had not mentioned in the deed of whom he ought to hold, he would hold of the feoffor and his heirs; but if he had recited in the deed `to hold of the chief lord of the fee', then, by this special recital, he ought to have held of the chief lord and not of the feoffor, and, so, if the feoffor had not determined in particular `to be held of the chief lord', he ought not to hold of the chief lord but only of the feoffor. But, now, it is ordained by Statute, when anyone aliens his land to another in fee, that the feoffee shall hold of the chief lord etc. and of no other, in which case ever since then, the lord, after notice given of the feoffment etc., is bound to make avowry upon the feoffee, but not before notice, notwithstanding the words of the Statute etc. But, when anyone gives his land in tail to hold of the chief lord, then there is no need to have any notice from the tenant, for the Statute makes mention only of where a feoffment is made in fee etc. And, therefore, although it is ordained by the deed that he should hold of the chief lord etc., who was the king, and although the king has since that time been seised of the services by the hands of the donor or his heir, I say that this shall not conclude the king but that he shall have this advantage, that anytime that he shall have notice etc., he shall be received to take him for his tenant according to the deed etc. Therefore etc.

Newton: It seems the contrary to me. And, as to what is said that, before the Statute, a man could have made an alienation of his land to be held of himself and that it is now ordained that he shall make a feoffment to hold of

[1] Stat. 18 Edw. I (*SR*, I, 106).

the chief lord of the fee, [and] that notwithstanding the Statute that, before notice, the avowry remains upon the feoffor, Sir, I fully grant this and that it is good law that, before the notice, the old tenant remains tenant as to the avowry. But I say that he is not a tenant in the right but the feoffee is, for, if the feoffee dies before notice, yet his heir shall drive the lord to avow upon him, and so the lord, before notice, has two tenants, one in possession as to the avowry, the old tenant, and another in the right and this is the feoffee. And such is the case at the bar. When Richard, the donor, gave the manors in tail `to be held of the chief lord of the fee', by these words, the tenant in tail became his tenant in possession as to the avowry and the donor remained tenant in the right to the king, in which case, when the donor died, the very tenancy descended to Alexander, as son and heir, and he became his tenant in the right, and possession in the other tenant in tail was determined in his person. And, thus, the notice is now to no purpose. And, further, when the gift was made in tail to Richard to hold of the chief lord etc., I admit as law that the paramount lord, who is the king, could have made avowry upon him because of this tenancy. But, when he did not accept him as his tenant but took the services at the hands of his old tenant, by such acceptance and seisin of the services from his old tenant, he did not agree to this tenancy, I say that he shall never in the future, counter to his disagreement, avail himself of this advantage to accept him as his tenant and to have the wardship of his heir because of his minority. Therefore etc.

Hals [J.K.B.], to the same effect: For, when Richard Champernon, knight, gave the said manors in tail to Richard, his son, to be held of the chief lord etc., the said donor still remained the king's tenant, as he was before, and, when Richard, the donor, died, the king, as lord, accepted Alexander, his son and heir, as his tenant by seisin of services at his hands, and, if the king were now to resort to having the wardship of the issue of the tenant in tail, then it would follow that the king would have two seignories from one and the same land, one from Alexander, son and heir of Richard, the donor, the other from Richard, tenant in tail, which would be inconvenient. And so, inasmuch as the king, after the grant, could have chosen whether he wished to have the tenant in tail as his tenant by force of this special tenure or to abide by his old tenant, who was the donor, which being the case, when he accepted the services at the hands of the heir of his old tenant, by this seisin of services, he refused the benefit which he might have had from the tenant in tail, in

which case, as it seems to me, he shall never avail himself of the advantage. Therefore etc.

Ashton: It seems to me to the same intent, for, if I can prove that Richard, the tenant in tail, was not very tenant of the king in his lifetime, then the king shall not have the wardship of his heir after his death. And this I will prove, for, if I have a very tenant in fee simple, I say that, during this tenancy of the fee simple in his own person, no one except him shall be called my tenant in possession, for, if the tenant in tail commits felony, I, who am lord paramount, shall not have any advantage by way of escheat. And this proves clearly that he is not my very tenant in the right. And, also, he is not my very tenant in possession, for then I shall be driven to avow upon him. And this he shall not be, but he shall be called my tenant as to the avowry etc. because of the estoppel etc. and not in the right etc. So here, because Richard, the donee, did not die tenant to the king, either in the right or in possession, the king shall not have the wardship of his heir etc.

John Hody, to the same intent: And let us suppose that Richard the donor, after the grant, had had Alexander underage, and had died and that the king had seised the wardship of him and, afterwards, Richard, his son and tenant in tail, had died, his heir underage (as is the case) and that a stranger had seised the wardship of the heir of Richard, the donee, etc. In that case, ought the king to have had a writ of right of wardship to demand the wardship of the heir of the tenant in tail, supposing him to be his tenant? I say no, for it would follow that he would have the wardship of the heirs of two persons because of one and the same tenancy, supposing that they should hold the same land of him by several tenancies, which would be inconvenient. So here, when Richard, the donor, died and the king accepted the services by the hands of Alexander, his heir, it should be said and adjudged to be as good in law as if he had seised the wardship of the said Alexander, if he had been underage etc. And so, now, to take Richard, the donee, for his tenant etc. would be against reason and inconvenient etc.

Cottesmore: It seems to me the contrary. And, Sir, the force and substance of their arguments is the king's seisin since the grant by the hands of the donor and his heirs. As to that, I say that this shall not conclude him, for the seisin is alleged of the rent, the which may be paid by other hands than by those of the tenant, in which case it might be said that he paid the rent, if any were paid, as bailiff and servant of the donee, for it is at the king's elec-

tion when he receives the rent whether he wishes to receive it by his hands as from his old tenant or by his hands as bailiff to the donee in tail. But, if he had made avowry upon him in a court of record, then, perhaps, he would be concluded from taking the other etc. or, if the king had been seised by his hands of homage or fealty, this would also alter the case, for these services could be paid by no one except the tenant himself and not by a bailiff. But rent can be paid by a bailiff, in which case, when the king claimed the wardship of the heir of Richard, the donee, from that it would appear that he did not accept the services paid by Richard, the donor, and his heirs, except as bailiff to the donee etc., in which case, as it seems to me, the king shall have the wardship etc.

Babthorpe, on another day: It seems to me for another reason that the king shall have the wardship, for it is found that Richard Champernon, the donee, in tail, leased the same land to a man for the term of his life, in which case, a reversion of the fee simple was reserved to the said Richard, and the tail discontinued, and the reversion between Richard, the donor, and Richard, the donee, also discontinued. And that the tail was discontinued by the lease, I will prove, for let us suppose that the life tenant had been impleaded and had vouched the donee, who was his lessor, to warranty and he had entered into the warranty. In this case, ought he to have had warranty of the donor? I say no, for he entered into the warranty because of the lease for a term of life and, upon the lease, a reversion of the fee simple was reserved, in which case, when he has entered into the warranty, he shall be said to be a tenant in fee simple. And this is an estate other than that upon which the warranty begins. And so, as it seems to me, when Richard, the tenant in tail, made the lease to a stranger for the term of his life, upon which lease a reversion of the fee simple was reserved, that he died tenant of the fee simple, in which case, the king shall have the wardship. *Quaere*.

Cottesmore: It seems to me that the king shall have the wardship. And, as to what has been said earlier in substance to the effect that he should not have the wardship because the donee, *scil*. Richard, did not die very tenant to the king, yet, so it seems to me, this will not prove it, for suppose an ordinary case where my very tenant gives his land to a man in tail and, in default of issue, the remainder to a stranger in fee. In this case, the tenant in tail shall hold of me, and I shall have the wardship of his heir, and, yet, he is not my very tenant in the right, but he who is in the remainder of the fee [is], for of

him I shall have the escheat if he commits felony etc. And so, in that case, the tenant in tail is my tenant in possession and he who is in the remainder in fee is my tenant in the right. So here, by the special grant in tail by Richard Champernon, knight, to Richard to hold of the chief lord etc., Richard, the donee, becomes the king's tenant in possession and the donor the tenant in the right. And, further, when Richard, the donor, gave the same manors to Richard Champernon in tail by his indented deed, `to hold of the chief lord', upon this grant, he reserved no seignory to himself etc., in which case, the said Richard, who was donor, should be estopped because of this grant from demanding any service counter to this indented deed. Consequently, so shall his heir be, who only claims through him etc.

Cheyne [C.J.K.B.]: I think the contrary and that the king's hands shall be removed, for, when Richard Champernon, knight, gave the manors to Richard Champernon in tail, the fee simple still remained in the donor as it was before, in which case, if the tenant in tail should be called tenant to the chief lord, from this would ensue an inconvenience, for, then, the donor would not hold of anyone but would be discharged of his tenure, the which would be contrary to law, that there should be a tenant in fee simple and that he should hold of no one. And so it seems to me, since the wardship in such a case should be of a very tenancy and the donor and not the donee was very tenant to the king, that the king shall not have the wardship of the heir of Richard, the donee. Therefore etc.

Goderede: I think the contrary and that the king shall have the wardship, for, if the king's hands be removed, this would be at the suit of Alexander, son and heir of the donor, and to his profit. And I will prove that he shall be estopped from having advantage etc., for let us suppose that Richard, the donor, had reserved to himself a penny of rent for all manner of services and to be held of the chief lord etc. and this by an indented deed. In this case, ought he, counter to this indented deed, to be received to claim services other than this penny? I say no. No more shall he be where, by deed, he reserved nothing for himself but gave the seignory to another etc.

Cheyne [C.J.K.B.]: I say that there is a great difference between your case where a penny is reserved for all manner of services and the case at the bar, for, if one holds of me by knight's service, he can give the land to another in tail to hold of him in socage for a penny or a halfpenny for instance etc., and the tenure is good, for this can be [done] of common right. But, in the

case of my very tenant, I say that this tenancy, for which he was my tenant, being in his person, I cannot have another tenant of the same land by another tenure, for then, as I said the other day, it would follow that I can have two several tenants of the same land, which is contrary to law and not pertinent. And so these words `to be held of the chief lord' are void in law, in which case, the donor and no other shall be said to be tenant to the chief lord as he was before. And, further, as to what is said that, notwithstanding the seisin of the services by the king by the hands of the donor or his heirs since the grant, unless this had been of record, this shall not conclude the king, but he can resort when he wishes? Sir, I say no, but this shall be said to be as good an estoppel against him, if this can be found by a jury, as if he had made avowry in a court of record upon him etc. Therefore etc.

Tyrwhit [J.K.B.]: I am of the same opinion and that the king's hands shall be removed, for, when Richard Champernon, knight, gave the said manors to Richard, his son, in tail `to be held of the chief lord', I say the donor still remained very tenant to the king. And this I will prove, for, notwithstanding that the donee in tail commits a felony for which he is attainted, I say that the king shall never have any advantage by this attainder. But, if the donor, after the grant, commits felony and is attainted, then the lord shall have advantage by that etc., *scil.* the escheat. And the services which the donee does to the king etc. if the king has accepted him as his tenant shall be extinguished because of this felony, and the king shall never afterwards have anything except what is reserved between the donor and the donee. And thus, notwithstanding the words `to be held' etc., no one shall be said to be very tenant except the donor etc. in whom the fee is vested, nor, consequently, can the lord have the wardship of any other heir etc.

Martin [J.C.P.]: I only ask one question, whether, if the king should have the wardship of the heir of Richard, the donee, in tail, this would be because of his old seignory or because of a new seignory beginning with the grant?

Cottesmore: Sir, because of his old seignory.

Martin [J.C.P.]: This cannot be, for this seignory was because of a tenancy of a fee simple, which seignory cannot be changed over to any other tenancy than a fee simple, unless it be that he has a life estate or in tail, the remainder over. But, if the fee simple still remains in the old tenant, I say that the seignory cannot be said to be over any other person or any other estate

except over his etc. And this is because, upon the grant made, the tenancy was not changed, nor, consequently, was the seignory. Therefore, the donor and no other, notwithstanding the grant, remained tenant, from whom, and from no one else. So it seems to me he shall have the wardship etc. And, as to what is said that, because there are words such as `to be held of the chief lord', these words should cause him to hold of the chief lord etc., Sir, I say that it is not so. These words are void in law, for suppose that I give certain land, rendering a certain rent, to a man together with my daughter in frank marriage. I say that this rendering of rent is void, for it cannot go with the inheritance, for to hold quit of rendering anything until after the fourth degree is the inheritance of frank marriage and so the rendering of the rent is void. So it is here. This tenure which sets a limit, that he should hold of the chief lord, is void, for he cannot be said to be his tenant when the fee simple still remains in the old tenant, *scil.* in the donor. Therefore etc.

Juyn [C.B.Ex.]: As to what is said that, when Richard Champernon gave the manors to Richard, his son, in tail, saving the reversion to himself, that the tenant in tail cannot be tenant to the lord where the fee simple is in the donor, Sir, this does not prove it, for, in an ordinary case, the fee shall be to another and yet the tenant in tail shall be called tenant to the lord. And this is like the case that has been put where land is given to a man in tail, the remainder over in fee to a stranger. In this case, the tenant in tail is tenant to the lord and yet the fee simple is in another person, in him who is in the remainder, and so it is not inconvenient that the fee simple shall be in one person and that another shall be tenant to the lord etc. So here etc. And, if the case had not been otherwise, it seems to me that the king should have had the wardship. But the case is different, for it is alleged in the plea pleaded that the king has always, since the grant, received his services and has been seised of them by the hands of the donor and his heirs and has never accepted Richard, the donee, as his tenant during the lifetime of the said Richard, in which case, it cannot be that he ought to have the wardship of the heir of a tenant unless he had been his tenant during his lifetime. And he should not be called his tenant until he had accepted him as his tenant, and he did not do this. Therefore etc.

Babington [C.J.C.P.]: It seems to me that the king's hands shall be removed. And I say that there is a great difference between this case at the bar and the case which has been put, *scil.*, if land be given to a man in tail, the remainder over in fee, that then the tenant in tail shall hold of the lord, not-

withstanding that the fee simple is in another person. Sir, I fully grant, in that case, the fee simple passed out of the donor's person upon the grant and it is in abeyance upon him who is in the remainder during the estate tail, in which case, until the remainder be vested in him who is in the remainder, the tenant in tail shall be said to be tenant to the lord paramount and the lord shall have all the advantages such as by way of payment of rent and other services and of wardship and marriage, just as he would have from his very tenant in the right. But the case at the bar is not the same, for, notwithstanding the grant, the fee simple remained in the donor, who was the old tenant to the lord, and it was not changed etc. And so, the cases are not similar. And, further, as to what has been said on behalf of Alexander that, since the grant, the king has always taken the services by the donor's hands etc., that it is no plea, inasmuch as no mention is made in particular of homage and of fealty or any other thing which cannot be paid by other hands, to this, I say that, when the donor held before the grants by knight's service, it includes that he held by homage and fealty. And he has said that, since the death of Richard, the donor, the king has been seised of the same services by the hands of Alexander etc. In this is included that he was seised of homage etc. And so it is as good in law as if the seisin of homage in particular had been alleged, which would have been a good bar. Therefore etc.

And then, by the advice of all the justices, it was awarded that the king's hands be removed and that the said Alexander be restored to the said wardship etc.

54

Anonymous
(Ch. 1427 x 1428)

A tenant of the king cannot convey land without a license from the crown, and such a license must be proved to assert his title against the king.

2 Statham, Abr., *Traverse*, pl. 16, p. 1169

If a man comes into the Chancery after an office which found that the tenant of the king died seised and shows a deed by which the same tenant

enfeoffed him, he shall not have a traverse to the office unless he shows a license from the king. And that by the opinion of *Hankford* in the Chancery.

55

Anonymous
(Ch. 1428)

Where an infant is formally engaged to be married and then his father dies and he is in the wardship of the king, the king cannot receive double the value of the marriage if the infant refuses to break the engagement.

YB Mich. 7 Hen. VI, f. 10, pl. [16]

The tenant of the king married [off] his son at the age of four, and he died when the son was underage fourteen years. And the king tendered the son a marriage, and he refused himself, agreeing to the first wife. And [to decide] whether the king should have the value of the marriage or not, the justices were assembled in Chancery.

Juyn [J.C.P. and C.B.Ex.]: It seem to me that the king should have the marriage. And I found my argument on the Statute,[1] because the Statute wills *quod maritagium haeredis infra aetatem de mero jure pertineat ad dominum feodi*. And whether, in our case, the infant was at the time of the espousal *infra annos nubiles*, in which case, he could *ad annos nubiles* elect a new marriage and *de mero jure* this election is given to the lord and the lord has elected another and if he had refused it, wherefore etc.

Cheyne [C.J.K.B.]: Your argument is founded upon the Statute, and my answer will be founded upon a Statute of recent time, because the Statute *de Praerogativa Regis*[2] wills *quod si mulier ante mortem antecessoris qui de rege tenuit in capite ante annos nubiles maritata fuerit, tunc rex habebit custodiam ipsius mulieris usque ad aetatem quod consentire possit et tunc eligat illa utrum maluerit habere virum illum, cui primo maritata fuerit, vel alium, quem ei rex*

1 Stat. 20 Hen. III, Merton, c. 7 (*SR*, I, 3).

2 *Praerogativa Regis*, c. 7 (*SR*, I, 226).

obtulerit. This Statute is beneficial, and a similar thing will be taken by the equity. And it is otherwise of the penal Statute, which will be taken *stricti juris. Ergo*, this Statute will be understood as well of males as of females by this Statute and although the marriage *de mero jure etc*. and the king has granted that where the election was with him, he has granted it to them by this word `*eligat*'. And, thus, your reason is responded to by the Statute.

Chaunterell: *Posito* that the king be seised of two infants under age, one [is] married by his ancestor and the other not, and the king tenders to them a marriage and they refuse, by your understanding, they will be *in consimili casu*, which cannot be if the Statute serves for nothing.

Juyn [J.C.P. and C.B.Ex.]: The cause of the making of the Statute was for the advantage of heirs married under age, and [this was] for two causes: first, that the king have the wardship of the body, because it will be then in the election of the heir whether he would *ipsum vel ipsam habere cui etc*. or the one whom the king offered. And even if the king granted this election to him, it could not be understood that, by this benefit given to the heir, the king will be excluded from his duty, *scil*. the forfeiture of the marriage, which is not a penalty, in a true duty.

At another day, *Huls, Bachalarius Utriusque Juris*, argued much in Latin. And he said *quod consensus matrimonii tribus modis cognoscitur, scil. inspectione corporis ut per pubertatem, in pilositatem, per cursum aetatis, scil. 14 annis in viro, in sexu faemineo 12 et per carnis copulationem et modis praesuppositis est consensus in haeredem notabilitem approbatus*.

And to that which My Lord Juyn said that the lords were the cause of the making of the Statute, *scil*. that, otherwise, the heir for the refusal should have paid the double value of the marriage and this Statute willed *quod elegat etc*. And, by so much, My Lord said that the double value, which is the penalty, will not be paid in the singular, which is the true duty. To this, it seems to me that, by this word `*elegat*', all is extinguished, *quia electio est fine compulsione, una res ab alia libera seperatio*. And if he will pay the value, this election is not *sine compulsione, nec est libera, quia compulsio est duplex, praecisa, et causativa; praecisa est cum si homo coarctatur (vellet nollet) facere aliquam rem secuti exire ostium; causativa, cum si homo cogat. exire ostium vel dabit decem solida. In isto casu, est compulsio causativa si solverit valore maritagii; et ubicunque est electio, ibi non est compulsio, et e converso ubicunque est compulsio, ibi*

non est electio, sed hic est electio data per Statutum, ergo a compulsione praecisa et causativa praeclusi esse debemus.

Paston: The Statute *de Praerogativa Regis* will not excuse you, because, by the Statute, no more is granted but that the heir could elect to have the wife that he had or the other who is at the nomination of the king. And yet the Statute does not speak at all of males. But, as the clerk has said truly, it is *quod lex beneficialis rei consimili remedium praestat odiosa aut casu quo efficitur ulterius non extendit*. And the Statute, to this intent that it gives an election, is only a recital of the common law, because at common law, the heir will not be coerced to be married, but to elect. But then, he will incur the penalty that follows, *scil*. the value or the double, as the case is here also. And, if the king tenders a marriage to an infant in his wardship and he refuses and, afterwards, the king, by a patent, grants to him permission to be married where he himself would, will not the king have, notwithstanding the patent, the value of the marriage? *Credo quod sic hic*.

Cottesmore: In a case that a man under age and *ultra annos nubiles* is affianced to a woman in the lifetime of his ancestor and, afterwards, the ancestor dies, notwithstanding this affiance, the lord will have the marriage. And this was adjudged now recently in the Case of My Lord of Bedford, and the cause there is because it was not well said properly a matrimony. Also, in this case it is an espousal, which is defeasible at will; it is only an espousal and not a matrimony. And of this, the doctors say that if they were not joined in matrimony in the lifetime of the ancestor, but, after the death of the ancestor and the title accrued to the king, he was dismarried. *Ergo*, nothing nor any assent can take away the title of the king which he once had.

Babbington, King's Attorney: In the case that an infant be married in the lifetime of his ancestor and also *infra annos nubiles* and that the ancestor dies and the woman dies, the heir being *impubes*, the lord will have the marriage. *Secus esset* if he was *ultra annos nubiles* at the dying of his ancestor and also his wife, because then, by the taking of the second wife, *efficitur bigamus*, to which the law does not force him.

Newton: If the husband should have brought an action [or made an] entry, the wife being *infra annos nubiles*, the writ had abated. And, in this case that if lands be leased to a man for a term of ten years upon condition that, if he paid £100 at the end of the term, he would have the fee and, if not, that he have a term, in this case, if he pay the money at the end of the term, now

[it will be] adjudged he had the fee for all of the term and his wife will be endowed. Also here, the infant had consented to the marriage, now [it will be] adjudged the marriage was good at all times, and it will not be at another time solemnized.

Strange: It seems to me that you do not have to allege whether the matrimony be good or not, but it is sufficient in our law that the solemnization of the Holy Church [was] *in facie ecclesiae*. And in a writ of trespass brought by the husband and his wife, it is no plea to say that the husband or the wife is still under age, *scil.* under the years *de pubertate*, or that they are cousins. And in the writ of *garde de corps*, it is a good plea to say that the heir was married to my daughter in the [life]time of the ancestor and he will not be entitled to say that they were cousins, because the solemnization (*ut supra*) suffices to us, and you will not deny it, but that the wife, if she be of the age of nine years at the death of her husband, she shall have dower from whatever age that her husband be.

Which Cheyne [C.J.K.B.] affirmed, and he said that the wife will have dower when, by the intent, she could deserve it. And this has been adjudged at nine years [of age].

And then Strange [said], if she will have dower at nine years, it is *infra annos nubiles*, and she will not have dower unless she and her husband were joined in lawful matrimony. *Ergo, a primo ad ultimum*, we understand [it to be] *matrimonium infra annos nubiles*. And thus the marriage was good in the time in the life[time] of the ancestor etc.

Juyn [J.C.P. and C.B.Ex.]: In a writ of dower, the age of both will not come into debate, neither of one nor of the other, if it be well pleaded, because the tenant could plead *me unque accouple en loyal matrimony*, and the bishop so certifies.

Quod fuit negatum.

Cokayn [J.C.P.]: Matrimony is double, *scil. inceptum* [*et*] *consummatum*: *inceptum*, as in our case, and, if the parties confirm it *ad annos nubiles*, then it is *consummatum* and good for all times, and it will have relation from the time when it was celebrated.

Babington: Although the heir to excuse himself will have this plea, but they who plead the plea are strangers, in whose mouth, the plea does not lie.

Juyn [J.C.P. and C.B.Ex.]: The doctors have discussed and are agreed that this which was done under age is not well a matrimony, but an espousal, which espousal is not included in the Statute *de Praerogativa Regis*. But, by

your intent, by the consent *ad annos nubiles*, it is made matrimony; this could well be. And yet the king will have the marriage etc., because, now, by the death of the ancestor de mero jure, the marriage belonged to the king if he was not married and he was not at this time; [it was] but an espousal. And as the title was in the king *infra annos nubiles*, the grant and the election that the heir will have *infra annos nubiles*, this was before vested in the king and the title above accrued to the king, which cannot be defeated by the election of the heir, unless he loses the marriage. And you have granted that the grant *ad annos nubiles* made the precedent espousal effectual. And this was granted, he being in the wardship of the king. And thus he thought that he will pay the double value. And, in the case that a man disseises my true tenant and my tenant dies and I get hold of the wardship of the body of the heir and he refuses to be married and, at his full age, he confirms the estate of the disseisor in fee, notwithstanding this confirmation, I will enter upon the disseisor, and I will hold the land until I have received the value of the marriage, and yet the confirmation made the estate of the disseisor good from the time of the disseisin, which was in the lifetime of my tenant. But, because my title was once good and in this same way as the beginning of the estate of the disseisor and this that his estate was made good, this is the cause that, by nothing that he knows to do, it will not be a prejudice to me. *Nec hic*. In this case, the beginning of the title of the disseisor was tortious. And this is the difference.

And, afterward, Juyn [J.C.P. and C.B.Ex.] [said] to this which you said, Strange, that we have nothing to do with the law of the Holy Church, it is not so, because void by privation and also by resignation are good titles in [an action of] *quare impedit* and yet this belongs to the law of the Holy Church. But there is a difference when one pleads to the right of matrimony and when to the possession; to the right, as *unque accouple*, and to the possession, as *nient sa feme*. And when the matrimony is the cause of the action, then it is a good plea to plead in the right, as in a writ of dower, *unque accouple*, but in [writs of] assize or debt or trespass brought by the husband and his wife, that, although the writ will abate, she can have a good writ alone and, on account of that, one will plead in such a case *nient sa feme*, which is in the possession.

Cheyne [C.J.K.B.]: The marriage which was made now to be adjudged was at all times good, because the consent is not the marriage, but determines and puts the precedent marriage out of suspense and doubt. And you say that there the espousals were nul; this cannot be, because the consent with the

thing precedent are a good marriage. And, if the marriage was nul, then the consent is only *una sola res*, which can never make a matrimony, *quia matrimonium efficitur ecclesiae solemnisatione etc*.

Strange: Also, the ancestor had a good title to the marriage of his son, as the lord had after his death. And when he was married, and well by law, and his father had the marriage, the law will not coerce him to have another wife, because he was married by one who in right had [it]. And if he will pay for the marriage, it would be inconvenient, as one did not offend, and, if he was married by law. And *qui per legem facit non debet punire*. And as to my first intent, notwithstanding that a man affianced a wife in the lifetime of the ancestor, the lord can have the marriage, and yet in right she is his wife. Because he did not have a solemnization *in facie ecclesiae*, in our law, it is not a marriage. Thus our law does not care whether it be a droitural matrimony or not.

Chaunterell: The election is given by the Statute, and *electio est libera*. And I intend to prove that it would be a penalty and not a duty, because if the king never tenders a marriage to one being in his wardship, he will not have the value of the marriage.

Juyn [J.C.P. and C.B.Ex.]: In the case of the king, he will have the value without a tender. It is otherwise of a common person etc.

And, afterwards, the infant and his friends went away acquitted etc.

Jenkins 95, 145 E.R. 67

The king's tenant by knight's service has a son seven years of age. He marries him to a wife of fourteen years of age. The king's tenant dies, his heir under fourteen years of age. If, at fourteen, he assents to his marriage, neither the single nor double value is due to the king nor to any subject in such case, for this consent at fourteen makes it a good marriage in his father's lifetime. Where this Statute[1] speaks of the daughter, it is also to be understood of the son.

[This was agreed to] by all the judges of England.

Sponsalia inter minores contractu ante septem annos nulla sunt. Infants before this age have no use of reason, and, therefore, *istiusmodi sponsalia nulla sunt*. If, within the age of consent, which is fourteen for the male and twelve for the female, either of them dies or disagrees to the marriage, the wardship

1 *Praerogativa Regis*, c. 7 (*SR*, I, 226).

remains with the lord, as if no marriage at all had been, and, in the meantime, the lord shall have the custody of the ward, and a writ of ravishment of ward lies against anyone who takes him from him. The book of the 7 Hen. VI is to be understood of the age of seven years or more. A male of the age of seven years is married to a female of fourteen years; [if], before the male is thirteen, she has issue, this issue is a bastard.

56

Anonymous
(Ch. 1452)

The Court of Chancery will enforce a testamentary trust.

1 Statham, Abr., *Devise*, pl. 8, p. 523

Trinity 30 Hen. VI.

In the Exchequer Chamber, *Illingworth* told how a citizen of London, by his testament enrolled in the Hustings of London, had devised certain tenements within the same City to his son and to three others in fee. And his will was by this same testament that one of the three should have all the profits of the said lands during his whole life. And then, because he who should have the profits was dead, the heir, who was another of the feoffees, brought a bill in the Chancery, comprehending this matter and that the said devise was in trust etc., and he prayed that the others should release to him etc.

Wangford: When, by his testament, he devised the land to all the four in fee and, by the same devise, it was his will that one of them should have all for life, it appears clearly that, after the death of him who was to have the profits, that the others shall have the fee. And they shall not release to the heir, for it is not like a feoffment in which no will is expressed. But, when his will is expressed, it shall be considered wholly his will, in which case, they hold to their own use etc.

Fortescue [C.J.K.B.]: I can see no difference between a feoffment and a devise as to the intent, wherefore, if you will not deny it, to wit that it was a trust, it is reasonable that you release to the heir etc.

Which all the justices conceded etc.

57

Anonymous
(Ch. 1452)

The question in this case was whether a testamentary trust of land can be revoked by the donor.

1 Statham, Abr., *Conscience*, pl. 1, p. 392

Michaelmas 31 Hen. VI.

In the Exchequer Chamber, Kirkeby, Master of the Rolls, related a matter which was in the Chamber, how one had made a feoffment of trust and declared his will to the feoffee after the feoffment, that, after his decease, one of his daughters should have the land. And, then, he came to the same feoffee and said that she who should have the land would not be married by him, nor be well governed, wherefore he said that he revoked his will and that he wished the other daughter [to have] the said land after his decease. And then he died. And the question is which of the two daughters shall have the land.

Laken: When he declared his will, the daughter had immediately an interest in the land, which he could not defeat afterwards; no more than where a man enfeoffs me to enfeoff another, who is a stranger to his blood, he cannot revoke it afterwards etc.

Illington, contra, for he does not show that the feoffment should be made to the daughter for any cause, so that the feoffor would have a *quid pro quo*, so there was no bargain but at his mere will, which he can conscientiously change well enough, for, if that daughter will not be governed by him, it is not in conscience nor reason that she should have the land. And I put the case that, after he had declared his will, he himself had been in poverty, and, for that reason, he would require the feoffee to re-enfeoff him, is it not in conscience that the feoffee would re-enfeoff him? (As if he said it was.)

Prysot [C.J.C.P.], *contra*, for when he has declared his will, then he is as well the feoffee of the daughter as the feoffee of the feoffor. And if the daughter declares her will to him, he is bound to do it after the death of the feoffor. And I think that such a declaration of his will is as strong as a condition declared upon a livery of seisin etc.

Fortescue [C.J.K.B.]: We are not arguing the law in this case, but the conscience. And it seems to me that he can change his will for a special reason, but otherwise not. And I put the case that I have issue a daughter and I am ill and I enfeoff a man and say to him that my daughter shall have my land after my decease; then I revive, and I have issue a son; now, it is conscience that the son shall have the land for he is my heir, for, if I had a son at the time etc., I would not have made such a will. And the law is the same if I will that one of my sons shall have the land and, then, he becomes a thief. And 'conscience' comes of *con* and *scioscis*. And so together they make `to know with God', to wit to know the will of God as near as one reasonably can. For a man can have land by our law, and by conscience he shall be damned etc.

Arderne [C.B.Ex.]: If I enfeoff a man, I cannot declare my will to him afterwards.

Which was denied. And they adjourned. Query [what] was the rest of it in the Chancery.

58

Cardinal Beaufort's Case
(Ch. 1452 x 1453)

Where equitable relief is appropriate but impossible, a court of equity can award common law damages.

2 Statham, Abr., *Sub pena*, pl. 1, p. 1162,
Baker & Milsom, *Sources*, p. 95

If I enfeoff a man etc. to perform my will and he enfeoffs another man, I cannot have a subpoena against the second feoffee, because he is a stranger. But, by the opinion of Yelverton [J.K.B.] and Kirkeby, Master of the Rolls, I shall have a subpoena against my feoffee and recover in damages for the value of the lands etc.

And Kirkeby [M.R.] said at the same time that, if my feoffee in trust enfeoffs another in trust of these same lands and dies, I shall in that case have

a subpoena against the second feoffee. But it is otherwise where he enfeoffs *bona fide*, for there I am without a remedy etc.

And so it was adjudged in the case of the Cardinal of Winchester etc.

In a subpoena in the Chancery.

Fitzherbert, Abr., *Sub pena*, pl. 19,
Cooper's Practice Cases 521, 47 E.R. 632

If I enfeoff a man to perform my last will and he enfeoffs another [without notice], I cannot have a subpoena against the second, because he is a stranger. But I shall have a subpoena against my feoffee and recover in damages for the value of the land, *per* Yelverton and Willoughby, Clerks of the Rolls, who say, that, if my feoffee, in confidence, enfeoff another in confidence of the same land, that I shall have a subpoena against the second. Otherwise it is where he enfeoffs *bona fide*, because, there, I am without a remedy [against the purchaser]. And so it was adjudged in the case of the Cardinal of Winchester.

59

Anonymous
(Ch. 1453 x 1454)

A court of equity will protect the possession of a copyholder against the lord of the manor.

2 Statham, Abr., *Sub pena*, pl. 2, p. 1162

A man who is tenant at will shall have a subpoena if he be tenant by copyhold against his lord if he ousts him etc. By the opinion of Kirkeby [M.R.] and Pole [J.K.B.]. [In a] subpoena in the Chancery.

60

Duchess of Suffolk's Case
(Ch. 1456)

If a person disturbs the king's possession of a wardship, a writ of amoveas manus *will issue against him on a mere suggestion without an inquiry or presentment.*

If the king grants the wardship of an heir and the land and a stranger disturbs the grantee, he will have an amoveas manus subpoena.

YB Mich. 35 Hen. VI,
Fitzherbert, Abr., *Suggestion*, pl. 9

Choke showed how it was presented that the duke of Suffolk held certain manors of the king in chief and died, his heir underage, and how the king by Parliament granted the wardship of the said heir and the land to the duchess of Suffolk during the nonage and until livery be sued out etc. without *aliquo inde reddendo*, by which the duchess was put in possession by the Escheator. And, thus, she was possessed until she was ousted by the duke of Norfolk from such manor, upon which the duchess submitted this matter in the Chancery and prayed a [writ of] *amoveas manus* directed to the Sheriff, because the Escheator was party with the duke of Norfolk to the said ouster. And, on account of this, she prayed three things from the king, one that she could have an *amoveas manus* on a penalty of £1000, and another that the duke should make a fine for entry on the king, and the third that he would answer for the issues etc.

Fortescue [C.J.K.B.], by advice of his companions, discharged him from the two last points, because it was not reasonable that he would make a fine and answer for the issues without answering. But he held that she should have an *amoveas manus* and that, if the duke had title, it is no mischief, because if he retains notwithstanding this writ, then a [writ of] attachment would issue, and, on this, he could show his title, and, if his title be good, he will retain.

And thus their opinion was that she would have an *amoveas* on a suggestion without presentment or inquiry.

And it was held by all the justices that, if one abates on the king's possession, that a writ of *amoveas manus* will issue against him on a suggestion

without an inquiry or presentment. And together, the justices held that, if the king grant to me wardship of the heir and the land to such a one, if a stranger deforce me, I will have an *amoveas manus* subpoena etc. And this has been adjudged of the body and of the land. And, if the king was seised of the wardship of his tenant and a stranger abates upon him, the king will have an *amoveas manus* subpoena etc., because the king cannot have [a writ of] ejectment from wardship, by Fortescue [C.J.K.B.].

61

Duchess of Suffolk's Case
(Ch. 1456)

Where a sheriff is powerless against a magnate, the Chancellor can order the magnate to enter into a bond to keep the peace.

2 Statham, Abr., *Sub pena*, pl. 3, p. 1162

Michaelmas 35 Hen. VI.

If I come into the Chancery and inform the Chancellor that I wish to have sureties of the peace for a lord and that it does not lie in the power of the Sheriff to arrest him by a writ of *supplicavit*, the Chancellor, of common right, will grant me a writ of subpoena in that case, directed to the same lord, as was held by all the justices in the Exchequer Chamber, in the case of the Duchess of Suffolk etc.

62

Anonymous
(Ch. 1457)

Where a beneficiary of a trust disseises the trustees, he, the beneficiary will be ordered to perform the trust.

Where the trustees are disseised by a third party, the beneficiary has the cause of action against the third party.

YB Hil. 35 Hen. VI,
Fitzherbert, Abr., *Sub pena*, pl. 22

In the Exchequer Chamber, the case was thus. A tenant in tail enfeoffed certain persons to perform his will and then made his will that the feoffees retain the land until they had levied 200 marks for the marriage of his daughter, for which, after the death of her father, the daughter sued a subpoena against the feoffees and the heir of her father, that is to say, her brother, to know why the 200 marks were not levied. And they did not know anything to say to the contrary, by which it was awarded that the feoffees would retain the land until they had levied the 200 marks and that then they would enfeoff her father's heir, that is to say, her brother. And, then, the brother, contrary to the said judgment, entered on the feoffees and took the profits so that the 200 marks could not be levied, by which the daughter, according to the will of her father and according to the judgment, brought a subpoena against the heir, that is to say, her brother. And if this lay against him was the doubt.

Choke: If a stranger had ousted the feoffees, the daughter would not have a subpoena against the stranger but would against the feoffees, and they will have an action against the heir. And thus it will be here upon this.

Fortescue [C.J.K.B.]: The heir is held to perform his father's will as long as the feoffment remained in its force, not defeated. And, if the feoffees were ousted by a stranger, to say that the sister will not have a subpoena against them, perhaps this will be true, but yet she will have it against the heir, because she is not as a stranger, but as she who is privy and bound by the father's will, and the heir will have a subpoena to make them release to him or to make them leave off from their suit against him. And, thus, a stranger will not have it, by which it is not in the case of a stranger; thus.

And the opinion of all the justices was that the will was good and that the heir will be forced to perform it notwithstanding that the land was entailed.

And the opinion of all the justices was that, when the feoffees are disseised and ousted, they are not bound to arraign an assize or bring an action unless at the request of him to whose use etc. and at his cost and labor or his heir's. And, if the *cestui que use* etc. enters and they bring an action against him, he will have a subpoena against them to cease their suit, and so the heir

will be bound unless he re-continue by a [writ of] formedon. And, if he enter and die seised, his heir is remitted, as it was said.

63

Platz's Case
(Ch. 1457)

The Court of Chancery can have a question of fact decided by a jury in the Court of King's Bench.

2 Statham, Abr., *Processe*, pl. 47, p. 975

Hilary 35 Hen. VI.

If they are at issue in the Chancery, I will make a [writ of] *venire facias* returnable in the King's Bench, and, when it is returned, then they will put the record in the King's Bench, and not before etc., as appeared in the case of Platz etc.

64

Duke of York v. Lord of Gramont
(Ch. 1457 x 1458)

A patentee of the crown can have the aid of the king to defend his grant where he is a subsequent patentee who is paying a greater rent than the former one did.

1 Statham, Abr., *Aide de roy*, pl. 32, p. 86

Query as to the case of the Lord of Gramont, where a [writ of] *scire facias* was brought against him by the Duke of York to repeal letters patent made to him by the king for the term of his life. And the said Lord of Gramont showed how the king leased to him for a term of years which still lasts, rendering to him more rent than the duke paid. And he prayed aid of the king.

And that was in the Chancery.

65

Anonymous
(Ch. 1459)

Trustees cannot act beyond the authority given by their settlor.

YB Trin. 37 Hen. VI, f. 35, pl. 23,
Cooper's Practice Cases 548, 47 E.R. 644,
51 Selden Soc. 173

In the Exchequer Chamber, the case was thus. One had four feoffees of his land to his use, and he sold his land to one H. and said to two of the four feoffees that it was his wish that the four feoffees should make feoffment to the said H. And the two feoffees notified the other two that it was their feoffor's wish that they should make a feoffment in fee to the said H. And the two refused to make a feoffment to H. But the two to whom the feoffor himself gave notice made an estate to H. of what belonged to them. And, then, the feoffor sold the said land to one J., and he came to the two feoffees, who refused to make an estate to H., and requested them to make a feoffment to J. And so they enfeoffed on their part.

And the said H. brings his writ of subpoena in the Chancery against the two feoffees who refused to make an estate. And this matter was adjourned into the Exchequer Chamber. And, because the two feoffees to whom the feoffor gave notice did not tell the others that their feoffor requested and commanded them to make the feoffment, but only notified them of their feoffor's wish, for this, they were not bound to do so without command and request of their feoffor etc.

And the opinion of the justices was that the defendants did right and that they shall go free of this subpoena and be discharged, because they did but as the law requires. Some said that, even though the feoffor had sent one of his servants to his feoffees ordering them to make an estate according to his wish, the feoffees are not bound to make a feoffment without a specialty proving his wish. *Quod nota*.

And it was said out of court by *Jenney* that he saw a case where the will of one was that his feoffees should make an estate for a term of life to one J.,

the remainder to one C. in fee, and the said J. would not take the estate etc. and this C. in the remainder had a subpoena against the feoffees to make the remainder to him after the death of J., setting aside J.

Fyncheden agreed. And he said, in that case, that the feoffees ought to make an estate for the life of J. if he refuses to take an estate from a certain person to the use of him in the remainder after the death of J., the tenant for term of life, *ut supra*. Thus, although the first one who ought to take the estate refuses [to take it], yet they in the remainder will have their remedy *ut supra*, setting them aside and in their lifetime. And it is not like a devise where one devises lands which are devisable, *scil*. to one for a term of life, the remainder over or divers remainders over, and he dies; if the first who ought to take the estate refuses, they in the remainder shall not have a subpoena against the feoffees or executor to do *ut supra* because, although he who ought to take the first estate refuses, yet the devise takes effect forthwith in everything by the death of the devisor, and, although the tenant for the term of life will not enter throughout his lifetime, after etc. [his death], he in the remainder entered as though the tenant for the term of life had entered, because, it [the devise] took effect by the death of the devisor in everything at one time. But, here, it is not so, for he in the remainder cannot enter unless [the tenant for] term of life takes the estate according to the will etc. And, if the tenant for term of life refuses, he in the remainder shall have no remedy, for, during the lifetime of the tenant for term of life, the feoffees could give or sell the lands, and, perhaps, they may die during the lifetime of the tenant for term of life, and then they are without a remedy, for they are without a subpoena, and they cannot enter, and thus they are without a remedy. And this is the reason why they shall have their subpoena during the lifetime of the tenant for the term of life. *Quod nota*.

Cary 10, 21 E.R. 6

All the Justices: And this confidence extends not only to the taking of the profits, but also that the feoffees shall do acts for the good of the feoffor. And, if the feoffor require him to make an estate to any other, he ought to do it, but thereof he ought to have a request in writing, for he is not to do it upon a bare message or upon a desire by word only.

66

Anonymous
(Ch. 1460)

Ecclesiastical courts have jurisdiction over spoliations but not over advowsons, the latter being common law rights.

YB Hil. 38 Hen. VI, f. 19, pl. 1

The case was thus in the Chancery. An abbot had sued in a court Christian a [suit of] spoliation against one R., clerk, and one H., clerk, for this, that where the said abbot and all his predecessors had been seised of the advowson of J. and, likewise, of the church as parson imparsonee to hold in their own use from the time of which memory does not run[1] and had had all the tithes etc. And the aforesaid H. and R. appeared there. And he had a spoliation of his tithes, and [they] held him out of his church and took the tithes.

And, upon this, the aforesaid H. and R. appeared and said that one was seised of the aforesaid advowson in the right of such a one, his wife, in his demesne as of fee and, further, this, how the ancestor of the wife was seised before him and how the husband presented the said R., who, at his presentment, was admitted, instituted, and inducted and took the tithes and held the church as parson and incumbent of the said husband until he resigned etc. And, afterwards, the said husband presented the said H., who, at his presentment etc., and he held the church and took the tithes, *ut supra*, and so each for his time, and that the advowson was never appropriated by the husband and his wife nor by the ancestor of the wife. And we do not think that the abbot should proceed against them, who were in by presentment, *ut supra*, in this plea and in this court Christian.

And, upon this, the aforesaid R. and H. came to the Chancery with all the matter in a libel to the Chancellor and prayed for [a writ of] prohibition upon this matter. And it was granted to them and they have [it].

And, upon this, the abbot came and prayed for [a writ of] consultation.

[1] This is the formula used to allege a prescriptive right.

And this matter was long pending in the Chancery. And now, it came into the Exchequer Chamber before the justices of the one bench and of the other and the Chief Baron of the Exchequer and the Master of the Rolls. And, there, the matter was well debated.

Markham [J.K.B.]: It seems to me that he will not have a consultation, because he is to have a prohibition in the case. But the abbot could have a good action of trespass, because, by his libel, in the first place, he has shown that he was parson imparsonee and held the church in his own use until the aforesaid R. and H. ejected him without any color, in which case, he could have a good action of trespass against them, who have not title nor color to cast a parson out of his church and take the profits, and the parson has a good assize for his rectory, cemetery, and for the glebe of his church, which is a freehold in him, and a writ of trespass for the tithes.

Which all the justices *concesserunt* against a stranger who has no color.

And so, here, as the defendants entitled themselves to the church by the presentment of a stranger, afterwards, by their answer, this did not make the first bill nor pleading good.

Wherefore, Moyle [J.C.P.] [spoke] to the contrary, because the libel of the abbot proved that the aforesaid R. and H. had put no color nor title to hold the church nor to take the tithes. And thus, they are as total strangers who have no color, in which case, he could have an action, *ut supra*. But, if the abbot had given them color to hold the church, as by lawful presentment *et hujusmodi*, thus, he was to have [a writ of] consultation in the case, but yet it seems to me that he will have a consultation by the matter, which came *ex post facto*, by the said R. and H., by their answer of the tithes, which are merely spiritual, coming in debate, in which case, it is reasonable to grant a consultation. And he said further that, at the common law, if the parson had been impleaded for his tithes, the patron had no remedy. But now, there is a remedy by the Statute of Westminster II,[1] that the parson has [a writ of] *indicavit*, and the patron has a writ of right of advowson for one-fourth of the tithes. And this writ is given by the Statute.

Markham [J.K.B.]: This is not so as you say, because, at common law, it did not have the power to hold a plea for any part of the tithes, but [a writ

[1] Stat. 13 Edw. I, Westminster II, c. 5 (*SR*, I, 75-77), note also Stat. 34 Edw. I (*SR*, I, 147).

of] prohibition lay, and, on this, a writ of right for the patron. But now, the Statute of Westminster II provides that *indicavit* will only be granted for the fourth part, at least, because to have a writ of right for the twentieth or fortieth part would be mischievous. And the Statute was made for this reason in this case.

Fortescue [C.J.K.B.] said that, at common law, there was a writ of right *quod reddat advocationem decimarum de quinque acris terrae* or of one acre of land *et hujusmodi*, and the Statute was made for that, because the writ of right *de decimis* will not be granted for a lesser part than *de quarta parte*. And, on account of this, the writ is *quod reddat advocationem decimarum quartae partis vel tertiae partis et hujusmodi*. And there was no such writ at common law.

Quod non fuit contradictus. Nota.

Danby [J.C.P.] said that the abbot could not have a writ of right of advowson, because he was parson imparsonee and held the church to his own use. And thus, the church could not be vacant, but it is always said [to be] full by the appropriation. And when the church is full of itself, he could not have a writ of right.

Quod Danvers [J.C.P.] *et* Moyle [J.C.P.] *concesserunt*.

Yelverton [J.K.B.]: Truly, the law is not so, because, if a stranger patron presents his clerk to the bishop, who is received, instituted, and inducted, the church is now full with the said incumbent, and, *per consequens*, he could have a writ of right, because, by the institution of the clerk, the stranger is put into the possession of the advowson. And this proves well the words in the writ of right, because, there, it lays the esplees in the parson and not in himself. *Ergo, per consequens*, the possession of incumbent is the possession the patron who presented him. And, if so, then he is in possession and the other is out, in which case, he will not have a good writ of right, but he who is the prior and holds the church in his own use; he will have a special declaration and lay the esplees in himself as parson imparsonee, because he is the prior and incumbent. And he will have a spoliation as parson and a writ of right as prior or patron, and a writ of right lies against him, and he does not plead plenarty by himself by six months before the writ was purchased, nor after, because, against the stranger, the church is always vacant, because he is not in by presentment. But he will not have [a writ of] *quare impedit* because, by the usage of this writ, the church will be disappropriated, but not by a writ of right.

Nota diversitatem.

Prysot [C.J.C.P.]: It has been adjudged a good pleading in *quare impedit* against the prior where he holds a church in his own use to say that it was full with himself a year and a day before the writ was purchased as a parson imparsonee because the church will be considered full. And, if the church was initially appropriated, then it is legally full, for which he thought that the *quare impedit* lies against him.

Fortescue [C.J.K.B.]: The matter in fact proves that *quare impedit* lies against the parson imparsonee, because there are two or three [writs of] *quare impedit* pending before yourselves at a certain day (and he named them). And in my time, I know that ten or twelve [writs of] *quare impedit* have been returned, and on account of that, the *quare impedit* lies well enough. But even if it does not lie, yet reason proves that it is not full, because the pleading of the plea against what it does at common law is determined by the Statute of Westminster II and the pleading is now given by the same Statute, because, at common law, it was a good plea to say that the church was full the day the writ was purchased and now it is not a [good] plea unless he says that the church was full by his own presentment six months before the writ was purchased. And thus, he must say that it is full by his own presentment, because, if the church be full by the presentment of a stranger, it is not to the purpose to abate his writ, unless he says by his own presentment six months before the writ was purchased. And here, he could not say that the church is full by his own presentment in this case, because it is not full by any presentment. And, on account of this, against strangers, the church will be adjudged always vacant as to this act. And, even though this pleading that he would allege was [allowed] in other times, yet it was not reasonably pleaded. But I know well that it was held a [good] plea for a long time past. *Quod nota*. And thus, he said to him that he will not have [a writ of] consultation, because, now, the right of the advowson will come into dispute, and the pleading is of the entire tithes of the church. And, in all cases where the tithes which amount to one-fourth part or more come into dispute between the parsons in a court Christian and where they are in by different presentments in the right of different patrons, so that the right of the patronage comes into dispute, thus lies [a writ of] prohibition, and no [writ of] consultation will be granted on this, because, there, no [suit for] spoliation lies. But spoliation lies where an incumbent ejects the other out of his church and takes the profits, and the

right of advowson will not come into dispute between them, as if a parson is created a bishop and has a licence from the pope to retain his benefice, if, now, the patron presents another who is received, instituted, and inducted, the other parson would have a spoliation, because, in this case, the right of advowson will not come into dispute, because both incumbents claim in the right of one patron, but whether the church becomes vacant or not will come into dispute in this special thing. And it is the same law if my incumbent accepts other benefices and so I present a new [clerk] who is received, instituted, and inducted; if my first parson has a licence to have a plurality, he will have a spoliation and the plurality will come into dispute there. It is the same law of deprivation, where, if one comes to me and surmises that my clerk is dead, where he is alive, and I present him, the other will have a spoliation. And so a spoliation lies always between the parsons, where they have color by their admission and where the right of advowson will not come into dispute.

Quod omnes concesserunt. And thus their opinion was clear in this case that the consultation does not lie, *causa supra*.

And thus was the opinion of the Master of the Rolls [Kirkeby]. And he said that an advowson could not be appropriated without a succession. And it ought to be in the first place that the right of the patronage be in succession or, otherwise, the appropriation is of no avail, because, even though the incumbent purchased the advowson and, there, appropriated by licence, this appropriation is of no avail, because it is necessary in the first place that he have the advowson to himself and to his successors and, thus, by licence to a purchaser to hold the church to his own use, because, if a prior of a hospital, college, *et hujusmodi* be seised of an advowson to him and to his heirs and, afterwards, says thus that the advowson descended to him as heir and he now purchased a licence of appropriation that he and his successors could hold the church in his own use and dies, yet, the advowson descends to his next heir, notwithstanding the appropriation, because he cannot appropriate the church to him and to his successors when he had the advowson by descent to him and to his heirs. But, in such case, he ought, if he wants to make the appropriation good and sure, to alienate the advowson and repurchase it to himself and to his successors, and thus to appropriate the church, and thus is the appropriation good, *quod nota*.

And it was said that the dispute upon the appropriation will be tried in a court Christian.

67

Walwin v. Brown
(Ch. 1460)

A suit in equity lies to require a person to make an inventory of goods received.

YB Mich. 39 Hen. VI, f. 26, pl. 36

[There was a] subpoena in Chancery by Walwin against John Brown of London to answer for certain goods and chattels to the value etc. which the late Thomas Brown of Kent, knight, had forfeited to the king by the attainder of the said Thomas of high treason and which etc. thus and yet are in the hands of the said John Brown, and which goods the king, by his letters patent have given to the said John Walwin. And, upon this matter, he had a subpoena against the said John Brown, who came into Chancery by Jenney.

And he [*Jenney*] demanded judgment of this subpoena because, upon this matter, he could have an action of detinue against the said John Brown at common law. Thus, when he can have an action at common law, it is not reasonable to allow him to have this action, because this action of subpoena does not lie here. Unless there is no remedy at common law, then, he will sue in this court of conscience. But, in this case, he can have a good action against him who has the possession of the goods by the common law, because, if one be outlawed, the king will have a good action of detinue against everyone who happens upon the possession of the goods, because, by the outlawry, the property is to the king, and he who has the possession is charged to the king by way of an action. wherefore etc.

Greenfield: The king cannot have an action by the common law for goods of one who is outlawed or attainted before someone has seized them to the use of the king or it be found by matter of record. And, even if the king could have an action at common law, yet it is at the king's election in which of his courts he would sue, *scil.* in the court of conscience or by the common law. And, consequently, his grantee cannot have an action at common law for them without possession when it lies in action.

And, afterwards, the court held that this subpoena lies well enough because it was commanded to the said John Brown to make an inventory of all

the goods which he had from the said Thomas Brown, knight, before the next [court] day or, otherwise, he will be ordered to the Fleet [Prison] until etc.

And, there, it was said that the common course in the Exchequer is, when the king by his letters gives or grants a debt that is due to him from anyone, the king's grantee would have a good action for this debt in his own name, and so he could not do anything else. *Quod nota*.

68

***In re* Estate of Percy**
(Ch. 1463)

The question in this case was what is the remedy for a disseisee where his disseisor has been attainted of treason and his lands have been seized into the king's hands.

YB Mich. 3 Edw. IV, f. 24, pl. 19

In the Exchequer Chamber before all the justices, a matter was rehearsed that it was found before the Escheator of the County of York that, in the time of King Edward I, one A.B. was seised of such a manor in the same county etc. And this office was taken before the Escheator *virtute officii*. And he, so seised, by an indenture shown in evidence to the jury etc., by the same deed gave the land to Henry Percy and this [was] in fee tail, *scil.* this manor etc., rendering to the donor and his heirs for the twenty years next after the gift annually of a red rose at such a feast, and, after the twenty years, each year £20 at such a feast to the donor and his heirs and, for default of payment, re-entry to the donor and his heirs. And it showed how the donee was seised etc. And then it conveyed the descent to one Richard Percy in the time of King Henry and conveyed the reversion and the rent to one Richard R., knight, and showed that, by default of payment, Richard R., knight, entered, and then Richard Percy died, and Richard R., the knight aforesaid, was seised until disseised by the earl of Northumberland,[1] who was one of the issue in

[1] R. A. Griffiths, `Percy, Henry, third earl of Northumberland (1421-1461)' *Oxford Dictionary of National Biography*, vol. 43, pp. 706-707.

the entail. And it showed how and thus he was in by disseisin, and the said earl was attainted by authority of Parliament held recently 4 November 1 Edw. IV [1461],[1] that the said earl had forfeited all his chattels, honors, manors, lands, tenements, rents, advowsons, wardships, and all other hereditaments of which he was seised in fee simple or in fee tail or otherwise to his use 30 March next before [1461]. And then, in the inquiry, [it was] shown that the earl died [29 March 1461], Palm Sunday, and how the said Richard R., knight, aforesaid, made continual claim on the earl during his life and at the time of his death etc.

And this office was returned into the Chancery. And, there, the said Richard R., the knight, came in and put in his plea for the first time according to the matter of the office above. And he showed the indenture there and pleaded all his matter as before and how the earl was attainted, and he pleaded further and showed further in his plea the provision of this Statute of attainder, *scil*. saving to all the lieges of the king not attainted his right and possession and lawful entry in all such castles, manors, honors, and his lands, tenements, rents, advowsons, etc., and other hereditaments, of which they were seised before by any of the said persons attainted etc. disseised. And he showed in fact the seisin and disseisin and the continual claim etc. and how, of such an estate by disseisin, the earl died seised and of no other estate and how the Escheator had seized it into the hand of the king by virtue of this office. The said Richard R., knight, prayed an *ouster le main* out of the hand of the king.

And this matter was well argued by the counsel of both parties and also by the justices.

And according to some of the justices, it was held that this inquest and office taken by the Escheator *virtute officii sui* was not good because all that which it has found is against the king and against the title of the king, and not for him. [He was] in by another where the right of the Escheator, by his commission, is said there to approve for the king and he should enquire for the king and not for the advantage of a strange [i.e. third] person and against the king. And thus here, perhaps, the office is totally void, and it should not in the first place be accepted in into the Chancery by those of the Chancery

[1] R. Horrox, ed., *The Parliament Rolls of Medieval England* (2005), vol. 13, pp. 43-55.

because it is against the title of the king. But perhaps if a *diem clausit extremum* had been sent to him, then perhaps he should have enquired of the right and of the truth and matter of seisin and of the right of the earl.

And, even though this office be good and that it is a good office, yet they thought that Richard R., the knight, who sued the *ouster le main*, will have his petition to the king and thus have the land out of the hand of the king by this, and not by pleading here by such manner with the king in the Chancery, because when the king is seised properly by matter of record, then the party who has right to this land is put to his petition of right, and, in this case, the king has been seised by a matter of record, etc., because, if I be seised of certain lands and disseised by one who, during this disseisin, commits a felony, on whom I enter, and the land is held of the king, and then he is attainted of felony, and it is found that he was seised of this land since the felony, *scil*. which is my land, by which the Escheator enters on me, and thus ousts me, even though I be ousted from my land by this inquest, yet I will not have a traverse to this office, but I will be put to my petition of right to the king to have my land back by this way, and not by force of a traverse, because the king has the land by matter of record. And for this, in every such case, properly, the party who is ousted or has right will not have any other remedy by an action for this land, except to sue by petition. And, thus, in the case before, the party here is at his remedy by petition etc.

Accordingly, other justices thought the contrary, that, in this same case of attainder of felony of my disseisor, I will have my land back by a traverse in the Chancery, because, at common law, if a man be ousted by virtue of an office, that, in this case, he will have his traverse and remedy to have his land back by this way and will not be put there to sue by petition, because, if the disseisee enter on the disseisor, so that, at the time of the attainder, the disseisor was not seised. But, by chance, if the disseisor was seised of the land at the time of the attainder, then perhaps it would be otherwise, because, then, it was the folly of the disseisee, and that he did not enter before the title came to the king, and so, there, he ought to have his petition. Thus is the case here, in a manner. The said Richard R., knight, was seised and disseised by the earl of Northumberland, and the disseisee made continual claim, which is adjudged possession in law, because, by such continual claim made on the disseisor and he die, the disseisee enters well upon the heir of the disseisor. But now, because the land is seized into the hand of the king by the record of the office

and all the matter of record aforesaid, on account of this, he could not enter upon the possession of the king, because, if the king enter upon me by title or without title, in none of the cases, can the king be said to be a disseisor nor abator, and the disseisee or he who has the right can no more enter on the possession of the king, nor can he have an action in our law against the king, but he has his petition that will be made in the nature of his action, whether he has an estate in fee simple, fee tail, or a term of life or otherwise.

But in this case here above, the said Richard R., knight, will not be put to sue by petition, but he will have his remedy by his pleading and surmise made in the Chancery to the king upon the office returned there for the king. And otherwise, the new Statute above would be only a feeble remedy which would give *salvo jure* [*rege*] possession and title and *legitimum ingressum* to all the lieges of the king not attainted of all castles, manors, rents, advowsons, lands, and tenements and all other hereditaments of which they were seised by any of the persons aforesaid attained and, this, by those words, which is an act for them who were disseised also, as well, so a special act for him has been made, that if any person be lawfully seised and disseised by any of the persons aforesaid attained, that the king will not have a benefit by this attainder and forfeiture, but that the disseisees will well enter again into their lands in which they have right or that it be saved to them their right, titles, possession of any land or other hereditaments of which they were seised for them and this by this special act or provision and saving for them who have right. It is in the election of the disseisee to sue a petition to the king as the matter of his right is or by on entry, if his entry was allowable, upon the disseisor himself who has forfeited etc., or otherwise at least by these words of saving made by this act, which is a statute for the disseisees. The disseisees will show their title and plead in the Chancery, as the disseisee has done here, and by his pleading upon the office returned for the king, he will have the land out of the hand of the king, so that he will have an *ouster le main*. And the proviso and saving aforesaid was made according to right and good reason, because, otherwise, peradventure, the king must have had the forfeiture of every land, tenement, and hereditament that they have possession not bound at the common law because of the general forfeiture given. And, on account of this, was the saving made and given, saving the right to the disseisees. And thus it is given in the same act of forfeiture a provision and saving to all the wives of those persons attained of treason etc. that their dowers and jointures were saved.

And as to that which is said that the office taken by the Escheator, above, is not good, nor that it will be sent nor taken into the Chancery by reason that it is *virtute officii*, in which case the Escheator ought to find a title for the king etc. and not to find that the king does not have title, because it is contrary to his office, because he ought to approve for the king, and now he is disapproving, as it seems to some, as to this, the Escheator did well enough, because he could not return the office otherwise but as it is [found] by the twelve men or more [i.e. the jury] who inquired of the possession of those who were attaint. Thus, the Escheator, if he does right, cannot return but as the truth of the matter is enquired before him by the inquest and the inquest as well, if it be taken for the king, it must be given according to the truth of the matter and not entirely for the title and the advantage of the king, because, thus, they would be perjured and would give a false verdict and oath. And, on account of this, to find the matter in fact as above, where in any such verdict or matter, [was] more reasonable and right to find. And this return, as it is thus, it is the act of the jury and not of the Escheator, by which the Escheator did well enough, and the inquest also [did well] to say the truth, because, if a man be indicted for felony that he killed another in self-defense and [the jury's verdict] shows how, this is a good verdict and inquest, yet this is a felony, and he will lose his goods. But, if it be found in the same manner on this attainder, he will not be thus [hanged], but the king will give him grace [i.e. a pardon]. And thus such verdicts are not for the king's advantage, and yet they will be received as is reasonable, because the jury cannot find otherwise but as their matter is in truth, if they be good and lawful.

And, on account of this, in the case above, the office is well taken and returned. And upon this, by the Statute of the attainder, above, the land and the manor of the disseisee by the Statute aforesaid seems in the hand of the king and the Escheator did well by this seizure into the hand of the king. And, by this office, the king has a title, such as it is, because the King's Attorney still can release the advantage of the demurrer in law upon the pleading of the disseisee upon this office, as he has done. And he can maintain that the earl did not disseise him for etc. And the same traverse and pleading could he have had in the first place well enough if he would. But now, as the office is

returned, it is good enough and according to the truth. And, on account of this, upon the Statute, above, that gives the saving and provision of the right of the disseisees, the said Richard R., knight, will have his remedy, where, if he will, by his entry for this acre in the same land, be the king or any other his feoffee or patentee seised, and, at least, now, that which is in the hand of the king by the seizure of the Escheator, as he has returned, by virtue of this office, he, Richard R., knight, who now pleads with the king by his matter by the benefit of the Statute, above, will have the land by an *ouster le main* out of the hand of the king and have a writ to the Escheator to amove the hands of the king. And, otherwise, if the disseisee aforesaid will not have his remedy by such an entry, as above, or by a prayer of *ouster le main* by his pleading, above, the cause of the Statute of the provision aforesaid would be in manner of no value, because if it would be taken that this provision will be given solely to the disseisees to sue by petition, this was only a feeble remedy and too slow a remedy, where the intent of those who made the Statute and this provision was not to put those who were disseised to a petition, but, as it seems, according to the intent of the words, to enter on the lands or otherwise to have this out of the hand of the king by an *ouster le main* by pleading upon the office found for the king, as above.

And even though the office, above, in some points is against the title of the king so that, according to some, by which it seems to them that the office will not be taken, if, as to this office, in any part of it, it is good for the king, *scil.* that the earl was seised of the manor etc. and forfeited by treason and by the act of Parliament, thus, at least, it will be taken for the advantage of the king and so much of the remnant will be void and of no value, because it is against the king. And thus upon that which will be taken for the king and for his title, the party who must lose his manor by this office could come to plead this matter and thus has the party done here and alleged all his matter how he had right and how the one who forfeited was seised only by a disseisin and how the Statute gave the saving of the right of the disseisees, and he showed his matter upon his pleading in certain, and he prayed an *ouster le main* that the hand of the king be waived. And, upon this, he will have an *ouster le main*. And, for this, at least upon the matter above, they thought that the party will have his *ouster le main* etc.

69

Cobb v. Moor
(Ch. 1465)

A court of equity cannot grant relief after a final judgment at common law, even for a gross fraud committed on the plaintiff and on the common law court itself.

Croke Jac. 344, 79 E.R. 294

Easter term, 5 Edw. IV, roll 35.

[Coke, C.J.K.B., said that] Cobb procured an action of debt to be brought against Moor and the action to be confessed by an attorney and a writ of error to be brought thereupon and the judgment to be affirmed. And all this was done in the absence of Moor, who, being beyond sea, upon his return exhibited his bill in Chancery to be relieved concerning this practice, there being no debt due.

And it was resolved that, after a judgment at the common law, he could not be relieved there, but he was enforced to exhibit his bill in Parliament. And there was a special act made for his relief.

E. Coke, *Third Institute* (1644), p. 123

A judgment was obtained by covin and practice against all equity and conscience in the King's Bench, for the plaintiff retained by collusion an attorney for the defendant, without the knowledge of the defendant, then being beyond the sea, the attorney confessed the action, whereupon judgment was given.

The defendant sought his remedy in Parliament and, by the authority of Parliament, power was given to the Lord Chancellor, by the advice of two of the judges, to hear and order the case according to the equity, which proves that the Chancellor could not do it of himself without higher authority.

70

Abbot of Leicester v. Regem
(Ch. 1465)

Where the crown claims to have a right, the person against whom that right is claimed can sue a petition of right to avoid it before the crown exercises the right.

YB Pas. 5 Edw. IV, Long Quinto, f. 37

In the Exchequer Chamber, all of the justices were assembled, and the matter was thus, how, in the time of the King Edward III, a writ of corody was sent to such an abbot and to his convent, rehearsing how the king is founder of the same abbey and that he and all his predecessor kings have been founders etc. and, by force of this, they have a corody and this in pension etc., commanding them to receive such a person to his corody in the same abbey etc. And, upon this, in the time of the King Edward III, the said man was received to his corody by the writ of the king aforesaid etc.

And now, in the time of Edward IV, Easter term *anno* five, the abbot of the same place sued in his name and in the name of his convent to the king who now is in the manner of a petition, rehearsing how such a person now in full life is their founder, and he conveyed the descent to him by such a person, the first founder, so that he and his ancestors from the time of which memory does not run, have been founders etc. and that the king nor his predecessors have not been founders etc. And he showed further the color [of title] aforesaid and the title aforesaid to entitle the king to be founder by simple title, as aforesaid, and not in right. And he showed how the King Edward III sent his writ, as aforesaid, etc. And one time, by this writ, such a person, at the nomination of the King Edward III, had the corody etc. at which time such a person, one of the ancestors of him who is now living to whom the abbot and his convent, by their petition, showed the founder was founder etc. And, thus, he showed the title of the corody in the king in this abbey and avoided it in right. And they prayed by their petition of right now sued to the king to be discharged of such corody which the king could claim by any such title aforesaid etc.

And, upon this matter, it was demurred in law by the King's Attorney etc.

And this matter was in the Chancery. And, as above, the justices were assembled in the Exchequer Chamber upon it etc.

And *Sotehill*, the King's Attorney, thought that the petition was not good for two or three causes. One is it appears by the petition that the king who now is has a right to this corody because, by the writ of corody directed in the time of King Edward III to the abbot and his convent, it was rehearsed how the king was founder etc. and, at this time, it is confessed that the abbot and the convent admitted such a person at the nomination of the king to have the corody according to the writ of the king written at that time for the corody, in which case, the abbot and the convent at that time by their deed under the convent seal granted the corody to him for whom the king wrote at that time, so that then such possession of the corody is the true title for the king to have the corody afterwards etc., because such possession upon such grant by the abbot and the convent, in which case the abbot and the convent by their own act are charged for all time, because the possession of one for whom the king wrote at that time was in the right of the king, as if a release made to a term for life by the disseisee will enure for the reversion to the disseisor who is in the reversion.

And also for other causes, this petition is not good, because this petition is sued in the name of the abbot and the convent where the convent is not a person able to sue or to be sued. Thus, the petition ought to have been sued in the name of the abbot, because the abbot, in law, is the head of the house, and he is the person who will charge or discharge the abbey and the church where the right of the church in perpetuity etc.

And also, this petition is sued by the abbot and the convent where they are not yet vexed for the corody, because it does not appear that the king has written presently for the corody.

Thus, the other suit now by petition is void and without a warrant or an original [writ], because, at the present, they do not have title nor color to sue the petition, because a petition is in lieu of an action. And for a man to sue an action where a wrong is not done to him, this is harsh. Thus, here, they sue a petition where they do not have a cause to do it, because no action is sued against them nor is there anything against them for the corody by the king who now is. And thus, they cannot maintain their action of discharge etc.

And according to the opinion of the justices, as to the corody granted by the abbot and the convent in the time of the King Edward III upon the writ then awarded, this does not make a matter to charge the abbot and the convent at the present, because this title is to be void by the pretense of this petition if it was good, because the matter of this grant and affirmance of the title of the king upon the writ at that time was only in affirmance of this title, and this title by the petition at the present is to be void, so that thus right and the title of the king to have the corody is to be void, because the king properly cannot have a corody except where he is founder and then this title voids all the title of the grant claimed by the king of the corody so that the king, in a manner, is in a worse condition than [is] a stranger, because a stranger can have a corody to himself and his heirs by a grant of the abbot and convent. But thus, the King cannot have it except by the title of his foundation, where he is founder. And thus the title of the foundation is void in the king. Then the title of the corody claimed by the king will be void to have any of his servants etc.

And, according to the opinion of some of the justices, the petition, above, as to the other two points is good enough, because the law is and ought to be, if the king writes to an abbot to have a corody [given] to his servant etc., the writ is always directed to the abbot and to the convent, *viz. abbati et conventui* or, otherwise, the writ is not good, because the common course is to write thus and to the *alias* [writ]; such a writ is returnable. And the returned of it will be in the name of the abbot and of the convent also. Thus, if the return will be in their names, then, by their return, because they can discharge the abbey. By this reason, if the abbey be to be discharged by a petition, it ought to be sued in the name of the abbot and the convent, because, in right and in fact, they are charged thereof. And because the charge and discharge lies in them, on account of this, it is reasonable that they are parties and the naming of them is good enough. And, thus, by one means, the convent with the abbot is pleadable and pleads, because, when a king supposed to be founder of an abbey or priory writes to them to have a corody for his servant etc., now, this is the original [writ] of the king of this corody and, then, the return of the abbot and the convent proving the charge etc. or the discharge, it is the defense of the abbot and convent proving that the king will have or will not have [it]. And, thus, the petition is in the place of their defense to charge or discharge the action. And the king and the pos-

session aforesaid being in the King Edward III is the cause of the suit of this petition so that this petition is dependant upon it, because it must be sued in the name of them and not in the name of the abbot himself etc., because the accessory must be in the same condition properly as the principal is. And, thus, this petition is sued upon the discharge of the corody aforesaid had in possession in the King Edward III by the writ that issued thus etc. And by that grant, then, they were charged. It is sued upon this origin and cause aforesaid, because it must be accordingly in the name of the abbot and the convent, because even though he be the abbot, still he is a monk, as he was before and professed and one of the convent. And the possession of the abbot and the convent properly is joint and not several, as a dean and a chapter have, *scil*. the dean his possession by himself and the chapter by themselves. And in the same manner, the abbot and the convent are the same body and an entire corporation, as is the mayor and commonality, who can sue or be sued, because their corporation is joint. And thus it is of a dean and chapter; they can be sued and sue, because to say *praecipe etc. quod reddat decano et capitulo etc*. is a good writ.

And, if the abbot demands anything, it is of the right of his church and not in his own right, because he is not only a monk in law, but, in law, he is admitted as the chief of the house and to sue and to be sued, and yet he is in law as a dead man and one of the convent, so that the convent is not more or less by him.

And, if a man will be sure of the grant or of the feoffment of an abbot or prior, he must have the feoffment or the grant sealed with the common seal. And, thus it is in law, as a person by himself and as a corporation, as is a husband and wife, who can be sued and sue also.

And, [if] a lease [be] made to a monk by the king, for a trespass done during his term, the monk can have a writ of trespass etc. and the monks are the convent, because if the monks were dead, then it was no convent. Thus, the convent is a corporation in law, and especially in the case of a grant made by an abbot or prior. It must be with the convent seal, and, otherwise, it does not bind except during the lifetime of the abbot etc. And, thus, the convent is a corporation in law, because they have a common seal, which is not the seal of the abbot.

And as to the other point, which is to show that the abbot and the convent now will not have this petition of right to discharge their house and

church because they are not chargeable in fact, because the king has not written to them to have the corody; as to this, they are charged in right to the king because of the possession of King Edward III in his time and this petition now sued is in the right for them to have a discharge, as if they have an advowson and the king is seised by a presentment etc.; now, they are put to their petition. And, thus, it will be even though the person dies and, thus, the church is void; they can sue by a petition to the king, even though they are not in manner now disturbed, because the church is void, because, against a stranger, being a usurper, a writ of right of advowson lies, as well during the avoidance of the church, as the plenarty by the usurper.

And, if the king, by chance, be seised of more rent of an abbot, who, as of right, should be, the abbot and the convent will have their petition of right and *ne injuste vexes* against a stranger, even though the king does not demand the rent after the seisin. And a man will have a writ of *warrantia chartae quia timet se implacitari*, even though he not be impleaded etc.

According to other justices, [it was] thought that the petition must be sued by the abbot alone if it lies, because the convent is not able to sue or be sued, because they are not persons in certain, but the convent always remains and does not ever die, as the abbot or prior or another man dies. And, if an abbot or prior claims land in the right of his house which belongs to him and his convent, he will not say in his writ *praecipe* to the tenant *quod reddat abbati et conventui*, be it a writ of right or another writ, because he is not a person suable for the right of the house, because, even though the right is in the house and the church and the convent, yet the law gives a sovereign and chief head to them to sue and to be sued, and this is the abbot or the prior so that the abbot or the prior only will sue or will be sued and not the convent etc., because the convent is not such a person to sue and to be sued, because it does not have a relation to any certain person, but to certain who make the convent, which persons each are perceived dead in law, and yet they all are the convent, which always lives and does not die, and yet the convent by itself is not a person enabled to hold or to give or to sue or to be sued. But the sovereign of them, *scil.* the abbot or the prior is the person in certain. And he is *persona capax* to sue and to be sued, because, if the house or the abbey or the priory claims any inheritance or other thing, the writ must be brought in the name of the abbot or prior only. And, thus, it must be sued against both of them, *scil.* against the abbot only or the prior only and not against the abbot

and the convent, because the convent cannot answer nor plead not sue nor be sued, because, if the obligation be made by an abbot or prior in the name of the prior and convent or of the abbot and convent and sealed with their common seal, yet the action must be sued against the abbot only or the prior only, because the convent cannot demand nor recover, neither can the convent answer nor plead, not can judgment be given against them, nor will they be condemned. And, thus, it is impertinent to sue the convent in any action or for the convent to sue, even though their sovereign be sued with them or that their sovereign sue with them. But all the suit will be in the name of the abbot or prior or against them, because he will answer for himself, the house, church, and convent.

And, on account of this, the aforesaid petition cannot be good, as they thought, to sue it in the name of the abbot and of the convent, because if a stranger disseises an abbot of land of the right of his church belonging to him and to his convent in right, yet the *praecipe quod reddat* or the assize or the writ of right, be it of land, rent, advowson, or of another such inheritance, it must be sued in the name of the abbot only and yet he must be named otherwise than as abbot, as they though, because it is uncertain to say *praecipe* such a one *quod reddat abbati* of such a place, but the writ will be *praecipe* to the tenant *quod reddat Johannem, abbati* of such a place etc.

And also, the petition, above, cannot be good upon the matter, because the abbot and convent are not at a prejudice nor at a charge, as appears by their own petition, because the king has not written to them for any corody not demanded of them any corody. Thus, the suit is in vain, because they sue to be [discharged] from a thing of which they are not yet charged, nor no man demanded it against them. Thus, [there is] no one, no tenant, of it who will have it by his petition, and his petition is in the place of his action. And, if he sue a *praecipe quod reddat* or a writ of right against one for land, rent, of other such thing demandable and he against whom the suit is taken is not the tenant of his demand, his writ is worth nothing, nor is it maintainable, because he demands to be discharged by the king of a thing which he says that the king claims, and yet, in fact, the king does not claim, so that the king is not seised of that of which he will have a discharge etc.

And, also, as appears before by the petition, the king is not seised in fact of the corody at present, because he [has] but ever claimed it nor written for it. And, on account of this, he fails [in] his petition, until the king claims it, as

is put of the case of an advowson, above, where the abbot seised of an advowson in the right of the church and the church [was] void, the king presented, and, after the presentment, the king dies, during the vacancy of the church, they thought that the abbot will not have his petition until the church be full again from the presentment of the king, because, then, the petition of the abbot will serve for his action etc.

And also, in the case above, neither the abbot nor his house is at a prejudice until the king demands the corody. And it could be that he will not ever demand it. And, then, the abbot [will] not put the suit to have a discharge, because he is discharged in fact until the king demands and writes for his corody, so that the petition is not presently maintainable, as they thought, because he is not a tenant of the king of this corody until the king claims it, at least. And if two men should enclose between themselves and one does not enclose, the other will not have a [writ of] *curia claudenda*, even though he said that he and his ancestors from the time which memory [does not run] have enclosed etc., unless he says and shows how he is damaged by the opening. And yet it is not traversable, and thus damages for the default of enclosure must be shown to maintain and prove that he had a cause and title to have his action.

Thus before, they thought that the petition to the king does not lie unless it could appear by the petition that the party who sued had a damage, prejudice, or wrong. And it is not proved in fact by the petition above etc.

And, where it is said that the petition sued by the abbot and convent is good because the king wrote to them by his writ, *scil.* as to it, this will not prove that, in the petition, the convent sued, because the king wrote to the abbot and convent to have his servant to have the corody by the assent and the deed of the convent. And, otherwise, the servant of the king will not have [it] except for the term of the life of the abbot. And to make the corody sure for his servant, it must be that the convent will assent etc.

According to the counsel of the party who sued the petition, he thought that, at least, the petition will be amended by the Statute,[1] because it is a mistake of the Clerk to put in the convent to sue where only the abbot alone should have been put in to sue etc. And, also, such an amendment of the

[1] Stat. 14 Edw. III, stat. 1, c. 6 (*SR*, I, 283).

original has to be amended by the Clerk who wrote it, as by the command of the justices for the Clerk to make an amendment of it etc.

And, by the opinion of three or four justices and the remainder not denying, it could not be amended, because it is not a mistake of the Clerk, but it is the act and the deed of the party himself who sued, because the abbot here has joined his convent with him in his suit where the convent is not able to sue. Thus, the abbot has joined with one who is not to sue, but is disabled in law to sue.

Thus it appears by the petition itself, in part of it, of the knowledge of the party himself that it is not valid in part. And, where a writ or count, or other plea appears bad in part of the knowledge of the party himself, all will abate. And the matter above will not be said a mistake of the Clerk, because it is part of the matter of the action; thus, it being a matter of the action, it cannot be amended, because it is the default of the abbot who sues to put in the convent to sue with him. Thus, it is the default of the party himself, because if an obligation be made to the abbot and to the convent and the abbot brought a writ of debt in the manner above, *praecipe etc. quod reddat abbati et conventui*, such a writ will abate etc. And it will not be amended because no mistake will be supposed in the Clerk, because he will have color to put in the convent because of the deed. But of an obligation made to the abbot alone and he brings a writ of debt and it says *praecipe* one such *quod reddat* to the abbot and to the convent or such similar etc., it will be amended, because it is the fault of the Clerk who made the writ upon the obligation and varied from it; thus, it is a mistake. But thus is not in the case above, because, there, it is the suit and the act and the fault of the party himself etc.

More, below, f. 122.

YB Mich. 5 Edw. IV, Long Quinto, f. 118

All the justices [were] in the Exchequer Chamber for a matter that was thus. The abbot of Leicester sued by a petition to the king, *scil*. a petition of right, that where one Robert Mylain,[1] before the time of memory, founded the abbey of Leicester. And, afterwards, within the time of memory, he conveyed the descent and the title of the patronage of the advowson of the same

[1] M. L. Rampolla, `Melun, Robert de (c. 1100-1167), bishop of Hereford', *Oxford Dictionary of National Biography*, vol. 37, pp. 763-764.

abbey to Sir Simon Montfort,[1] which was in the time of King Henry III, which Sir Simon de Montfort levied war against the King Henry III aforesaid. And, on account of this, the King Henry III aforesaid seised all the manors, lands, and tenements of the said Sir Simon and, among others, the advowson and the patronage aforesaid. And, afterwards, he conveyed the title thus of the aforesaid patronage to King Edward III. And the King Edward III, *anno* third of his reign [1329] wrote to such abbot to have a corody to such a one. And the said King Edward III, by his patent at this same time bearing date etc. desired that, at his request and prayer, such a one could have a corody etc., so that this is not to be taken for an example at another time for the king to have a corody. And, afterwards, in the time of King Richard II, he conveyed the descent to himself of the patronage etc. [and] by his writing, desire, and request, such a one was received to have a corody there etc. And, afterwards, he conveyed the title and the descent to King Edward IV, who, now [is], as cousin and heir to Edward III and Richard II etc. And he will traverse further in the petition against the king without this that the king was the patron in the right of his crown or that it was of the foundation of the king or of his progenitors or predecessors kings of England, and without this that the king has any other possession of any corody except in the form aforesaid. And he prayed further in the petition to the king to do him right etc.

And this petition was endorsed and put into the Chancery of the king. And a commission afterwards was awarded to certain persons to enquire of this matter. And it was found according to the matter aforesaid. And it [was] put into the Chancery etc.

And there, by the Attorney of the King, for the king, *scil*. by *Henry Sotehill*, it was demurred in law upon all this matter aforesaid.

And, upon this matter, all the justices were assembled in the Exchequer Chamber whether the abbot will be discharged of this corody or not. And divers points were moved there etc.

And, to the first, it was moved by the serjeants of the king that the petition is double. One matter is that the abbey is not of the foundation of the king nor of his predecessors or progenitors, but of the foundation of another, a private person, and that it was forfeited to the king and, at least, the patron-

[1] J. R. Maddicott, `Montfort, Simon de, eighth earl of Leicester (c. 1208-1265)', *Oxford Dictionary of National Biography*, vol. 38, pp. 800-809.

age, among other lands and tenements seized, by the King Henry III, so that the king who now is, by his prerogative, nor by the common right of his prerogative, is not to have a corody. And, thus, it is a matter for the maintenance of the petition in right to have the abbey to be discharged of the corody. And such matter is sufficient matter of right for the discharge of the corody etc.

Another matter is that whether the King Edward III will discharge the abbey of such corody due to him, where or because he was the founder of this abbey, thus, even though the possession of the corody had been had after this grant and patent, yet this possession will not cause the corody to be of right but yet notwithstanding such possession, still upon the matter of the patent that made a discharge in the right of the corody, the petition will be maintainable to have a discharge in right etc.

And, also, by the petition, it appeared that it is alleged that one Robert Melain, before the time of memory, founded the abbey of Leicester, which matter cannot be tried, nor lies in trial; thus the petition in this cause is void. And, also, it appears by the petition in itself that, in the time of King Richard II, at his prayer and denomination, where such a one etc. was admitted to a corody and he had it by the common and convent seal, in which case, the house is always charged to the king because of their grant to such a one by their common seal at the request and denomination of the king, even though it was only of another foundation, either as above or as the King Edward III will discharge the house of the corody by his patent, so that the possession afterwards of the corody at the desire of the king to one by their common seal, it will be barred for all times in their petition of right etc.

And, also, for another cause, this petition of right does not lie, because, it does not appear by the petition, by any matter included in it, that the king that now is had any servant or person in possession of the corody at his nomination or of any of his predecessor kings.

And, also, it does not appear that the king has written to them for any corody, in which case, it does not appear by their petition expressly that they are aggrieved nor vexed for the corody by the king, in which case, thus, their petition fails etc.

And as to the first cause, of the doubleness of the petition, it was held single enough, because, in the petition, it was only the King Edward III reciting by his patent that where such a one at his nomination and desire was received to a corody of this abbey that it will not be taken in example at other

times against the abbey, and, in which case, those words are not a discharge to the abbey of the corody, and, on account of this, the petition, as to this point, was held good enough etc.

And as to another cause of the alleging of the foundation by one Simon Montfort of this abbey before time of memory, that the petition is not good as to this, where, because it cannot be tried, the petition was held good enough as to this, because matter after it after time of memory is shown enough sufficient matter how Sir Simon Montford was the founder of this abbey and because he levied war against the King Henry III, for this, the King Henry III seized all his inheritance and possessions etc., so that enough matter sufficient after the time of memory (and [it is] triable well enough) is shown proving that the king, and how the king, is the founder of this abbey etc. And, on account of this, the petition, in this point, is good enough, as the king came to this foundation by another right and not by reason of his own foundation. Thus, the matter in this point is sufficient enough, proving that the king will not have the corody of this abbey by his prerogative, because it is not of the foundation of the king or of his predecessor kings etc.

And, as to the other two points, according to some, the petition does not lie, because, by their common and convent seal, they admitted such a one to his corody. Now, by their deed, they have charged themselves forever and by their own folly, because, even though the king wrote to them to have a corody to such a one, they are not bound to give it or to receive the donee of the king to it if they be not of his foundation. But they can allow the process to go to an *alias, pluries*, and then to an attachment to return and certify their title of right how they are of another foundation and not of the king, and thus can they excuse etc. But, if they release this advantage and receive as the king writes and wills such a one to his corody and, by their common seal, as the use is, and as all to be, yet, afterwards, they cannot discharge themselves of it, but they are bound by it, because they had a time to have discharged themselves, which they passed by their admittance of their common seal etc.

And as to the other point, he thought that the petition does not lie upon the matter for this which does not appear because some person is in possession of the corody by the desire, nomination, or writing of the king or of his progenitors or predecessor kings, in which case it appears that the abbey is not aggrieved nor charged. And because it is not damaged by the king nor by others, his progenitors or predecessors, he thought, on account of this,

that his petition does not lie, nor is it maintainable. And it could be that the king would never write or desire a corody of the abbey. And, thus, until it be aggrieved or damaged or be charged, he thought that the petition does not lie, because he sued a petition before he had a cause [of action]. And, thus, the petition is sued without cause. Thus no original shows upon which the petition lies. And, by the petition, it does not appear that any corody was given or any man received to a corody there after the time of King Richard II, that he was seised of the gift of it etc.

And, if the king presents to my advowson and is seised and, afterwards, the church is void and I present and my clerk is in, now, I were in possession again. And, if, during this possession in me, I will sue a petition of right to have a discharge of the king of the possession or of the title that he has, I will not have it, because I was not aggrieved, because I was myself possessed. But, if the presentee of the king be in in the church so that I were aggrieved, now, I will sue my petition to be restored. Or, if the king seize my land, I will sue by a petition, because I sue to have a judgment to be restored to my land. But, where I myself was seised of my land and the king is entitled by an office or other matter of record of this land and [there was] no entry upon me so that I be in possession, I will not have a petition until I be ousted. But, if I were ousted by the course of the common law, I would be put to my petition. And, now, when I be ousted by an office, I will tender my traverse and take it first by a patent, but the traverse I will not have until I be ousted, because I be not prejudiced until I be ousted by the office. And, if a man receive land against me by default, but, after the default, he does not enter upon me but I continue the possession, I will not have a writ of right or a *quod ei deforceat* until I be ousted, because, even though judgment be given against me and thus I [be] bound by the judgment, yet, notwithstanding such charge, I will not have an action until I be aggrieved by an ouster, because, if a *praecipe quod reddat* be brought against me and I vouch over another who enters in the warranty and cannot bar the damandant, by which he has a judgment of record against the tenant and the tenant over in value against the vouchee, but the demandant does not sue execution against the tenant, the tenant, on account of this, will not have anything in value against the vouchee until the damandant has execution against him, because he is not at a loss, prejudice, nor charge while the land is in his possession.

And also, where there be two neighbors and [they] should enclose, the one will not have a *curia claudenda* against the other unless a damage or prejudice be done by one or the other. And also, the tenant will not have a *ne injuste vexes* against the lord before he be distrained, so that his matter proves that he is aggrieved; then he will have his writ of right for his discharge etc.

After, others thought to the contrary, that the petition, as to this last point, lies well enough, because the matter of the petition proves that the King Richard II was in his possession by his writing for his servant who was received to the corody and under the convent seal, as the common usage is to receive him thus to the corody, in which case because of this possession, the abbey is charged in right to this corody, *scil*. at the gift of the king, so that the gift is in the king by this possession, notwithstanding that it is of another foundation, which right and possession of the gift the king, who now is, has. And because of this possession, the king can write to the abbot when he wishes and they will be bound to receive him whom the king will have whether they wish or not, because the possession that is in the king by the admittance of one to the corody suffices to charge the house to have the corody at the nomination of the king when he will write, so that, in possession, the house is charged of what they cannot have a remedy except to have their discharge by their suit of right, which is a petition of right for them etc., because, even though no man is seised and in possession of the corody now at this time by any gift of any king before, yet, because it appears that the King Richard II had such a one admitted to the corody by his writing, command, and nomination, now because the King Richard was possessed of the gift to give it at another vacancy, which gift is now in the king, of which the petition for them to be discharged lies, because against him who has the corody, even though once possessed of it by the gift of the king and the receipt of the abbot, against him, the petition does not lie, because, of this title or possession, the petition does not lie, because the abbot did not demand the corody, but the abbey, to be discharged of the corody, who must be sued against the king who is the tenant of it, *scil*. who has the gift of it. And, thus, in the case above, the gift of the corody being in the king, it will cause the petition to be suable, because they are chargeable with the corody. And to be discharged in the right of it, the petition is sued, because, in the case that is put above, where I be seised of an advowson and the church is void and the king presents

and his clerk is instituted and inducted, now, on account of this, the king is in possession of the advowson even though he did not have good right and whether the church, after this, be full or void, I will have my petition to the king to be restored, because of this of which my petition lies, it is the advowson, which the king has by his possession, and not the presentment, because in this same case above, where I have a right to an advowson, as above, and, afterwards, the church is void and the king presents and his clerk is admitted etc. and, afterwards, the church is void again by his death, even though the church be void, yet I will have my petition to the king, because he is in possession of the advowson and it lies in his gift to give the presentment and this church to a person. And, be the church void or full, I will have my petition, because I will not wait until the king presents again, because it could be that he will never present.

And thus, it could be in the case above of the corody that the king will not give or write for the corody. But, even though he do not present or write for the corody, yet *nullum tempus occurrit regi*; but he can when he wishes. And, on account of this, my petition to have my right, I may have [it] at any time when I wish, because the king is bound to do right to every man and, of right, the abbot must be discharged. And by another way, he cannot have a discharge except by this way to have a judgment in his petition to be quit and discharged of such corody against the king and his heirs etc.

And there are divers cases that a man will have an action and yet he has his land in his own hand, as if a man recovers against me by a false oath or an erroneous record and he has his judgment; after the judgment, I will have an attaint or writ of error, even though I be seised of the land, because, by the judgment, the other will enter upon me at his will. Thus, I be only a tenant at will, but yet, even though I be not ousted, I will have my writ of error or attaint because of the charge and prejudice that lies upon me by this recovery and record.

And also, in divers cases put before, an action lies for a man even though he is not well aggrieved, as in *ne injuste vexes*, it supposes that he was distrained for other's services etc. And he will have this action even though he was not distrained, because this surmise is not traversable. And, if he be distrained, now, he can in this action receive his damages.

And also, in a *curia claudenda*, he will suffer the prejudice and will cause the other to enclose, and this surmise is not traversable. And also, in a writ of *curia claudenda*, it can be in the right, *scil*. the *debet*, as in the *debet et solet etc*.

And thus, in a writ of warranty of charters, he will have it and recover *pro loco et tempore*. And such an action is maintainable. And yet perchance, he is not impleaded nor ousted from his land, *scil. quia timet se implacitari*, but, for the charge which is to be upon him, even though he has not lost [anything], yet the law favors him to sue his writ of warranty of charters.

And, thus, it is in a writ of *mesne*. This will be maintainable even though he had no wrong or prejudice done to him, as perchance, where the defendant traverses that he was not distrained in his default, the plaintiff recovers his acquittance etc.

And thus it is, if a man sue [an action of] *replegiare* and the defendant appears and makes an avowry and has a return awarded, now, after the judgment to have a return, the plaintiff can pray for his writ of second deliverance. And yet the plaintiff himself had the cattle delivered to him by the *replegiare* and they are in his power. But, for the charge that lies upon him by the judgment, the plaintiff will have his action as above.

And thus it will be in a case put above, where an office is found for the king of my land, even though the king is not seised or that [there is] no seisin or entry for him, escheat nor other, yet, in law, the seisin and the possession is in the king. And thus, I be chargeable at least for the issues to the king after the office found, in which case, for the charge that is and lies upon me, I will be received at my petition well enough, even though I be seised, because my seisin is worth nothing against the title of the king in this case.

And thus, in the case above, by the possession of the corody that the king has by the gift, which right and possession is now in the king who now is, this gives sufficient cause to the abbot to have and sue his petition to have a discharge of that which lies in charge upon his house.

And, as to the other point, if the king writes for his servant to have a corody and to the *alias* and *pluries*, one is accepted and sealed by the convent, as above, where, of right, the king should not have a corody, and, afterwards, the abbot or the prior or, at least, the successor sues his petition, notwithstanding such possession of the king, to be discharged etc. and he has judg-

ment to be discharged, now the servant will not be ousted, but [a writ of] *scire facias* will be directed against him to come and answer why he should not be ousted and he will not plead another plea unless it be proving the right of the king, because if he could prove the right of the king to make such a gift, he will have it. And yet he thought that it is harsh that he will plead where the king has not made any title but discharged the house upon his petition and by the *scire facias* against him, he will be ousted because the title of whom he claims is ended. And thus his power will be ended also, even though he has the convent seal, because, as to the common seal, it will not be a title to him, because his donor had lost his title. And then he cannot have a title which is only accessory. And also, even though he had it by a common seal, it does not matter, but he will be ousted, because, at the time that he was admitted and had his corody by the common seal, at this time, the abbot could not deny it, because he was coerced to do it. And because he will be coerced to act by the writing of the king by often writing, as by *alias* and *pluries* and attachment, thus he cannot choose but by coercion he is forced to it. And, afterwards, yet if he sues his petition to the king and he is discharged of the right of the corody and discharged and acquitted by a judgment of the corody, now the title of the person who had the corody is ended. And he will be ousted but not without a *scire facias*. And the law will be the same of a patentee of the king where the king is seised of my land by an office or other matter of record and, afterwards, he grants it by a patent and, afterwards, I sue my petition and judgment is given for me, the patentee will not be ousted by me without a *scire facias etc*.

And thus it will be in the case above of a corody, if, upon his petition to the king, judgment be given that he be acquitted of the corody etc., the donee will not be ousted, as above, because he is a stranger to this record of the petition, but he will be ousted by a *scire facias*, because the judgment is and will be that the abbey will be and is discharged of the corody, which cannot be unless he be ousted and thus, in right and in possession also of the corody, the abbey will be discharged and acquitted. And, thus, he will have his judgment etc.

And another case was in the Case of the Prior of Bath. Such a petition was sued to be discharged of a corody, and one was in as donee, in the corody, by the gift of the king and by the convent, as the use is so to do. And, upon the petition, judgment [was] given for the prior and a *scire facias* was

granted against the donee. And it [was] returned [that he was] garnished, and he made default. And judgment [was] given that he should be ousted. And, afterwards, by the assent of the house, it was said that he was allowed to have the corody. But this was not [by] the rigor of the law, because, in the nature of a *scire facias*, it is, if the defendant be returned *scire feci* and he does not appear, he will lose by default because he was summoned etc.

According to some, at this same time also, [it was held] that where the king is founder as of his own foundation or of his predecessor kings, of common right, he will have the corody, and this common right is by his prerogative.

But yet, in this same case, it was said that a man can have a prescription against it, to prescribe that they should be discharged of the corody so that he will not have a corody etc. And thus he can discharge him[self] by prescription, because it could have a legal beginning, *scil*. before the time of memory discharged of a founder king that the abbey will be discharged of the corody or pension for his clerk, because, at this day, a man cannot have a warren, except by a grant of the king, yet, by prescription, one can have [it] because it could have a legal beginning at first before the time of memory. And so a man can have a leet by prescription or a park or view of the frank pledge, and yet, if a man will begin it at this day, he must have a grant of the king and a patent etc.

Thus, if the king be seised of a corody at this day, against this seisin, the party will not have a discharge by prescription, but he must have a grant of the king of discharge or by a petition [of right]. But, if the king had been at no time seised of the corody, then this prescription will be a good discharge. But where the king is to have a thing by matter of record, prescription does not lie against it etc.

According to others, [it was] thought that the law is [to the] contrary, that a man cannot prescribe in this point against the king, because it is against the common right due to the king, because, where the king is founder of an abbey or priory as of the foundation of the king, of common right, he will have a corody etc. And, if he will have it of common right, even though he nor none of his predecessors have been seised, this is not carrying a discharge to the house, *quia nullum tempus occurrit regi*, so that the king can give the corody at his will, which he will have of common right. And no prescription will prejudice him without more in any such case, no more that if the abbey

or priory be founded by the king within time of memory, even though he had not been seised of a corody. It does not matter, because he can and will have it when he wishes. No more will he be barred of his corody where it was founded before time of memory, even though he had not had possession of the corody after time of memory.

But perhaps, where he is founder before time of memory of an abbey or priory and also there was a patent before time of memory having special words, as it was in the Case of the Prior of St. Bartholomew,[1] where he had a patent to be discharged of *escu et potu* and this patent was made before time of memory and, with this all[owance], it was the use afterwards for all times and thus by prescription and use after time of memory with the grant before time of memory, such matter and prescription can make a good discharge, because the grants [were] made in former times; if they were made at this day, they will be void. But those made before time of memory by general words and the use after, this has made the grant good. And certain liberties and franchises used, on account of this, and good etc.

But to prescribe in a thing that is to pass or a claim by matter of record, this a man cannot do unless he grants before the time of memory or records before the time of memory and the use [is] after. These two together are a good title, or allowance by matter of record after time of memory, because, if a man prescribe to have *catalla felonum et fugitivorum* or to have cognizance of pleas, he cannot have it by prescription, because the king himself cannot have it except by matter of record. And, on account of this, another [person] will not be in a better condition, but he must have a matter of record or that which amounts to as much, as to have a patent or record before time of memory and the custom and use after or to have a grant and a patent or record of allowance after the time of memory. And, otherwise, he cannot prescribe.

And thus, for another law, it will be similar in the case of a corody. A man will not prescribe to be discharged against the king in it where he is founder from the time of which memory [does not run] anymore than of a foundation by the king within of memory, because *nullum tempus occurrit regi etc*.

And, afterwards, it was said to the King's Attorney and the King's Serjeants by the serjeants, either he should demur and stand there, as he has

[1] *Rex v. Prior of St. Bartholomew's* (1436), YB Trin. 14 Hen. VI, f. 11, pl. 43.

done or that they have done, or, otherwise, they should traverse for the king etc., because the king can relinquish this demurrer in law of the matter in law and waive it and take his traverse to the matter surmised in the petition.

And it was said by the King's Attorney [*Sotehill*] that he would not change, but he would stand by that which they had done before, because they do not have other matter, because, in truth, the matter is such as the petition is sued etc.

And, then, the justices said, then, we will be advised in this matter.

And it was shown at the same time that another petition was formerly sued by this same abbot and his convent upon the same matter as this is. And this matter was argued whether the convent should be named or not. And it was held that the convent will not sue nor be sued in this case etc. And, on account of this, the abbot sued to the king and had a privy seal directed etc. giving power to amend his petition according to the law. And thus it was done as a new petition sued by the sovereign of the house only, which is the petition as above.

And the petition, above, was challenged also, because, in the petition, it was not prayed that the king himself discharge the corody, but only, upon his matter, all included in his petition, he prayed that the king should do him right in it and that he be discharged of the corody. And on account of this, the petition is good, to which it was said by the counsel of him who sued the petition it is enough to say that the king should do him right and, in this, it is included that he prays to be discharged of the corody etc. And, Sir, now we pray to be discharged of the corody.

And the petition was viewed and the entry of the demurrer for the king by his attorney etc. and the demurrer of the party also. And, in the conclusion of this entry, it was prayed for the party that right be done to him by the king and that he be discharged of the corody etc. And the justices went their way, *ut supra, etc*.

And, afterwards, at the next day in the Exchequer Chamber, the justices being there, then, it was agreed among them that the aforesaid petition, as to this that no mention is made in the petition of any servant being now in possession of the corody by any request or command of the king or that the king had not written to them for any of his servants to have a corody is good enough, because it is shown that the King Richard II, in the petition, by his writing had his servant admitted to the corody there, thus the possession is in

the king who now is, because that which the King Richard II had by the gift and admittance of this right and possession of the gift of the corody is in the king who now is. Thus, he can well write to the abbot for his servant to have the corody when he wishes and the abbot cannot discharge himself because of the possession had before. Thus, the abbot is chargeable in fact as the king wishes, and to discharge it, *scil.* the charge which is in fact and which lies upon the house, their petition well lies etc.

Choke, Justice [C.P.], showed to his companions thus that the same case and such a case was in the matter of the Prior of Bath, where he sued such a petition to be discharged of a corody etc. And, in his petition, no mention was made of him who had the corody by the request of the king and the admittance of the house. And the petition [was] good enough notwithstanding this. And it was tried for the prior according to his matter of the petition etc. And after it was discussed between the king and him upon his petition, he prayed for a *scire facias* against him who was possessed of the corody. And by great advice, it was granted.

And, thus, in the case above, the petition is good enough, because it is shown that the King Richard II had one admitted to the corody, in which case, it will be taken that it is still fully alive and [he is] in possession of the corody unless the contrary be shown. And even though it is not possessed, still the petition is good enough even though it neither shows nor makes mention of him who has the possession because there is enough matter before proving that the king is possessed of the title and gift to give the corody, which is sufficient cause to maintain the petition, because it is not reasonable to delay their petition as they are chargeable, as appears above, because, if the petition be not sufficient, they then would be delayed without reason, where, of right, they should be discharged of it, because the king could write to them to admit such as he wishes to the corody, whom they could not deny, because the possession is the title sufficient for the king, which possession they will not discharge upon the writ of corody sent to them by the king. But by the *alias, pluries*, or the attachment upon it, at most, they will be coerced to put it, because the possession cannot be discharged of them except by a petition upon the right etc. Thus, if they will not have this petition, but if it should abate, and, then, the king write for his servant to have the corody and them after this admission to put them to a new petition and by it given their discharge from the king of the right and, then, by a *scire facias* to have the servant

out, it would be circuitous without reason, which will not be allowed, because it is better to discharge him now by his suit, which is in the right, because he demands right to be done to him. And this is to be well discharged of the corody demanded where due to the king to give in possession because of the possession before in his predecessors etc. And of such possession in the king of the corody, the king can grant it to another, to him, and to his heirs etc.

And this was denied by several of the justices, because, where the king should have a corody as founder by his prerogative of common right, it belongs to him, but it is harsh to grant it to another in fee or otherwise, because he can grant his prerogative to no one.

Choke [J.C.P.]: Where the king is seised of an advowson or where another man is seised of it and he grants to me and my heirs to name the parson etc. so that I have the nomination of those who will be parsons, now, no one will be the parson but such as I name etc. because he could not be so before I should by the grant name him who would have the corody.

Yelverton [J.K.B.]: In your case of the nomination of parsons, you are the patron and your [writ of] *quare impedit* will be *quod permittat eum praesentare* and not *nominare etc*. But this right that the king has to name who will have the corody, this he cannot grant as he cannot grant his prerogative.

Choke [J.C.P.]: I saw once such a grant by the king. And it was made by great advice.

Yelverton [J.K.B.]: It has need of great advice truly, because it is harsh for the king to grant it to another except as his prerogative is to write for him who will have it by his name and the abbot or prior, by the writing and command of the king, to admit him to the corody. But, for the king to grant the nomination to another, *scil*. that the grantee will name and will write to the house to admit him whom he names to the corody, this is harsh etc., because it is the prerogative of the king which cannot be dismembered from the person of the king etc.

And, afterwards, the justices were agreed that the petition was good enough even though it did not prove that the king had any servant to admit to the corody. And it was said by them all there, of land demanded by a petition, it will be otherwise, because, if the king had made a lease of land that I should have to another a term for life, it is necessary for me in my petition to make mention of the life tenant, because I will not have a *scire facias* against

him, *scil*. the patentee, unless he be named. And thus, in the petition, it must be shown and proved that he had the freehold and where the freehold is.

And, then, it was said by the King's Attorney [*Sotehill*] whether he had other matter for the king or not, so that he will stand here and not pass further.

And he said, Sir, I have no other matter but such that was touched upon the other day, because, in truth, this abbey was of the foundation of the ancestors of Sir Simon de Montfort and, for the levying of war by the said Sir Simon de Montfort, it came to the King Henry III, as is shown etc. And he thought that now, as it is annexed to the crown, that now the king will be of such like condition as if it had been founded by himself or by his ancestors kings, because, if the king gives me a license to make an abbey or priory and, afterwards, I die without an heir so that it escheats to the king, he thought that now the king is founder, because by the license given to me to make such a foundation by the king or his predecessors and after the founder dies without an heir, now, it returns to the crown again so that the king is the patron in the right of his crown and he will have a corody there, because he is founder in the right of his crown as of now, because it issues out of the crown and now is come back. And thus he thought in the case above, at first, this license of the foundation issued out of the crown and, by the forfeiture of Sir Simon de Montfort, it was annexed again.

And it was said by the justices that thus it could not be here before, because this foundation coming to the king because of the levying of war by Sir Simon de Montfort, and, thus, this foundation is not in the king but of another right. And, if you can show that this foundation was first of a king before time [of memory] and, afterwards, granted by a king to a man and his heirs and, afterwards, came by escheat to the crown, this will be another matter. But [it is] not so in the case above etc., because this foundation was by the ancestor of Sir Simon and not by the ancestors of the king etc. And, by the forfeiture of Sir Simon, it came to the King Henry III. And, by the Statute of Kenilworth, it appeared how Sir Simon levied war against the king and how he was punished etc.[1]

And, afterwards, the King's Attorney [*Sotehill*] showed how it appeared in the petition that one such abbot, by the common assent and the seal of the convent, admitted such a one at the *rogatum regis, scil*. in the time of the King

[1] Dictum of Kenilworth (*SR*, I, 12-18).

Richard II and, thus, they are perpetually bound etc. And at this time, when the King Richard II wrote to them this writ of corody, the abbot could have come in and pleaded and have his discharge. And, because he had a time and did not do it then, but admitted the servant to the corody at that time and under their convent seal, it will be a charge to them perpetually, as he thought that they not discharge them afterwards etc.

And the justices agree now to this point, because by the writs of the king awarded and the *alias* and *pluries*, the abbot will be bound, whether he would or not, to admit him who the king named to his corody. And also he will be received to have it under the common seal, because thus the king wrote to them. And thus he will have it, because, otherwise, he could not be sure or have a sure estate. And thus he did not have a time to plead nor to discharge the possession of the king. And thus such admission is in a manner contrary to their will. And, at least, by another title, *scil.* the desire of the king, for which, if he sues his petition of right after to be discharged of this possession had by the king and his petition goes and [is] tried for him, then he will be discharged of the corody in right and possession. And thus the title of the king [is] defeated, by which the servant who has the corody is in; then, afterwards, he will have a *scire facias* against him who has the possession, and he will be ousted, because the right of him by which he is in and the title by which he is in is defeated and ended. And, thus, he will be ousted, because upon the record by the defendant against me where I was not tenant at the time of the record, but I purchased the land afterwards, I will falsify the record in a *scire facias*, to say that I had nothing at the time etc. but I have such a *que* estate, because I did not have a time to plead before this non-tenure. And thus it will be where non-tenure is not a plea, as, in *scire facias*, non-tenure is not a plea, because, if a *scire facias* be brought against me and I be not a tenant and it is recovered against me, I [can] falsify the recovery against me afterwards by this plea of non-tenure, because I did not have a time beforehand to plead this plea. And thus, in the case above of the abbot, where he did not have a time to plead his matter because of the possession of the king, on account of this, in his petition afterwards, he will have his remedy well enough even though the servant was admitted by the common seal and the desire or prayer of the king as founder where he was not, as above. And thus the servant will be ousted after the petition by a *scire facias etc.*, because they could not do otherwise at the time of the admission etc.

71

Anonymous
(Ch. 1465)

Where the matter of an office found is proved to the judge, anyone can traverse the office, but not where the matter is merely alleged by a party.

The king cannot be enfeoffed by a deed without an enrollment of record, because no livery can be made to the king.

YB Mich. 5 Edw. IV, f. 7, pl. 15

It was found before the Escheator that J.S. and his wife, by a deed (shown to the jurors), enfeoffed the king in fee to their use. And, at divers days, it was moved to the Chancellor to have the office argued whether it be sufficient, by which the Chancellor assigned a day in the Exchequer Chamber.

And the serjeants of the king said that the matter should not be argued [in the Chancery] because no certain person will be traversed not showing how he is prejudiced by the office.

The Chancellor [Neville] and Stillington: There is a distinction where the matter appears insufficient to the judge by the matter contained [within the office] and when *dehors* by an allegation, because, where it appears by the office to the judge, anyone will be admitted to [traverse] *ut amicus curiae*, but not in the other case, which was affirmed by all the justices, as, in the case of an insufficient indictment or an exigent awarded where no exigent ought to be granted, the justices *ex officio* will send [a writ of] *supersedeas* for the information. Thus, it was ruled that the office would be read and [its sufficiency] argued.

And it was mentioned that it was not sufficient, because the king cannot be enfeoffed by a deed without an enrollment of record because no livery can be made to him. And this was the opinion of all of the justices. *Quod nota*.

Catesby: *Non constat* if this deed be enrolled or not until a search be made.

Markham: Then, this is a sufficient matter for the king. But the office taken is void because the office could not find a matter of record, as an outlawry etc.

Another matter was moved that the office was not sufficient because it said to the use of J.S. and A. and the king cannot be enfeoffed to the use of another.

Sotehill: This term `to the use of' is not material, because, if a stranger be enfeoffed to my use, I have nothing in the land, but he will have the fee simple, and the writ will be brought against him.

Markham: But you will be returned and sworn on a jury. If I enfeoff one of land to my use and I die and the king seize my infant heir and this is found, I will have livery during the seisin to my use.

And all the opinion [of the court] was with him.

Markham showed that such a deed by the husband and his wife was not received in the Chancery no more than a fine.

And, at last, it was held clearly that the office was void and that the party aggrieved would have an assize if he be ousted. And it was well argued in the Exchequer Chamber whether [a writ of] *supersedeas* would issue. And the opinion was clearly that a *supersedeas* would issue, by all the justices, and that the *supersedeas* would rehearse the patents granted to the patentees that they not intermeddle. *Quod nota etc*.

72

Note
(Ch. 1465)

If a purchaser from a trustee has knowledge of the trustee's breach of trust, the purchaser will be ordered to perform the trust himself.

YB Mich. 5 Edw. IV, f. 7, pl. 16,
Cooper's Practice Cases 522, 517, 47 E.R. 632, 630,
Baker & Milsom, *Sources*, p. 97

If J. enfeoffs A. to his [own] use and A. enfeoffs R., notwithstanding that he [A.] sells to him [R.] etc., if A. gives notice to R. of the intent of the first feoffment, he [R.] is bound by a writ of subpoena to perform [J.'s] will etc. But, if a tenant in borough English enfeoffs one to the use of himself and

his heirs, the youngest son will have the subpoena and not the heir general. Item, if a man makes a feoffment upon trust [for himself] of land which descended to him through his mother and dies without issue, the heir on his mother's side will have the subpoena. But, if the tenant of a special estate tail makes a feoffment to his own use without declaring his will and dies, the remainderman will have the subpoena. But, if a tenant in tail with remainder over [in fee] makes a feoffment of a trust without declaring his will and dies, the remainderman will have the subpoena. But query this. But, if a husband and wife are seised in the right of his wife and the husband makes a feoffment without declaring his will, the wife will never have the subpoena.

73

Anonymous v. Hickford
(Ch. 1465)

The question in this case was whether a sister was the heiress to her brother who was only a beneficiary of a trust of land.

YB Mich. 5 Edw. IV, f. 7, pl. 17

Richard, earl of Warwick,[1] had issue, Henry[2] by one wife and three daughters by another wife. And he enfeoffed J. Hickford and others to perform his will and then to enfeoff his heir. And he made his will and declaration, and he died. Henry died. Now the will was not performed, so that, to carry out the will, they would make a feoffment.

Query whether the subpoena will be brought by one [daughter] alone so that she will have it or by all the sisters. And it seems that [the subpoena will be brought] by one alone, because she could have had a subpoena on a

1 C. Carpenter, `Beauchamp, Richard, thirteenth earl of Warwick (1382-1439)', *Oxford Dictionary of National Biography*, vol. 4, pp. 592-595.

2 C. Carpenter, `Beauchamp, Henry, duke of Warwick (1425-1446)', *Oxford Dictionary of National Biography*, vol. 4, pp. 588-589.

bill supposing that J. Hickford and others were seised to the use of the Earl Henry, without speaking of Richard.

But a distinction was put where they were enfeoffed and where not, because, here, the will was declared, so that they were not enfeoffed, so that Henry could not have taken the profits, but the feoffees could take [the profits] in conscience by reason of possession, because where, in conscience, a man ought to take the profits, notwithstanding that others are feoffees, such taking of the profits is also such a possession in conscience, *quod possessio fratris facit sororem esse haeredem in feodo etc*., as, in the common law, a true possession in demesne.

But, then, it was said that this Henry ought never have taken the profits until the will be carried out; so, no possession in conscience could make his sister inheritable against this and to the first intent, yet it seems to me that one ought to have the subpoena, because there is a distinction between a will that extends in the nature of freehold and a will that extends in the nature of a term, because if the will be that a stranger will have the profits of the land during his life, then Henry will not have the profits until after the [stranger's] death. So, [it is] in the nature of a reversion after the death of the life tenant, where *possessio fratris* has no place. But the will of Richard was that W. would pay certain debts and would make a charter that would be terminated and executed in certain years, as if he said that a stranger will have the profits during twenty years; now, it will be as at common law, as where the ancestor has leased for a term of years and died; yet this is possession and he will be said [to hold] in demesne, so that possession will make the sister to be heir. So here, etc.

74

Anonymous
(Ch. 1465)

The question in this case was who has the right of escheat where a tenant creates a trust for his own benefit and then is convicted of a felony.

YB Mich. 5 Edw. IV, f. 7, pl. 18,
Baker & Milsom, *Sources*, p. 97

If there are a lord and a tenant and the tenant enfeoffs one [to his own use] without an express purpose and commits a felony and is attainted, query who will have the subpoena, because the lord will not have it.

75

Anonymous
(Ch. 1465)

Where a grantor creates a trust for himself, he can devise it or alter it. But, if the trust gives a right to a third person, such as an entail, he cannot afterwards change it.

YB Mich. 5 Edw. IV, f. 8, pl. 20,
Cooper's Practice Cases 558, 47 E.R. 649,
Baker & Milsom, *Sources*, p. 98

If one enfeoff another [to the feoffor's own use] without delimiting the intention and he will make a will afterwards, the last will shall be observed. But, if the feoffment was made with any certain intention, this shall be observed without variation. Unless the intent be to the use of the feoffor and his heirs, he can vary and do it without a new will, because a stranger does not have an entry. It is otherwise if it be done with the intention of taking an estate tail to himself, [then] he cannot vary it, because it is not the same as a general estate.

Cary 11, 21 E.R. 6

When the use is to the feoffee and his heirs without any other intent, there he (the *cestui que use*) may declare his will thereof and may vary [it] at his pleasure. But, if it be to any intent certain, as to take back an estate tail, or with remainders to others, then he cannot change it, for the interest that is in others.

76

Anonymous
(Ch. 1465)

Upon an incomplete return by a coroner of an outlawry, it will be deemed that the outlawry was done properly.

YB Mich. 5 Edw. IV, Long Quinto, f. 116, pl. [41]

A [writ of] *certiorari* issued out of the Chancery to the Coroners of the County etc. to certify whether there was any outlawry against Thomas C. etc. and, if there was any, to certify *qualiter, quando, et quomodo*.

And the matter of an outlawry was certified into the Chancery by the Coroners as appears here.

And by [a writ of] *mittimus*, it was sent into the Common Bench.

And as to the manner of the outlawry, it was certified in this manner, that Thomas C., before named, at the fifth county [court] of etc., held at such a place within the same county, was demanded to appear in an action taken upon the Statute the eighth year of Hen. VI[1] in the Common Bench by such a one and he did not appear, by which it was awarded that he would be outlawed etc.

And *Genney* showed this matter to the court before and how, out of this court upon this outlawry certified as before, a [writ of] *capias utlagatum* was awarded, by which he prayed that, because this outlawry appeared in itself that it was not good because of the four county [courts] held there was no mention made in certain nor in what action this outlawry was pronounced etc. nor that the exigent was awarded, but it only certified generally the outlawry, except by the fifth county [court] etc., in which case upon this, it is taken now that no exigent was awarded, except that which had been certified. And also, the certain action was not shown, so that the writ of *certiorari* was not served nor [does it] return *qualiter et quomodo*. And, at least, the outlawry appears bad in itself. And, on account of this, we pray a [writ of] *supersedeas quia erronice emanavit etc.*

And it was held by the better opinion of the court that, upon this, it will be understood the better for the king that an exigent was awarded and that

[1] Stat. 8 Hen. VI, c. 10 (*SR*, II, 246-248).

the four county [courts] were held, and he was demanded at them. And also, it will be understood for the king that this outlawry was on a certain original writ, so that the uncertainty of the return of the *certiorari* will not prejudice the king and, at least, even if the outlawry was not other but as before, yet it remains in its force for the king. This will be understood good enough until this be reversed by a writ of error. And on account of this, if the party outlawed would have any remedy, he ought to have his writ of error etc., because neither the Court of Common Bench here nor no more the Chancery can redress nor reverse this outlawry, but they will hold this good for the king, while it remains in its force, because if [writs of] *capias, pluries*, and exigent be awarded and the defendant be outlawed, if the defendant does not appear at the day, the exigent is returnable here in the Common Bench to reverse the outlawry, but this day passes and he appears at another day afterwards by process or otherwise, [then] he is put to his writ of error to reverse this outlawry, because, for the king, this will be held good enough until the outlawry be reversed by a writ of error, because, by way of warrant or answer, thus, it will not be reversed etc.

77

Anonymous
(Ch. 1467)

If a demurrer was filed by the king, the king can withdraw it and plead in bar.

Where a plaintiff has alleged in the Chancery that there is no record whereby the king shall be entitled and this is not dened, it shall be taken as true.

If a tenant of the king alleges that the king granted to him and he prayed aid and a search of the records is made and no evidence is found for the king and the case proceeeds and it is found against the tenant, this will not bind the king.

64 Selden Soc. 1

Hilary term 1467.

In the Exchequer Chamber, *Pygot* rehearsed the aid prayed of the king, which was granted last term in a writ of *de quibus*, and how the demandant had in the Chancery alleged that there was no record by which the king was

entitled, to which the King's Attorney had answered nothing. And the question is whether or not they ought to make a search for the king, notwithstanding that the King's Attorney had not made a rejoinder.

Markham [C.J.K.B.] and Yelverton [J.K.B.] said that the aid was wrongly granted, inasmuch as the attainder and the office taken thereon was in fact alleged, because, by the letters patent, it was evident how, by such special cause, they came into the king's hands. But it would be otherwise if such cause had not been mentioned in the patents, for, then, it would be understood that the land granted was in the right of the crown.

Choke [J.C.P.]: There is a difference when the king grants a manor *ex mero motu*, reciting that it came to him by such a forfeiture, but which he had by feoffment from so and so, and when he grants a manor upon a like false suggestion made to him in a petition, for, in the first case, the patent is good, although the recital may be false, because it is granted of his mere motion, but, in the second case, it is not good because it is granted on the suggestion of the party. And, further, it seems that aid was rightly granted because, if the tenant sues a *scire facias* on an earlier patent etc. to repeal a later patent, the second patentee shall have the aid of the king, and yet the second patent *prima facie* appears void. And this is a more unusual case.

Markham [C.J.K.B.]: Truly, it is the same, and the patents are repealable in both cases.

Choke [J.C.P.] [was] strongly to the contrary.

Markham [C.J.K.B.]: No, Sir, he shall not have aid, for, although the tenant for term of life by grant of the king grants me his estate and, in defiance of his lease, disseises me and I bring an assize and he prays aid, I say that I shall show the matter and oust him of his aid, because this confirms the king's patent.

Choke [J.C.P.]: It is not the same, for, in my case, the second patentee can show in the Chancery how the first patent was granted within the month or that no office was found. And it was thus adjudged in the time of King Henry VI in the case of Lord Dudley. But, in your case, he affirms the patent etc. And, further, it seems to me that a search shall be made although the King's Attorney has not made a rejoinder, for, at common law, he shall have aid prayer and also a petition and, in each of these, a search at common law. But it was inconvenient until a search was fully returned that there should be no title of record for the king, but, now, the Statute of 14 Edward III,

chapter 13,[1] shortens this [time] and provides that there shall only be four writs of search. Hence, although the King's Attorney says nothing, yet they of the Chancery, for the benefit of the king, when it seems that the king would suffer loss and that the evidences pertain of right to the king, ought to make a search, for the king, in many cases, is at a greater advantage than any other person, for the king, after a demurrer in law, can relinquish it and join issue. (And this was granted by all.) And I shall prove that the evidences pertain to the king, for the king shall have a *scire facias* against whoever has any evidence pertaining to the said land [which has] thus come into his hands by a forfeiture.

Markham [C.J.K.B.]: On the contrary, or when the demandant has alleged in the Chancery that there is no record whereby the king shall be entitled, and of this he has no denial, we shall take this as true. Therefore, it is right that he shall have his [writ of] *procedendo*.

And such was the opinion of all the justices.

And note that Markham said that, in any case, he would not have a search at common law, nor has he ever had it. And, in this case, to my mind, the demandant shall have a *procedendo in loquela* and *ad judicium* in one and the same writ. And this where it appears that the evidences do not pertain to the king, as, for instance, if the remainder be to the king etc. or if the tenant says that he holds for term of life with reversion to the king, because, in this case, the king shall have no title before the aid prayer etc. And, further, if the tenant showed how the king granted etc. to him for term of life etc. and he prayed aid and a search is made and no evidence found for the king, and *procedendo* is granted and it is found against the tenant, yet the king shall not be barred by this recovery against the tenant. It is otherwise in a petition between the king and the party, because, in that case, he [the king] himself is a party. It was also said that, if it be found that the king's tenant aliens without licence and the alienee be sued, he shall show how for such cause the tenements were seized into the king's hand [and] judgment whether *rege inconsulto etc*. And thus shall the heir say during the time that he is in wardship to the king. But, in these [cases], he shall not have a search.

[1] Stat. 14 Edw. I, stat. 1, c. 14 (*SR*, I, 286).

78

Anonymous
(Ch. 1467)

A married woman cannot grant or consent to a grant of her land during the marriage.

Coercion vitiates consent.

A purchaser of land with knowledge of the breach of trust by his seller can be ordered to perform the trust.

Where a bill of complaint is dismissed upon a demurrer, the defendant cannot receive court costs.

YB Trin. 7 Edw. IV, f. 14, pl. 8,
Cooper's Practice Cases 527, 47 E.R. 634,
Baker & Milsom, *Sources*, p. 98

There was a case in the Chancery, *scil.* a man was enfeoffed to the use of a woman, who took a husband, who sold this land to a stranger for a certain sum of money, and the wife received the money. And the husband and the wife asked the person who was enfeoffed to the wife's use to make an estate of this land to the stranger, and he enfeoffed the stranger. And, afterwards, the husband died. And the woman brought a subpoena against the person who was enfeoffed to her use. And he showed all these facts, and, upon this plea, she demurred in judgment etc.

And the case was stated in the Exchequer Chamber before the Chancellor and the justices of both benches.

Starkey, for the plaintiff: This plea is not sufficient, because what was done by the wife was void, because, if she had been seised of the land and the husband and wife had made a feoffment, she would have had [a writ of] *cui in vita* after the husband's death, because the feoffment made by the wife during the marriage is void. Likewise here, in conscience, this sale made by the husband and wife was entirely the husband's act and not the wife's etc.

The whole court agreed etc.

And the Chancellor [Stillington] said that the wife could not consent during the marriage. If something was done out of dread or coercion, it could

not be called consent. And whatever a married woman does may be said [to be done] for dread of her husband. And thus they should take no notice of the fact that the wife received the [purchase] money, because she could not have had the benefit of it, but only the husband.

The Chancellor [Stillington] said to *Starkey* what are you asking for?

[*Starkey*:] We pray that the defendant be committed to prison until he satisfies us for the same land etc.

The Chancellor [Stillington]: You could have a subpoena against the vendee, who is in possession of the land, and recover the land against him.

Yelverton [J.K.B.]: If he was aware of the deceit and wrong done to the wife, then the subpoena lies against him but not otherwise etc.

The Chancellor [Stillington]: He knew the woman had a husband.

Starkey: We pray that the defendant be committed to prison. And, as to the subpoena against the other person, we will be advised.

And it was also said by the court, where one brings a bill in the Chancery and the defendant demurs in law upon the insufficiency of the bill and, by the advice of the court, the bill is decreed insufficient, in this case, the defendant will not have damages,[1] because the Statute[2] that gives damages is where the suggestion is found true or not true and, in such a case, the truth of the matter was not tried etc.

64 Selden Soc. 12

It was granted in the Exchequer Chamber before the Chancellor by Danby [C.J.C.P.], Choke [J.C.P.], and Yelverton [J.K.B.] that, if a man enfeoffs another to the use of him and his heirs and he has issue a daughter and dies and she takes a husband, although she and her husband by their joint consent sell the said land to a man for a certain sum of money and, thereupon, give notice to the feoffee, by which he makes an estate in accordance etc., yet the wife, after her husband's death, shall have a good subpoena etc., because a married woman cannot give consent inasmuch as she is not free during her married life, because, *ubi non est libertas, ibi non est consensus etc.* and she had no profit of the sale, because the money belonged to the hus-

1 *I.e.* court costs.

2 Stat. 6 Edw. I, c. 1 (*SR*, I, 47).

band, and, when it was received, it was his entirely. So it is if a woman makes feoffment to another to her use and, then, takes a husband and they have issue and, then, the wife tells the feoffee to make an estate after her decease to her husband for the term of his life and then she dies, the husband, in this case, shall not have subpoena on this will.

Quaere if she had been in debt to a stranger before the marriage and had told the feoffee to pay him from the profits etc., seeing that it is in discharge of the debt, does a subpoena lie on this?

Danby [C.J.C.P.] says yes.

It was also said by them [that] if I enfeoff a man to my use and then he enfeoffs another for a certain sum etc., if this stranger knows that he was enfeoffed to my use, I shall well have a subpoena against the stranger.

Catesby: If a wife gives me her husband's goods and then is made executrix, yet she shall have an action of trespass for the same goods taken away, against his right, in the lifetime of the testator.

Cary 14, 21 E.R. 7

A man was enfeoffed to the use of a single woman, who took an husband. They both, for money, sell to B. the land, which he pays it to the wife. And she and her husband do pray the feoffee to make an estate to B. Afterwards, her husband dies.

Now, by the Chancellor [Stillington] and all the Justices, she shall have aid against the first feoffee by a subpoena to satisfy her for the land, and, if the second feoffee were cognizant, a subpoena shall be against him for the land, for all that the wife did during the coverture, as they said, shall be taken to be done for fear of the husband.

79

Anonymous
(Ch. 1468)

A court of equity will give a remedy for a breach of contract and for a breach of trust.

YB Pas. 8 Edw. IV, f. 4, pl. 11

A subpoena was sued in the Chancery for this, that where the defendant had made the plaintiff the procurer of his benefice and promised to him *per fidem etc*. that he would hold him harmless for the occupation. And he showed that the defendant resigned his benefice unknown to the plaintiff etc. And, by the occupation of the benefice afterwards etc., the plaintiff was vexed etc.

Jenney: It seems that he will be put to sue in a court Christian for the breach of his faith, as well as, if I promise and become engaged to a woman to marry her, if I do not do it, she will sue in a court Christian, and not in this court etc.; so here.

The Chancellor [Stillington]: You speak truly. For a breach of faith, he ought to sue there if the petition [shows] a canonical injury to him. But, in this case, because he is damaged by the non-performance of the promise, he will have a remedy here.

Jenney: Sir, this promise is also a covenant. And it is his folly that he wished to have had a deed, and so he could have had a remedy by our law, because, if I promise to build you a house, if I do not do it, you will have a remedy by a subpoena etc.

Chancellor [Stillington]: He will have it etc., and so you can say, if I enfeoff a man in trust etc., if he will not do my will, I will have no remedy, according to you, because it is my folly to enfeoff such a person who will not do my will etc., but he will have a remedy in this case, because *Deus est procurator fatuorum*.

80

Anonymous
(Ch. 1468)

The question in this case was whether a co-executor can be compelled to answer to a suit before his co-executor is served with process.

YB Trin. 8 Edw. IV, f. 5, pl. 1

A subpoena was sued against three executors, and one appeared. And the plaintiff prayed that he be put to answer etc.

Fairfax: It seems to me that he will not be put to answer, because this is the first writ, and, if the action was sued now at common law, the one executor will not be put to answer at the summons, because the Statute[1] is, that he who first appears by distraint will answer, and also, by the law of conscience, he [the first defendant executor who appeared] will not be put to answer, because it could be that the others have matter to bar the plaintiff of which he who appeared has no knowledge etc.

The Chancellor [Stillington]: Those three executors are only in the place of one person, *scil*. their testator, so, without the appearance of all the persons [representing the deceased testator], the one who is only a member etc. will not be put to answer, because, otherwise, the others will be concluded by his ignorance etc., which is not conscience. And, Sir, this court ought not to be [governed] by the Statute, because where the Statute gives process at common law, we are not bound to follow it, but, where the Statute gives a title of right to a man, we are bound to obey it etc.

Pygot, to the contrary: And, Sir, this is their own act that they are executors, and there is no default in us. So there is no conscience to delay us by their absence. And, Sir, I understand that, in an action at common law, he who first appears to a summons will answer or, otherwise, the Statute serves for nothing, because the one can appear and the other always make a default etc. And those words in the Statute, *scil*. 'by distraint' etc., are void, and he who first appears makes a good and effectual [answer], because, if one appeared to the *capias*, he will answer.

Sotehill agreed to this.

Starkey: The Statute has been construed recently that, where an executor appears by compulsion, he will be put to answer.

Markham [C.J.K.B.]: If a subpoena be sued against four feoffees etc., if one of them appear, he will be put to answer without his fellows etc., and the more so here.

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1 Stat. 9 Edw. III, stat. 1, c. 3 (*SR*, I, 271).

Rogers: He can answer if he wants without his fellows, but he will not be forced to answer alone etc.; no more here.

Pygot: If an attachment be sued against certain clerks of this place as executors, if one appear at the attachment, he will be put to answer etc.

The Chancellor [Stillington]: This attachment ought to follow the nature of the action at common law, and this subpoena is not so etc. And, in the attachment, I have two powers, one as a temporal judge and another as a judge of conscience, because, if it appears to me on the matter shown in the attachment that there is conscience in the matter, I will adjudge this as a judge of conscience etc.

But the justices said that he ought not in the attachment, but the party ought to make his bail according to the form of other matters of conscience etc.

And it was moved whether a subpoena lie against executors or against an heir.

And Choke [J.C.P.] said that he previously sued a subpoena against the heir of a feoffee, and the matter was disputed at length. And the opinion of the Chancellor and the justices was that it did not lie against the heir, by which he sued a bill to the Parliament etc.

Fairfax: This matter is good store to dispute afterwards, when the others appear etc.

Cary 15, 21 E.R. 8

If a subpoena be brought against three executors and one of them appears, he shall not be compelled to answer until they be driven to appear also, for they are but one.

81

Young v. Anonymous
(Ch. 1469)

A suit in equity lies where a party is denied the opportunity to make a defense in a common law action because the action was brought in a foreign venue.

YB Pas. 9 Edw. IV, f. 2, pl. 5,
Cooper's Practice Cases 517, 47 E.R. 630

A subpoena was sued in the Chancery by Yong of London upon a recovery upon a bond in one county where the bond was executed in another county. And he made his suggestion that, by this foreign suit, he was ousted of divers pleas which he could have had if it had been brought in the same county.

The Chancellor [Stillington, bishop of Bath and Wells] said that this subpoena is sufficiently maintained upon this matter, for the plaintiff did against conscience, for he willed not that the truth should be known when he sued such foreign suit, for the truth of nothing can be known so well in any place as in the county where the thing was done etc.

Cary 2, 21 E.R. 2

The defendant [at common law] sued and suggested in Chancery that, by this means, he was put from divers pleas, of which he might have taken advantage if the obligation had been sued in the very county. And he had aid there, for the Chancellor [Stillington] said that he sued to hide the truth and against conscience also, which cannot be so well found in any place as in the very county where a thing is done.

82
Anonymous
(Ch. 1469)

Courts of equity prefer substance over formalities.

YB Trin. 9 Edw. IV, f. 14, pl. 9,
Cooper's Practice Cases 518, 47 E.R. 630

In Chancery, it was touched upon by the Chancellor [Stillington] that a man shall not be prejudiced by a mispleader or by a defect of form but only according to the truth of his matter and we have to judge *secundum conscientiam et non secundum allegata*, because, if a man suggests by a bill that

one has done injury to him and the defendant says nothing, if we have cognizance that he [the defendant] has not done injury to the plaintiff, he [the plaintiff] shall recover nothing. And there are two manners of powers and processes, *scil. potentia ordinata et absoluta. Ordinata* is where a certain order is observed, as in the positive law. But the law of nature *non habet certum ordinem* but by whatever means the truth may be known etc. *Et ideo dicitur processus absolutus etc. in lege naturae requiritur* that the parties be present etc. or that they be absent by contumacy, that is to say where they are cited and make default etc. *et examinatio veritatis*.

83

Wolseley v. Which
(Ch. 1469)

Where a creditor gives his or her debtor additional time to pay, the surety is discharged.

YB Mich. 9 Edw. IV, f. 41, pl. 26

[Ralph] Worsley, a baron of the Exchequer, sued a subpoena against the Dame Which upon this matter, that, where the said Worseley and one Middleton had from Sir H. Which wools to the value of £1000 to their own use, for which they were bound upon a [bond] of £300, the said Middleton to have all the profit of the merchandises of the wools etc.

The said H. Which made the dame his executrix etc. And there, she gave to the said Middleton longer days for payment by an agreement between them. And, where a great part of the entire sum was paid to the dame, she sued the said Worsley upon the said bond etc.

Catesby: This complaint is insufficient, because he said `the greater part of the entire sum' and did not show how much is paid, and it could be that the greater part is paid and yet nothing of this obligation on which he is sued is paid, and thus there is no conscience in this suit. And, also, he did not show with certainty what day [for payment] was given to Middleton etc. And, even if she had stayed her suit against him, Worsley will not have advantage by

this, because, by law and conscience, she could have sued the one or the other, wherefore etc. And, if it is granted to Middleton that she would not sue him, will Worsley ever be discharged by this? I say not etc.

The Chancellor [Stillington]: At the beginning, she could have sued the one or the other, but she has made a covenant in the law of nature between herself and Middleton to stay the suit against him, which gave an advantage to Worsley, because she has chosen to be paid by Middleton etc. And, if Middleton had paid the dame or if there had been an agreement between them that she would have this debt from one J., who was a debtor to Middleton, I say that Worsley will have an advantage by this, so here.

Jenney: In your case, there is satisfaction to the dame, wherefore etc.

The Chancellor [Stillington]: As to the uncertainty, the plaintiff cannot know what sum is paid or what day was given to Middleton [to pay] because this did not lie in his knowledge without Middleton etc. But he ought to show with certainty matter that lay in his cognisance. But this will come on the examination of the conscience. And, Sir, in this court, there is no requirement that the bill be completely certain according to the solemnity of the common law, because, here, it is only a petition etc.

Catesby: Would it be a good bill here to have a subpoena against one to say that his father enfeoffed him in trust and made his will at the time of his dying and he not know his will because the defendant had his testament and prayed that he be driven to show the testament? I say not, but his will ought to be surmised etc.

Jenney: This has been adjudged here in a subpoena [which] surmised that the defendant had certain charters concerning his land, but he did not know what manner of charters they were etc.; in this case, he had been put to the common law.

Pygot: There, he could have a writ of detinue at common law, but, if land be given to me in fee tail by a deed and, by the same deed, other land is given to another, he cannot have a writ of detinue for this deed, because it belongs to me by reason of the matter etc. But he will have a subpoena against me to have the deed to maintain an action for the land if it be to sue etc. And, Sir, here, the plaintiff cannot know what day was given to Middleton or how much was paid without the said Middleton, whereby etc. And we pray a subpoena against him etc.

Jenney and others: If this subpoena be maintained on this oral covenant, then a man does not need to make an indenture etc., because, if the deed in which the covenant that he made orally etc. [was breached], then a subpoena etc. [would issue].

Cary 1, 21 E.R. 1

If two be jointly and severally bound to pay money and the obligee will give a longer day or another favor to the one and then will sue the other for the debt, he which is sued shall sue in Chancery.

Cary 15, 21 E.R. 8

If lands be severally given by one deed to two men, he which has the deed shall be compelled here to show it for the defence of the other's title.

84

Anonymous
(Ch. 1470)

A pending suit that involves the crown abates upon the death or deposition of the king.

47 Selden Soc. 145

Michaelmas term 49 Hen. VI.

Item, it was held in the Exchequer Chamber that, where a man has tendered a traverse to an office in the Chancery found for King Edward IV, he shall now tender a new traverse inasmuch as the king who was then a party is deposed and, thus, as if he were dead. The same law will be if the party had sued a petition, and it is all one law, because the traverse is given in place of the petition.

Also it was held clearly that, if one had been at issue on an indictment of felony with King Edward aforesaid and it had not yet been tried, it is nec-

essary for him to be newly arraigned for the aforesaid reason. But, if he had been acquitted in the time of King Edward and the judgment had rested until now, that, then, the judgment shall be given now, because, after an acquittal, the king will have no day of postponing the judgment. The same is the law if he have been found guilty.

Also it was held by Billing, Chief Justice, that, after the king has joined issue on a traverse or on a petition, he may not leave this and take another, but, in this case, he can waive the issue and demur in law, or, if he demur in law, he can waive this and take issue.

But, if the king deliver land to a man, and, afterwards, another office is found for the king, on which the king, by the Statute of Lincoln,[1] sues a *scire facias* against him and they are at issue, that, in this case, he can relinquish the issue and take another issue, and thus from issue to issue so long as he wishes, on the ground that the party is tenant and, therefore, has no damage.

And this was held a good difference by the serjeants.

Quaere tamen, for it is a great vexation for the tenant.

Item, if one tenders his law and has a day of making his law and, in the meantime, the plea goes without day by the demise of the king, in this case, the plaintiff will have a summons *ad perficiendum legem*, and, if he be summoned and make default, he will be condemned, and, if he do not respond to this, a [writ of] *capias* shall issue *ad perficiendum legem*, as was said, and, if he be not present by this writ, he will be condemned.

85

Barrowwick v. Hawes
(Ch. 1471)

A debtor can pay the trustee of his creditor, and, if the trustee does not pay the money over to the creditor-beneficiary, the trustee can be sued for the breach of trust.

Where a plaintiff sues in good faith, he is not liable for damages.

[1] Stat. 9 Edw. II, of Sheriffs (*SR*, I, 174-175).

YB Trin. 11 Edw. IV, f. 8, pl. 13

One P. was bound in a statute staple to Johan, who was the wife of J.P., and one J. Hawes to the use and need of the said J. etc. And, afterwards, the said Hawes released to the said P. all actions, executions, and recognizances etc. And upon this, one Barowike and the said Johan, his wife, sued a subpoena against the said Hawes and the said P. and alleged the matter aforesaid and that the said P. knew well that the said Hawes was not named in the said recognizance except to the use of the said J. and, by covin between them, took the said release to defraud J.; Hawes etc.

And, because it is permissible to anyone to help himself and to obtain a discharge of his debt, and, if the same P. had paid to Hawes, as he well could, it will not be reasonable to charge him with the payment at another time. And Hawes could have imprisoned the said P. and have sued and vexed him for the duty. And for the same reason, he released him etc.

For which P. was discharged from the subpoena. And it stood against Hawes because he deceived Johan, etc.

And, *tamen*, it was moved, if my feoffee of a trust etc. enfeoff another who knows well that the feoffor has nothing except to my use, a subpoena will lie against both, *scil*. as well against the feoffee as against the feoffor. And so it is of a chattel. If a man have goods to hold to my use and he sold them to one who knows well that he had nothing except to my use etc., thus here and for the reason, when he released etc., he did not show any payment from me to Hawes etc.

To which, it was said that, in the said cases, it is reasonable, because, in conscience, he purchased my land or my goods etc. But, here, by the release, he did not purchase anything, but he [was] discharged from the duty, as if I enfeoff a man to my use, that [if] a stranger, [who] knows well that he has nothing except to my use, does a tort in the land, I could force my feoffee by a subpoena to sue him and recover damages to my use etc. But, if my feoffee release to the tortfeasor etc., against him, I do not have a subpoena, notwithstanding that he knew that the person who released was a feoffee to my use, because this release is only a discharge etc. But I will have my remedy against my feoffee. But there seems to me no diversity between the discharge and the purchase, because, in conscience and before God, he is not discharged unless the person to whom the duty in conscience is discharged of it, because, if the debtor by any artifice or device excludes the creditor, it is not in good

conscience. But, if P. had paid the money to Hawes [and] he had taken the release, this payment discharges him in conscience, because Hawes was able to receive the duty by the agreement of Johan inasmuch as the recognizance was made to both etc.

Cary 14, 21 E.R. 8

Pyers was bound in a statute to Hawes and Joan for the behoof of Joan, and Hawes released to Pyers, whereupon she brought a subpoena against them both. But Pyers was discharged although he knew [of] the confidence, because it is permitted in such a case a man should help himself to be charged of his bond, and the subpoena stood against Hawes, because he had deceived Joan.

YB Trin. 11 Edw. IV, f. 8, pl. 14

Thomas P. was bound to the said Johan and Hawes in the recognizance of a statute staple aforesaid. And, afterwards, Hawes released, *ut supra*, and, then, Johan married Barowike. And, then, the said Barowike and Johan, his wife, and Hawes sued execution in the Chancery upon the statute and had the body of Thomas P. in execution. And, on this, the said Thomas P. sued [a writ of] *audita querela* against Barowike and Johan, his wife, and Hawes, etc.

And the process in this was *scire facias quare executionem recognitionis praedicti supersedere non debeat etc*. And the writ returned *quod scire etc*. And they were summoned. And Barowike and Johan, his wife, appeared, and Hawes made default. And, because one made default, it was held the default of all, by which T. was discharged from execution. And he prayed for his damages.

Vavasour thought that he will not have damages, because the process is a [writ of] *scire facias* by the course of this court, and thus it will follow the nature of a *scire facias* from this court, because if one be condemned to me in the Common Bench and then I have his body in execution and I release to him, on this, he will have a *scire facias* against me on the said release, etc. In this case, he will be discharged from execution, but he will not have damages etc. But, if, in the Common Bench, a man sue an *audita querela* against me, and he has a *venire facias* etc., in this writ, he will recover damages etc. And, Sir, he will not recover damages against Barowike and his wife, because

he did not release and they cannot have knowledge of Hawes's release. But, if any damages will be recovered, it will be against Hawes, who sued against his own act.

Fairfax: In your case of a *scire facias*, if there be a release made to him after he is in execution, it is true that he will not have damages because execution was well sued at the beginning and the *scire facias* is only to discharge him from the execution etc. Yet, if I am bound in a recognizance etc. and the recognizee releases to me and then sues execution, this is a tort against me, for which I will recover damages. And, even though the process here be a *scire facias*, yet he recovers the damages as he recovers in an *audita querela* in the Common Bench etc. where the process is a *venire facias*. And, even though Barowike and his wife did not release, yet, by Hawes's release, Thomas P. was discharged. And, when, afterwards, they sued execution, this was a wrong to him, for which it is reasonable that he recover damages. And this execution was made afterwards by all etc. [As to] that he did not know of the release etc. of Hawes, they ought to take a recognizance at their peril. And this is the folly of Johan to take such a recognizance jointly with Hawes. And, in many cases, a joint possession can make a prejudice to his companion etc.

The Master of the Rolls [Alcock]: Sir, where a man sues *bona fide*, it would be unreasonable that he recover damages, and, here probably, he and his wife *possunt ignorare factum* of Hawes, when he had the recognizance in his hand and did not have notice of the release of her co-obligee. And it is not reasonable that he render damages, because it was done *bona fide*, and not with the intent to vex. And he had assets of principal of such part. But, where a man made a recognizance to me and I myself release and sue execution, it is reasonable that he recover damages etc. And, if a man make two recognizees and the one goes overseas and the other releases to the recognizor and die and then the other recognizee returns and sues execution, because he had no knowledge of the release of his companion, is it reasonable that he render damages? I say no etc.

Rogers, ad idem: And it could be that execution was sued by a stranger, and not by Barowike, etc. And, Sir, where executors will sue execution on a statute merchant where their testator has made an acquittance and the recognizee sues an *audita querela* against them etc. and because they could not have notice of the acquittance by their testator, it was adjudged that they will

not render any damages etc.[1] And he thought that Barowike will not render damages etc.

Catesby: [If so, then] we cannot have judgment against Hawes and no judgment against Barowike.

Vavasour: You well can, as, in [an action of] debt against two, if one was requested to pay etc. and the other not, he who was requested refuses, he will render damages and the other no damages etc. And, Sir, in this case, it could be that execution was sued by a stranger etc. And I was in a case once where a man made a recognizance on a statute and the recognizee died and then another appeared in his name and had execution, I, for the recognizor, could not have a remedy etc. And, Sir, it is the common course here to grant execution on the statute, even if the recognizee does not appear in person, but another [appears] for him and showed the statute. The law is the same, if it be made to two and the one appears with the statute, he will have execution in both their names, *quod fuit concessum*.

Choke [J.C.P.]: It will be understood that both pray execution of the statute, because, if one wanted to have prayed execution in one county and the other in another county, they will not have it, by which it will be understood that they agreed in suing execution etc. And, in your case, where the recognizee was dead and another sued execution in his name etc., thus you will have a writ of error for this in the Parliament etc. And, Sir, in this case at bar, even if the process be a *scire facias*, this is the course of this court, yet the plaintiff will have such a recovery as he would have if he were in the Common Bench where the process is a [writ of] *venire facias* etc. And, in this case, damages will be recovered against both etc., because execution, which is the cause of the damages, was sued by both.

And the Master of the Rolls [Alcock] said, Sir, even though, by the law, damages will be adjudged against both, yet we are here in the Court of Chancery, in which our power is to adjudge as well according to the law etc. and of conscience. It would be unreasonable, when he had no knowledge of the release etc., that he render damages etc.

Choke [J.C.P.]: In this case, you should and will judge according to the course of common law, and, if there be error in your judgment, it will be redressed by the Parliament. And so it is in an attachment for trespass or

[1] YB Mich. 19 Edw. III, Rolls Series 31b, vol. 13, p. 311, pl. 4 (1345).

debt against one of the ministers of this court etc., by which it ought to be adjudged according to the common law.

And, afterwards, he said that he wanted to be advised until the next term etc.

Quaere, because it seems that, if it be so that there will be damages on this *scire facias* that they adjudge etc., *scil*. that the default of one will be the default of both, because it could be that Barowike will have a release from him to sue execution or it could be that P. was never in execution etc. or that he never had such a recognizance from the plaintiff etc. because if it be thus that the default of one will be the default of both, I, by communication between myself and a stranger, will recover damages against anyone I want etc.

86

Bueke v. Abbot of St. Augustine's
(Ch. 1472)

The parties in a writ of indicavit *are both patrons and both parsons*.

YB Mich. 12 Edw. IV, f. 13, pl. 11

In the Chancery, the case was thus. The dispute was between the abbot of St. Austin's of B. and the parson of A. for certain tithes in an ecclesiastical court, process being continued until *sentencia definitiva* was [given] for the abbot etc., *scil*. that he should have the tithes. And the parson appealed to the Court of Rome. And, upon this, the pope had mandated a delegation to the chancellor [of the bishop] and others, who made a subdelegation to R. Sovery and others, before whom now the right of the tithes pends in litigation etc.

And upon this, Sir Maurice Bueke, as patron of the said parson, sued a writ of right *de advocatione decimarum* against the same abbot, who had the church in his own use. And thus the abbot was the patron and the parson etc.

And the said Maurice prayed a [writ of] *indicavit* to the judge subdelegate, before whom the plea now pends etc.

And, first, it was moved that he must show a copy of the libel so that it could appear whether the debate be of the fourth part of the tithes or less

etc. See 7 Edw. II, in a writ of right of advowson of tithes claimed in his own use etc.[1]

And the Chancellor [Stillington] said that he must show *quod libellum est contestatum coram judice delegatus etc*., by which the plaintiff said that he brought in a copy the day after.

And another matter was moved, whether this *indicavit* lies in this case, because it is said in the Register that *indicavit* lies among four persons, of whom two are the patrons and two the parsons, but, here, there are only three etc.

And by Littleton [J.C.P.], Choke [J.C.P.], and several others, being there, it was held clearly that it lies well in this case because, even if there are only two parsons, yet one is patron and parson, so he will represent the estate of two persons etc. See 27 Edw. III; in a writ of right of advowson, the abbot claimed the advowson in his own use and recovered upon this title etc.[2]

The Master of the Rolls [Morton] said that the abbot could hold the benefice in his own use, and yet he did not have the advowson, because the ordinary, by the assent of the patron, could commit the church to the abbot in his own use etc.

Littleton [J.C.P.]: The advowson is to have the presentment, but, when the abbot holds in his own use, here, there cannot be any presentment. And so it is merely void etc.

Catesby [said] to the Master of the Rolls [Morton], when the patron assented that the abbot hold to his own use, by this assent, he relinquished his patronage etc.

Vavasour: There is another matter here, the [writ of] *indicavit* is only a *supersedeas*. But, if the judgment was given in the ecclesiastical court before the *indicavit* be granted, then, it was merely void to grant the *indicavit etc*. But here, even if the judgment was given on the tithes, now, by the application, the matter is removed, and, now, the right of the tithes is in dispute in the ecclesiastical court, and it is unreasonable that it be tried there before the patronage was tried here, by which it seems that the *indicavit* lies well.

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1 YB Mich. 17 Edw. II, f. 497, pl. [6] (1323).

2 Perhaps YB Mich. 27 Edw. III, f. 12, pl. 57 (1353).

87

Anonymous
(Ch. 1472)

Where a tenant in capite *of the king dies, the king has the wardship of all of his land.*

However, in this case, a writ of ouster le main *lay because the land in issue was held by the decedent in tail of another lord.*

YB Mich. 12 Edw. IV, f. 18, pl. 24

In the Chancery, an office was returned upon a *diem clausit extremum* that one W. was seised of the manor of T. and held of the king in chief and he was seised of another manor in tail to him and his heirs of his body engendered, which was held of the archbishop of York by knight's service etc. and that one Alice was cousin and heir to the said W., the daughter of Robert, son and heir to the said W.

And, upon this, one R. came and showed how the said manor that was held of the archbishop was given to the said W. to him and his heirs male of his body engendered and that the said W. had issue the said Robert, father of Alice, the elder, and the said Richard, the younger, etc. And he died seised of such estate. And he prayed that he could be admitted to traverse the said office etc.

Catesby: He will not have a traverse [of office] in this case, because both [Richard and Alice] claim and demand the possession of the said W., because, if the king's tenant had two sons, and, by an office on a *diem clausit extremum*, the younger son is found heir etc., the elder has no remedy for it, because they both claim by one same ancestor. Thus, he cannot traverse his own title etc. And it was said that thus it was in Paston's Case, where the younger was found heir; wherefore no more here etc.

Laken [J.K.B.]: The reason that he will not have a traverse in your case is because, by his own matter, he proves that the king had good cause to seize [the land] against him and all others. And, there, it is to have livery, because it is held of the king, so that the king can be apprised of his tenant [as a matter] of record, and he cannot have livery unless the office be found for him etc. But, Sir, in this case, it is not to have livery but a [writ of] *ouster le main*, because the land is held of the archbishop and not of the king. But,

if any part of that which was fee tail to the heirs male was held of the king, he will not have a traverse, because the king had cause to seize all etc. And, Sir, in this case, both [Richard and Alice] do not claim by one title, because the one claims as general heir and the other by a special tail. Thus, each is like a stranger to the other's title. But, in the case where the younger was found heir, *ut supra*, each by the same title that the other claims etc., by which it seems in this case that he will have a good traverse etc.

Vavasour: If this matter had been found by the same office that it was entailed to the heirs male and that he had a general heir, *ut supra*, and that he, who now tenders the traverse of office, had been heir male etc., should the king have it? Sir, certainly not, *quod fuit concessum*. And it was held that the Statute of *Praerogativa Regis*, ch. 1,[1] which provides *quod rex habeat custodiam omnium terrarum etc.*, is understood to mean if it descended to the same heir to whom the land held of the king descended, but, if any parcel descended to another heir, he will not have it etc., where, if an ancestor will have a special tail, the remainder over etc.

And the opinion of the court was that he would be well received to traverse the office etc.

88

Newbrough v. Attorney General
(Ch. 1473)

After the parties are at issue, the defendant cannot change his defense; this rule applies to the crown as well as to a private defendant.

When the parties are at issue in the Court of Chancery, the facts will be tried by a jury in the Court of King's Bench.

YB Pas. 13 Edw. IV, f. 8, pl. 1

In the Chancery, it was rehearsed that an office was found for the king in certain land. And in the term of St. Hilary last past, one Nubrough made

[1] *Praerogativa Regis* (*SR*, I, 226-227).

title to the said land by reason of an entail and that he was ousted by the said office. And he traversed the title of the king, and upon this, they were at issue. And a [writ of] *venire facias* was awarded in the Chancery, returnable in the King's Bench the quindene of Easter.

And in the vacation time before the said quindene, the Attorney of the King came to the Master of the Rolls [Morton] and said that he wished to change his issue and traverse the title shown for the party. And he prayed [a writ of] *supersedeas* of the said *venire facias*. And this matter was now argued whether he could change the issue.

And by divers of the justices of the one Bench and of the other, it was held clearly that he could not change the issue, because, then, he could do it infinitely etc. and, also, in another term, he cannot vary it. And, also, in this court, the party does not have any day, but, in the King's Bench upon the first issue etc.

But it was said that, if the Attorney of the King take issue on a traverse, he could waive the issue and demur in law, and he could waive the demurrer and take issue on the traverse, because, here, there is no new matter, and the parties have a day always in this court. And, in the first case, if the matter be insufficient in law, then the issue is misjoined, but he cannot take a new issue where one had been taken before if the issue be well joined and not a mispleading etc., because the king, by his prerogative, cannot do wrong to another etc.

And it was mentioned [that], if a traverse be tendered to the office found for the king, the [King's] Attorney can maintain the office or traverse the title shown for the party in his traverse, because no one will have the lands out of the king's hands without having title etc.

And it was mentioned that there was no traverse at common law for a real chose before the Statutes of 34 and 36 Edw. III[1] but always a petition and *monstrans de droit*. But, for a chattel, there was traverse [of office] at common law etc. And, even though a man does not take his traverse within the month, he can take it when he will, but, then, he will not have the land to farm. Thus, the traverse that is the usage within the month etc. is to have the land to farm etc.

[1] Stat. 34 Edw. III, c. 14 (*SR*, I, 368); Stat. 36 Edw. III, stat. 1, c. 13 (*SR*, I, 374-375).

And, then, it was rehearsed that the course of the place is [that], when an issue is taken on a traverse etc., that this court will make the *venire facias* returnable in the King's Bench, so that they can have there a [writ of] *venire facias sicut alias etc*.

And the opinion of the court was that this Court of Chancery cannot make the *alias* [*venire facias*] etc., because they cannot record here *quod vicecomite non mandavit breve* in the King's Bench, so the *alias* [*venire facias*] ought to be [given] in [the King's] Bench etc.

89

Anonymous
(Ch. 1473)

A court of piepowder can be held by a custom outside of a fair or market.

YB Pas. 13 Edw. IV, f. 8, pl. 2

In the Chancery, *Pygot* rehearsed that it has been assigned for error before now of a judgment given *in curia pedis pulverisatis consuetudinem civitatis etc*. because it was not said *quod fuit in pleno mercato vel in plena feria*, and this was adjudge no error, because it was *secundum consuetudinem civitatis*. Thus, a court of piepowder can be [held] by a custom without a fair or market etc.

90

Skrene's Case
(Ch. 1474-1476)

The king, by his prerogative, can bring an action in any court and by any procedure and, in cases of conflict, the better result will stand.

Where a ward of the crown inherits land not held in chief, the king will have this land in wardship also.

YB Pas. 14 Edw. IV, f. 4, pl. 4

In the Exchequer Chamber before the Chancellor and all of the justices of England, *Jenney* rehearsed the case, how after the death of J. Screne, esquire, his lands were seized into the king's hands by a *diem clausit extremum*, and were in his hands for the infancy of Sir John Screne, his heir, and then he died without suing livery etc. And, after this, a commission was issued on a suggestion in the nature of a *diem clausit extremum* etc. sent to several persons to inquire what lands and tenements the said Sir John Screne held of the king and who was his heir etc., before whom it was found that he had held the said lands of the king etc. and died without heir etc., by which the lands were seized into the king's hand etc. And now, the question is whether this commission that issued in the nature of a *diem clausit extremum*, where he ought to have issue in the nature of a *devenerunt* was good or not, and, if it was not good, then the office was void etc.

And it was moved by the barristers that it was void, because it appeared by matter of record that the land was in the king's hand and also the matter in fact, *scil*. the seisin by which the lordship was in suspense, because he will not have the wardship of it etc. And he cannot have the land and the services also etc. Thus, Sir John Screne did not hold of the king etc. And this proves that the words of the *devenerunt* that rehearsed that the ancestor held of the king etc. and B., the heir, could not have a *diem clausit extremum etc*.

And, by the serjeants and the Attorney of the King [*Hussey*], the contrary was moved [that the office was valid] because, even if an order was put [as to] how the heir ought to sue to have his livery, *scil*. by a writ of *diem clausit extremum, mandamus, devenerunt*, or *quae plura*, because they are writs for the party according to his case, yet the king is not bound to this order, but, at his pleasure, ought to sue for his own profit and to have his title found, and this by a writ of commission to the Escheator *virtute officii etc*. And, Sir, no one would deny that this matter has been found by the Escheator *virtute officii etc*., which will be good, even if it was not found by virtue of the writ, and, for the same reason, the heir, if he wants to have livery, ought to sue a writ, because he will never have livery on an office taken *virtute officii* nor by *virtute commissionis*. And a *diem clausit extremum* sued after the year by the king is good, yet the heir will not have livery on this etc. And, even though the writ of *diem clausit extremum* be not good, yet the office is taken because the title of the king is good notwithstanding that it is *inquisitio capta virtute*

brevis etc., but the court takes this *virtute officiis etc.* and thus the better for the king etc. And, Sir, to that which is said that that Sir John Screne held this land of the king, because he was in the king's wardship, Sir, this is not so, because the freehold was in him etc. notwithstanding that, if he had entered on the king, *nullum accersit ei liberum tenementum* so that the widow would lose her dower by intrusion or if he made feoffment *nullum accersit ei liberum tenementum etc.* But here, the freehold was in him, and he ought to hold of someone etc. And the king can have a writ of escheat after the death of Sir John Screne, *ergo* he was his tenant. And, Sir, I put that Sir John Screne had purchased other lands held of the king; unless the king will have a commission in the nature of a *diem clausit extremum*, how will he have this land etc., because he cannot have aid in the nature of *devenerunt* etc., by which this land was not in the king's wardship etc. So, it seems that the king can choose in what nature he wants to sue his commission, which is properly his suit etc. And the justices in the Common Pleas held that the commission was void.

And some showed a distinction when a commission is granted *ex mero motu* and when by suggestion, because, when it is by suggestion, it will be understood by the party in which case it ought to follow the nature of the writ that the party ought to sue etc. It is otherwise if it be *ex mero motu etc.* And also, this writ, which was granted on a suggestion, was *quia datus est nobis intelligi etc.*

And some put a distinction between a commission absolute and a general [commission], because, if the commission had been general to inquire of all wardships and escheats etc., this would have been good. But when it is a special [commission], it ought to follow the nature of the writ, in which nature it is sued; so here etc. And, if a man had a *diem clausit extremum*, he will not have others in the same county, because thus there would be twenty different persons found heir to one same person, which would be inconvenient, and so there would be no end in the law. And, if it be found by an office that the land is held of the king and that I am the nearest heir and within age and [by] another office it is found for the king by commission or by a writ that another is heir etc., this is void. Thus, the first [office] is of effect, and the others void etc. And, as to what is said that it could be that the said Sir John Screne had other lands purchased held of the king etc., Sir, the king will be aided by a *devenerunt* and a *quae plura* or a commission in the nature of the two etc.

And the justices of King's Bench, *scil.* Billing [C.J.K.B.], Needham [J.K.B.], and Yonge [J.K.B.], held the commission good, because, as the king is above all persons in dignity and honor above, so he is in law in prerogative, and the law is understood and construed favorably for him, because he can sue in whatever court he wants, and, if he pleads a double plea, it is good enough, and, if he demurs in law, he can waive it and take issue etc. And there is no distinction between a general commission and a special commission to the king as to the point. And, even though it is taken on an information, this information will be understood as counsel for the king and not for the party. And, Sir, if a commission had issued to inquire solely whether Sir John Screne died without heir or not, this would have been good. And yet, this is on a special point, *quod fuit concessum ergo a fortiori* here. And the king is not bound to follow the order that is delimited to the heir etc., but, if a commission be made to three, if two take the inquiry, this is void. But it is otherwise here etc.

The Chancellor [Rotherham]: If a commission be made to several *conjunctim et divisim etc.*, if one take an inquiry and another an inquiry, the better will be taken for the king etc.

But several of the justices said that the first [inquiry] will be taken, because, by this, the commission is executed.

The Chancellor [Rotherham]: If a commission issued for the king that had the nature of all the writs, *scil. diem clausit extremum, mandamus, devenerunt, quae plura, et hujusmodi*, this is good for the king.

Yet some of the barristers denied this etc.

And it was mentioned that, if a man had a *diem clausit extremum* and he loses the writ, if he comes into the Chancery and will show that it is lost, he will have a new writ etc. Query if an office be found on both, which one will be taken etc.

And some of the barristers said that, if one who was not heir sued a *diem clausit extremum* out of the Chancery etc. and, then, the heir came and showed that he is the heir, he would have a new writ. Query etc.

And also it was mentioned, if the Escheator found an office for the king by a writ that was insufficient, still the office is good, because he has two powers, one *ex officio* another by writ, and, even though the writ is unavailing, all is not void etc.

And by the serjeants of the king, it was moved [that], if an office be found by a *diem clausit extremum etc., scil.* that one is heir to Sir John Screne

who held of the king etc. and he is within age and so the king is entitled to the wardship and then, by a commission, the same matter be found and that one H. is heir, this is no good, because no better title is found for the king, because, in this case, both entitle the king to a chattel, *scil.* a wardship etc. But, if the latter office entitle the king to the land by escheat or another title of inheritance, this is good, and he who was found heir by the first office will never have livery until he has traversed the second etc.

YB Mich. 15 Edw. IV, f. 10, pl. 16

A manor was given to one William Skrene and to Elizabeth, his wife, and to the heirs of the body of the aforesaid William Skrene engendered, and, for default of issue etc., the remainder to the right heirs of the aforesaid William Skrene. And William Skrene and Elizabeth had issue, John Skrene, which John Skrene was seised of a manor that was held of the king in chief as of his crown. William died seised; Elizabeth held herself in. And the said John Skrene had issue, Sir John Skrene, and died seised, by force of which the present king seized the wardship of the said John Skrene, the son, by reason of his infancy. And then, the said Elizabeth died seised, after whose death a *diem clausit extremum* issued to inquire of what lands and tenements the said Elizabeth died seised etc., by reason of which the gift to William Skrene and to Elizabeth, his wife, was found, *ut supra*, and that the said manor was held of the bishop of Ely etc. and that John Skrene, the son, was the nearest heir etc., who was still in the king's wardship, by force of which the king seized the manor held of the bishop etc. And then, John Skrene, the son, died without heir. So, a commission in the nature of a *diem clausit extremum* issued to inquire of which lands and tenements the said John Skrene, the son, died seised and who was his nearest heir etc., by force of which it was found that he died without heir and that the one manor was held of the king and that the other manor was held of the bishop of Ely. And, recently, it has been well disputed, whether a writ of commission in the nature of a *diem clausit extremum* was well awarded or not.

And it was said by *Hussey*, the Attorney of the King, that the common course of Chancery and also of the law is that, when the king's ward died within age, that, after his death, a [writ of] *devenerunt* will issue and not a *diem clausit extremum*, and this course would be awarded for the party, and, if this course be not observed, the party will never have livery, because, if a *diem*

clausit extremum issues where a *devenerunt* will issue, the party will never have his livery, and yet the office will be good for the king, because it has been seen that a *diem clausit extremum* issues to inquire which tenements he held of the king and who was his nearest heir etc. And it was found that he who died was attainted of treason etc., and this was held a good office for the king's advantage, and the king seized his lands. Thus, it is here when the office issues in the nature of a *diem clausit extremum etc*. and the king's title is found, it is for the king. And yet the party will never have livery for this, nor also will he have a traverse to this, but he ought to sue an office according to the law, and, on this, sue his livery or make his traverse, as the case be.

And note that an Escheator returned an office in the Exchequer, and the office was not indented, by which the justices said that he ought to have imprisonment for two years and make a fine to the king by the Statute 37 Edw. III, cap. 1.[1]

YB Mich. 15 Edw. IV, f. 11, pl. 17

And, afterwards, at another day, *Jenney*, before the Chancellor [Rotherham] and all of the justices of the one bench and of the other, showed the aforesaid case. And, for the bishop of Ely, he said that the commission in the nature of a *diem clausit extremum* that issued was well awarded. And thus, then, the bishop will be received to traverse it. And that the commission was well awarded, I will prove it, because, if John Skrene, the father, was in the wardship of the king, by which John Skrene, his father, the grandfather, died seised and held of the king etc. Thus, all the lands and tenements that can come to Sir John Skrene by the death of John Skrene, the grandfather, the king will have good cause to have them. But, if other lands descend to Sir John Skrene by another ancestor than by his father, the king will not have them, unless they are held of him, because, if a man has issue two sons and dies seised of a manor that is held of the king and the king seizes the body of the elder son and the manor and, then, the younger son dies seised of another manor that is held of a stranger by knight service, so that the son is his heir and he enters in the manor, the king, in this case, will never have the wardship of this manor, because this manor has come to the heir by another ancestor.

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[1] Stat. 34 Edw. III, c. 13 (*SR*, I, 368), confirmed by Stat. 36 Edw. III, stat. 1, c. 13 (*SR*, I, 374-375).

And note that this case was granted by the court.

[*Jenney*:] So here, the manor of which Elizabeth died seised did not come to Sir John Skrene by him by whose death he was in wardship, but by the death of a stranger, because now he claims this manor as relative and heir of William Skrene, son of John Skrene, son of the aforesaid William Skrene, and not as heir to John Skrene, by which etc.

Danvers: It seems to me the same because John Skrene, the grandfather, did not hold this remainder. And I will prove it to my purpose, because, if my true tenant leases his land for a term of life to a man, the remainder over in fee, now the remainderman does not hold of the lord, but of the tenant for life. And, if the remainderman dies, [leaving] an infant heir, he will not be in wardship, because his father did not hold of the lord. But it is otherwise if my true tenant leases his land for a term of life saving the reversion to himself; now, the lessor remains my tenant, and, if he dies [leaving] an infant heir, he will be in wardship, because he holds of a lord. So here, when William Skrene died, so that the fee simple descended to John Skrene, the grandfather, *scil.* the remainder, then he did not hold of the bishop of Ely, but Elizabeth, his mother, held of the bishop. And, if there be no tenure, then no one can have the wardship, because the Statute *De Praerogativa Regis*, ch. 1,[1] is:

> *quod dominus rex habebit custodiam omnium terrarum eorum etc. qui de eo tenentibus in capite per servicium militarium de quibus ipsi tenentes seisiti fuerunt in dominico suo ut de feodo die quo obierunt de quocunque ipsi tenuerint per huiusmodi servicium dum tamen ipsi tenuerint tenementum ab antiquo de corono usque ad ligitimam aetatem haeredis etc*.

So, by the words of the Statute, it is proved that such a thing that the king will have in wardship will be held of anyone or, otherwise, the king cannot have the wardship. Thus, when John Skrene, the father, does not hold the remainder, it cannot be in the king's wardship, and, thus, the king's seizure is as no seizure, in which case the commission was well awarded that issued in the nature of a *diem clausit extremum*. And thus, the party can well traverse it. And also to prove that John Skrene, the father, did not claim this remainder by John Skrene, the grandfather, his father, I will prove this, because, if

[1] *SR*, I, 226-227.

William Skrene, the grandfather, had issue, the said John Skrene, the father, and Sir John Skrene, the knight, by different mothers and died, this remainder ought to have descended to John Skrene, the grandfather. And, if he died without an heir of his body, the said Sir John Skrene, the younger son, ought to have the remainder as son and heir to William Skrene and not as brother and heir to John Skrene, the grandfather, because he is of the half blood to him. Thus, the said Sir John Skrene will have a writ of intrusion after the death of the tenant for life, as the grandfather's relative and heir. And so this proves that he claims this remainder by another ancestor than by his father, in which [case], the seizure here is not permissible, by which the commission was well awarded, in which case, the party will have his traverse.

Philpot: I will put to you a case where a man will have the wardship where there is no tenure between them, as if I give land to a man in tail, who discontinues in fee, and the tenant in the tail dies [leaving] an infant heir, he will be in wardship, yet, between the tenant in tail and myself, there is no tenure. And also, if my true tenant be disseised, I will have the wardship of my true tenant's heir, and, if the disseisor dies seised, [leaving] an infant heir, I will have the wardship of him also, *quod fuit ei negatum*.

Fincham: It seems to me that *Danvers* has well said for the tenure. And this has been a maxim in our law, where the remainder is granted over and where the true tenant reserves a reversion in himself, in the one case, he holds of the lord, and in the other case not. And, as to the first case that *Philpot* has put, this is good law, because into whosever's hands the tenements come, the donee remains tenant to the donor, because, if he ought to make avowry on the discontinuance, he has lost his reversion, which will be a grave mischief. Thus, between the donor and the donee, there is always a tenure. But, in the case at bar, there is no tenure. And, also, the Statute speaks further, *de quibus ipsi tenentes seisiti sint in dominico etc. die quo obierunt*. Thus, if the king's tenant be not seised in his demesne at the time of his death but as much only as he has the remainder in right and not in fact, the king cannot have the wardship of it etc.

Bridges: It seems to me to the contrary. And I will put a case where the king's tenant was not seised of the demesne and yet the king will have the wardship, because, if one be seised of a manor and leases the said manor to a man for a term of life, the remainder over in fee to the king's tenant, which manor is held of a stranger, the king's tenant dies, [leaving] an infant heir and

the king seizes the wardship and then the tenant for a term of life dies, in this case, the king will seize the said manor, and yet his tenant did not die seised in his demesne etc.

With which Bryan [C.J.C.P.] and Littleton [J.C.P.] agreed.

Catesby: The king will have the wardship in various cases where his tenant does not die seised in demesne because the writ of *diem clausit etc*. proves it to be the contrary because the writ says *capiatis in manum nostram omnes terras etc. de quibus etc. sive sint in dominico sive in servicio*. Thus, it is proved there is no need that the king's tenant die seised in demesne, and, if there be a mesne lord and tenant, the mesne purchases a manor that is held of the king in chief and dies seised, [leaving] an infant heir, the king seizes the wardship, he will have the manor and also the mesnalty, and yet the mesne lordship is not in demesne, and, if, afterwards, the tenant paravail dies seised, the king will have the wardship of the manor, and yet the king's tenant did not die seised in demesne, but solely in service. And to say that he did not hold this remainder of the king is not true. If a lease be made for a term for life, the remainder over in fee, the lord will have his avowry on the tenant with the term for life and not by the general words as to say he will avow upon him as upon the tenant by the manor. But the lord must show the special matter, that is to say the lease for the term for life and the remainder over. And then, those two things together causing the lord to make his avowry by the manor and this manner of avowry will not be made unless the tenant for the term of life and the remainderman must hold, and the remainderman holds and none can [hold] except of the lord. *Ergo* he held of him; *ergo* the king's seizure was permissible. So the commission was good for the king and not for the party etc.

Littleton [J.C.P.]: If a man grants a rent charge to the king's tenant in fee, if the king's tenant dies, the king will seize the rent, and yet this is not held of anyone.

Townshend: It seems to me that the party will have his traverse. I grant well that, if any man holds of the king in chief any land by a certain service and the tenant gives the land by licence to a stranger in tail and the donor dies, the king will seize the lordship, and this is by the common law. But, when he ought to have the lands that are held of other lords, it is against common right, and this prerogative is given by the Statute. Thus, he ought by strict necessity to use the prerogative according to the words of the Statute.

Thus, by the Statute, if the king ought to have the lands held of other lords, they ought to die seised in demesne. And, now, John Skrene, the father, did not die seised in demesne. *Ergo*, the king's seizure was of no effect, and so the king possesses by wrong, as no possession, in which [case] most naturally the commission issued in the nature of a *diem clausit extremum* rather than a *devenerunt*. And, if the commission were well awarded, *ergo*, there, the party could have his traverse to it etc.

Bryan [C.J.C.P.]: If the Statute will be interpreted according to the words in the Statute, then, if the king's tenant is seised of any land that is held in socage and the king's tenant dies leaving an infant heir, the king will not seize the land held in socage, *cujus contrarium est lex* and the Statute. And the Statute *de Praerogativa Regis* is in affirmance of the common law etc.

Pygot: By the reason put by *Townshend*, the king will never have the wardship of lands held by others unless they were seised in demesne at the time of his death. And this is not so, because, if the king's tenant be seised of another manor that is held of another lord and he leases the manor to one for a term of life, saving the reversion to himself, and dies seised etc. and the king seizes the wardship of the body and of lands held of him and, then, the tenant for a term of life dies, the king will have the manor during the infancy of the heir because he was a tenant to the lord. And, in this case at bar, the remainderman held this land of the lord by the manor, because he could grant this remainder or forfeit this remainder, because, if he commit a felony for which he is attainted and, then, the tenant for life dies, the lord will have the land by way of escheat, and he cannot have it if there not be any tenure. So, by your argument, if there be any tenure between him and the lord, the king has lawful cause to seize it in his hand, and, if this seisin is lawful and the king's ward died during his infancy, after his death, by the common course and law of the Chancery, a [writ of] *devenerunt* would issue. And, inasmuch as it did not, the commission was awarded erroneously. Thus, the commission for the king's advantage will be held good, and yet the party will not be received to traverse any point of this office, by which etc.

And afterwards, at another day, Nele [J.C.P.]: It seems to me that the party will have his traverse. And, first, the king's prerogative is a Statute and not in affirmance of the common law, because it was held Trin. 44 Edw. III,[1]

[1] YB Trin. 43 Edw. III, f. 21, pl. 12 (1369).

in the case of *quare impedit* brought against the prior of Lanthony, if the king seised of a manor to which an advowson was appendant had made feoffment of a manor, not making mention of the advowson, yet the advowson had passed. And, at this day, by the Statute, this is restrained, because the advowson cannot pass out of the king at this time, unless by express words. Thus, it seems that this is a Statute and not an affirmance of the common law, by which etc.

Littleton [J.C.P.]: It seems to me the contrary. And, Sir, as it seems to me, this Statute is in affirmance of the common law, because, in every statute, there is delimited a certain time when it was made and in the time of what king and in what place, because Magna Carta was not a statute at the beginning, until this was confirmed by Marlbridge, ch. 5,[1] and there is the time delimited with certainty when it was made, and also Westminster II, *quia emptores terrarum etc.*,[2] and several other statutes have a time certain in writing when they were made. But this Statute has no such day delimited, by which it is not a statute any more than *dies communes in banco, dies communes in dote, expositiones vocabulorum*;[3] those are written in our books and yet are not statutes but were made with such an intention that what was in doubt at common law would be put into certainty. So is the Statute *De Praerogativa Regis*. And, on this, it will be a statute to one intent; all the points within the said statute will be held as effectual. And this is not so, because I saw once before My Lord Markham [C.J.K.B.], that the king's tenant died and had issue, a daughter, the daughter married herself off without the king's license, and she did not pay a fine, but, if the king's widow marries herself off without a license, she will make a fine to the king, and the Statute *De Praerogativa Regis* provides that, in both cases, she will pay a fine. *Ergo* this cannot be said to be like a statute, but like an affirmance of the common law. And, Sir, if anyone pleads in any action before us a grant of an annuity made to God and to the Church of the Blessed Virgin Mary, if we, by our discretion, see that the grant at this time is good, we ought to hold it as good. And, thus, the pleading will be in such form, *scil.* that the grantor granted 20s. of rent to one John at Stile, then being abbot of the same place, and to his successors

1 Stat. 52 Hen. III, c. 5 (*SR*, I, 20).

2 Stat. 18 Edw. I, c. 1 (*SR*, I, 106).

3 *SR*, I, 208.

by the name of God and the Church of etc., and this will be a good manner of pleading now, and yet such a grant will not be held good at this day. Thus it is in the case put by Nele [J.C.P.]. The law's usage was at such time that the advowson ought to pass by the feoffment of the manor and, at the time when the prerogative was made and written, the law's usage was the contrary, so that by nothing that has been said has it been proved that the prerogative is a statute, but it is an affirmance of the common law. And, as to the case [at bar], it seems to me that there is a sufficient tenure, because, if the remainderman had granted the remainder to an abbot in mortmain, the lord of whom the land is held can well enter, and he cannot enter unless it was held of him. *Ergo* etc. And, if there were no tenure, this remainder was in John Skrene, the grandfather, because, if the writ of *warrantia chartae* was brought against John Skrene, the grandfather, and the demandant had recovered *pro loco et tempore* and John Skrene, the grandfather, died, the person who recovers is impleaded; he vouches to warrant the heir of John Skrene, the grandfather, and the demandant has judgment of record etc.; if the tenant for a term of life die, the person who recovers by the writ of *warrantia chartae* will have execution of this land etc. And this proves well that the remainder was in the father when the writ of *warrantia chartae* was brought against him. And, if my true tenant leases his land for a term of life, the remainder over in fee, and the remainderman commits a felony by which he is attainted, the lord will have the remainder and will never have his old lordship because it is extinct. See this case adjudged Mich. 3 Hen. VI, fol. 1,[1] in a writ of waste, where the lord who had the remainder by way of escheat brought a writ of waste, and, if the lordship be extinct, this is a proof that the remainder is in the lord, by which this remainder was in the remainderman, by which etc. And further, Sir, if there be no tenure between the remainderman and the lord, yet the lord can have the wardship, as if my true tenant give the land to a man in tail, the tenant in tail discontinues the tail to another in fee, now, the avowry of my true tenant lies always upon the donee in tail, and the discontinuee holds the land of no one. And, if the discontinuee die seised of another manor that is held of the king, his heir being underage, the king will have the wardship of the manor and also of the other land. And yet the tenant of the king at the time of his death held the land of no one, by which the tenure is not to

[1] YB Mich. 3 Hen. VI, f. 1, pl. 1 (1424).

the purpose. And further, every man will grant well that, of a reversion, the king can have the wardship of the body and also of the land after the death of the tenant of a term of life. And I understand that there is no diversity to this intent between the reversion and the remainder, because, if I lease land to a man for a term of life and then grant the reversion over to another in fee and the tenant attorns, then, the tenant for life dies and a stranger abates, the grantee will have a [writ of] formedon in the remainder and not in the reversion. So, between the words, there is a great distinction of a remainder and of a reversion. See this last case adjudged Pas. 6 Edw. III,[1] in formedon in the remainder, by which it seems to me, for these divers causes, there, the party will not have his traverse, and also the remainder is vested, because, if the tenant of a term for life make a default, after the default, it will be recovered by the Statute and also he will have a writ of waste and all other advantages as a remainderman. But it is otherwise if the land was granted to a man for a term of life, the remainder over to the right heirs of one J.S.; now, the remainder is in J.S. nor will his right heir be in wardship, because, there, he is purchaser of the remainder, Trin. 11 Hen. IV, in *scire facias*, but here it is otherwise, by which etc.

Choke [J.C.P.]: I grant well that the Statute *De Praerogativa Regis* is in affirmance of the common law. And, as to the matter, it seems to me that the party will have his traverse, because, if the king ought to have the benefit of seizing anything that his tenant had, it ought to be in the king's tenant as possession in fact or possession in law, but the king will not have anything by the death of his tenant where nothing was in him except solely a right, as if the king's tenant died leaving an infant heir and the king seized the wardship, and, then, the heir sued a writ of cozenage against a stranger and recovered certain land, the king will not have the wardship of this land, because nothing was in his ancestor except solely a right, no more than if the king's tenant be disseised and the disseisor dies seised and then the king's tenant dies leaving an infant heir, the king will not have the wardship of the land of which his tenant was disseised, because nothing was in his tenant at the time of his death except solely a right, which was not possession in fact nor possession in law. And, Sir, as it seems to me, the king's seisin by virtue of the *diem clausit extremum* was not permissible after Elizabeth's death, because the power that

[1] YB Pas. 6 Edw. III, f. 23, pl. 53 (1332).

was given to inquire was only as to which lands and tenements the widow held of the king etc. and who was her next heir etc. [and] they said that Sir John Skrene was heir to the lands by the aforesaid special matter as heir to his father. And so they have said their verdict without authority, in which case, it is as no verdict. And beyond that, the writ of *devenerunt* will prove that the king's seizure was not permissible, because the writ provides that `*terra et tenementa nobis devenerunt per mortem Johannis Skrene, patris, ac ratione minoris aetatis Johannis Skrene, militis*'. This writ is a copulative, by which both parts ought to be true. And it is not so, because this manor was held of the bishop etc., nor did it come to Sir John Skrene by the death of John Skrene, his father, but by the death of Elizabeth, his mother, who was another ancestor, by whom the king's seisin was not permissible. And thus, there, the party on the last office ought to have his traverse.

Needham [J.K.B.]: It seems to me the contrary. And, in divers cases, the king will have the wardship of a thing where there was no tenure of it, because, if the king's tenant be seised of a market, of a fair, of a warren, or other such things and dies, leaving an infant heir, the king will have the wardship of all, yet the market was not held of anyone, so there is no relevant tenure. And, as to this that has been said that this manor held of the bishop did not come to Sir John Skrene by the death of John, his father, this is not so, because the said manor came to him after his mother's death and by his father's death, and, if the heir comes to his full age, he will have one entire livery of both manors because these two manors were seized into the king's hand by the death of one ancestor, by which etc.

Urswick [C.B.Ex.]: It seems to me the contrary, and, in some cases, a man will have an advantage as heir, and yet he will not be in wardship, as if I enfeoff a man of an acre of land on condition that, if my heir pay him 20s. of rent after my death, that my heir can enter, and, then, when I am dead, my heir pays the 20s. and enters, in this case, if he be an infant, he will not be in wardship, and yet he will be adjudged in the land as heir and will have his age. And the reason why he will not be in wardship is because at the time when the feoffor died, there was no tenure between the lord and him. So here.

Bryan [C.J.C.P.]: It seems to me the contrary. And, in your case, here, he will be in wardship, because he is in on the land as heir to his father. But, perhaps, a writ of right of wardship fails him, as if my true tenant be disseised

and die without an heir, I can enter, but a writ of escheat fails for me. And, as to what has been put by Choke [J.C.P.], that, for a right only, the king will not have seisin, I grant well, but, if it be so that the possession be once annexed with the right, then the king's seizure is permissible, as if the heir, who is in the wardship of the king, bring his writ of entry *sur* disseisin and recover land that is held of another lord, the king will have the wardship of it, because, after the recovery, he will be adjudged in in the same course as if his ancestor had died seised. Thus, when the possession is annexed with the right, the king will have the wardship. And the law is the same for the writ of cozenage if he brought the writ for the possession of this ancestor by whose death he is in wardship. Thus, the king will have the wardship. And, if the writ be brought for the possession of the other ancestor, the king will not have the wardship, by which etc.

Billing [C.J.K.B.] [held] to the same intent, because the remainder-man has the remainder in the best possession in remainder that there can be, because no man can have a better possession in a remainder than the aforesaid Sir William Skrene had, by which.

Littleton [J.C.P.] then put a case, *scil.*, if an acre of land be leased to a man for a term of life, the remainder over to a bishop and to his successors and then the bishopric be void, by which the king seizes the temporalties, then, the tenant for a term of life dies, the king will have the land during the time that the temporalties are in the king's hand, and yet the bishop was never possessed of the remainder, but, because this remainder was in the bishop in fact, this is the reason the king will seize it.

Quod fuit concessum by *Jenney*, so it will not be so in this case.

And then *Digas* asked Littleton [J.C.P.] a question that, if my true tenant be seised of a manor that he holds of the king and be disseised and the disseisor dies seised, then, my true tenant dies seised of an acre of land that he holds of me, leaving an infant heir, by which I seize the wardship of the body and of the land and, then, the infant heir recovers the manor held of the king by a writ of entry *sur* disseisin against the disseisor's heir, so the king seized the wardship of the manor from him, will the king have the wardship of the body and of the acre of land or not?

Littleton [J.C.P.]: He will have it, because, by the recovery, he is in the same condition as if the infant's ancestor had died seised of all.

Digas: This is a marvel, because I was seised and in possession of my wardship once, by which.

Ideo quaere etc.

YB Pas. 16 Edw. IV, f. 4, pl. 8

Sulyard came into Chancery and showed how, because it was advised by all the justices that the commission in the nature of a *diem clausit extremum* that issued after the death of Sir John Skrene was not well awarded for this reason, because the bishop of Ely ought to traverse the king's title, but he ought to have a [writ of] *devenerunt*. And he said that, because the bishop had sued a *devenerunt*, by which it was found that Sir John Skrene held the manor of Dale in the County of the Bishop of Ely and that he died seised without heirs, which is proved to be [in the] heir to Sir John Skrene by which the bishop is to traverse the office found by the king, by which it was found that the manor was held of the king, and also to maintain that the said Sir John Skrene died without heirs.

Morton, the Master of the Rolls: How can you do this etc.?

Sulyard: For this reason, that, if an office be found that one T. be his infant heir and, afterwards, by another office, it is found that one B. is heir to J., in this case, B. ought to traverse the office found for T. and ought to interplead on those two offices. So here, by the one office, it is found that Sir John Skrene died without heir and, now, there is another office found that proves B. to be heir, by which, if the bishop wanted to have livery of his manor, he ought to traverse that he was not the heir, but that he died without heirs.

Morton: [It is] not the same, because, between them, those who claimed by the heir can interplead, but the one is found heir, and the bishop has no title except by escheat. So, if it be so that he died without heir, then the bishop [could take] the land escheated at his election.

Browne: To my thinking, they cannot interplead, because your writ of *devenerunt*, by which it was found for the bishop of Ely, was thus that *terra et tenementa devenerunt ad manum domini regis per mortem Johannis Skrene, patris, ac ratione minoris aetatis Johannis Skrene, filii praedicti Johannis, filii Williami, etc*. And it is proved by record of office that Elizabeth, the widow of William Skrene, the grandfather, had an estate for the term of her life, who survived John Skrene, the father. Thus, the writ of *devenerunt* ought to be such, that *terra et tenementa devenerunt etc. per mortem Elizabethae Skrene*

ac ratione minoris aetatis etc., because no tenements *devenerunt* into the king's hands by the death of John Skrene but solely by the death of Elizabeth. Thus, the writ of *devenerunt* that issued is erroneous. And thus, upon this, the parties cannot interplead, because, if one B. be found heir to one T., where, in fact, one D. is heir to the said T., the said D. will never traverse the office found for B. before he has an office lawfully awarded, by which D. is found to be heir, nor will B. ever have livery beforehand.

Sulyard: D. will never have livery before an office found for him, but he can traverse B.'s office before any office found for him.

Rogers: It will be in vain to traverse the office unless he can have livery if this traverse be found for him. So it seems that, before he will have his traverse, he ought to have an office found for him etc.

Query.

91

Brian v. Anonymous
(Ch. 1474)

A private act of Parliament can confer jurisdiction on the Court of Chancery.
A private act will be construed narrowly.
A private act must be specially pleaded.

YB Mich. 14 Edw. IV, f. 1, pl. 1

One Brian, who was disseised of certain land, sued an act of Parliament for himself that he could have a subpoena against the party etc., by which it was enacted that the Chancellor for the time being call to himself the justices of the one Bench or of the other, have the power to award a subpoena against the party, to be before them at a day delimited by them and that they have the power to award writs of disseisin. And several other things were rehearsed in the act etc.

And on this act, the party sued a subpoena against the other etc. *quod sit coram domino rege in Cancellario ad certum diem etc*. Thus, the writ was as in a writ of subpoena etc.

And it was challenged in that there was no record in the Chancery that any judge was with the Chancellor, nor a day given by them etc. Also, a writ of subpoena founded on this act will be returnable before the Chancellor and a justice according to the act, because a joint power is given to the Chancellor and to the justices or justice etc. Thus, he would have a special subpoena on the matter etc.

Townshend thought that the writ is good, because it is thus in effect, that the Chancellor call the justices to him and, even though it be not in the record that it was so, it makes no matter to him, because he will call the justices whenever it will be that the party comes before him and he will make a remedy etc. Yet it has not been the usage to make mention in the record that the justice was called etc. And also the said Statute of 27[1] provided that the Chancellor will make the party come before him etc., and yet the subpoena on the statute was only a common subpoena, *scil. quod sit coram domino rege etc*. But, by such a writ, when there is a Chancellor and the party comes into court, now, he comes before him etc. And, Sir, this act provides that they will make a writ out of the Chancery, and the Chancellor and the justices cannot do this, unless by reason of the office of the Chancellor, because a justice of the Bench cannot grant a writ out of the Chancery etc., *quod fuit negatur*, if it be enacted that he will do it etc.

Littleton [J.C.P.] thought that the writ is good, because the act will be construed according to the intent etc. And it cannot be supposed that the makers of the act intended otherwise but that he will have a general writ and also that all the other circumstances will be done by the Chancellor as in any other subpoenas etc. And, if an act be made that a man will have a writ of debt returnable before the justices of the King's Bench, yet the writ will be in general form etc., *scil. quod sit coram nobis ubicunque etc*.

Which Laken [J.K.B.] denied.

Billing [C.J.K.B.]: Judges of the King's Bench are judges of pleas etc.

The opinion of the Chancellor [Stillington] and all the justices except Littleton [J.C.P.] [was] that the writ was not good, but that he will have a special writ on his case and matter etc. And, as to the Statute of 28 etc. there, the justices are only counsellors. But, in this act, they are judges and have as much power as the Chancellor. And this appears by the act, that they are

[1] Stat. 36 Edw. III, stat. 1, c. 9 (*SR*, I, 374).

judges and have etc., which gives power to them. Thus, the intent appears clearly that they will be judges in the matter etc. Also the said Statute of 28 is that the Chancellor, by his discretion, etc. Also, when an act is made for the common profit of the realm, it will be interpreted broadly, but a private act will be interpreted strictly etc.

And it was said that, in redisseisin, notwithstanding that the writ is *assumptis tecum custodibus placitorum*, yet the sheriff is the judge and the coroner is not, but [is a] counsellor etc.

And it was mentioned that the Chancellor ought not grant a subpoena on the act unless the act had been sent into the Chancery etc., because without the act, a subpoena does not lie on the matter. And, thus, it was disputed whether the writ will be made returnable before the Chancellor and a justice by a certain name, or otherwise *coram Cancellario et uno justiciario etc.*, and, if it be commenced before a justice and he dies, whether it can be continued by another etc.

And various difficulties about the making of the writ [were discussed].

And so it remained etc.

92

Anonymous
(Ch. 1474)

After the parties are at issue in the Court of Chancery, the plaintiff can have a scire facias *and file a new traverse.*

A defendant can confess and avoid a matter of record.

YB Mich. 14 Edw. IV, f. 1, pl. 2

One traversed an office in the Chancery. And they were at issue, which was sent into the King's Bench to be tried etc. There, he who tendered the traverse appeared and said that, before the traverse, the king had granted the land by his charter, so he should had have a *scire facias* against the patentee and, because he had not, then he could not pursue the traverse etc., but the plaintiff wished to make a new traverse etc.

It was said that he could not traverse in the said Bench, because only a transcript of the office was there, but the office remained in the Chancery etc.

And it was asked of the justices in the Exchequer Chamber whether he could pray a *scire facias* now on the first traverse etc.

YB Trin. 14 Edw. IV, f. 6, pl. 8

One traversed an office in the Chancery. And they were at issue, which was sent into the King's Bench to be tried etc. And, there, the person who tendered the traverse came and said that the king had granted the land by his charter before the traverse so that he should have had a *scire facias* against the patentee and because he had not, thus, he cannot pursue the traverse in the Bench etc., but he should have traversed anew etc.

And it was said that he will not be traversed in the said Bench, because, there, there is only a transcript of the office [found], but the office remains in the Chancery etc.

And it was asked of all the justices in the Exchequer Chamber whether he, on account of this, could pray for a *scire facias* in the Chancery upon the first traverse, which was granted by all the justices, because the mispleading for the lack of form will not prejudice in any case in the Chancery, because it cannot be said to be the court of conscience if the act of the clerk in the pleading would cause the party to lose the advantage of his suit and of all his costs.

And it was said at the same time by Choke [J.C.P.], Littleton [J.C.P.], and Nedeham [J.K.B.] that, at this day, a man can confess and avoid a matter of record, as if it be found before the Escheator that there was a tenant in fee tail, the remainder over in fee, and that the remainderman had committed a felony, by which he was outlawed, and that the tenant in fee tail is dead without issue, then, one can traverse this office, as to plead that, before the Statute *De Donis Conditionalibus*[1] *et post prolem suscitatam*, the tenant in fee tail had enfeoffed him, and, after the said feoffment, the remainderman was outlawed *ut supra*, and pray that the king's hands be removed. And this was a good avoidance, because he had confessed the said office, which was the king's title, and avoided it, because the fee simple was always gone by the feoffment of the remainderman before the said Statute etc.

And the justices rose etc.

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1 *Stat. 13 Edw. I, Westminster II, c. 1 (SR*, I, 71).

93

E. v. Crop
(Ch. 1474)

A suit will not abate because of the infancy of a garnishor.

YB Mich. 14 Edw. IV,
Fitzherbert, Abr., *Age*, pl. 20

A subpoena was brought by one E. against H. Crop and J. Crop, sons and heirs in gavelkind of one R. Crop, to have an estate in certain lands, of which he himself enfeoffed the father of the defendants and others to his use. And he showed how their father survived his co-feoffees etc.

The defendants said that the common voice in the country is that he enfeoffed their father to the use of the plaintiff and his wife and the heirs of their two bodies engendered and they had issue, such a one, by which they prayed a writ from him warning what was granted.

By which he came in by a writ and showed that he was underage. And he prayed that it stay during his nonage.

And the Chancellor [Rotherham] by the advice of Leic[ester] and Littleton, Justices [C.P.], awarded that the matter not tarry for the nonage, because he was not in by descent, by which the infant and his next friend put in his title, according to Littleton, against the heirs of the feoffee etc.

94

Tate v. S.
(Ch. 1474)

A bill of complaint can be amended to cure a variance.

YB Mich. 14 Edw. IV,
Fitzherbert, Abr., *Sub pena*, pl. 15

A subpoena [was sued] against S. And, pending it, one Thomas Tate put in a bill against the same S. to have an estate in the same land. And, because

his bill was more recent, he was driven to answer to the other bill, by which he put in his answer to it, on which they were at issue. And, then, it was shown that the bill of Tate and the answer to Tate varied in two points that were the ground of the matter.

And it was held by the Chancellor [Rotherham] by the advice of king's serjeants that it was not relevant, because the bill of Tate is not now relevant, because he is put to answer to the other bill.

To which it was said that, if it was found for Tate, he would recover on his bill, and this could not be when it is variant from his response that was tried for him.

To which the serjeants said that Tate would be received to amend his bill according to his answer, because he was sworn on his answer and not on his bill.

Quod nota etc.

95

Anonymous
(Ch. 1476)

Where an heir in wardship to the king wrongfully takes the profits of the land in issue and is sued for the profits and defaults, the king can have execution against the heir.

When the king is specially entitled to have a thing by a matter of record, it can be neither granted nor pardoned by a general pardon nor by general words but only by special words.

YB Pas. 16 Edw. IV, f. 1, pl. 3

In Chancery, the Master of the Rolls [Morton] moved this case. If the king's tenant dies seised of a manor that is held of the king, his heir within age, and the heir enters, and, then, all this matter is found by a *diem clausit extremum* before the Escheator, and that the heir entered without license, and that the heir had taken the profits of the said manor at all times after the ancestor's death, and this is returned here before the Chancellor etc.,

Morton, the Master of the Rolls, [said] in this case, now, the king can enter. But I posit that a *scire facias* in the nature of a *fieri facias* issues against the heir to know, for what the king will not be answered for the issues and profits and also for the manor, and, on this, the sheriff returns the heir is garnished at a certain day, at which day the heir does not appear, in this case, whether the king will have execution or not etc.

Catesby: It seems to me that the king will not have execution, because this *scire facias* that issued is founded on a matter in fact, which was found before the Escheator, so it could be that all this is false. Thus, to award execution to the king, where the party never pleaded on this *scire facias*, would be unreasonable. But it is otherwise if one be condemned to the king and, on this, a *scire facias* issues and the party is returned, garnished, and defaults. Execution upon this will be awarded, because, there, the *scire facias* is founded on a matter of record.

Morton: It is all the same, because the king has as pure a right in the one case as in the other to have execution when the party was garnished etc.

Catesby: So, I think, in fact, as I have said.

Morton: I believe that many men are deceived in this case, because I suppose that, if the king will pardon such an heir after the office is found all manner of entries, this is void, because the land is the principal and the issues and profits are accessories. Thus, when the king pardons the principal, he cannot have the accessories, as if the king's tenant has alienated in fee etc. and it is found by an office, and that, after such alienation, the alienee had taken the profits and the king pardons the alienee for all manner of entries, in this case, he will have the land *una cum exitibus*.

Morton: By which, neither in the one case nor in the other, because the entry on the land without suing livery was a trespass to the king, and the taking of the profits is another act. Thus, when the king has pardoned only the entry, this cannot extend otherwise than to the words of a grant of pardon, and the pardon pardons nothing but the entry itself. *Ergo*, notwithstanding, the king will retake the issues. And I have seen a precedent recently in this case as I have said.

Catesby: It seems that, notwithstanding the pardon, that he will make a fine to the king for the entry, because, when the king is once entitled by an office to some land, if the heir enters in the land for it, nothing accrues to him, but the king is always in possession, as if no entry had been made.

And, if it will be understood as if no entry had been made, then the pardon made to a man who had no possession will be understood as a void pardon against the king. And thus, if the pardon be void and the party has committed a trespass to the king, thus, it is reasonable that the party will make a fine to the king for the trespass.

Philpot: In some cases, the pardon is good, and in some cases not, because, if the pardon be made before the office is found, then the king will be barred by reason of this pardon, but, if the pardon be made after the office is found, then this will not be a bar, *quod fuit concessum per quosdam*.

And Morton said that, after the office is found for the king, *ut supra*, the party ought to have a special pardon, because, when the king is specially entitled to have a thing by a matter of record, it cannot be granted nor pardoned by a general pardon nor general words but by special words etc. Query etc.

96

Uxenfield v. Knivet
(Ch. 1476)

Where an action is brought for land, if the defendant disclaims, the land vests in the plaintiff, but, if the action be brought against two joint tenants and one disclaims, the land is vested in the other tenant.

A person can disclaim in the Chancery and not lose his lordship.

YB Trin. 16 Edw. IV, f. 4, pl. 1

A subpoena was sued by Sir Robert Uxenfield, knight, against Knivet and two others, who were feoffees. And the aforesaid R. Knivet showed how he cannot himself re-enfeoff, because he said, by *Catesby*, that the land of which he demanded the re-enfeoffment is held of him by a certain service and that the said Sir Robert made the feoffment and delivered seisin to one of them in the name of all. And he said that he would not agree to this feoffment at this time nor ever after. The which matter etc.

Rogers: This disclaimer is irrelevant, because, by this disclaimer, nothing vests in the other two, because this court has no power to take a disclaimer, so

nothing departs from the said Knivet by this disclaimer, but he stands tenant of the said land. And, if he will be said [to be the] tenant of the land when he is enfeoffed in trust, he is bound to make the feoffment by the subpoena.

Catesby: If a [writ of] *praecipe quod reddat* be brought against a man, if he disclaims, all vests in the demandant, but if *praecipe quod reddat* be brought against two and the one disclaims, by this disclaimer, all the land is vested in the other tenant. Thus, by the same reason, when the subpoena is brought against three in this court which is of record, the one who never agreed to this feoffment can disclaim well enough, or, otherwise, he always loses his lordship, because, if he ought to re-enfeoff Sir Robert, he has extinguished his lordship, which would be a grave mischief to him.

Quod fuit concessum by all the court.

But query whether he can disclaim in the Chancery. And it seems yes, because it is for his disadvantage and that he can disclaim orally in safeguard of his lordship.

97

Lutterel v. Attorney General
(Ch. 1476)

The question in this case was whether, upon a scire facias *upon a petition of right, there should be a search for the king's title upon an aid prayer.*

Litigation cannot be delayed by a search for the king's title for more than six weeks.

YB Trin. 16 Edw. IV, f. 6, pl. 7

In the Chancery, the case was thus. The dame of Lutterel had sued to the king a petition of right, rehearsing in her petition how the king did not have any right in the tenement except by the forfeiture of such a one, upon which a *scire facias* issued against the earl of Pembroke, the patentee of the king. And, upon this matter, it was greatly delayed by the aid prayer and otherwise. And, now, at this term, the dame demanded a [writ of] *procedendo*,

and the patentee prayed a search for the king. And that he will have a search for the king or not, this is the matter [in issue].

Jenney: It seems to me that the search is not well grantable, because it is not grantable to any other intent except to certify the king of his title, and, here, we have certified him of his title by the matter of the petition, which rehearses that the king's title is by the forfeiture. And I put that, in case the king brings a [writ of] formedon against me and I plead a good plea in bar, on which a search is prayed for the king, I say that he will not have a search. And so here, etc.

Fairfax: It seems to me the contrary, because, if the search would not be granted, it would be greatly unreasonable, because it could be that the king had a release from the party more recently, or [the king had] another title that is not comprised in the petition, of which title neither the king nor the party defendant can have any cognisance nor notice of it without a search, by which it seems to me that there is no doubt but that a search will be granted etc.

Rogers: It seems to me the contrary, as in the case we put that a formedon be brought, the tenant says that such a one was seised etc. and, thus seised, gave the said land to him in tail, the remainder to the king etc., and he prayed aid and had aid, and then prayed a search. I say that he would not have a search, because the king's title appeared well enough to the court that this is by reason of the remainder. And, so, in this case, inasmuch as the king, by the petition, is sufficiently informed of his title, the search is not grantable etc.

Pygot: It seems to me the contrary. And I take a great distinction when the king is [involved] by way of action and where he is [involved] by way of defence, because I grant well that, where he is [involved] by way of action, that such a search is not grantable, as in the case that has been put of formedon in the descender brought by the king. And the reason is because the king has founded his action, *scil.* his formedon on a certain matter, of which matter, by any common understanding, the king is sufficiently informed and made certain. And so, it is not necessary nor requisite to have a search etc., because, if he had other matter than was comprised within this formedon as of another gift or another title, the king would not have any advantage from this other title. But, where the king is [involved] by way of defence, as in the case at bar, a search will be granted, because, as has well been said, it could be that the king has another title than is comprised in the petition. It would be

unreasonable that the king will be precluded by the party plaintiff's supposition in her petition. Thus etc.

Townshend: It seems to me the contrary and that, in no case where the king himself is a party, that a search is not grantable, because I put that an office is found for the king in a disturbance of my possession and title and, on this, I sue a traverse, in this case, no search will be granted for the king, because, by my traverse, I have asserted the king's title. So has the plaintiff, by his petition, asserted the king in this case. But I will well agree that, where an action is brought against a man who prays aid of the king by reason that the king leased etc. for a term for life or for years in tail, that a search will be grantable, because, in such a case, the king's title does not appear. So, it is reasonable to grant the search, but not here.

Catesby: It seems to me the contrary and that, in this case, a search will more naturally be granted, because her petition is a petition of right, by which the right of the land is to be tried and determined finally between the king and the party and the king cannot have perfect notice of his right except by suing a search of his evidences and records, of which he will never have notice nor advantage without a search. So, it would be unreasonable that the king would lose his right for lack of a search, which is only a brief delay to the party plaintiff, and, if it will not be granted, by this, perhaps, the king will be disinherited, which would be a greater mischief than a delay, because as has been said it could be that, by the search, it could be found that the king had another title than is supposed by the petition, and it could be that this title supposed by the plaintiff is not the king's title, [but is] falsely supposed, by which it seems to me that the court ought to be assured what title the king had before the grant of [a writ of] *procedendo*. And thus, it seems to me that a search will be granted etc.

Tremayle: It seems to me the contrary, because, as it seems to me and as has been said, by the petition, the king is well enough assured of his title. And to that which was said, that the king has another title etc., the court does not presume it unless it be specially shown. And then, perhaps, a search will be granted, but not here before such a special matter shown, because, if the plaintiff here had mistaken the king's title or if he had not comprised all the king's titles within his petition, the petition avails nothing. Thus, it will be understood by common presumption that every title that the king has is concluded within his petition, by which, without showing another title, a search

will not be granted. And it was only a short time ago that, in the Exchequer Chamber before all the justices, a man had sued by petition of right against a man who had aid of the king, and then he prayed a search, and, because it appeared well to the court that the tenements were seised in the king's hands without an office by process of the king and, on this commission to the patentee, it was awarded that he will not have a search. And yet, it could be that the king had another title, but none of this appears nor is shown to them, by which it seems to me that it will be similar in this case, inasmuch as the title on which the grant was made to the patentee appeared by the petition to the court, a search is not grantable etc.

Digas: It seems to me the contrary. And, Sir, if a search will not be granted in this case, it will not be granted in any case in the world, because the grant of the search can satisfy the king as to his title, which he will lose without having a search, because it will be strongly unreasonable to disinherit the king by not granting the search, which is not solely granted to save the king's right, but it is granted as well to save the title of the tenant in the tenancy, by which it seems that a search will be granted as well for the king as for the party etc.

Browne: It seems to me the contrary for various reasons. And I will prove it, because no search will be granted for the king for two reasons, one cause is because the king has by his letter of privy seal, which remains in this court of record, commanded the court to proceed forth without any delay. Thus has the king granted that he will not lose an advantage of any search in delay of the party. Also, as has been said, the party plaintiff has certified to the king all the titles as will be presumed. And, if he had not done so, the king could show it to have the advantage of it in abatement or in bar of the petition. And also, the king is at no mischief, because he will have sufficient time to be advised and to search for his title, because the king's title can be shown at any time before judgment is rendered and to appear in sufficient time. And a search will not be granted to the party, because, as appears well by the letters patent, the plaintiff had certified to the king by her petition as to his title. So, it is neither necessary nor requisite, but in vain and in delay of the party to grant him the search, because the king's whole title depends on the forfeiture, because the letters patent are `*quae in manus nostras devenerunt ratione*' etc. So, he will have no advantage of any other title, no more than in a case where I have divers parcels of land in Dale by divers different purchases

and I enfeoff you of all my lands in Dale that I have by purchase from one J. at S., in this case, you do not have my other lands in the same vill, which I have by purchase from other men; no more does the patentee have here etc., by which etc.

Et adjornatur etc.

And note that it was said here that, before the Statute of 14 Edw. III,[1] in a search, the king could be advised for as long a time as he wanted, but, now, it is ordained by the same Statute that the party will not be delayed by such a search, unless for six weeks at a time etc.

98

Anonymous
(Ch. 1476)

A court of equity can grant relief where goods were given away to defraud creditors.

YB Mich. 16 Edw. IV, f. 9, pl. 9,
Cooper's Practice Cases 531, 47 E.R. 636

In Chancery, a bill was abated for insufficiency of matter. And the plaintiff said that this bill was misconceived. But he showed for his matter that J.B., who was formerly the husband of the [wife of the] defendant, bought of the father of the plaintiff, whose executor he [the plaintiff] is, at Brig certain goods of the value of 100 marks etc. And then this same J.B. comes into England, and, to defraud his [creditors], he made a gift of his goods to a certain etc., but he continued his possession and took [himself] to Westminster [franchise], and he died. And his goods remained in the possession of his wife etc. And, then, she took him who is alleged to be defendant to husband and went to London. And [he] carried the said goods with him and is seised and possessed of them etc., which matter etc.

And we pray that he answer to this matter and bill, and he has a copy of it.

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1 Stat. 14 Edw. III, stat. 1, c. 14 (*SR*, I, 286).

And so the court awarded. *Quod nota etc*.

Cary 18, 21 E.R. 10

A man made a gift of his goods of intent to defraud his creditors and yet continued the possession of them. And he took sanctuary and died there.

Now, his executors, having the goods, were charged towards the creditors.

99

Anonymous
(Ch. 1476)

On the facts of this case, the court of equity allowed a surety to sue at common law.

Where the evidence in a court of equity is conflicting or false, the court can order additional testimony to be taken.

YB Mich. 16 Edw. IV, f. 9, pl. 10

A man was surety for another, and he and two others were bound to him to keep him without damage. And, then, the surety paid the money and sued those who were bound to him. And, pending this plea, he, for whom he was surety, had a subpoena against him to have certain goods out of his hands which he had delivered to the surety for his indemnity before the surety had made the obligation. So, because he would have surety by obligation, it is not understood that he will be doubly charged, by which he prayed delivery of the goods.

And the defendant in the subpoena pleaded that the goods were delivered to him for another cause. And he showed this with certainty etc., on which the parties were at issue, by which the plaintiff prayed an injunction from the court to the defendant that he would not proceed to maintain his action of debt brought in the Common Bench on the said obligation.

But the court would not grant it, because it appeared that the defendant had made title by different means, as well to the goods as to the obligation,

and so it would be unreasonable to grant the injunction in delay of the defendant, *quod nota*.

And query, because, if a plaintiff be barred first in this court, he will not have advantage of this in the Common Bench etc.

And note that, the same day there, divers exceptions were taken to the matter testified by certain witnesses on their oaths.

And, because the articles of their testimony were contradictory in divers points and part of what they said was false as to other parts, the court said that it would be repealed and commanded the party to bring in new proofs, because the first proofs have disabled themselves etc., *quod nota*.

100

Anonymous
(Ch. 1477)

A marriage is not a good consideration to make a contract enforceable.

YB Trin. 17 Edw. IV, f. 4, pl. 4

The Master of the Rolls [Morton] asked the justices of the Common Bench, if a man promises a certain sum of money to another to marry his daughter or servant, who marries him accordingly, whether he will have an action of debt at common law for this money or not.

Townshend: It seems to me [there is] no action in our law, because it is only a bare promise. *Et ex nudo pacto nulla oritur actio*; as if I promise you £20 to repair your hall, here, no action lies for this, because he had no *quid pro quo*. And it is not the same where I promise you 6s. every week for board for such a one, because, there, he has a *quid pro quo* and the law presumes that he is such a one for whose service I have an advantage. Also, in the case at bar, the thing that he ought to do is spiritual, which cannot be sold nor can the party be compelled to do it. And, if so, it is unreasonable that the other will be charged.

Rogers and *Sulyard*, to the contrary: And to what is said that this was only a bare promise, this is not so, because he had a *quid pro quo* inasmuch as

his daughter or friend is advanced by the marriage by presumption, because, if I promise a schoolmaster so much money to teach my son, which he does, he will have an action of debt, so it is where I promise a physician or surgeon a certain sum to cure such a poor man, or if I promise a laborer certain money to repair such a road that is the high road, a good action lies on this; *sic hic*.

And then Choke [J.C.P.] and Littleton [J.C.P.] were agreed with the Master of the Rolls [Morton] that, in the principal case, no action lies at common law, because the matrimony, on which the promise was founded, was a spiritual thing, which could not be sold in any manner.

101

Anonymous
(Ch. 1478)

A person can prescribe to have a right of way to go out of a church or over a churchyard notwithstanding it is a sanctuary.

YB Trin. 18 Edw. IV, f. 8, pl. 10

Note that it was held by all the justices and barristers in the Chancery that a man can prescribe to have a way to go out of a church or over a churchyard notwithstanding it is a sanctuary.

Morton, the Master of the Rolls: You have no business to meddle with this, and, if you do, you will be excommunicated.

Warnowe: What do you say about the churchyard of the Charterhouse? It is a common way for the inhabitants of London to St. John's. And they prescribed in this.

Vavasour: One can distrain a parsonage for an outrage after they are offered, because it is a lay chattel etc.

102

Anonymous
(Ch. 1478)

A widow's dower will not be defeated where her husband alienated the land during the marriage.

YB Trin. 18 Edw. IV, f. 9, pl. 13

In the Chancery, an office was returned, which was thus, that one John was seised of an acre of land in fee and he held of the king *die quo obiit*. And it did not appear by the said office that he died seised. And, afterwards, his widow appeared. And she prayed to be endowed. And that she will be endowed, this is the case. Query.

And [it was] thought yes, because it appeared that her husband was seised and, even though he will alienate during the marriage, yet the widow will be endowed of this best possession etc.

103

Anonymous
(Ch. 1478)

A married woman cannot order her trustee to alienate land in trust for herself.

YB Mich. 18 Edw. IV, f. 11, pl. 4,
Cooper's Practice Cases 524, 47 E.R. 633,
Baker & Milsom, *Sources*, p. 99

In the Chancery, the case was thus. A woman made a feoffment on trust when she was single, and then she took a husband. And, during the marriage in her lifetime, she made her will that her feoffees should made an estate to her husband and him and his heirs forever. And she died. And, after her death, her husband sued a subpoena. The case is whether this will was good or not.

Tremayle: It seems that the will was good, that the feoffees shall be compelled to make an estate according to the will, because, just as a wife may make executors with her husband's agreement, so, by her husband's agreement, she may make her will that the feoffees should make an estate to the husband. And conscience requires well enough that this be done etc.

Vavasour: There is a great difference between your case and this case. There are various cases where a wife, by her husband's agreement, may make executors, as if a bond be made to the wife when she was single, she may make executors during the marriage by her husband's agreement, and, in this case, the executors shall have the action of debt on the bond, because the husband cannot in any way have an action on it after the wife's death, because his interest is determined by the death. Also, she may make a testament, by her husband's agreement, for her clothing, which in our law is called paraphernalia, and this shall be good even though they are the husband's goods. But, in the present case, the law is otherwise, because the law will not allow anything done by her during the marriage to be good. If she makes a feoffment of her land during the marriage, it is void. And this well proves that nothing done by her during the marriage concerning any inheritance is good, because the writ of *cui in vita* [says] 'whom in her lifetime she could not gainsay', and this proves well that her act and her will is void during the marriage etc.

Jay, to the same effect: If this will were good, a wife's inheritance would not be safe from her husband's alienation during the marriage, for the feoffment made before the marriage was made with the intention that the husband's alienation should be of no effect. Moreover, if the will were to be effective, it would be prejudicial to the heir.

Sulyard conceded this.

The Chancellor [Rotherham]: The will cannot be good, because she cannot gain or lose the land during the marriage without her husband, and, since she cannot do it at common law and any act done by her is void, the law of conscience likewise says that her will shall be so and of no effect etc.

Tremayle: A fine levied by a husband and his wife is good.

Vavasour: The reason is because the wife shall be examined openly in court by the justices, and her intent is proved by matter of record etc.

But, at this time, the opinion of them all, except *Tremayle*, was that the will was void.

104

Hamped v. Anonymous
(Ch. 1478)

A deed of feoffment without livery of seisin is void.

YB Mich. 18 Edw. IV, f. 13, pl. 9

A subpoena was sued by one Hamped against B. and C. And they showed how the person that the plaintiff alleged to be their feoffor had issue, one R., and died and that the inheritance descended. And they prayed process against him, by which R. came in to show how his father was seised and died seised and the descent to him, without that that he enfeoffed those B. and C.

And the said B. and C. were examined. And, upon the examination, they said that the feoffor made a feoffment to them, but he never delivered to them livery and seisin.

And it was moved whether the heir have a judgment of record of the land or that the plaintiff recover his damages against the feoffees.

Morton, the Master of the Rolls, answered that he could not give judgment of land, because it appeared that the feoffees had nothing by reason of the feoffment. And, if they were arbitrators, the heir could have his remedy against them at common law, *quod fuit concessum per totam curiam*.

And whether the plaintiff would recover his damages, this is the matter.

It was said by *Calow* that he should receive damages because, if the garnishee in a writ of detinue pleaded and then defaulted, the plaintiff would recover damages, because he was made privy; thus, the heir was made privy here etc.

Cary 15, 21 E.R. 8

A. made a deed of feoffment to his own use to B., but he gave no livery of seisin. A. dies. C., his heir, brings a subpoena against B.

But, by Morton, Master of the Rolls, C. was denied help here, because B. had nothing in the land. And, if he abate, there is a remedy at the common law against him.

105

Anonymous
(Ch. 1481)

An infant cannot create a trust of land.

YB Pas. 21 Edw. IV, f. 24, pl. 10,
Cooper's Practice Cases 533, 47 E.R. 638

In the Chancery, the case was thus. An infant within age enfeoffed certain men of lands in Kent, where the custom of gavelkind is. And he declared his will to them that they should give the lands back again to him and his wife in tail. And whether this [declaration of his] will was of effect or not was argued. And, upon this matter, the subpoena was sued against the feoffees.

And Genney [J.K.B.] said that the [declaration of] will was not good, because the custom is such in Kent, where the land is, that an infant when he is of the age of fifteen years may sell his land and his sale shall be good. And that is the custom and not otherwise. Thus, each custom ought to be taken as it is used, and no other thing can be taken by the equity of it. Thus, the intent of the plaintiff is that the custom extends as well to this [declaration of] will as to the sale of the land. And that cannot be, because a lease and release cannot be made by an infant within the said custom, which proves that the custom must be taken strictly as it is used, and that is that an infant may make feoffment at such an age.

Digas, barrister, to whom Master Genney had said that the custom ought to be taken as it has been used and extends only to feoffments upon sales and not to feoffments in trust and to [declarations of] will: Sir, there is also good reason that it shall be taken [as extending] to wills as to feoffments, because, in borough English, where the youngest inherits, if the father make a feoffment in trust, the youngest brother shall have the subpoena. The law is the same in gavelkind, and yet the custom is no other but that the youngest ought to inherit. But it is incidental and reasonable that he who shall have the land shall have the action. Thus, here, it is not against reason nor conscience that he shall make such a [declaration of his] will, as well as he shall make the feoffment. And this feoffment was made for the security of the wife.

The Chancellor [Rotherham]: This ought to be tried by the people of Kent, how their custom and use is.

Digas: No, it is in your discretion.

Littleton [J.C.P.], *veniendo* from Westminster, said that, if an infant is made executor, he may sell the goods of the testator and give and dispose of them for his soul and also he may release by the same reason, and [there is] no diversity. But query, for a married woman executrix may well sell and dispose of the goods of the testator, yet she cannot release, *ut dicitur*, without her husband. Therefore, no more can an infant. And, if a man is bound to an infant, if the infant brings an action thereupon or delivers the obligation of debt for payment, he may not be discharged by an acquittance nor a release.

And then, at another time, Littleton said, that he and all his companions were agreed that the custom shall not extend to this [declaration of] will unless the custom be so used, because, if an infant at common law desires to make a [declaration of his] will to his feoffees in trust, it is void, wherefore etc.

106

Corbet v. Corbet
(Ch. 1482)

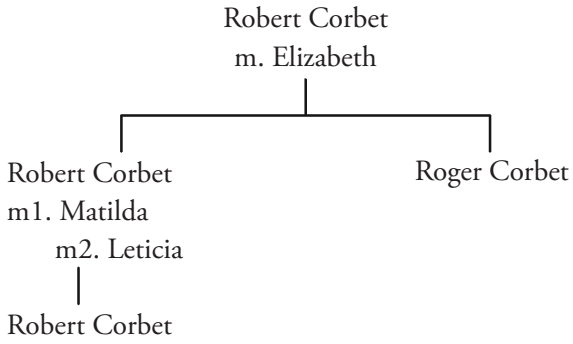
A dispute over an inheritance where one claimant is allegedly illegitimate because of the alleged invalidity of his parents' marriage will be tried in the secular courts and not in the ecclesiastical courts.

YB Hil. 22 Edw. IV,
Fitzherbert, Abr., *Consultation*, pl. 5

Note that one Robert Corbet, knight, had issue two sons by his wife Elizabeth, *scil.* Robert, the elder, and Roger, the younger, and he died. And Robert, the elder son, being under the age of fourteen years married one Matilda, and, at full age, they remained together and had carnal intercourse *et cogniti et reputati pro viro et uxor palam etc.*

And then Robert put away the said Matilda, his wife, and espoused one Leticia etc. while Matilda was still living. And he had issue by Leticia, one

Robert etc. And then Robert, the husband of Leticia, died. And Leticia said openly that she was the lawful wife of Robert and her son [was] legitimate, for which Roger sued in the spiritual court to reverse these espousals between Leticia and Robert and that Leticia be silenced etc., by which Leticia sued [a writ of] prohibition etc.



By which, Roger appeared in Chancery and showed this matter and the libel, and he prayed [for a writ of] consultation, because the force of the libel is to disprove the second marriage and to enjoin Leticia to silence.

Bridges: His intent is to bastardize the issue between Leticia and Robert and to prove himself heir. And the action and original writ will not be first moved in a spiritual court to bastardize a man but in the temporal court, because a man can be a bastard in temporal law and legitimate in spiritual law, and a man who is engendered during the marriage in adultery is a bastard in spiritual law and legitimate in temporal law. And, if one beats a clerk if he sues in a spiritual court, to convict him of excommunication, he does well. But, if he sues there for the examination and also to have amends, he will have a prohibition etc. And thus it is done here.

Sulyard, to the same intent: If I promise by my faith to enfeoff a man or to pay such a debt by such a day, if I do not do it, he will not sue me in a spiritual court for the perjury, because it is mixed with a temporal cause etc. And, in the time of Hen. IV, there is a similar case.[1]

[1] YB Trin. 11 Hen. IV, f. 88, pl. 40 (1410).

Kidwelly: It appears that the second espousals were during the first marriage, and thus it appears that they were utterly void and the issue a bastard, because, if the second wife and her husband brought an action, it would be a good plea to say generally that she was not his wife, and it will be tried for him, because she is not his wife in fact etc., by which etc.

And this notion was agreed by three serjeants and denied by none.

Townshend: His demand and petition in his libel are only that he be proved heir and the other a bastard, and he has made himself heir in his libel etc. But his request is not to be heir etc., by which the consultation will be granted.

Pygot: Even though the second espousals are void, yet, by the continuance of common fame for a long time that the second espousals were good, this matter that you say proves the second[1] espousals will be forgotten and cannot be tried. And thus it will be understood good and the issue legitimate, and, for this mischief that could befall, he has the suit in a spiritual court to disprove the second espousals. And it remains [a matter] of record always. And to that which is said that the matter is mixed with a temporal cause, *scil*. whether he is heir or not heir, it will be tried in a temporal court, Sir, if I devise a certain sum of money to the heir of J.S. by my testament, there it will be tried in a spiritual court whether he be heir or not heir. And also, if, while my father is living, my mother be divorced for false and void causes and my father marries another wife and my mother [marries] another husband, and my father and my mother die and have issue in their second espousels, I will have my suit in the spiritual court to revoke the divorce between my father and my mother and disprove the second espousals and to make the issue by the second espousals bastard. And, by this means, I will have my temporal inheritance and the two issues [of the second espousals] bastards always. And, if my older brother enters into religion and is professed and then relinquishes his habit and his obedience, I will have a libel in a spiritual court to try his profession to have him to his obedience.

Which some denied, because he can have an action by the temporal law and object his profession against him. But, if he had been claimed back from his order for a false and unjust cause, then the younger [brother] can have a citation to revoke this deraignment.

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1 Sic in report for `first'.

Catesby [J.C.P.]: If my father and mother are divorced and then marry others and have issue and die, in this case, I grant well that I will have my suit originally in a court Christian, because I cannot have an action in temporal law as heir during this divorce and also the divorce is a spiritual judgment that will be reformed in a spiritual court. But here, he will have all actions in a temporal court as heir and all benefits as heir against the issue of Leticia notwithstanding the second espousals, because they are utterly void in all laws, temporal and spiritual. And, if a man marry his cousin, both of them not knowing, and have issue, even if, afterwards, they are divorced, the issue is legitimate in our law.

And some doctors affirmed this, that he was legitimate in the spiritual law, and also some doctors said that, if a married man takes another wife who does not know that he is married, the issue between them is legitimate even though, in all laws, the espousals are void. And the cause is because the wife did not know of the first marriage etc.

[Catesby, J.C.P., continuing]: But, inasmuch as the libel does not make mention of any divorce or of the first marriage so that he can have a remedy at common law, it seems that the consultation does not lie. And executors will not sue in a spiritual court for a debt on a contract, nor will a man sue for breach of covenant without a deed in a temporal court nor any other place. And, if he would sue for them in a spiritual court, [a writ of] prohibition lies and no consultation. And a man will not sue to execute a devise of land in a spiritual court, even though it concerns a testament. And to what is said that a consultation will be granted because it could be that, by a continuation for such a long time, the second marriage cannot be proved void, inasmuch as the witnesses could be dead or forgetful, it is better to suffer a mischief than an inconvenience, because, if, in a spiritual court, a judgment was given that he could not proclaim himself as heir but must keep silence, then, if he did the contrary, he will be excommunicated. And, consequently, he will not have any action as heir to the ancestor. And, by such means, no one will sue a writ in a temporal court, because, if a man had feloniously killed my ancestor or stolen my goods, he will have a citation against me that I do not commit any defamation of him for this. Thus, I can never have my action. And, if the spiritual court will have jurisdiction, all the cause ought to be spiritual, because, if a parson brings a writ against a layman for taking away tithes, the temporal court will have jurisdiction, but, if it be between parson and parson, the spiritual court will have jurisdiction. And yet, if, afterwards, in the

spiritual court, they are to try a temporal cause, a [writ of] prohibition will lie, as, if the one parson pleaded that the place etc. was within his parish and the other *e contra*, after such matter is shown, prohibition lies. And thus, in an action by a parson against a layman, if it be in the right of the tithes, the court Christian will have jurisdiction etc.

107

Anonymous
(Ch. 1482)

A court of equity will not grant relief to an obligor by record who paid the debt but neglected to take a receipt.

YB Pas. 22 Edw. IV, f. 6, pl. 18,
Cooper's Practice Cases 513, 47 E.R. 628,
64 Selden Soc. 53

In the Exchequer Chamber before all the justices of the one bench and the other and many serjeants and barristers being there, the Archbishop of York, [Rotherham,] the Chancellor of England, demanded advice of the justices about granting a subpoena. And he said that a complaint was made to him, that he [the complainant] was bound in a statute merchant to another and the recognizor [complainant] had paid the money and did not have any release, and, notwithstanding this, the recognizee sued execution. And [the complainant] said that the recognizee would not deny if he was examined but that he was paid, whether, said My Lord, ought I to grant a subpoena?

Fairfax [J.K.B.]: It seems to me that it were altogether contrary to reason to grant a subpoena and, by two witnesses, thus, to defeat a matter of record, for where one is bound in such form, he is not bound to pay without an acquittance or a release, as if a man be bound in a bond, he is not bound to pay that duty, unless the obligee is willing to make an acquittance. And, therefore, it appears to me that it is his [the recognizor-complainant's] folly.

The Chancellor [Rotherham] said that it is the common course in the Chancery to grant [a subpoena] against a bond and also upon a feoffment of

trust, where the heir of the feoffee is in by descent or otherwise, because we find records in the Chancery of such.

Hussey, the Chief Justice of the King's Bench: When I came first to the court, which was thirty years past, it was agreed in a case by the whole court, that, if a man had enfeoffed another in trust, if he died seised, so that his heir was in by descent, that then no subpoena lay. And there is great reason that it should be so, because, by the same reason, that, by a subpoena, by two proofs, a descent may be disproved in Chancery. I say that, in like manner, one can disprove twenty descents and those descents, which is against reason and conscience. And, therefore, it seems to me, that it is less evil to make him who allows his feoffee to die seised of his land to make him lose that land than to make, by proofs in the Chancery, many to be disinherited. And so it is in the statute merchant and also in the bond. It is less evil to make those [recognizors and obligors] pay again only through their negligence than by two proofs in the Chancery to disprove a matter of record or a matter of specialty, when it is his negligence. And it is not for the [obligor] to pay before he has the acquittance of the plaintiff [obligee] or his release. And I say that to him, and so is the law.

To this the Chancellor [Rotherham] said, then, it is great folly to enfeoff others in my land. And then the Chancellor agreed as to the statute merchant, because that was a matter of record. And, as to the rest, he wished to be advised etc.

108

Attorney General, *ex rel.* Danvers v. Pole
(Ch. 1483)

The question in this case was whether the defendant had a certain right of wardship.

YB Trin. 1 Edw. V, f. 6, pl. 12

In the Chancery before the bishop of Lincoln [Russell], Chancellor of England, and before justices Choke [J.C.P.] and Catesby [J.C.P.], a mat-

ter was moved for the king before them by *Townshend*, King's Serjeant, who made an information in the Chancery for the king. And it was surmised to the court that, where one William Fowler was possessed of a wardship of the body and land of the heir of one J. at S., the said William Fowler granted the said wardship of the body and land to one W. Danvers and, afterwards, the king, by his letters patent confirmed and ratified the estate of the said W. Danvers of the said wardship, by force of which a subpoena was awarded against one T. Pole because he had the [infant heir's] body to have the body before the king in his Chancery at the octave of Trinity and also to appear there.

At that day, the said Pole came in and said by *Bryan*, a barrister, that this information was not sufficient and demanded judgment whether he should bring the body in on this information, because, if he should, then great mischief would ensue, because then no man would have the custody of his own seignory, because, if we should deliver the wardship, we will not have any manner of remedy to have it back, because we have no original [writ] to answer and no office is found for the king. And the information is not sufficient because, by this, no manner of title nor color of anything is given to the king, because the information is only whether it was in the possession of Danvers. The king confirmed his estate. Thus, there was no possession in the king, nor is title shown. And for us to put the king into possession here where no possession nor right is put forward to be the king's will not be reasonable. Thus, we pray to be dismissed from having to bring in the body and we to continue the possession etc.

Townshend, for the king, prayed delivery of the body, because the king can be entitled to a wardship by various manners, as by a *diem clausit extremum* or by an information or by seisin. Thus, it is unreasonable when the king impleads any man for such a wardship, that be out of possession, because the possession of right belongs to the king, and the party who now has the possession is at no mischief, because, if it belongs to him, then he can have a writ of ravishment of ward.

Sulyard, to the contrary: And to what is said that it is reasonable that the king have the possession when he impleads any man etc., this is true. But this ought to be where sufficient cause or title is given to the king to have the possession, as by an office found that is a matter of record or a good information or any possession having once been in the king. And none of

these is shown, because nothing is shown except a confirmation by the king to Danvers, which confirmation does not give any title nor possession to the king, because thus the king can confirm the estate of another where he has not any right etc. And, if, in the information, any tenure had been surmised between the father of the infant and the king, then, perhaps, it would be otherwise. But no tenure is surmised, nor any other title; thus etc. And to what is said that we would not be at any mischief, because we could have a writ of ravishment of ward etc., Sir, I understand that no law would compel any man to have or to sue an action for this where his possession of the same thing is lawful, and the contrary has not yet been shown, by which, we pray the possession to continue in us etc.

Vavasour, for the king, thought that the king will have possession or he to whom the confirmation [was made] etc. and, after this, that he had the possession then to dispute the king's title. And to what is said that no title nor possession was shown to be to the king, except, by the information, it is shown that the king confirmed the estate of Danvers etc., Sir, this is no matter, because the information will not be a wrong to the king. When the body has come in, then the king will not make himself a new title or, otherwise, the information will be amended, because the king will not be in the same case as a common person, because, in a [writ of] *quare impedit*, the king will make to himself twenty titles, twenty presentments, and all will be inquired by the jury, and, even though one be found against him, another can be found for him etc. And, on account of this, it is reasonable, inasmuch as, [in] a subpoena made by the information, it is surmised that Danvers was guardian in fact, by which it will be inconvenient that the party will have any traverse or any plea against the information or in destruction of the king's title before the king would be in possession. And, for this, he thought the king will have the possession, and, also, when the king has him in possession, the king can make him another title. And for this it seems to me the body will be delivered.

Justice Catesby [J.C.P.]: Sir, I understand well, as has been said, how a title would be made for the king and to that which has been said, that it is the better for the king that will be taken, and also, as has been said, the information can be amended if it not be sufficient. But I understand well that a tenure surmised in the king is a good title and this any stranger will do for the king, *scil.* that one such died in the king's homage, and also a tenure

with possession is a good title for the king, if he has right without an office, and also an office is a good title for the king. Thus, we are all agreed that an office found for the king is a good title, *scil*. that such a one died in homage, who held of him etc. *Item*, one will seize for the king where the king has a title, and this is without an office. And also, a tenure surmised by a matter in fact, that is to say, by information, is a good title to put the party who claims the wardship to traverse the information and the tenure etc. And, Sir, I say also that, even though this information in such a form is not sufficient for the king, because it is not shown that any office has been found etc. that the infant's ancestor died in the king's homage nor any tenure surmised in fact nor any seisin in the king etc., yet I understand well that, for the king's advantage, the information will be made better and amended or, otherwise, another title can be made for the king, as *ut supra*. But to compel the party to bring in the body and to put the king in possession on this surmise cannot be, because, if there is not any original [writ] that gives the king a title, to which the party who has the body can have an answer nor a traverse, which, if it was found, would cause the party to have the body back or if a good title was made for the king, as by an office, then the party can well traverse the office and make a title to himself and both will be inquired. Or, if the king's title was supposed by possession and with right, then the party will have the answer to this and will make a title to himself. Thus, because none of these is shown here to have the body out of the king's possession, if the king would have the possession for this, it seems to me that the party will have the possession and not the king. And, if there be a delivery to the king and, after this, the king will not make another title to which he can have an answer, then the party will be put to his petition to the king or to his writ of ravishment of ward against a stranger if a stranger have the possession, which would be a mischief to the party. Thus, it seems to me that he will not deliver the body without a better title etc.

Choke [J.C.P.], to the same intent: As has been said, where an information is made in the Chancery, on which a subpoena is awarded, if the information not be sufficient, the party can make another if he wants. And, Sir, an oral information is good for the king, upon which a subpoena can be awarded, and the party will answer to this oral, unwritten information. And on account of this, in this case, even though the information that is put in writing not be sufficient, yet the party who put it, that is to say, he who is

supposed to be guardian in fact by the confirmation [Danvers] can orally surmise possession in the king or a tenure by knight's service, and then this is sufficient to put the party to answer. And this will cause him to have the body in [court]. But, even though it be good, he will not be delivered to him who claims to be a guardian in fact, but he will be delivered to the court, and the court, which is a third party, will deliver him to one of the Masters in Chancery in the wardship of my lord the Chancellor for safekeeping until the right be determined, to whom he will be delivered.

And, afterwards, by the advice of the Chancellor [Russell] and the Master of the Rolls [Morton] and the justices there present [Choke and Catesby], a day was given to Danvers, who put off the information until *crastino Johannis*, at which day he will put in his information sufficient to be answered, and then the court will be advised what will be done and how the party will be ordered to have in court the body and that he will be delivered.

109

Note
(Ch. 1483)

The king wills that no wrong be done in his name, and, therefore, a disseisin by the king's servant is done outside the scope of the servant's authority and thus not by the king.

YB Trin. 1 Edw. V, f. 8, pl. 13

Note that it was said on the same day [26 June 1483] in the Chancery and agreed by all the judges and serjeants being there [Choke, Catesby, *Townshend, Sulyard*, and *Vavasour*] that the king cannot be said to be one who commits a tort, because, if one would disseise another to the use of the king where the king has no right, the king could not be said to be a disseisor. *Quod nota*.

110

Duplege v. Debenham
(Ch. 1484-1499)

Where a creditor has execution upon a statute staple of lands and tenements and, before the debt has been paid, he is expelled by the debtor by threats or on account of the death of the wife, who was the owner of the lands, the creditor can then have a writ of capias ad satisfaciendum.

The indemnity bond that a party must put up in order to have a scire facias *is conditioned that the recognizor will sue with diligence, that he will prove the matter to be true and just, and that he will pay any judgment thereupon.*

A creditor who is secured by a statute merchant or a statute staple can recover interest and expenses in addition to the principal sum due.

Where a creditor secured by a statute staple or statute merchant dies, his executor can come into court and show the statute and the will and have execution without a scire facias. *It is otherwise where a creditor recovers at common law and dies, for there his executor will not have execution on the judgment without a* scire facias.

YB Mich. 2 Ric. III, f. 7, pl. 14,
64 Selden Soc. 75

Sir Gilbert Debenham was bound to Robert Duplege in a certain statute staple in the sum of £100 etc., which statute, moreover, was certified in the Chancery by the Mayor of the Staple. And, thereupon, the said Robert Duplege had prayed a writ to take the body of the same Gilbert and also one to extend his lands and tenements in the counties of Suffolk and Middlesex only and in no other county. And these writs were not returned. And, afterwards, the said Robert caused the Mayor of the Staple to certify the same statute a second time by the lord king's writ of *certiorari*. And he certified the same statute a second time in the Chancery, and, thereupon, the said Robert prayed writs both to take the body of the said Gilbert and to extend his lands and tenements in ten counties, and the counties Suffolk and Middlesex were not among these. None of the writs, as yet, had been returned etc. And, afterwards, at the time of the restoration of Henry VI [1470-1471],

the same Robert caused the Mayor of the Staple to certify the same statute again a third time in the Chancery. And, thereupon, the said Robert prayed a writ as above in five or six counties, among which the counties of Suffolk and Middlesex were not named. And, thereupon, the [writ of] extent was returned in the Chancery, and he had execution touching the lands of which the same Gilbert was in possession in the right of his wife, who died during the term, etc. And the same Gilbert, likewise, made threats in London to the same Robert touching his life, of such a kind and so extreme that he did not dare to collect the rents and profits of the aforesaid lands etc.

And the opinion of all the justices assembled at the instance of the Chancellor of England [Russell] in the Exchequer Chamber was this. If anyone, upon a statute staple, had execution of divers lands and tenements in divers counties and, before the money for these has been paid, he had been expelled by the recognizor by threats against his life etc. or on account of the death of the wife (as was the case etc.), he to whom that statute was made, upon such reasonable cause, shall have a [writ of] *capias* in the county in which he sought the writs etc. and not in another place or county, provided always that the statute be certified once and not more. And, upon that cause, the recognizor shall have an answer. And, thereupon, he shall have a [writ of] *supersedeas* with surety to the king and to the party, according to the form of the Statute in the eleventh year of Henry VI, chapter 10,[1] etc.

And, afterwards, the same Robert, seeing etc. and thinking to himself that three separate statutes touching the one sum had been certified against the said Gilbert etc. and that, since, upon the first certifying of the statute, the same Robert had prayed his process in the counties of Middlesex and Suffolk only, had secretly sued a *capias* against the said Gilbert to the sheriff of Middlesex whereby the body of the same Gilbert was taken, and, thereupon, the same Gilbert, by virtue of a writ of *corpus cum causa*, was brought before the Chancellor of England in the custody of the sheriffs of London and Middlesex, and the same Gilbert brought there surety both for the king and for the party for the suing of a writ of *scire facias* against the same Robert [and] sufficient matter and proof that the same Robert has been paid etc.

And, thereupon, all the justices of both benches having been summoned there by the Chancellor [Russell], both the matter and cause recited above

[1] Stat. 11 Hen. VI, c. 10 (*SR*, II, 285).

were put before them, and, thereupon, the aforesaid Statute of the eleventh year of Henry VI, chapter 10, was viewed and considered. That Statute was taken to mean that such surety shall contain three conditions: first, that the recognizor ought to sue his aforesaid writ of *scire facias* with effect; second, that he ought to prove the matter contained in the aforesaid writ to be true and just; third, that he ought to stand to the judgment of the court thereupon if that matter be sufficient. And, if he shall make default in any of these three conditions, he forfeits both sureties, *viz*. to the king and to the party. And, because the said Gilbert had not his aforesaid writ of *scire facias* ready to be returned at that time, the surety and that recognizance cannot be taken, because those recognizances ought to contain those three conditions. And as soon as the aforesaid writ of *scire facias* shall have been returned, the Chancellor ought then to receive the recognizance either in the presence or absence of the party, provided always that those persons be adequate. And it is the same touching the larger amount, *viz*. the expenses and costs of the party etc.

YB Mich. 15 Hen. VII, f. 14, pl. [7]

In the Exchequer Chamber, before all the justices and serjeants assembled there, the Chancellor of England [Russell] asked their advise in a matter, and he rehearsed the case. Sir Gilbert Debenham, knight, was bound to one Duplege for £100 in the statute staple to pay at a certain day, at which day, Sir Gilbert Debenham did not pay. Thus, J. Duplege sued a certificate to the Mayor of the Staple to certify the statute into the Chancery at a certain day, who certified the statute, by force of which there was awarded out of Chancery a writ directed to the sheriff of N. to arrest the body of Sir Gilbert Debenham and to seize all his lands and tenements, and, afterwards, the sheriff returned, as to the body, *non est inventus* and, as to the land, he had extended, which land in fact was certain land of which he was seised in the right of his wife, and, afterwards, the wife died, and the heir entered. And the said J. Duplege wanted to have a *capias* to take the body of Sir Gilbert Debenham.

The question was whether he would have it or not.

Kebell thought that the *capias* was well adjudged, because, if the sheriff had returned to the first writ that he had arrested the body and also that he had returned the extent of the land, as he has done here, even though Duplege

had taken the land until he has been satisfied, yet Debenham would remain in prison, because the law presumes that he wanted there more quickly to satisfy the party. The second cause is [that] it could be that the land will be divested out of the said Duplege's possession by a lawful title before he is satisfied of the indebtedness, in which case, the party, notwithstanding that the land is out of his possession, will have the body in prison until he be satisfied, as in case the tenant for a term of another's life or a disseisor be bound in a statute merchant and he to whom the statute was made has the lands and the body in execution by force of the statute and he whose wife dies or the disseisee re-enters within the term, in this case, the body remains in prison until he be satisfied of the indebtedness.

But note that he will never have any lands or tenements by a new extent. And also he made a great distinction between a tenant by statute merchant and a tenant for a term of years, because a tenant for a term of years has a certain estate and ought not hold the land beyond his term by any way, but a tenant by a statute merchant or staple is otherwise, because the judgment is that he ought to have the land *secundum ratam* and the extent until he be satisfied and it does not speak of any certain years. And it can be that, by many ways, the tenant by statute merchant or staple can hold beyond their term of the extent, as if he who is bound interrupts him from taking the profits or by a sudden accident part of the land floods or burns by wildfire. Because this is not the fault of the tenant by statute, he ought to hold the land beyond the extent, by which, even though the years of the extent be passed, yet this does not prove that the party is satisfied of the indebtedness, by which etc.

Tremayle, to the contrary: And I say that execution ought to be inseparable and not separate. And it is this Duplege's folly that he wanted to take the land in dispute for the sum until he be satisfied, for which cause he ought not have a *capias* afterwards, because, then, it would follow that he would have execution twice, as in case one recovers a debt or damages, the party can chose whether he wants to have a *fieri facias, elegit*, or *capias* if the *capias* lay on the first original [writ]. Thus, we put that the party pray an *elegit*, by which he has the moiety of the land in execution, and, then, after the land is divested out of his possession by one who has the better right, he will never have a *capias* afterwards.

Townshend, to the same intent: And even if the law be thus, that he ought to have a *capias* within the term of the extent, yet he ought not have

it now, because the law presumes that he is satisfied, inasmuch as the sum appears of record, and also the extent of the land appears of record, by which, now, it can only be understood that he is satisfied, because the years of the extent are passed, because, to my thinking, the party, after the years have passed, can enter.

Quod alii negaverunt.

[*Townshend*, continuing:] And he can have a *scire facias* if he wants without any surmise if the years are passed. The reason is because the law presumes the party satisfied. But, within the year, he will not have a *scire facias* if he does not show an acquittance or get the money into court, because it will not be understood that the party can be satisfied within the year without a surmise. And, if the party had levied the money by the cutting of wood or by reason of some casual profit, then he would have a *venire facias* or a surmise that he had levied the money, and, on this *scire facias* or *venire facias*, the party will be garnished. And if he cannot deny but that the matter that the other has alleged is true, then he will have back his land. Thus, I understand that the law presumes always that, within the term, the party is not satisfied without special matter shown and, *e contra*, after the term, the party is satisfied. Thus it seems to me that, after the term is passed, the party will not have the *capias*.

Fairfax [J.K.B.]: To what is said that it was the party's folly that he wanted to take the land and that he would not have a *capias* afterwards, this is not so, because I say that there is a great distinction between the case that *Tremayle* has put and the case here, because, by the common law, one will not have execution from the land and body at one time, as, if one recovers a debt or damages against another, he can choose if he wants to have a *capias* or an *elegit*, and, if he takes the *capias*, he will not have the *elegit*, and, *e converso*, if he takes the *elegit*, he will not have the *capias*. And this I have seen adjudged. And the case was thus. One prayed an *elegit*, and the sheriff returned that he had no goods nor land after etc., by which the party prayed a *capias*, and *non potuit habere*, because the entry was `*elegit sibi executionem fieri de medietate terrae*, but, after the *fieri facias*, he can have an *elegit* or a *capias*, by which etc. Thus, as *Tremayle* has said, by the course of the common law, the plaintiff ought to choose his execution at his peril, but, where an execution is given by the Statute, as it is here, the party cannot chose his execution, but ought to follow the words of the Statute, which are that he will have the land, the body, and his goods also by one writ. And inasmuch as the party has thus sued

execution, and he comes in now by the sheriff's return that the body *non est inventus*, this is no fault in the party. Thus, inasmuch as he will never have the body in execution according to the Statute and there was no fault in the party, it seems to me that it is clear enough that, within the year, he will have the *capias*.

To which all the justices agreed.

[Fairfax, continuing] And it seems to me that, even though the years are passed, yet the party will have the *capias*, because, even though he had the land delivered to him, yet it does not follow that he is satisfied, because, as it seems to me and also as was said in several cases, the cognisee will have the land beyond the extending, as in the cases that have been put previously, for which cause, it is only a presumption that he is satisfied. And it appears of record that he is a debtor and also by the extent. And, if the party will not have a *capias*, he is without a remedy, and he against whom the *capias* is sued is not at any mischief, because, if he has raised the money, he can have a *scire facias* and dismiss himself out of prison. And, in this *scire facias*, it will come into dispute whether he be satisfied or not.

Item, others of the justices said he ought to have the *capias*, but it will be on a surmise, inasmuch as it appears that the years are passed.

Item, if the party against [whom] the statute is sued interrupts him from execution, or he will have the land beyond the extending until he is satisfied etc.

Item, it was held by all the court that, if the land be extended for too small a sum, the party who is bound will not have a re-extent, because he is at no mischief, because he can tender the money and have the land back, and, if he gets money into court, he will have a *scire facias* against the party and will have his land back. It is the same law if the land be extended at too large a value, the party to whom the statute is made cannot pray a re-extent, because he is at no mischief, because he can pray that the extendors can hold the land and answer to him according to the rate and extent. And this is provided by the Statute of Acton Burnel.[1]

But note that this prayer ought to be the first day that the extent is returned, because, if he agrees once to the extent, he comes too late to pray that the extendors can hold the land according to the extent.

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1 Stat. 11 Edw. I (*SR*, I, 53-54).

R[eporter]: *Item*, query what remedy was for him to whom the statute was made before the making of the Statute of Acton Burnel. I believe that he could pray a new extent, because he would have no other remedy; *tamen quaere*.

R[eporter]: *Item*, it was held by some of the serjeants and justices, that, after the years of the extent, the party can enter without suing a *scire facias*.

And others [said] the contrary, and this for two causes. The first is, inasmuch as he had the land by matter of record, he ought to be divested out of his possession by as high authority, *scil*. by the suing of a *scire facias*. The second cause is because it can be that the party had cause to retain the land beyond the years of the extent, as in the cases rehearsed before, and also the party will have the land until he be satisfied of his costs and damages as well as for the dispute for the duty, which costs are not certain. Thus, even if the years are passed, yet he has cause to retain the land for the costs.

Note that the Statute of the Staple of 27 Edw. III, c. 9,[1] says, that the Mayor of the Staple can by virtue of the same obligation take and hold the body in prison until he has made satisfaction to the creditor for the debt and the damages, and, in case that he be not found within the staple nor their goods to the sum of the debt, it will be certified in the Chancery under the said seal, for which certification there will be a writ etc. sent to take their body, lands, tenements, and chattels, etc. and on this there will be due execution made in a manner as is contained in the statute merchant, which the statute merchant is, and it saves always to the merchant damages and every manner of costs necessary and reasonable in trouble and expense.

Thus note that the party in a statute merchant and staple also recovers damages and expenses.

Item, the justices were of differing opinions how and in what way he will be compensated for damages and expenses.

Fairfax [J.K.B.]: If one be bound in a statute merchant or staple for £40 and, afterwards, his creditor has his lands in execution, that are extended at £10 [per year], now it will be extended by common understanding that, in four years, the party can be satisfied for the indebtedness of the £40, by which, after the four years, the party will have a *scire facias* to have back his land, and, on this *scire facias*, he who had the lands in execution can show that

[1] Stat. 27 Edw. III, stat. 2, c. 9 (*SR*, I, 336-337).

he was damaged by reason of the detaining of his debt and also which costs he had, and now the Chancellor, who is their judge, can determine whether the damages and costs are reasonable or not, because he can know what are reasonable damages and expenses in a writ of debt as well as a jury. But it is otherwise in a writ of trespass etc. Thus, inasmuch as the extent appears and the Chancellor by his discretion can adjudge the damages [and] expenses if he has occupied the land after the four years, so that he can take his reasonable damages and expenses, as will be given by the discretion of the Chancellor, thus, the party will have execution from the land and *e contra*.

Ad quod non fuit responsum.

[Fairfax, continuing] *Item*, there is a distinction between a statute merchant and a statute staple, because, in the statute staple, the party, after the certification in the Chancery, will have a *capias* to arrest his body, lands, and all his goods in one writ. But, in a statute merchant, he ought first to have a *capias* to arrest his body and no more. And if the sheriff returns *cepi corpus*, then he will remain in prison for the space of a quarter of a year, within which time he can sell his goods and his lands, and if the sheriff returns *non est inventus*, then he will have execution of his goods and lands.

And so note, that the statute staple is the speedier remedy than is the statute merchant.

Item two seals are put on a statute merchant, one is the party's seal with the king's seal, for which cause, some say that the party can have a writ of debt on it if he wants and refuse the remedy that is given to him by the Statute, *quod vide*,[1] inasmuch as it is the deed and the obligation of the party, but it is otherwise of a statute staple, because it has only one seal, and the party's seal is not requisite, for which cause the party will not have a *scire facias* on it, nor a writ of debt, because it is an indebtedness made by the special law that which was not by the common law. And, inasmuch as this statute provides a remedy, he will not have another remedy than what is given by the Statute.

And note that it was held by all the justices in the Exchequer Chamber, except Bryan [C.J.C.P.], that if one be obliged on a statute staple or merchant, and he to whom the statute is made dies, his executor will come into the Chancery, and show the statute, and the will [as to] how he is made executor, and he will have execution without a *scire facias* for the cause previously

1 YB Mich. 3 Edw. IV, f. 27, pl. 24 (1463).

rehearsed. It is otherwise where one recovers at the common law, and dies, his executor will not have execution, but he must first sue a *scire facias*. It is the same law on the part of the defendant, if he dies, the plaintiff will not have a *fieri facias* against his executors, but he must first sue a *scire facias*, or, if the court be changed, the plaintiff must sue a *scire facias*; as if one recovers in a writ of debt, and, afterwards, the record is removed into the King's Bench by writ of error, the plaintiff will have a *scire facias* before a *fieri facias*. It is otherwise in a statute merchant or staple, because he must sue the process accordingly as it is given by the Statute, or, otherwise, he will have no remedy. And this was the Case of Sir Rauf Hastings.[1]

Chief Justice Hussey [C.J.K.B.] said, that if one sues execution on the statute staple in the Chancery, and the sheriff returns that the obligor is dead, in this case, on the return of the sheriff, he will have a *scire facias* against the executors because the *scire facias* is grantable on the sheriff's return and not directly on the statute.

Ad quod non fuit responsum.

[For the pleadings and record of this case, see 64 Selden Soc. 77-82.]

111

Hungerford v. Ashton
(Ch. 1484)

Executors and administrators of a decedent's estate can have execution on a statute staple upon the production of the proved will or letters of administration without a scire facias.

YB Mich. 2 Ric. III, f. 8, pl. 16,
64 Selden Soc. 82

Ralph Ashton, knight, made a statute staple to J. Simpson for £100. And the same Simpson made his will and made J. Hungerford his executor. He died, and the same Hungerford died intestate. And his wife took admin-

[1] YB Mich. 9 Edw. IV, f. 41, pl. 27 (1469).

istration of all the goods both of those of the aforesaid J. Hungerford and of those of J. Simpson which were not administered. And she, the wife, had the statute staple certified in the Chancery of the lord the king. And, there, she, forthwith, showed the bishop's letters of administration of the goods *ut supra* and prayed execution. The question was whether she should have execution, *viz*. a [writ of] *capias* and [a writ of] *extendi facias* without a [writ of] *scire facias etc*.

And the opinion of all the justices in the Exchequer Chamber (except Bryan, the Chief Justice of the Common Bench), in the presence of the Chancellor of England [Russell] in the aforesaid Exchequer Chamber was that both executors and administrators shall have execution without a *scire facias* upon the production of the proved will or else of the letters of administration, because both, in the Statute of the Staple and in the Statute of Merchants,[1] execution thereof is definitely fixed by express words, *viz*. by a *capias* and an *extendi facias* touching lands and moveable goods in any way within the control of the Mayor, and, if he has nothing within the control of the Mayor whereof execution can be made, then the Mayor shall certify the statute staple in the Chancery, and, there, he to whom the statute staple is made, on production of the obligations sealed etc., shall have a *capias* and an *extendi facias etc*. although it may be twenty years since the recognizance of the staple was made and certified. And it cannot be likened to a recognizance of debts or recovery of debts and damages etc. before the justices, because the Statute of Westminster II, touching matters which are recorded in court etc.,[2] recites that, if the recognizance be recent, *viz*. within the year, then a *fieri facias*, and, if beyond the year, a *scire facias etc*. And, if anyone who is neither executor nor administrator shall, upon the production of a will or of letters of administration which are both false and fictitious to the deceiving of the Court of Chancery, have prayed etc. and had recognizance and execution, and he the recognitor shall have paid the money etc., the true executor shall have a writ of deception against the false executor etc. *Vide* touching the Statute of Merchants in the Common Bench, where executors had execution in the sixteenth, twenty-first, and twenty-fourth year of Edward

1 Stat. 27 Edw. III, stat. 2 (*SR*, I, 332-343); Stat. 11 Edw. I (*SR*, I, 53).

2 Stat. 13 Edw. I, Westminster II, c. 45 (*SR*, I, 93-94).

III.[1] Likewise, about the eighth year of Edward IV in the Case of Matthew Philippe in the Chancery of the lord the king, the executors of him to whom the recognizance was made sought execution upon such a statute upon production of the will etc. and they had it etc. If the testator had died before the statute is certified so that the statute is certified at the suit of the executors, they shall forthwith have execution without a *scire facias*, because the recognitor cannot hold any plea, although he afterwards had a release etc., but he is put to his writ of *audita querela* or *scire facias*. And, if, perchance, they who are not executors come into the Chancery and produce a will proved but forged, they shall still have execution both of the body and of the tenements. And, if, perchance, he who is really the executor or else the testator who is still living [come into the Chancery], when the recognitor is in execution in such wise falsely and fraudulently, they shall have writ of deception against such fictitious executors etc. And the recognitor shall have a *audita querela* or a *scire facias*, and those writs shall try whether they were executors or not etc. But, if the recognitor, after he has made one recognizance, makes another recognizance to a second person and the second recognizance is executed, now, he to whom the first recognizance was made shall have a *scire facias* against him who thus had execution, because he is in possession by judgment of the court. And, in the same way, upon a return of a writ of *capias* and *extendi facias*, it is possible for a writ of *scire facias* to issue; for instance, the sheriff makes a return that the recognitor is dead, then he who prayed execution shall have a *scire facias* against the heirs and tenants of the land of the recognitor to know why he should not have execution thereof. But it is necessary to have notice who are the heirs and tenants of the land. And, in that case, they shall have an answer and shall plead in bar of the execution etc.

[For the pleadings in this case, see 64 Selden Soc. 84-85.]

[1] YB Hil. 21 Edw. III, f. 13, pl. 14 (1347); YB Mich. 24 Edw. III, f. 31, pl. 8 (1350).

112

Spinella v. Taylor
(Ch. 1484)

A clerical error in a pleading in Chancery can be cured by an amendment to it.

YB Mich. 2 Ric. III, f. 12, pl. 30,
64 Selden Soc. 96

Three Lombards brought a bill of debt in the Chancery of the lord king against Robert Tailor of London, surgeon, as against the servant of Richard Ive, upon a certain obligatory writing. And the bill was thus, *viz*. that the defendant had made the writing in the parish of St. Martin le Grand, London, in Bridge Ward, London. And there was no mention of London at the head of the bill, as it was proper in any bill to put the county at the head. And, similarly, the bill should be thus, that the defendant in London in the parish of St. Martin. London, was lacking in both places.

The record was out of the Chancery etc. And thus it was sent into the King's Bench with a *venire facias* returnable, *viz*. a fortnight after Trinity. And, afterwards, process continued until it was found against the defendant by *nisi prius etc*. And, before judgment, an exception was taken concerning etc.

And all the justices were summoned to the Exchequer Chamber at the instance of the Chancellor, [to answer] whether the bill could be thus amended or not.

Some of them were of the opinion that it was not necessary, and some to the contrary, that it was of no avail, and, nevertheless, to eliminate the ambiguity, the bill was amended by the Statute of Misprision.[1]

And yet it seems harsh to me, because the county and place always come from the information of the party etc.

And another exception was taken, *viz*. that it does not appear in the bill whether the plaintiffs appeared in person or by attorney. And, because the defendant was attached in London for the same cause, he had a [writ of] *supersedeas etc*.

[For the record of this case, see 64 Selden Soc. 97-101.]

[1] Stat. 8 Hen. VI, c. 15 (*SR*, II, 252).

113

Anonymous
(Ch. 1486)

Where a person claims land that the king has seized as in the wardship of another, the claimant can sue the other person, the heir, for it when he comes of age.

YB. Hil. 1 Hen. VII, f. 12, pl. 24

Also it was found that certain land was held of the king in chief and that such a one died seised [leaving] his heir of full age. Another came in the Chancery and tendered his traverse within the month after the office was returned, *scil.*, that he himself was seised in fee on the day [the king's tenant in chief died] etc., denying that he who was supposed the king's tenant had anything on the day of his dying and denying that it was held of the king etc. And [the plaintiff] showed of whom it was held, as it seems, but he did not pray to have the land at farm, according to the Statute of 36 Edw. III.[1]

And then the king made livery to him who was found heir [by the office]. And now came he who tendered his traverse [the plaintiff], and wanted to have the land at farm. And he prayed that the land would be re-seised etc. Whether the livery was good or not, this was well argued.

And the clear opinion, in effect, [was] that the livery was good etc. And the cause was because it will be unreasonable that the king would lease the land at farm what he [the plaintiff] had no cause to hold, except because of such a traverse. And now he who had right [the plaintiff] could sue against the heir. And, if the land will be re-seised, the king will have the rent and the issues etc. and, if the traverse was found against him who tendered the traverse, this would be a wrong to the heir etc. But, where the king had cause to retain the land for a certain time and make livery during the time, there this traverse would be good, and there the land will be leased at farm, *quod nota bene*.

[1] Stat. 36 Edw. III, stat. 1, c. 13 (*SR*, I, 374-375).

114

Lady Montagu's Case
(Ch. 1486)

Where two persons are found heirs separately in different counties, each of them can have a traverse of office for himself in each county.

YB Pas. 1 Hen. VII, f. 14, pl. 1

This case was in the Chancery. After the death of Lady Montagu, it was found in the County of B. that a certain John was her son and heir, where he was her younger son and within age, and, in other counties, it was found that George was her son and heir and within age. And all those offices were returned into the Chancery.

And now, it was shown to the court in both offices, that John, the son, and George are dead within age and without an heir of their bodies. Now, the question is what will be done. And the matter was well argued.

And the Master of the Rolls [Morton] sent for the justices, and Catesby [J.C.P.], Sulyard [J.K.B.], and Townshend [J.C.P.] were sent into the Chancery.

Townshend [J.C.P.]: If two separate persons are by different offices by force of [writs of] *diem clausit extremum* found the heir to one person, the king will keep his possession until the heirs are of age, and, there, on their suing livery, they will interplead and will join issue, who of them is the right heir, and he for whom the matter is found will have the livery of the whole. But this matter cannot be argued during their nonage. This is clear law, if each of the heirs has issue and dies, their issue within age, now separate [writs of] *devenerunt* will issue in every county according to the nature of the first offices, and, these new heirs being within age, the land will be in wardship until at their [full] ages, and then they will interplead, as their ancestors would have done if they had lived until they came of age, because it ought to be disputed between the issue or [between] those who are found heirs, *scil.*, which of them is the right heir, and this cannot be determined unless they are parties, and this they cannot do until at their full age. *Ergo* during their nonage, [there is] no remedy. But, if this be found, that one of them died without

an heir of his body and that the other is heir to him, then the interpleader is gone, because there is no controversy about the inheritance. But, as to how this will be done, he [Townshend] wanted to be better advised.

Catesby [J.C.P.]: John and George are separately found heirs to the Dame, which cannot be consistent, so one [office] is false. Thus, he who is now heir ought to surmise in the Chancery that one office is false, and he will have a special commission to inquire of this matter. And this will find that he will have his livery, but he cannot have livery on a false office etc.

Sulyard [J.K.B.] held at first that a commission will issue. But then he relinquished this for the opinion that Townshend [J.C.P.] took, but that the true heir ought to have a commission or another writ to find him heir in those counties where he was not found heir, because he cannot have livery without an office found for him, *quod nota*.

From this, it follows, when two are found heirs separately in different counties, each of them ought to have an office for himself in each county, or, otherwise, the one of them who is not found the true heir can have livery, *quod nota*.

Et adjournatur.

115

***In re* Estate of Benstead**
(Ch. 1486)

The king can grant livery of land seized after the death of a tenant to the heir of full age during the pendency of a traverse of office by a third-party claimant.

YB Trin. 1 Hen. VII, f. 27, pl. 5

Note that it was found by an office that one J. Bensted died seised of certain manors and he held them of the king and that one Emma was cousin and next heir to him and it showed how (and this was returned into the Chancery) and that she was of the age of fifty years and more. And certain persons came there and showed how they were damaged by this office and showed a title by feoffment by the same Bensted and traversed the dying

seised of Bensted and the tenure of the king. And, upon this, upon sufficient surety, they had the lands at farm etc. And, afterwards, the king granted a special livery to the said Emma. And those who tendered the traverse came into the Chancery and said that this livery was void pending their traverse unargued etc.

And upon this, the Chancellor [Alcock] sent for two justice, *scil*. Catesby and Suliard, who held the livery void *causa qua supra*.

And, afterwards, he sent for My Master Hussey [C.J.K.B.], who held the livery good. And, on account of their diversity of opinions, the Chancellor [Alcock] adjourned the matter into the Exchequer Chamber before all the justices and the Master of the Rolls. And, there, the matter was well argued by the serjeants and barristers.

And, afterwards, all the justices, except Catesby and Suliard, held the livery good.

And those two were *in contrare opinione* because they said that the Statute[1] provided that he who felt himself aggrieved should appear and tender his traverse on good evidence shown and should have the land to farm on sufficient surety, which he [the plaintiffs] had found. So to oust them from their traverse by such a livery is unreasonable, because the heir is not at any mischief, because if she demands her livery and this is interrupted by the traverse and this traverse is found against them, the heir will have livery with the issues, and so she is at no mischief. But, if this livery be good, then those who tendered the traverse and had found sureties to the king [are] at great mischief to answer to the king, and they cannot proceed in their matter. And the king is bound to do right, and the king cannot do right unless he holds the lands in his hand until it be found. And it is not reasonable, when the king has taken surety, that they be ousted until it be found.

And all the justices held clearly that the livery was good, and that the traverse was now terminated, and the surety found to the king, and the farm were quashed now by the livery, and that, by simple right, the lord must, when the heir comes of age, deliver the land to the heir, and the heir can well enter at his full age and hold it, and if he be of full age, the heir can enter forthwith, and the lord cannot interrupt him; no more can the king, if the heir does what, as a matter of right, he ought to do, *scil*. if he be underage, to

[1] Stat. 36 Edw. III, stat. 1, c. 13 (*SR*, I, 374-375).

do [as] his office is to be found. And, when he comes of full age to prove his age, the king, by simple right, will make him livery, if he be ready to do those services that belong to him. And, if the king denies him, the king ought to make livery to him with the issues, after which the heir does his duty. And, if he be found of full age, as she is here, and she appears in the Chancery and prays her livery, she will have it forthwith, because she will not prove her age, because she is found [to be] of full age, and if livery to her be denied, she has a wrong [done to her], and, for this wrong, she will have her livery for this with the issues.

So it is well proved that the king is held always to make livery to the heir at his full age without delay if the heir will demand it. But, even though the heir be found of full age and he allows a year or more to pass before he wants to demand the livery, the king will have the issues for all this time for his laches. And so it will be when one is underage and comes to full age and does not prove his age immediately, but long after; the king will have the issues for all this time for the laches of the heir. And, in those cases, the fault is in the heir. But, if no fault was in him, the king is bound to make livery to him forthwith when he is of full age.

And, to what is said, that this could not be because of the traverse that is given by the Statute, until the land be and ought to be lawfully in the king's hand, but when the king ought to make livery, the traverse of a stranger will not delay this, because it will be against all reason that a stranger will delay the heir's livery, because suing livery is the heir's action against the king. And, when all is found for him, it is not reasonable that a stranger, by putting in his traverse, will delay him.

And yet the traverse was well put in at the outset, as, if the widow brings a writ of dower against the guardian and, pending the writ, the heir comes of age, the writ is abated, and yet it was well purchased. But, when the heir comes to his full age, the heir ought by necessity to have his land, and the stranger's action will not delay him. And the lord cannot render dower when the heir is of full age and has this land lawfully, which he ought to have in spite of the lord. And so the king cannot oust the traverse when the heir ought to have the livery, *scil.* his land by law, because the king cannot make livery to him who tenders the traverse. And he who tenders the traverse is not at any mischief, because he can have his action, or [the plaintiff can] enter on him, as his case is. And so [the plaintiff is] at no mischief.

Note that no one will traverse the heir from his livery unless there is interpleader between two heirs, so the king cannot know to which of them he can deliver the land until it be tried. And so, when two are found heirs by one same jury, as when there are twins, *scil.* where two male infants are born at the same time or in such similar cases. But if one be found heir by a jury at first and then another is found heir by another jury, when the first comes of full age, he will have the livery notwithstanding the other's claim, because the king was first at one time entitled by him, and on account of this, [as a matter] of right, the king will make him livery, and the other is not at mischief, because he can sue.

And this case was put by Hussey [C.J.K.B.], who said that the stranger here ought not traverse the tenure of the king if there was no office found for him, but the lord of whom the land is held and the heir himself can traverse the tenure of the king, but not a stranger unless he has an office found for him.

And several cases were put.

Bryan [C.J.C.P.] thought that the traverse was badly put in when the heir was found of full age, *quod alii concesserunt*.

93 Selden Soc. 161

Benstede died seised of the manor of Benstede, as was found before the Escheator, and [it was found] that [Ellen], his aunt, was his heir and fifty years of age. And one B. came into the Chancery and traversed the office and prayed to have the lands at farm, and, pending the traverse, the king made livery to the heir. May he make livery?

It seems so, for, until the traverse is found and he has [a writ of] *ouster le main*, the land is in the king's hands in affirmation of the heir's title; so that he must grant livery to the heir when he demands it; and so the livery is good. [Likewise], if the king grants a ward *quamdiu in manibus nostris fore contigerit*, in this case, the king may grant livery to the heir before his full age. And he may oust the patentee unless he has cause to retain for the forfeiture of marriage. But, if the grant is *durante minori aetate*, there the king cannot make livery to the heir during his nonage. (The reason is apparent.) And it seems in the previous case that, if the king has granted the land at farm to him who has tendered his traverse, yet this is no impediment to the king's making livery, for the king remains in possession, and he is bound by the law to make livery to the heir at full age when he demands it. Therefore, the livery is good.

It remains to be seen whether the traverse is abated, for, if a man sues a petition of right and the king alienates the land, yet the petition does not abate; and so likewise here. (But it seems to me [Sir John Spelman] that the cases differ, for he does not demand the land by his traverse. *Quaere*.)

93 Selden Soc. 162

Benstead died seised of the manor of Benstead. This was found by an office, his aunt aged fifty years [being] found his heir. A stranger traversed the office and, upon a prayer, had the land at farm. And, pending the traverse, the king made livery to the heir. Whereupon, the question was whether, after the traverse and farm granted, the king might make livery? It seems so, for the king is entitled by an office in the right of the heir and is to make livery to him without his prayer. When the king grants a ward *quamdiu in manibus nostris fore contigerit*, the king may make livery when it pleases him, but not if the patent is *durante minori aetate*. 3 Hen. VII, 3; 8 Hen. IV, 16; 26 Hen. VIII, 8; 21 Edw. III.[1]

And so, notwithstanding that the king accepted the traverse and leased the land at farm, yet he is bound to do right and make livery to the heir. If a petition is sued against the king and the king grants the land to a stranger, still the petition is not abated.

116

***In re* Estate of Higford**
(Ch. 1487)

A writ of diem clausit extremum *is an enquiry touching the title and estate of a deceased person.*

A writ of diem clausit extremum *is an original writ for all the heirs of the same tenant, and, after one such writ has issued and is returned, then it is not possible for another writ of the same nature to issue.*

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[1] YB Hil. 3 Hen. VII, f. 3, pl. 10 (1488); YB Mich. 8 Hen. IV, f. 16, pl. 20 (1406); YB Mich. 26 Hen. VIII, f. 8, pl. 4 (1534); Trin. 21 Edw. III, Fitzherbert, Abr., *Livere*, pl. 32 (1347).

Several different titles may be found by one office for several, separate persons after the death of one who died seised of several manors held of the king, and they may have livery upon such an office by only one writ of diem clausit extremum.

YB Trin. 2 Hen. VII, f. 17, pl. 3,
64 Selden Soc. 127

After the death of John Higford, knight, etc., there issued in the Chancery of the lord the king a writ of *diem clausit extremum*, by which it was found that he died seised of divers manors in fee, one of which, by the law of England, he held after his wife's death, and he held that in chief of the king by the services of a sixth part of a knight's fee. And it was found that he had three daughters, two of full age, and the son of one of them was underage. And thus it is returned in the Chancery. And, afterwards, before livery, William Higford, brother of the said John and uncle to the daughters, came and showed evidences to the court, by which parcels of the aforesaid manors were in tail to him and the heirs male, issue of his body, and he prayed a special commission to enquire touching the title and estate etc.

Some said that he cannot have this because he had his opportunity to show his title and interest before the Escheator when he was sitting upon the inquisition, whereby it was possible to find both the title for his heirs male and the other manors for his nieces. And, upon the same inquisition, either of them could have had their livery etc. And, likewise, as soon as the two daughters of full age have had livery out of the hands of the king, the same William Higford can enter etc.

And, likewise, it was said that this writ of *diem clausit extremum* is an original writ for all the heirs, both male and female, of the same tenant, and, after one such writ has issued in one county and is returned, then it is not possible for another writ of the same nature to issue. And a commission of this kind is in effect nothing but a *diem clausit extremum*.

And so it was the opinion of the court that it is not possible to have a commission of this kind.

And the two sisters of full age sought livery of the manors etc.

And the opinion was that they could not have it, because it is not fully found by express words but only tacitly and by implication that one manor is held of the king, *viz*. when it is said that John Higford held of the honour

of Winchester but by service of a sixth part of a knight's fee; and, by such an office, the heir cannot have livery.

And then they wanted to have livery of other manors, and they could not, because livery of hereditaments found by a single *diem clausit extremum* shall not be by parcels.

And, afterwards, in Hilary Term all the justices, who were in the Exchequer Chamber at the request of the Chancellor of England [Morton] for the solving of this question, were of divers opinions.

Hussey, Bryan, Hody, the Chief Baron, Fairfax, and Sulyard were, however, of opinion that a new commission in the nature of a *diem clausit extremum* ought not to issue after such a general writ of *diem clausit extremum* has been complied with in all points for the benefit of the king and the heir general, because of the inconvenience which might thence arise, *viz*. if one had such a commission as though he were the heir male and is found by it to be the heir male and to have title to the manor and lands touching which title was found at first by a *diem clausit extremum* and, thereupon, he and the heir interplead, a third heir may come and make another suggestion that he is the heir for another special reason and ask for another commission and so on *ad infinitum*. And, for another reason, it is not possible to concede it, because the heir upon such a commission shall never have livery according to the course and usage of the Chancery; so the masters and clerks there say etc.

And Bryan [C.J.C.P.] and Roucliff, the Second Baron of the Exchequer, then showed a precedent for a commission for the heir general in a case of this kind in the fifteenth year of Henry VI when, by a *diem clausit extremum*, it was found at first for the sister. And, similarly, another such commission was granted last term for Lord Dacres against Sir Robert Fynes,[1] in which case, by the former inquisition, it had been found that the said Robert held the manor of B. of the king for a term of life with remainder to Lord Dacres, the father of the said present Lord Dacres, and his heirs, who, after the death of the said lord, his father, and, after a fresh inquisition had likewise been taken thereupon, he now came into court and showed the Court of Chancery how he, Robert, had surrendered his estate to his father touching the aforesaid manor etc. And he prayed for a commission to enquire

[1] *Lord Dacres v. Fines* (Ch. 1488), see below, Case No. 119.

touching the premises, and he had it etc. But whether it be good or not is as yet pending etc.

There was another question in the same matter, and it was this. This writ of *diem clausit extremum* issued after the death of John Higford, and it is found that Margaret, his wife, held the manor and that, by the same Margaret, he had three daughters and that the same Margaret died etc., after whose death, the reversion descended to the aforesaid daughters etc. The question was whether this writ be a sufficient warrant for the heir of the mother and the heir of the wife of John Higford or, alternatively, whether a writ of *diem clausit extremum* after the death of the aforesaid Margaret should have issued in the lifetime of John Higford, by which the title of the wife might have been found and who was her heir and whether, in the same way, another writ should have issued on the death of the husband.

All the justices then assembled in the Exchequer Chamber of the lord the king were of one opinion that that office is sufficient for the king to have seisin both of the manors and of the bodies of the heirs and to hold them until etc.

And Hussey, the Chief Justice [K.B.], Bryan [C.J.C.P.], and Fairfax [J.K.B.] were of opinion that, by the law of England, when, after the death of the tenant, it is found by this writ of *diem clausit extremum etc.* that the reversion of the manor after the death of the mother descended to the heir of the mother, it is sufficient to give the heir livery of the inheritance etc. because, in effect, tenure of the king and holding by the law of England is all one, and the reversion etc. And mention must expressly be made of the estate of the wife when such an office has by the law of England to be taken after the death of a tenant. And, in divers cases, three different titles may be found by one office for three separate persons after the death of one who died seised of three manors held of the king, and they may have livery upon such an office by only one *diem clausit extremum etc.* Thus, touching one manor, he holds only for a term of life, touching another manor, to him and his heirs male, touching a third, to him and his heirs female etc. or for a term of life with a remainder in fee.

And Sulyard [J.K.B.] and Hawes [J.C.P.] were of opinion that such an office is sufficient as to seisin on behalf of the king, both of the body and of the lands, but that, after the death of the tenant holding by the law of England, that writ alone is not a sufficient warrant to find an office for his

wife's heir to have delivery of the lands of his mother, because, in such a case, a writ of *diem clausit extremum* must issue immediately after the death of the wife, the mother, in the lifetime of the husband. In the same way, suppose that a certain woman was seised of a manor in fee and had a son and, afterwards, took another husband and had another son and the manor is held of the king in chief and, afterwards, the wife died, a *diem clausit extremum* shall issue and the husband holding by the law of England shall after her death have livery of the manor, and, afterwards, being seised thereof of such estate, he died; after his death, another writ of *diem clausit extremum* issued, and it is found how the wife was seised in fee and had issue, and, afterwards, had married that man named in the writ and had other issue, and [how she] had died, and the reversion thereof descended to the first issue by the first husband. Now, by this first office, the first issue shall have livery of the lands by this writ. And, likewise, it is said that the course of the Chancery is that, after the death of any married woman, the wife of some tenant of the king, a writ of *diem clausit extremum* ought to issue and, upon an office thereupon found, livery ought not to be made to the heir of the woman before the issue of another writ after the death of the tenant by the law of England, because such writ is the normal suit of the heir when that land comes to him by hereditary descent etc. And such is the course of the Chancery etc.

117

Lady Wingfield's Case
(Ch. 1487)

A claimant against the crown can sue a second petition of right for the same matter where the matter was found for the crown upon the first.

YB Mich. 3 Hen. VII, f. 13, pl. 19

Note the Dame Wingfield had sued a petition to the king, which was endorsed into the Chancery. And she had a commission, by which it, [the matter], was found for the king, and not for her.

Bryan [C.J.C.P.] and Fairfax [J.K.B.] thought that she will be put to a new petition and that this plea is ended because it is found against her.

Townshend [J.C.P.] thought that she can elect to have a new petition or sue for a new commission because the petition, until she has a commission that finds for her, is as a void thing, and is inoperative until the [opposing] party appears in the Chancery, and is there on her petition, and as [the commission] is found for her, she maintains her title and traverses the king's title; so the petition is pending, and the parties have their day in court. And the king can elect whether he wants to maintain his title or to traverse the plaintiff's title. And, thus the plaintiff will be nonsuited after issue joined, and he held that it would be peremptory. *Vide* Hil. 11 Hen. IV, 52.[1]

Hussey [C.J.K.B.] said that, if it was his own case, he would sue a new commission on the old petition, and not a new petition, because the old [one] is pending.

And, in conclusion, they held that the new petition is good and that she would have this new commission etc.

118

Note
(Ch. 1488)

A writ of datum est nobis intelligi *must be based upon matter of record*.

YB Hil. 3 Hen. VII, f. 2, pl. 6

And note also that it was said by the Chancellor [Morton] and the others of the Chancery that there is a writ that is called *datum est nobis intelligi* and that it lies when it is of record in the Chancery that lands are held of the king, as by an old office, and, afterwards, by a [writ of] *diem clausit extremum*, it is found that it is held of another person. Then, for the king's, advantage, they will grant another writ to inquire, which is called *datum est nobis intelligi*. But this writ will not be granted upon a surmise but upon matter of record.

[1] YB Hil. 11 Hen. IV, f. 52, pl. 30 (1410).

119

Lord Dacres v. Fines
(Ch. 1488)

A writ of melius inquirendum *does not lie after a writ of* diem clausit extremum *has been returned.*

YB Mich. 4 Hen. VII, f. 15, pl. 1

It was found by a [writ of] *diem clausit extremum* after the death of the Dame Dacres that one A.B. was seised of certain land, and he gave this same land by a fine to Robert Fines for the term of his life, remainder to the Lord Dacres and to his wife in tail, and how the Lord Dacres died and the Dame Dacres entered upon the said Robert and disseised him, after which disseisin, the aforesaid Robert re-entered, and thus was the aforesaid Robert seised at the time of the death of the said Dame Dacres, and that she did not die seised of any other lands.

To which one came into the Chancery and submitted that the said Robert Fines surrendered his estate to the said Dame in her lifetime, and thus she died seised. And he prayed a new commission to the same sheriff to better enquire for the king. *Et habuit*. By which it was found that A.B. gave the said land by a fine to the said Robert for the term of his life, the remainder to the said Lord [Dacres] and his wife aforesaid in tail and that she died seised of such estate.

Brown: The award of this general commission is void. When the [writ of] *diem clausit extremum* once issued and by it title [is] found, you shall not take at any time afterwards another writ, because it is the common course in the Chancery that one will not have but one *diem clausit extremum etc*. And this general commission will not serve, because, upon this general commission, an heir cannot ever sue his livery and it is not reasonable that the king will be entitled to this land by such a commission, by which the heir will lose his right forever, and, by the *diem clausit etc.*, the king will be estopped as well as the heir, because, otherwise, to every *diem clausit etc*. which is not found to entitle him, he could take another; thus *infinite*. Also, this commission is badly awarded, because it appears by the verdict of the first inquisition that,

even though the dean had been seised, as is surmised, yet it appears that this land was held of the donor in tail and not of the king. Thus, to enquire for a better title for the king where it appears that, even though it had been as they surmise, the king did not have title but to enquire upon another title is void. By which etc.

Wood, to the contrary: And where the king has a title, it is reasonable to have an inquisition to find it or, otherwise, the king will lose his right, as if land held of the king is leased for a term for life, the remainder over in fee, and the remainderman releases to the life tenant and he dies seised and it is found by a *diem clausit etc*. that he held a term for life, the remainder over, etc., now, if one should not surmise that he had released and pray a new commission, the king will lose his right, because matter in fact without matter of record cannot entitle the king. And thus it is if a *diem clausit etc*. finds that one is daughter and heir of full age and, where there is another daughter under age, there, a new inquisition will issue for the king. Thus here, if the said Robert Fines had surrendered, this gives a title to the king, which title the king cannot have unless this commission had been awarded, by which it is more reasonable to allow this commission than to make the king lose his right. And to that which is said that it appears that the king has no title, inasmuch as the land is held of the donor, Sir, this commission was general to enquire of all lands of which he died seised, by which it could be that there were other lands within the same county of which he died seised and that they were held of the king, for which, at least, this commission was well awarded to enquire of them etc.

Kebell, to the contrary: And where a title is found by a *diem clausit etc*., the king and also the heir are estopped to say the contrary. But the king or the heir can confess and avoid or surmise such matter that is not contrary, and he will have a new commission. Where it is found by a *diem clausit etc*., that one daughter is heir of full age where there is also another daughter of full age, a new commission will not be awarded. But, if the other daughter had been under age, it is otherwise, because it is not contrary. And thus it is where the brother is found the heir, where the widow is privately pregnant, a new commission upon this surmise will issue, because it will confess that the brother was once the heir. But that which is directed to the contrary will not cause a new commission to be awarded, as it was adjudged in the Case

of Hykford[1] recently; one was found heir and came and would surmise that he was the heir male and prayed a new inquisition, and, by all the justices, he was ousted. And if [a writ of] *quale jus* be awarded and no collusion is found, if, afterwards, one would surmise collusion and pray a new *quale jus* for the king, he will not have it. And yet the writ saves the right etc. But the cause is because this thing was once tried between the king and him. And thus here, when a *diem clausit etc*. would issue and find that it was before [found] to the king, he will not have a new commission upon a surmise that is directly contrary. And, as to that which is said that it could be that he had other lands within the same county and, for this cause, the commission would be well awarded, then he must have surmised other matter although the king has surrendered, which is clearly contrary to that which she must be seised at the time of the death of the said Dame, for which I understand that the commission was badly awarded and all this that depends upon it, in manner, is void.

Fisher, to the contrary: And this *diem clausit extremum* is the suit of the heir. And, if the heir miscarries in his suit, still it will not be prejudicial to the king. As in [a writ of] *aetate probanda*, [if] he would make an omission of certain land, he will not have livery of the remaining, but all will be re-seised into the hand of the king, because the heir by his writ must also allege the title of the king as his own title. And, on account of this, in this case, inasmuch as the droitural title of the king is not found by this *diem etc*., it seems to me that the commission was well awarded.

Vavasour, to the same intent: And I put it that the *diem clausit etc*. would say when it is returned that she did not die seised of any land, either if it be found who is the heir of the tenant of the king or he died without an heir, what [is the] remedy for the king except that he would have a new commission?

Fairfax [J.K.B.]: The king could enter, and he does not have another remedy.

Vavasour: This seems marvelous.

Kebell: It is necessary for you and your company to say something for your fee from the king.

Tremayle, Justice [K.B.], thought that the commission was badly awarded, inasmuch as it appears by the first *diem clausit extremum* that the

[1] *In re Estate of Higford* (Ch. 1487), see above, Case No. 116.

land was held of the donor and not of the king, but the king could take by the hands of the tenant in tail, because he is in possession, but, this notwithstanding, he is the tenant of the donor. And, also, the surmise is contrary to the finding of the *diem clausit etc*.

Fairfax [J.K.B.] [held] to the same intent: I understand that there are five types of enquiry ordained after the death of the tenant of the king. One is the *diem clausit extremum*, and this is immediately after the death. Another is the *melius inquirendum scil*. when any of the points that should be taken are omitted or when the first office is insufficient. And this is where the Escheator dies or the tenant in the *diem clausit extremum* or where the *diem clausit etc*. is not returned. Another is *quae plura*, and this is where any land is omitted. And another is devenerunt, and this is where the ward dies under age. And the fifth is *mandamus*, and this is after the year. And this last inquisition is not any of them. And if it be found that the tenant of the king died, his heir of five years, where he is six or seven years, this matter will not cause a new commission [to be issued], but the right of the king will be saved to him when the heir sues his writ of *aetate probanda*. And to prove that this *diem etc*. is the suit of the heir, I will prove it to you by a case which was in the time of My Master Newton, because a [writ of] *supersedeas* was put to have a stay of a *diem etc*., and it was held by the justices that they should not stay [the proceedings], because, the great seal of the court, it will not stay to do right to a party. And this proves well that he was the heir. Thus, it is not reasonable, when he has duly made his enquiry, that another thing will be found and put him to his [writ of] livery. And also, it appears clearly that, at the time of the surmise made, if the surmise had been true that the land was not held of the king, in which case of an award of a special commission by this traverse, it is as void.

Vavasour: There is a writ in the Exchequer that is called *dum fuit infra aetatem*, of which you have not spoken.

Brown and *Kebell* and others marvelled at what writ it will be.

But *Brown* said to Robert Fynes enter into the land upon the good adventure of the opinion of the court.

And, afterwards, at another day, Hussey, Chief Justice, was of the same opinion, *scil*. that the commission was badly awarded. And he said that, if one be found heir to my father etc., I will be without a remedy during the time that the land will be in the hand of the king except by a petition [of right].

And thus, it was held clearly by all of the justices, that the commission was badly awarded.

R. Huls agreed with this. Mich. 8 Hen. IV, folio [*blank*].[1]

120

Anonymous
(Ch. 1489)

The question in this case was whether co-executors must act together jointly.

YB Hil. 4 Hen. VII, f. 4, pl. 8,
Cooper's Practice Cases 545, 47 E.R. 643

A subpoena in the Chancery was sued, because there were two executors and one released without the assent of his companion to one who was indebted to their testator. And it was surmised that, for this reason, his will could not be performed. And a subpoena was sued against the executor who released and him to whom the release was made etc.

Fyneux said that it is not remediable, because every executor has complete power by himself and one can do everything that his companion can do and so the release made by him is good.

Chancellor [Morton]: *Nullus recedat a Curia Cancellariae sine remedio*. And it is unreasonable that one executor will have all the goods and will make a release alone.

Fyneux: Sir, then, *si nullus recedat sine remedio, ergo, nullus indiget esse confessus*. But, Sir, the law of the land is for many things, and many things are to be sued here that are not remediable at the common law and are [remediable] enough in conscience between one and his confessor. And so is this thing etc.

Chancellor [Morton]: Sir, I know well that every law is or of right ought to be in accord with the law of God, and the law of God is that an executor who is of evil disposition will not expend all the goods etc. And I

[1] YB Mich. 8 Hen. IV, f. 16, pl. 21 (1406).

know well [that], if it be so, and he does not make amends or [get a] ratification, if it be in his power, or, if he will not make restitution, if it was in his power, he will be damned to Hell etc. And to make a remedy for such a thing, as I understand, is well done according to the conscience etc. And the testament was `*constituo* [*talis*] *esse executores meos ut ipsi disponant etc*. And so the power of these two is joint and not several. And so, if one does an act without his companion, he does this without any warrant. And it is otherwise *pro salute animae meae etc*. But, if they misspend this, it is not with their warrant etc. And, Sir, I know well [that], in your common law, if you make a commission to inquire for the peace, you cannot arraign the felons, and, in a letter of attorney to deliver seisin of one acre of land, if he delivers two, it is without warrant and *nihil operatur*. Sir, in the case here, the testament is their power and the last will of their testator. And, if they exceed and are contrary etc., it is well to be remedied, as I understand etc. But I will hear this argued etc.

121

Anonymous
(Ch. 1489)

The grantee of lands held in capite *of the king can pay the fine for the license to alienate and have his land without a traverse of office unless the king holds the land by a record*.

YB Hil. 4 Hen. VII, f. 5, pl. 10

In the Chancery, it was found by an office that lands held of the king were alienated without a license from the king. And the feoffee appeared and wanted to pay his fine and to have livery of the land etc.

And it was surmised by the King's Attorney [*Hobart*] that the alienee was to have his lands out of the king's hand and this was enfeoffed to the use of the king. And he prayed that the land remain in the king's hands etc. And it was mentioned that the king would have his remedy by a subpoena and not by this means.

And also [it was said] by the Chancellor [Morton] that the alienee will have livery etc., because this thing is a thing that touches the commonalty of all the realm in times to come. And it is only here before me on a bare surmise, which will not cause the party to be delayed from his right etc. But, if the right of the king in the form remains in the court by matter of record, it will be otherwise etc., but, for the surmise, it is unreasonable to put the party to this traverse etc.

And it was mentioned by the serjeants at the bar that, if land be in the king's hand by twenty various titles, the party will answer to all the titles, but, if the party traverses one cause that is found and, afterwards, another cause is found etc., the land will not be bound again, which note well.

122

Anonymous
(Ch. 1492)

The question in this case was whether the person who sues a traverse of office is the plaintiff or the defendant so as to be able to proceed to trial.

115 Selden Soc. 85

It was found by an office that a man held of the king and died, leaving an heir underage, and for this reason the king seized the wardship and committed it to a stranger. And, thereupon, one came into the Chancery and found surety to the king for the farm and traversed the office. And, thereupon, he was given a fixed day in the King's Bench for the trial of the issue. Later, the [writ of] *venire facias* was returned served, and, thereupon, the King's Attorney came and prayed a *nisi prius* for the king.

Kebell: There was no *nisi prius* at common law, but *nisi prius* is provided by the Statute of 4 Edw. III,[1] and it is provided for the plaintiff and not the defendant, unless the plaintiff defaults. And if the *nisi prius* is awarded before

[1] Perhaps Stat. 14 Edw. III, stat. 1, c. 16 (*SR*, I, 286-287), but note Stat. 13 Edw. I, Westminster II, c. 30 (*SR*, I, 85-86) [note by J. H. Baker].

the jurors' names are awarded upon the *venire facias*, everything is void. This traverse is the action of the party who tenders it, and so he is *actor*. It is not like the case where one comes in upon process on an information in the Exchequer, for there he is purely *defendens*.

Wood: In the traverse, he makes recital of the whole of the office, and he traverses the point found in the king's favor. And, therefore, since he has done nothing except traverse the king's title, the king is *actor*, and the person who tenders the traverse is purely *defendens*.

Dymoke: When he tendered the traverse in Chancery, he took the land at farm from the king and found surety for the farm. But he is not an accountant to the king until the matter between the king and himself has been dealt with. Thus, it is advantageous for him to delay the matter, and so it is to be presumed that he will not pray the *nisi prius* to his own disadvantage. And, therefore, it is right to grant it for the king.

Frowyk: At common law, he was driven to his petition of right, in which petition he was *actor*. And this traverse is given him by the Statute[1] as a better remedy. Therefore, it is beyond argument that he is *actor*. And there is no such mischief as Dymoke has spoken of, for, when he tendered the traverse in Chancery, he found surety for the farm and also for suing *cum effectu*, as in a writ of error.

The whole court were against him, for he did not find surety to sue *cum effectu* but only for the farm.

But see the Statute of 8 Hen. VI,[2] which provides that he shall find surety to sue *cum effectu* and so forth, as Frowyk said, *quod nota*.

Tremayle [J.K.B.]: A man may be nonsuited in this traverse as well as in another action, and so he is *actor*. A *venire facias* with a proviso is never grantable to the defendant without a default by the plaintiff; and no more is this *nisi prius*.

Fairfax [J.K.B.]: If someone recovers by an erroneous judgment and the other sues a writ of error and they are at issue upon an error in fact, the party who is defendant in this writ of error shall not have the *nisi prius*, but the plaintiff [in error] shall, because the intent of the Statute was to speed the party who is vexed and who is dispossessed of the thing which he intends to

1 Stat. 34 Edw. III, c. 14 (*SR*, I, 368).

2 Stat. 8 Hen. VI, c. 16 (*SR*, II, 253).

have by his suit. And that is the plaintiff, for the party who recovered by the erroneous judgment is in possession and the other out. Likewise, the king is in possession here, but he has granted it over, and *scire facias* [lies] against the committee.

Hussey [C.J.K.B.]: I am well aware that, in a petition, the party is *actor*, because the king and the party must interplead on the petition. But here, they must interplead on the office, which is the king's title. And, therefore, this office is the king's original, for the traverse is taken upon this office, and so the party who tenders the traverse does nothing but answer the king's title. Thus the king is *actor*.

Kebell: The person who sues an action intends to have recovery of the thing whereof he complains he has been deforced and which is out of his possession. Here, the king is in possession of the thing in debate, and so it is impossible for me to demand something which is in my own possession against someone else who has nothing.

(This was granted by Fairfax [J.K.B.] and Tremayle [J.K.B.].)

It was adjourned.

123

Rede v. Capel
(Ch. 1492)

A court of equity will give relief where a meritorious party cannot get relief at common law.

A court of equity will give relief against fraud.

YB Pas. 7 Hen. VII, f. 10, pl. 2

In the Chancery was such a matter. One Bartholomew Rede had execution of certain land for a certain sum due in a statute merchant, and the extent of it [was] to £10 *per annum*. And, before the duty [was] paid, one W. Capel, knight, bargained with the lessor for this land and bought the land by a bargain [and sale]. And, afterwards, the statute was shown to him and the execution of it. And he spoke with the conusee and would have given to

him ten marks *per annum* during six years, where it was £10 each [year] by the extent. And Bartholomew Rede would not. And, afterwards, W. Capel brought in the court a writ of right in ancient demesne, because the land lies in ancient demesne, against the lessor. And he appeared and vouched over. And the vouchee appeared and had a day to imparl and plead. And at the day, he made a default, and W. Capel had judgment to recover against the lessor. And he [was] ousted in value. And, afterwards, W. Capel entered into the land.

And upon this matter, Bartholomew Rede brought a subpoena. And it was argued whether he had any remedy or not.

Coningsby: It seems to me that he has no remedy, because the Statute of Gloucester, c. 11,[1] is that the termor [can] falsify this record to save his term and that the execution ceases if it comes before the judgment where, at common law, he will not have any remedy. And now he could be received[2] to save his term if he would. Thus, as he was not received, it is reasonable that he will lose his term, because it is his own folly. Thus, [there is] no remedy. And thus, even though W. Capel acknowledged well that he was in execution, but because he did not acknowledge at the time of the bargain, it is reasonable now that his folly will prejudice him, because he did not appear to be received. And he has alleged no excuse for his default, because there was some color, if as beyond the seas or imprisonment or any such matter, then, for this, it is reasonable that, by common law and conscience, he will lose his term, as the Statute says to him that he can save it if he would. But as he would not be received but that he will lose his term, what conscience is there to restore to him his term when he shows that he would not have it by his [own] fault? And thus the termor, and this is the same case, yet even though it is not expressly within the remedy of the Statute, yet it is taken by the equity [of the Statute]. Thus it is adjudged 19 Hen. VI that the conusee will be received by the Statute. And thus, inasmuch as no falsification lies at common law in the case of a termor nor by one who was in execution by the statute merchant or staple of a recovery had against the lessor and now a remedy is given by the Statute and this remedy he has removed by his default, for which case, in

1 Stat. 6 Edw. I, c. 11 (*SR*, I, 49).

2 *I.e.* intervene [at common law].

conscience, he does not have any remedy. And in 20 Hen. VI, it is adjudged that the termor will not falsify a recovery. By which etc.

Kebell, to the contrary: And as to that which is said that W. Capel bought all of the land and it is reasonable that Bartholomew Rede should have all of the loss, and not W. Capel, because he was not received, but made default and never prayed to be received according to the Statute, W. Capel had no loss, even though Bartholomew Rede be restored, because he did not buy any more than the lessor will have and it was not the demesne, but that which he did not have, for which case, he is not at any loss, because he did not buy the land in execution. And, in conscience, he could not have more than the person had of whom he bought. And, if he deceived him, he can sue him. And, further, to say that it will be his folly that he was not received, *ergo* it is reasonable in conscience to cause him to lose his term, it is not so and for two causes, because, if he had a right before, it is not reasonable that the folly of making default will lose his term, because, by the common law, if one recovers by a writ of right or in another action by default, now it is folly in himself that he would not appear and yet he will falsify this recovery in a writ of right. And this is the common law. And so [it is] here, in conscience, because, even though the common law is that the termor will lose his term, because he had only a chattel and a chattel is not favored in law as [is a] freehold, and also it is reasonable that he will be bound by the recovery against his lessor, because he has the thing that the demandant demanded, *scil*. the freehold, and the termor did not have the freehold and, on account of this, it is reasonable that the recovery be good against the lessor. And it is inconvenient that the termor falsify the recovery of the freehold had against his lessor for the saving of his term, as the demandant could not have any remedy against his termor. And thus, perhaps, for this inconvenience, [it is] that the termor will not falsify it at common law, but yet, in conscience, he will have a right. Thus, here, this inconvenience is not material, because the case of a judgment will not be reversed, but a collateral means in conscience, and, now, he will be examined here, and the judgment in the court of a recovery will not be impeached, but it will stand. But the party will be restored according to conscience, because he has as great a [matter of] conscience to restore him to his term as of a freehold. Where a feoffment upon confidence is made at common law and the feoffee will not release to him [the beneficiary], he will be compelled here to restore it in conscience, because the first feoffment will not come into

examination but only where, in conscience, it should be restored etc. And the case of a feoffment etc. and thus, because it is the same of a statute merchant as of a term. And, as it seems to me, in right, if the conusee be ousted and he brings an assize and the other pleads *nul tort nul disseisin* and does not plead the rec[overy], the jury finds the tort and disseisin, because, in right, he was disseised, even though he cannot obtain it in the assize against this rec[overy] if it be pleaded. And thus, in conscience, the person who recovers cannot have more than he bought and this was the reversion that was in the lessor, because he will not have any demesne. And thus, it is a case for which the party will be restored.

And further, another cause is because he had no defense here in the recognizance to pray to be received, because he could not be received in the case here, and so then [there is] no defense in him. The Statute gives the receipt for the termor and, by the equity, it is taken for the conusee, but this is upon the default of the lessor where [there is a] surrender by fraud. But, here, there is not any default or surrender, and, thus, it is not within the case of the Statute, because, for a sham pleading, he cannot be received, because it is not expressly within the Statute, unless only for a default or surrender, because where a receipt is given by the Statute of Westminster II, c. 3,[1] by a defendant for a term of life, in this case, [there is] no receipt for sham pleading, unless it was made by the Statute of *anno* 13 Ric. II, c. 17.[2] And, at this day, the prayer will be received for the default of his right, but not for sham pleading, by which, for the same reason, here, the receipt for the termor is outside of the case of the Statute. Thus here, the defendant did not make a default or surrender, but pleaded in bar, *scil*. vouched, and the vouchee made the default, and not the tenant, for which he cannot be received, because there is not any default in the tenant, for which case there can be no receipt if the plea was shamly pleaded.

Quod Hussey [C.J.K.B.] and Bryan [C.J.C.P.] *concesserunt*, that [there was] no receipt in the case here. But this case is at common law, because, for sham pleading, the Statute does not make a provision, *quod nota*.

Hussey [C.J.K.B.] and Bryan [C.J.C.P.] thought expressly [it is] good conscience to restore him to the possession if there is no remedy by the com-

1 Stat. 13 Edw. I, Westminster II, c. 3 (*SR*, I, 73-74).

2 Stat. 13 Ric. II, stat. 1, c. 17 (*SR*, II, 66).

mon law for him, because this recovery was by fraud and a recovery by fraud is abhorred in our law, and nothing is more [so], because if one recovers upon a true title by fraud, in our law, he will be defeated because it was by fraud, as in a similar case, as if a wife cause a man to abate or disseise the heir of her husband against whom she will receive her dower, it will be defeated. And thus here, in our law, fraud is *omnino* rejected. Thus, it appears here [to be] express fraud, because Capel did not have right to the land but by fraud, because he acknowledged at the time of the recovery the title of the conusee. And thus, it was no recovery by title but by fraud and no title, for which cause it is a good reason and conscience that the party will be restored. And, if he cannot [be] by the common law, then, by conscience; it is good knowledge. And this was the opinion of both judges.

Bryan [C.J.C.P.] said the common law was that the termor can falsify in [an action of] *ejectione firmae*, because he was not a party and he had title and this recovery is false, for which cause, he thought that the termor will falsify for the saving of his estate, *scil*. a chattel, as well as the grantee of a rent charge and that there is not any difference between a rent charge or a lease for a term of years, because one had title as well as the other. And it is reasonable that, for this matter, he will falsify it as well as for the freehold, because one will have a petition of right for a chattel real as well as for the freehold. And thus, if the grantee for a term of years will falsify it, the conusee will falsify it.

Hussey [C.J.K.B.]: There is not any doubt but that the grantee for a term for life of a rent will falsify the recovery against the tenant of the land. Then it is to see if the grantee for a term of years will falsify it for his interest as well as the other, and thus the conusee will falsify it, because it is the same [thing].

Kebell: It is not charged, because it is the same land.

Hussey [C.J.K.B.]: Even though it is the land that the conusee has, yet it is a charge, and it is good to see whether he will falsify it or not. But, if he cannot falsify it, it is good conscience that the party will be restored.

Chancellor [Morton]: It is good conscience that the party will be restored because, as to that which was said by Mordaunt, that [there is] no remedy by common law, but by a Statute, and, on account of this, [it was] his folly that he would not pray to be received and, on account of this, [there is] no remedy by the common law, *ergo* nor by conscience, so there is in all cases no remedy by the common law nor any right and yet [there is a] good

remedy by conscience, because, by a feoffment upon confidence, the feoffor does not have any remedy by the common law, and yet by conscience he has. And, thus, if one pay a duty of an obligor and does not have a writing [of the payment], this is good [in] conscience, and yet, at common law, [there is] no bar. And thus, if one be an obligor to M. to the use of another and the obligor acknowledges this use and releases to the obligor, the beneficiary to whose use he was bound will have a subpoena against the obligee. And so of the case of a feoffment upon confidence and he made a further feoffment which acknowledged it, because, otherwise, [there is] no default in him. But, if he acknowledges it that his feoffor enfeoffed upon consideration, he will be restored by a subpoena here by this court. And, by the common law, if one sells to a man in a market overt my horse which the vendee knew, this is not an alteration [of the ownership] of my horse because of the knowledge that he has, which is the cause of it.

Quod Hussey [C.J.K.B.] *concessit*.

Mordaunt: In all of the cases put by My Lord the Chancellor, they are mixed with conscience and [this is] because he had not any remedy by the common law. Yet, upon the confidence that the parties put in the other person to have the things according to the contract between them and, if he will not [do it], it is good conscience that he will be aided by this court. But, here, there is not any mixing with a confidence etc., for which it is not similar to the other cases.

Chancellor [Morton]: If one did not have any writing and his debtor died, [there is] no remedy by the common law. And yet, here, by this court, in conscience, he will have a remedy.

The justices Hussey and Bryan held clearly that, if there is no remedy by the common law, as by a falsifying, by conscience, he will have a remedy. *Quod nota*.

For which, the next day, *Coningsby* [said] it seems to me that they have a sufficient remedy by the common law, *scil*. by falsifying. And this is adjudged in 20 Edw. III. *Vide librum*. And the reason is because it is similar to the cases, because he has a great interest in the land, *scil*. as of a freehold, because he will have an assize and thus the termor cannot, because he has only a chattel to every intent and, for this cause, it was adjudged, as before, that the conusee will falsify a recovery had against his conusor, because he had title before the recovery and a better right.

Kebell, to the contrary: And, as to the livery, it was not adjudged so as it has been said. And to say that there was a difference between the conusee and the termor, because the conusee could have an assize and the other not, it is the same case, and there is no difference in such a respect to falsify, because, even though he could have an assize, it is *ut de libero tenemento*, yet he does not have a freehold, without doubt, because the having [been] disseised will not change his estate, because, if the land is put to him for six years and the value of each year [is] £10, then the conusee will not have the land longer that six years, and thus only as a lease for a term of years. But the conusee could, perhaps, as for casualties, be content, as by wardship or escheat or other casualties, as wrecks *et huiusmodi* (R[eporter] *quaere bene*) where the conusee could not hold beyond the six years if it happen that the land be impaired by the act of God, as by the sea or by a sudden event, as by fire etc.

Kebell said that he [cannot] hold beyond the six years.

R[eporter]: But he spoke nothing of sudden events. *Ideo quaere* which of them would have the prejudice. And he thought, as I understood, that the conusee will not have [it] and will retain until satisfaction. But *vide* the reason in Duplege's Case, *anno* 2 Ric. III.[1] And for this mischief, he will have the body [of the debtor] as of right, *quod non est ita*. But for reason, as I believe, the Statute gives both generally. And it could be for this reason, that, if it happens that the land be recovered upon a good title, then the body remains.

Some said that he could not in this case have execution again of other lands coming afterwards to the conusor.

Ideo stude these matters.

Hussey [C.J.K.B.] thought that, if, because he is discharged by matter of record, so he recovers by matter of record. And he said that, in Mich. 11 Hen. VI, in an assize,[2] [one] was of the opinion there that, if the land of the conusee be [damaged] by a sudden accident, the conusee will retain longer than the years that is now to answer the extent etc. And so he thought [there is] no difference between the lessee and the conusee. And, at the common law, he thought that the lessee could not falsify it, because, at the common law, if the lessee for term of life, the remainder over, a recovery had against the tenant for a term of life upon a false title, the remainderman will not have any

1 *Duplege v. Debenham* (Ch. 1484-1499), see above, Case No. 110.

2 YB Mich. 11 Hen. VI, f. 6, pl. 11 (1432).

remedy, because he did not have any possession. And, on account of this, he cannot have any action. Thus, by the same reason that the remainderman of a freehold will be bound by a false recovery had against the tenant for a term of life, *a fortiori*, the lessee for a term of years will be bound though he has only a chattel. And the cause whereby the remainderman cannot falsify, but will be bound by the recovery, is because he had the freehold against which [a writ of] *praecipe quod reddat* lies and the entire fee will be recovered. And, on account of this, the estates, as they depend [upon it], will be bound by this recovery. And, on account of this, it is not reasonable that they will falsify the recovery by this interest of a chattel, which is not favored in law. [It is] as strong as a freehold, as when the guardian ousts the lessee for a term of years by the common law. And so he will not oust the tenant for a term of life. But of a rent charge for a term of life, where it goes out of the land, he will falsify the recovery, because he had nothing in the land but a thing issuing out of the land, *scil*. the rent. And the law [is the] same perhaps of a grantee for a term of years here of the rent. And the reason is because he had nothing in the land. But, here, the lessee or conusee has [an interest] in the same land, and they are bound by this recovery as well as the lessor, because this thing is demanded. And even though the reversioner did not have it, yet it is recovered against him, because he cannot have an action against the other who is a lessee, by which, then, it is reasonable that he will be bound.

Mordaunt, to the contrary: And as to that which is said that, by the same reason that the remainderman will be bound and he has no remedy than [him who] has the estate of inheritance, because he does not have the possession by the same reason, and *a fortiori* the one who has only a chattel, Sir, it seems to me that the remainderman at the common law will have a sufficient remedy, *scil*. a writ of formedon in the remainder, because, even though the [writ of] *praecipe quod reddat* lies against the life tenant and not the remainderman or reversioner, it was never reasonable that, by the false plea of the tenant, that their right should be bound. And thus, as it seems to me, the remainderman will have a sufficient remedy at the common law, even though he never had possession, *scil*. by [a writ of] formedon in the remainder, and, even though he will be bound, yet this does not argue well that the termor will be bound, because the law is thus that he will bring his writ against the life tenant and not against the remainderman or the reversioner. But yet he will recover their interest against the life tenant, because he demands the fee

and the fee is in them and the freehold in the other who is the tenant, and thus his estate. And the thing that is in demand is divided between them, for which cause it is reasonable that he will recover all of his estate and out of the possession of them who have it. But the termor has nothing of this, and, on account of that, he is not included within the judgment, as where a lessee for a term of years is ousted and his lessor [is] disseised and the land descends etc. so that the entry is taken away, yet the termor can enter, and the cause is because no term descended, for which cause his entry is not taken away. But, if he be a lessee for a term for life, the remainder in fee, and he is disseised and the descent [occurs], the entry is taken away from the life tenant, because his freehold descended. And thus, if the life tenant dies, still the remainderman does not enter, because he claims a fee and the fee descended, because his entry was taken away. But for a termor it is otherwise, because no term of years could descend, for which cause, the entry will not be taken away. *Eadem ratione* [is] for a recovery had against his lessor, because no term is neither demanded nor recovered, nor *per consequentem* taken within the judgment. *Ergo*, he is not bound by the judgment, and, on account of this, he will falsify.

And, as to that which is said upon the Statute, for the same recovery of the term, he can be received, because he cannot falsify it by the common law. Otherwise, it is said that the Statute was void and it was a vain thing to make a statute where the remedy was at the common law. This is only simple reason, because divers statutes are in confirmation of the common law and where there was a sufficient remedy at common law, but for a better remedy, because, by a recovery by a defendant against a husband and wife, a writ of right lies against him for the wife at the common law, and yet the Statute[1] was made for a better remedy, *scil. cui in vita* and thus a closer remedy. *Et sic de singulis*. And thus, in this case, even though there be a remedy by the common law to falsify it in an action, yet the receipt [in court] is a closer remedy, because, by it, he will not be voided from his possession, but, in falsifying, he will be put to his action. And this receipt varies from all receipts, because, if a reversioner be received in a [writ of] *praecipe quod reddat* and pleads a sufficient plea and [it is] found for him, the demandant will be barred and this savors of the freehold of the life tenant, who was demanded and lost before. But it is a receipt and the more sufficient which proves the

1 Stat. 13 Edw. I, Westminster II, c. 3 (*SR*, I, 73-74).

title of the demandant to be false. Yet the demandant will not be barred, as in the other case, but he recovers against the tenant, and *cesset executio*. And thus, because there is not anything that is demanded of it, *scil.* the chattel, for which cause, he will not be barred of his action for the freehold which he demanded against a stranger and of it he had nothing. And, on account of this, the judgment is given and *cesset executio*. But where there had been no receipt, he will be put to his action upon his entry upon him by force of this recovery and to falsify the recovery, by which, it seems to me that, at the common law, the falsification lies well for the termor and, for the same reason, for the termor, because I will not make any difference between them in such a regard, for which etc.

Wood: It seems to me the contrary, because the demandant cannot do otherwise but to use his action against the life tenant and not against the termor. And he demands all of the estate and the same land in demesne and not in reversion, because he has as well a title to the demesne as to the freehold or the reversion, because he demands an entire estate in fee in demesne and even though it be divided between divers [persons], as to one the demesne in lease and to the other the reversion. He demanded this whole estate and he has title. Thus, even though the order, by the common law, is that his action does not lie except only against the tenant of the freehold and not against the reversioner or termor, yet he recovers it. And, on account of this, the remainderman will be bound. And he has no remedy at the common law, because he does not have at the common law [a writ of] formedon, as it was said. (Reporter: *Quaere de ceo*.) And then, for the same reason, the termor will be bound. And to say that he is not included within the judgment, this is not so, because he cannot enter by this recovery even though he have title, because it is not included, *cuius contrarium est lex*, because he enters, because the judgment is that he recover the land and thus the demesne. And all the entire estate is recovered, as he demands the fee, and it is recovered because he had title, and he could not otherwise use his action except against the life tenant only. But, if he could, then this termor is not bound by it, as, against two joint tenants, a stranger brings an action and recovers against one of them; in this case, the other will not be bound, because he could have sued his writ against both, for which it seems to me that the termor will not falsify, for which etc.

Cary 19, 21 E.R. 10

A man had lands of ancient demesne in extent for debt. And they were recovered from him by the sufferance of the vouchee, whereby he was ousted. In this case, he shall be helped here. Morton, Chancellor; by the assent of Bryan and Hussey, justices.

124

Anonymous
(Ch. 1492)

Where an ancestor has broken an entail and then encumbered the land by a statute merchant and then by a mortgage and then died and the heir in tail underage enters for the condition broken and not as the heir in tail, he will be remitted, and this will discharge the creditor's execution. However, if the heir had been of full age, he would take the land subject to the encumbrance, because he did not claim as the heir in tail.

YB Mich. 8 Hen. VII, f. 7, pl. 4

In the Chancery, the case was thus. A tenant in tail made a feoffment and took back the estate. And he bound himself in a statute merchant. Then he made a feoffment in fee upon condition and confidence. And, afterwards, the recognizance was executed and in execution. And, afterwards, he died. And the heir in tail underage enters for the condition broken. Whether he will be remitted or not, this was the point because, if he be remitted, it seems that this would discharge the execution.

Kebell thought there was no remitter because the heir came to it by the condition broken. Thus, he will be adjudged in as his father was before the estate was made upon the condition. And this was of an estate of fee simple because his father took the estate after his discontinuee. And thus he made the estate upon a condition, thus in the manner as if my father had entered for the condition broken, he will not be remitted, no more the son, because he could not be in a better position than his father was if he had come to

the land by the condition broken, because he has the right to have the land by an action of formedon. And he has a right to have the land by the condition. Thus, when he takes the land by the condition, he refused the title that he would have by the action. Thus, even though he be underage, yet it does not remit him because he was not compelled to take the land by the condition. And thus it was his folly, because it is not the same as where the land is thrown upon him by a remainder or by descent, because, there, he is a tenant in spite of himself. But, here, he is not a tenant, for which case he will be adjudged in the title by which he entered. And this is by the condition, as if the tenant in tail enfeoffs his brother and dies and the brother, *scil*. the uncle to the heir, makes a feoffment upon a condition and dies, the heir enters by reason of the condition broken. He will not be remitted because he will be adjudged in as heir to the uncle and not as heir to his father *per formam doni*. And, in this case, he will not be remitted. And, in this case, if the recovery had been against the uncle by default and the heir had sued an action of deceit against the sheriff or a writ of error and recovered, he will not be remitted, because he came to the land as heir to the uncle by this recovery and not as heir to the tail. And thus, by the same reason of a condition, he will be adjudged in accordingly as the statute was before the estate made upon a condition.

But the case of 4 Hen. VI[1] is otherwise because the heir will enter for the condition broken as heir to the father and thus the woman, who was the widow of his father, entered upon him because the discontinuance was defeated by the entering of the heir upon the condition broken. But he is not defeated here, but he will be adjudged in of the estate that his father retook of the discontinuee, because, upon this estate, he made the estate upon a condition. And I understand, if the discontinuance be by the husband, the discontinuee made a feoffment in fee upon the condition where a recovery is had against the discontinuee and he dies and the wife is heir to him. In this case, if she enters for the condition broken or the reversion, there [by] the recovery by a writ of error or deceit and entry, she will not be remitted.

And this here, because the estate upon a condition was made unless the tenant in tail was seised of an estate of fee and the estate tail discontinued, on

[1] YB Mich. 4 Hen. VI, f. 2, pl. 5 (1425).

account of which, when the heir enters for the condition broken, he will be adjudged in in fee simple and not by the title of tail.

Rede and others *e contra* because this cannot be otherwise taken except as a remitter, because it is the common principle of remitter unless the heir has right by *eigne* title to the land and he is tenant in fact and in law and he does not come to the possession by folly; because he was underage, he is always remitted.

And thus here, this entry was legal, and there was no folly because he was underage. But, if he had been of full age, then there was no remitter, because, then, it was folly in coming to the estate, as if a tenant in tail discontinues the estate tail or the husband discontinues the right of the wife and the tenant in tail dies and the discontinuee enfeoffs his heir underage, he is remitted. And yet he was not tenant in law nor in fact before the feoffment was made, which the taking of the statute will remit to him inasmuch as no folly can be adjudged in him who is underage in coming to the estate.

And the reason is, unless he had the possession by no folly, he does not have so high a right and title as by a writ of formedon, which title and action he cannot have. And, on account of this, as the principal is, he will be remitted because he cannot come to the latter title, *scil*. the possession, by folly, because his infancy excuses him. And thus, in the other case, if the husband takes back the estate to himself and his wife, his wife is remitted because this taking is not any folly in his wife.

But, where folly will be adjudged in coming to the possession, it is otherwise, as if the heir, in the case put, had been of full age when he was enfeoffed or the wife had been unmarried when she took back the estate and of full age, in these and similar cases, there is no remitter. And thus, if the heir had been of full age in the case debated, he will not be remitted if he had entered for the condition broken because, there, the folly will be adjudged in him in coming to the land by this title of the condition. And thus, in these cases put where a recovery is had against the uncle, being the discontinuee, and the heir underage had reversed the recovery as heir to the uncle by a writ of deceit or by a writ of error, in this case, there is no remitter even though he be underage because he will be taken as of full age because it is a recovery by matter of record and he will be concluded by the reason of the recovery that is of record as well as one of full age to claim any other title.

But, in the case here, it is by matter in fact by which the infant comes to the land by the condition and by a legal title and not by tort. And, because he was underage at the time of the entry, he will be remitted because no folly will be adjudged in him. And thus in my conception, clearly, there is a remitter.

Another matter *Kebell* moved [was] because the land was in execution put against the feoffee upon condition and confidence by the statute merchant made by the feoffor, who was tenant in tail and this was by the equity of the Statute of Ric. III.[1] (*Quod nota* this is taken by the equity as similar.) Thus, because the land was put in execution against the feoffee, this was a suspension of the condition for this cause. Thus, if the condition is in suspense against the father for this time, then, if the father die, if will not be revived by the son, because he claims the condition by the father and because the moneys are not yet satisfied is the reason that the condition is in suspense. Thus, the entry of the heir is not lawful, because there was no condition, because, if he had released the condition or taken a lease for a term of years and granted over his estate, for this time, the condition is in suspension against the father and his heir, who claims by him.

Rede, e contra. (But he did not argue because the court had risen.)

Ideo quaere of this point. And there was another good point, as was said by Vavasour [J.C.P.], because I did not hear the case well. *Marrow*, of the Temple, knows this case well because he was counsel in the said matter.

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Anonymous
(Ch. 1493)

In a dispute over land, if aid of the king be granted without good cause, it is not error, because it is only a delay, but it is error in the case of a voucher.

In a land dispute, if aid of the king is denied where it is grantable, this is error.

Anyone can prove the king's title in the Court of Chancery.

[1] Stat. 1 Ric. III, c. 1 (*SR*, II, 477-478).

YB Pas. 8 Hen. VII, f. 11, pl. 1

In the assize, the bailiff showed that a lease was made to his master for the term of his life, the remainder over in fee to the king. And he prayed the aid of the king, and it was granted. And the plaintiff came into the Chancery and prayed for [a writ of] *procedendo* without an examination of the title of the king because the aid was not well granted, because this prayer in aid caused the record to come in without cause and thus it is in the Chancery without a warrant, by which he thought that it should be remanded without delay.

Frowyk and *Kebell* thought that the aid was well granted by the plea pleaded by the bailiff because the bailiff can plead a recovery by his master against the plaintiff, by force of which he entered, and so was in [possession] without wrong, and thus he will plead a fine and a grant of the reversion and other things.

Hussey [C.J.K.B.] interrupted them and said that the bailiff pleads all things that are inquired of by this assize.

Kebell wanted to argue that the aid would be granted by the bailiff's plea by the form.

Hussey [C.J.K.B.] said that there was no need to argue this, because, even if [aid of the king] be not lawfully granted, yet when it comes here, it will not be remanded until the king's title be completely examined, because here is the place ordained or appointed and appropriate for it. Thus anyone can show other matter here which he wants to prove the king's title, so that the [writ of] *procedendo* will not be granted. Thus, it is common erudition that, if aid be granted for a cause and the cause is not sufficient, it is not error, because this is only a delay. But, of a voucher, it is otherwise. Thus, if aid be granted on a sufficient cause in a common person's case, this is not error. But if it is denied where it is grantable, then this is error. Thus, in this case, even if it be granted by the bailiff's plea, which perhaps is not a sufficient cause at the outset, but when it is granted and has come here, it will not be remanded, because everyone who ought to show sufficient cause for the king, which proves that the king has title, so that he would not grant the *procedendo*. And this is proved by the case in Mich. 3 Hen. VI;[1] aid of the king was prayed and

[1] YB Mich. 3 Hen. VI, f. 5, pl. 5 (1424).

there was not sufficient cause and the *procedendo* was granted and then the defendant showed the cause. And, even though he had the aid last term on an insufficient cause and, now, he shows a new and sufficient cause and prays aid anew and because aid was granted last term and sent here in the Chancery and the defendant could have shown this cause which he shows now and because it was not shown, he has exceeded his time. And thus, because every person can show the king's title in the Chancery, when it has come here, whether the cause be sufficient or not, because it was not error to grant it at the outset, and then, when it is remanded etc., he will show no cause to have new aid. Thus, this case was ruled in Mich. 3 Hen. VI. But the same term, if he shows cause and the court awards this cause was not sufficient, in the same term, he can show another sufficient cause, and aid of the king will be granted. And thus here, even if aid was not well granted by the bailiff's plea etc. But, when the record has come here, anyone can show matter to prove the king's title, because, if it was remanded, he would not have a new aid, because the title, the cause that he would show when it is remanded, he can show now in Chancery, and so [a writ of] *procedendo* will not be granted without an examination [of] the king's title according to the form of the Chancery, by which etc.

Ad quod concordat Bryan [C.J.C.P.], who was in Chancery.

R[eporter]: *Quaere* if aid was grantable by the bailiff's plea.

126

Note
(Ch. 1493)

In the case of infant wards of the crown, both claiming the same land, and one comes of age before the other, the one of age can have his livery of his inheritance without waiting for the other to come of age.

YB Pas. 8 Hen. VII, f. 11, pl. 2

Note that Hussey [C.J.K.B.] said that, if one be found heir to a man and of full age upon a *diem clausit extremum* and another is found an infant

and heir in another county to the same man and of land in this county, in this case, he who was of full age will make his fealty and homage and will have his livery and not be delayed for his livery until the other comes of age and then [they] interplead. And [it is] the same law if they are found both infants; he who first comes of age will have his livery and not be delayed until the other comes of age and then to interplead.

R[eporter]: *Quaere bene*, because it was said so, but I have not heard the reason that he put to prove it, by which etc.

127

Anonymous
(Ch. 1493)

Where a trust of land is created and the settlor grants an annuity to pay legal fees in reference to the land and the annuitant dies, the trustees cannot appoint a new annuitant without the consent of the infant heir.

YB Pas. 8 Hen. VII, f. 11, pl. 3

Note that, at the same time that Hussey and Bryan were in Chancery, the Chancellor [Morton] asked of them divers cases that were before him.

And one was, if a man was enfeoffed upon confidence of land of an estate and annuities were granted by the father of the infant, their feoffor, during the lives of others for their counsel and they died, whether the feoffees could grant new annuities to be of their counsel in defense of this land without the assent of the heir.

And the justices said, of all ordinary offices, as a steward, it is a good grant during their time and of it they will have an allowance in their accounts unless they account for the profits by a subpoena by the command of the Chancellor, but not of a grant of fees for a term of life. This is not ordered without the assent of the heir unless he is of full age.

Kebell: It seems to me that grants of fees of counsel are good without the assent of the heir because it is agreed that they could defend the land with the profits and, for this, to have an allowance. Thus, perhaps, the profits

are not able at the time to defend this title of the land and so, to defend this title, they should grant an annuity of little value, which is necessary for the defense of this title and without the assent of the heir because this does not amount but to the profits if so much of the profits could be taken at this time which amount to the sum in gross during his lifetime. But, of necessary and ordinary officers, he thought that he could change them by a subpoena because he need not have a steward and, thus, if there be more profit to have no steward than a steward, he could discharge him; so of a bailiff or a receiver because he could do the thing himself. Wherefore etc.

128

Anonymous
(Ch. 1493)

The king can release and extinguish his right of a corody.

YB Pas. 8 Hen. VII, f. 12, pl. 5

In the Chancery, the case was thus. The king was the founder of an abbey, and he had granted the corody to a man, and he was in possession of it. And the king had granted the said corody to the same abbot and that they would be acquitted of him and his heirs. Whether or not this grant to the abbot was good was the matter.

And it seemed to some that it was not good, and this for two causes; one, the king did not have the corody at the time of the grant, because another had the possession at that time; as if the king had granted an office to one and, afterwards, he granted the same office to another, the first being in possession, the second grant is void; so here; and the other cause is, because the king had the corody [as a matter] of common right of such abbey where he was founder; as if I hold of the king and the king releases or grants the same services to me or my heirs, yet I hold of the king notwithstanding, because it is incident to the king to have all land held of him, and there cannot be any land not held of him mediately or immediately. And so the law is the same where the king is the founder of any place. It is impossible to be a founder

and not to have a corody of the place. And, thus, for these causes, the grant is void.

And the justices were against this, as I heard from others, *quia non interfui*.

And as to the first cause, they held the [second] grant good. And it is not as where an office is granted by the grantee of the same office, because, there, the grant is void, because the king is deceived, because the office is granted to another person, and the king does not have the reversion of the office in himself, for which cause, such a grant is void, because, if the king would recite where he had granted such an office to one such for a term of his life, he will grant this office to another to him to have after the decease [of the first grantee] etc. to him and to his heirs. This is good, because, even though the king does not have any reversion in himself, yet he is seised in law, by which his grant would be good, as it seems, because, at the outset, when the first grant was made, the king was seised of the office, because the king cannot be an officer himself, and yet the grant is good, because he is seised in law. Thus, he can grant it.

(Query of this case.)

But here, the house is charged with it. Thus, if the thing can be discharged, the king can release to the house. *Ergo*, by his grant, he can extinguish it, and the first grantee will have it only for a term of his life. And this was recited in his patent, and, thus, the king in this case was not deceived. Thus, it can be discharged, and the grant is good and will enure to them by way of extinguishment. And, as to this, that the king cannot be a founder unless he will have a corody, as if the king release to his tenant all services, yet he will hold it of the king; this is not the same, because it is impossible that there would be any land not held of the king. But the king can be a founder and not have a corody, because even if [as a matter] of common right he would have one, if he did not reserve one, this is true, and yet the king can express upon the foundation that he does not want to have any corody. And this is good, and the king will not have any corody. And, thus, even though [as a matter] of common right, if he be the founder, then he will have a corody, because the better [interpretation] will be taken for the king, because he is the conservator of the law, but yet he can express upon the foundation that he does not want to have any corody, and, then, he will have nothing. And, by the same reason, it can be extinguished afterwards. And the reason here

is, because all this that pertains to the name of the founder remains and will not be extinguished, so, if the name of the founder can continue, this extinguished corody notwithstanding, then the corody is lawfully extinguished. And the king is the founder well enough without having a corody, because he will have prayers, as if the king enfeoffs another and says nothing, he will hold by knight service, the better service, and yet, even though this be of common right at the outset, if he releases all except fealty, all is extinguished except it, because this is sufficient service to make a tenure. And, thus, even if the king has a corody where he is the founder and, afterwards, if he releases the corody, the name of the founder remains if the prayers, which are the cause of the foundation, remain. Thus, inasmuch as the king can be a founder and have the name of founder, this grant notwithstanding, it is not such an incident, but it can be severed well enough. And the king, as it seems, can grant this corody to a man, to him, and to his heirs.

And, thus, as *Pygot* reports, the opinions of Bryan [C.J.C.P.] and Hussey [C.J.K.B.] were that the king's [second] grant was clearly good; by which etc.

129

Sygemond v. Spenser
(Ch. c. 1493)

A person who has an equitable right can sue in a court of equity against the settlor and the trustees of a trust as well as the disseisor of trustees and the trustees of a disseisor.

115 Selden Soc. 132

One came into the Chancery on a subpoena at the suit of one Sygemond. The substance of the matter in the bill was as follows. A man had feoffees to his use of certain land, and the plaintiff married the daughter of the *cestui que use*, and, upon the marriage, he made a bargain with the woman's father that he should have his land after his death. And the plaintiff alleged that the

defendants had continuously taken the profits after the death of the wife's father.

The defendants claimed title to the land by reason of the last will of the said wife's father.

Furthermore, *Rede*, who was of counsel with the defendants, argued that the subpoena did not lie against the defendants on the facts contained in the bill, for one thing, because he has not alleged that we are freehold tenants, but only pernors of the profits, and, therefore, we are unable to convey to him an estate in the land. Even if we were tenants of the soil, he has still not shown that we came in through the father's feoffees to uses for the purpose of being feoffees to the use of their feoffor, as they themselves were, for, otherwise, the subpoena does not lie against me upon a bargain made in the time of the feoffees to the use of the party who made the bargain. And so etc.

Jay, ad idem: The action of *contra formam collationis* lies against an abbot who is not tenant, namely, after his alienation, but that is by the express wording of a statute.[1] And, if a tenant in dower leases over her estate, a writ of waste lies against the woman at common law. In these cases, *scire facias* lies against the terre tenant to have enforcement of the judgment against those who were privy to the first suit. In this court here, however, such process does not lie against the terre tenants on a judgment given against the pernor, who is defendant here.

Kebell: Your arguments are all based on a fallacy, for your arguments are that a subpoena does not lie against anyone but the terre tenant, because a person who is not tenant of the land may not convey an estate. [But] if I have feoffees to my use and they alienate the land, it is beyond question that I or my heirs shall have a subpoena against the alienors, even though they have nothing in the land.

Rede interrupted him, and said, you shall recover everything in money in that case, but not the land.

Kebell: I tell you that the alienation does not change the judgment, for the judgment against the alienors shall be to recover the land, and they shall be committed to prison until they have conveyed a lawful estate. Moreover, if someone who has feoffees to his use sells me land, I shall have a subpoena against him to bring in his feoffees in order to convey an estate to me.

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1 Stat. 13 Edw. I, Westminster II, c. 41 (*SR*, I, 91-92).

The Chancellor [Morton] confirmed both cases.

Kebell: Also, you claim the lands through a will made by *cestui que use*, and we claim through his bargain made with us, and, therefore, the whole variance between us is determinable in this place and not elsewhere. I tell you as law that, if I claim land against feoffees in trust and someone else makes another claim to have the land or to have a special interest in the land, I shall have a subpoena against him to stay his claim; and yet he is not the freehold tenant. Furthermore, a subpoena lies against the disseisor of feoffees in trust or against their feoffees where they have made a full feoffment, as well as against themselves.

The Chancellor [Morton] agreed.

130

Anonymous
(Ch. 1494)

Where land is seized by the king upon the death of a joint tenant, the surviving joint tenant can recover by a monstrans de droit.

YB Pas. 9 Hen. VII, f. 9, pl. 24

Nota, if there are two joint tenants and it is found by an office that one was seised in fee and died seised and that the land descended to such a one, his son, as heir, the other [surviving joint tenant] has his remedy by *monstrans de droit*. And this is in such manner, he will come into the Chancery and show all his matter and pray allowance of this, and he will have [it], *quod nota*.

131

Anonymous
(Ch. 1494)

When there is a variance between a scire facias *and the* mittimus, *the* scire facias *is not warranted and the* mittimus *must be amended or the suit abates*.

YB Hil. 9 Hen. VII, f. 18, pl. 13

In *scire facias* to execute a fine, the case was thus. A fine was levied to one J. at S. and to Alice, his wife, and to the heirs of their two bodies engendered. And, upon this, a [writ of] *certiorari* issued to remove the record out of the Treasury into the Chancery. And now, it came into the Common Bench by a *mittimus*. And, on account of this, the plaintiff has sued this *scire facias* as heir to J. at S. and to Alice, his wife, etc.

Kebell: In the *mittimus*, the plaintiff has made himself heir to J. at S. only, and, now, in the *scire facias*, he has made himself heir to the husband and his wife. Because of this variance, we pray that the *scire facias* abates.

Rede: It seems to me that, by this variance between the *mittimus* and *scire facias*, the writ is well warranted by the *mittimus*, because, by the fine, it appears that it [the fine] was levied to J. at S. and to Alice, his wife, etc. so, by his own showing, he is heir to both, and now, by the *mittimus*, it appears that he has made himself heir to the said J. solely, so he is heir to both, as was said before by me that he is heir to one of them, because this is [consistent] with the fine, and also with the *scire facias*, which was well warranted; so it seems the writ is good etc.

Kebell thought the contrary and that this *scire facias* ought to follow the *mittimus*, or otherwise the *scire facias* is not warranted, because this *mittimus* warrants this *scire facias*, by which it ought to agree with the *mittimus*, as in case land be given to my father and to my mother and to the heirs of their two bodies engendered, and I want to bring a [writ of] formedon, and I make myself heir to my father, where it will be that I am heir to my father and to my mother, it is a good plea for the tenant to plead `he did not give in the manner and form as he had supposed', and yet he is heir to the father. And also, if I give land to a man and to his heirs male of his body engendered, if the heir brings formedon and makes himself general heir, it is a good plea to say `he did not give by' etc. and yet he is heir male, but because he showed forth the deed, which proved the contrary of his writ, so, for the variance between the deed and the writ etc.; so here, because this *mittimus* warrants the *scire facias*, which *scire facias* does not agree with the *mittimus*, it seems that the *scire facias* will abate.

Fisher: In your case of a grant to the heirs male, I grant it well, because, in this case, it is contradictory to the gift. But, in this case, as has been said, this is [consistent] with the fine and [consistent] with the *scire facias*, that, if

he be heir to them, he is heir to one of them, and also ought to sue a *scire facias* etc. And so he has done here; by which etc.

Wood: It seems to me to the contrary, because, where an action is sued on a record, it ought to be warranted by this record, because, in the *mittimus*, he is made heir to the father solely, and, in the *scire facias*, he is made heir to the father and to the mother; so this *scire facias* is not warranted by the *mittimus*. And it could be that two fines were levied, one to the husband solely, and the court ought to be assured which of them it is and if six descents are in his father or ancestor etc. and if the heir will be to bring an action, he ought to show in which etc. *post mortem* etc. and show how he is heir with certainty, and not by an argument taken, because the court will be assured of this, *scil.* how he is heir, etc.; so here, because the *mittimus* and the *scire facias* vary, the court cannot be assured whether he is heir to both or to one. So it seems that the *scire facias* will abate.

Fyneux [J.C.P.] thought to the same intent, because this fine ought to warrant the *mittimus*, and the *mittimus* warrant, the *scire facias*. And now, when he is made heir in the *mittimus* to the father solely, and, in the *scire facias*, he is made heir *ut supra* as the fine appears, now the *mittimus* does not warrant this *scire facias*. And, if a formedon be brought, it ought to agree with the deed, because, if I give land to one and to his wife, *ut supra*, by a deed, and the heir brings a formedon and makes himself heir to his father and to his mother separately, now the writ is unavailing, because the writ does not accord with the deed, and yet he is heir to both. But, because the action is founded on the gift and on the deed, which deed proves the contrary, by which etc.; so here, because this *mittimus* warrants the *scire facias* and the *scire facias* warrants etc. And, when there is a variance between the *scire facias* and the *mittimus*, then the *scire facias* is not warranted etc. And, because it is [a matter] of record etc., he ought to sue the *scire facias* according to the record etc. And, because he does not have it, it seems that the writ of *scire facias* will abate.

Vavasour [J.C.P.] [held] to the same intent, because it ought to accord with the *mittimus* or, otherwise, the *scire facias* is not to warrant etc. And he can be heir to them both, and yet he is not heir to his father alone, as, in case one has issue and his wife dies and then he takes another wife and now lands are given to the husband and his wife and to the heir of their two bodies engendered, and they have issue and die, now he is heir to both; *ergo*, he is

heir to the father. So this argument does not hold place, *scil.*, if he be heir to both, *ergo*, he is heir to one of them. And so here, he can be heir to both, and yet he is not heir to one of them solely; by which etc. And there is a distinction when the *mittimus* issues [as a matter] of record and when on a surmise of the party, because in the one case, *scil.* when it issues as a matter of record, it seems to me that it will be amended, but when it issues on a surmise of the party, it will not be amended. And I myself saw here that a fine was levied to a man and to his heirs male and, on the *scire facias*, he was made general heir, and this was amended etc., by which he thought that it will be amended.

Rede thought that the *mittimus* will be amended, because, when it was removed into the Chancery by a *certiorari* out of the Treasury, then the record remained there until it be removed lawfully, and when the clerk can have notice so that the default was made, it was in the clerk; so it is reasonable that it will be amended, because he could have notice on the view of the record. But it will be otherwise where it was on a surmise of the party, because there it is the folly of the party and his fault, and not the clerk's fault, by which he thought that it will be amended.

Kebell thought that it will not be amended, because, if the husband and wife bring a formedon in the descender and the writ is `descended to the husband and wife', where the land descended to the wife only during the coverture from a gift to the wife's ancestor, in this case, it will be amended, because the form of the Chancery is that it ought to descend to the wife only and not to the husband, and, because it is apparent, it will be amended. But it is otherwise in this case, because the gift was to the husband and to the wife *ut supra*, and, for default of issue of their two bodies, that it would revert to the right heirs of the husband and to his wife or to the husband alone, because it can be that he claims as heir to the husband only by reason of the remainder that he claims as heir to his father, to which estate the clerk is indifferent. So it ought to come from the surmise of the party, and, if so, then it will never be amended. And as it has been said, he can be the heir to both, and yet he is not heir to the husband only or to the wife only etc. nor to any of them separately etc., by which he thought, inasmuch as he came by the surmise of the party, that it will not be amended.

Fyneux [J.C.P.]: You say well, but, in this case, it appears well that he claims by force of the entail, and so it is certain. And this is not by surmise of the party, but, if he claimed another estate than the entail, there, it ought

to come from the surmise of the party, in which case, then, it would not be amended. But, inasmuch as it appears by the writ that he claims by force of the entail and not any other estate, so then it will be amended.

Quod Vavasour [J.C.P.] *concessit*.

132

Anonymous
(Ch. 1494)

The standard penalty recited in a subpoena out of the Court of Chancery is only in terrorem, *but, where a subpoena is disobeyed, the Chancellor will impose a fine for the contempt.*

YB Mich. 10 Hen. VII, f. 4, pl. 6,
Cooper's Practice Cases 516, 47 E.R. 629

In Chancery, a man appeared upon a subpoena. And the effect of the bill of the plaintiff was that the defendant was enfeoffed to the use of the plaintiff, and judgment was given for the plaintiff that the defendant should make him an estate before such a day and he was ordered to do this by the court in [a penalty of] £100 where he did not make the estate. Whether a *scire facias* against him will issue or not for the forfeiture of it [was the question].

Kebell thought that the *scire facias* will issue because, in this case, the penalty is put in certain and, if the sheriff returns upon a [writ of] *capias cepi corpus et quod languidus est in prisona*, a writ will issue against him to bring the prisoner with him, which is called *duces tecum*. And, if he not act by this writ, another writ will issue to the sheriff to bring the prisoner under a penalty, by which the *scire facias* will issue forthwith. And I have seen often time that an action of debt was brought for a penalty forfeited in a leet; thus etc.

Hussey [C.J.K.B.] and Vavasour [J.C.P.] and several others, barristers, held clearly that a *scire facias* will not issue in this case, because there is a difference between a recognizance and a penalty, because every recognizance is a judgment in itself, but it is otherwise of a penalty, because, if the defendant

make a default in the subpoena, the penalty is not forfeited because this penalty is not put in the writ except *in terrorem*. And, if the defendant make a default, then the Chancellor will assess a fine upon him according to his discretion, and, then, when he assesses the fine, now there is a judgment given, and, upon this, a *scire facias* will issue. And this is the difference.

133

Anonymous
(Ch. 1494)

Where a settlor of a trust of land dies, his heir being underage, the king does not have the wardship of such land where the heir is not entitled to have the land.

YB Mich. 10 Hen. VII, f. 10, pl. 24

In the Chancery before the Chancellor and the chief justices of the one bench and the other, the case was rehearsed that it was found by an office that Sir T. Dalawar was seised of certain land and he enfeoffed the said Chancellor and another to his use and to perform his last will. And he died, his heir underage.

[There were] two questions: one, whether the king would have the wardship; the other, whether the feoffees, at the full age of the infant, should sue a [writ of] *ouster le main*.

Frowyk: As to the first, it seems that he will be in wardship, because the new Statute in the time of the present king[1] provides `if a man make feoffment of lands, which are held in knight service to the use of the feoffor, and no will is declared, the lord will have the issue in his wardship as if the father had died seised'. Thus, in this case, if it is not found expressly by the office whether or not the feoffor made any will but solely that the feoffees were seised to the feoffor's use and to the intent to perform his last will, thus the better will be taken in favor of the king, *scil.* that the feoffor had not made any will, because, if it was found by office that one J.S. was seised of land

[1] Stat. 4 Hen. VII, c. 17 (*SR*, II, 540-541).

in fee and held of the king in chief and died seised, his issue underage, and *per quae servitia ignorantia*, the king will have the wardship, and, when the certainty of tenure is not found, this will be construed for the king's better advantage. But, if a common person wants to entitle himself to the wardship, he must surmise that his tenant, *scil.* the feoffor did not declare any will. Thus, there is a distinction between a common person's title and the king's title. And also it seems that the feoffees ought to sue [a writ of] *ouster le main*.

Hussey [C.J.K.B.]: It seems that the office does not give the king title to seize [the wardship], because the Statute is `where the feoffor has not declared any will, the issue will be in wardship'. Thus, if a title be given to another for the nonfeasance, where the feasance of the same thing that entitles him. And he put various cases.

Chancellor [Morton]: How ought one to surmise the nonfeasance of anything, because such a thing that lies in the negative cannot be tried.

Bryan [C.J.C.P.] made the same reason that Hussey [C.J.K.B.] made.

And, then, the justices rose.

134

Wawton v. Capell
(Ch. 1494)

A court of equity will relieve against a penalty in a bond to secure a debt, but not a penalty in a bond to keep the peace.

102 Selden Soc. 13

Michaelmas, 1494.

A subpoena was sued against Sir William Capell [d. 1515] in Chancery because the plaintiff in the subpoena had borrowed £60 from him in plate, which he sold for £40, and was also bound by a statute merchant to the aforesaid Sir William in £80 for payment of this money, and had also made a feoffment to certain persons of certain land and, by indenture, willed that, if

he paid this £60, the feoffees should be feoffees to his use, but otherwise they should be feoffees to the use of the said Sir William; and he did not pay the money, and so Sir William took the profits of the land and sued execution of the statute merchant.

Kebell thought he could have this land in conscience, even though he had execution of the statute merchant, because he does not have this land in return for the money in such a way that he is paid twice, but has it by way of penalty; and [the plaintiff] may bind himself to that, just as he may give the land away for nothing. If someone holds of me in return for 1d. of rent, he may bind himself in £100 for payment of this rent and, if he fails, I may have this penalty in conscience.

The Chancellor [Morton]: When someone is beholden to another in a principal debt, the debtee cannot in conscience take anything in respect of this indebtedness except the principal debt, even if the debtor is bound to him in twenty penalties.

Kebell: In that case, you might do much good to those who are bound in this court to keep the peace and are to forfeit their bonds.

The Chancellor [Morton]: The sum which is forfeited for breaking the peace may be taken in conscience, for nothing can be well done nor can the realm be governed without peace. This court could not be held without peace. Therefore, it is right that whoever acts against the peace should be punished. And by breaking the peace a crime is committed, and, therefore, it is right that he should pay this forfeiture.

And the Chancellor [Morton] held in this case that the debtee may in conscience take so much of the penalty as represents his damage by the withholding of the debt.

135

Anonymous
(Ch. 1495)

Where a conveyance does not take a reversion away from anyone, there is no forfeiture.

YB Pas. 10 Hen. VII, f. 20, pl. [13]

In the Chancery, Hussey [C.J.K.B.] and Bryan [C.J.C.P.] being there, the case was thus. Various persons were enfeoffed to the use of one Sir Richard Roo during his life, and they enfeoffed him in fee. [And the question was] whether or not he has forfeited his interest.

And the Chancellor [Morton] said that he wanted to know from the justices what the common law was.

And they said and were agreed that there was no forfeiture by common law, because no reversion was taken away from any person.

Kebell said that no one ought to forfeit his interest unless it be of freehold, as if a tenant for a term of life prays aid of a stranger, this is forfeited, but, if a pernor of profits prays aid of a stranger, this is not forfeited.

And the Chancellor [Morton] agreed that there was no forfeiture in conscience. And he said that they ought in conscience to reform that which is badly done and no more, and [there is] no forfeiture by conscience.

And so it has oftentimes been ruled.

136

Anonymous
(Ch. 1505)

Where a defendant is in default, the plaintiff must nevertheless prove his case by some evidence.

In this case, the doctrine of res adjudicata *did not apply because there was no final judgment in the former case.*

YB Mich. 21 Hen. VII, f. 34, pl. 40

A case was argued in the Chancery by *Coningsby, sed non audivi ipsum*.

Greville: The case is one sued a bill in Chancery and did not prove his bill, but the evidence of the defendant was better by which the defendant should have judgment by the evidence, that he should be discharged and the plaintiff barred.

And now the plaintiff, who sued the bill, in the enforcement of the judgment, said that it is a matter determinable at common law.

Greville said that he will be estopped because it was his own suit and it does not lie in his mouth. And, when the plaintiff sues a bill, he must prove his bill even though the other never makes a response to it before he will have judgment.

The Chancellor [Warham] was of the same opinion.

But nevertheless *Coningsby*, to his adversary, said that it has never been judged in Chancery upon this matter, but [there was a writ of] *procedendo*.

137

***In re* Estate of Mathew**
(Ch. 1505-1507)

When an issue out of the Court of Chancery is sent into the Court of King's Bench to be tried to a jury, the King's Bench can give a final judgment without remanding the case to the Chancery.

YB Mich. 21 Hen. VII, f. 35, pl. 44

An office was traversed in the Chancery and sent into the King's Bench to be tried. And the case was thus. It was found by an office *virtute officii* that one J., the king's tenant, gave certain land to one T. and to his male heirs. And he claimed as cousin and heir etc.

And it was found *virtute brevis* that the land was given in general tail to this same T., who had four daughters, who claimed the lands and tendered their traverse that the land was given in general tail, and that they are the heirs. And one of them was an infant. And, now, it is found here for the general heirs.

Whether judgment will be given, query.

Fyneux [C.J.K.B.]: When the traverse was tendered in the Chancery, they did not have power to try it there, and when it is tried here, we are only in the manner of justices of *nisi prius*. And we cannot give judgment but

remand it to the Chancery. And I do not know what advice he will have of the judgment given here.

Grevill: One court will try a thing, and another court will give judgment, as [where] a foreign release in Chester is pleaded, it will be tried here, and, then, after the trial, it will be remanded. And I have seen a precedent of this. So, those of the Chancery do not have jurisdiction to try this issue, but, when it is tried here, it will be remanded into the Chancery.

Brudenell: A foreign release pleaded in a franchise will be tried at the common law, and, then, after the trial, it will be remanded to the franchise. But, if the two courts are at common law, it will not be remanded, as of a record removed out of Common Pleas to this court, if it be tried here, we will give judgment here, and it will not be remanded.

Fyneux [C.J.K.B.]: If the king's title is found against him, judgment will be given here, and the king's hands will be removed. And, if there be a plea in the Common Pleas and a dilatory exception taken, and, notwithstanding this, they do not want to allow it, if it be allowed here, the plea will not be remanded, but judgment will be given here. And, if the error be in Chester and reformed here, we will award execution in this court.

Coningsby: That which is found is only void, and they ought to interplead, because, when they claim by one ancestor as heir, they ought to interplead in the Chancery and not take the traverse, but, inasmuch as they have not, all that is found is void, by which, they ought to begin again, and it is only a mispleading.

Palmes: If it be found by an office that one is heir to J.S. who held of the king and is an infant and, by another office, it is found that there are two daughters who are heirs of full age, they ought in this case to interplead in Chancery and not take a traverse, because I understand that they will never interplead, unless they claim by one same ancestor and title, but if they claim by separate persons and not by one ancestor, they ought to take a traverse and not interplead. And, in this case, they claim by separate titles, and it is found for the general heirs, in which case, they will not interplead, so the traverse was well taken.

Grevill: When it was found for the general heirs, it sufficed for them to answer to the king, and, because it is found for them, it seems that the king's hands will be removed.

Coningsby: If one be found by an office [to be] heir to the king's tenant and an infant and it is found by another office that another is heir of full age to the same ancestor, they ought to interplead or, otherwise, he could have a special livery and so have a remedy even though he was an infant. And it is not denied but that the ancestor died seised, but it will be otherwise if he claims by two separate titles.

Brudenell: The right to the land will not be tried by interpleader, but only the privity of blood.

Fairfax, at another day: When the traverse is found here by a verdict according to the traverse, yet the justices cannot give judgment, because the record is not here, and, if a transcript of a record be sent into the Exchequer and it is tried there, they do not give judgment because the record is not there.

Brudenell: If two offices are found, and one [finds] the heir is an infant and he finds pledges to prove his age, the other will not be excluded by it if it be tried, because he is entitled by office.

Fyneux [C.J.K.B.]: The heirs cannot tender a traverse unless they are of full age, but those who are infants cannot tender a traverse.

Coningsby: The writ that came to you is your warrant, and you ought to do according to the law of England, and you cannot exceed your warrant, and, if it be that he die before it be tried or confessed, here, he [the king] will be re-seised, and so the office is in its force.

And, afterwards, the justices were minded to give judgment for the general heirs, because it was found for them by verdict, and they would be advised how they would deliver [judgment].

Which note well, because it is a novel case.

Keilwey 93, 72 E.R. 257, 116 Selden Soc. 565

It was found by a *diem clausit extremum* after the death of one David Mathew that certain land was given to a man in tail general, and, by various descents, the land was traced to one Robert Vele, and the land descended to one Katharine, wife of Henry Ogan, and to three other daughters as kinswomen and heirs of the donee, namely to Alice, daughter and heir of the said Robert, and so forth. Katharine was of full age, and the others underage.

Afterwards, by a general commission, it was found that the land was given to the ancestors of the said Robert, entailed to the heirs male, and that

one William Vele was heir male, and [the office] showed how [he was the] son of William, brother of Robert, and so forth and that the said William the son was underage, as a result of which the king had seized the wardship of him. The said Henry and Katharine (being of full age) came into the Chancery and traversed the office found before the commissioners under the general commission, namely the gift to the heirs male in tail.

And the record was sent by the hands of the Chancellor into the King's Bench, and it was found in favor of the said Henry Ogan and Katharine his wife.

But note that the record which was sent into the King's Bench for trial of the issue contained the whole purport of the office which was found for the heirs male before the commissioners, whereas the purport of the office found for the heirs general before the Escheator was not certified into the bench, but the heirs general showed the gift to the heirs in general tail and traced [the descent] and traversed the gift to the heirs male.

One question was, whether the said Henry and his wife should have interpleaded in Chancery with the heir male or not? Another question was, assuming the law to be that they should interplead, whether the King's Bench judges may give judgment for the said Henry and Katharine, his wife, that they should have livery out of the king's hands or not? And the third question was, whether the record was well certified into the Chancery, inasmuch as the purport of what was found for the heirs general upon the *diem clausit extremum* was not certified out of the Chancery into the Bench?

It was moved that they should not interplead, because they are not found to be heirs to one man but claim by separate titles. Interpleader only lies in Chancery where they are found by different offices to be heirs to one person, for the interpleader is for no other purpose than to try the privity of blood. See at the beginning of Trinity term, 5 Edw. IV,[1] in a petty office, which agrees with the above. See also at the beginning of Michaelmas term, 7 Hen. IV,[2] in a petty office, where it was adjudged, where three people are found heirs to a manor by different offices and from different ancestors and each of them, on coming of age, prayed their livery out of the king's hands, and Tyrwhit said it had been adjudged that, where two or three people are

1 YB Trin. 5 Edw. IV, f. 4, pl. 4 (1465).

2 YB Mich. 7 Hen. IV, f. 4, pl. 25 (1405).

found heirs to one man, they should interplead before any livery. Likewise, in this case, for, if the king pleads with one, that will give good instruction to the others.

Later the king's serjeants were driven to answer without any interpleader.

See also the second plea of Michaelmas term 1 Edw. III;[1] in a *diem clausit extremum*, it was found that someone was heir to one John Gifford and was underage and the land was held of the king and, by an inquest of office, it was found that someone else was heir to this same John, and they were received to interplead forthwith, notwithstanding the infancy and notwithstanding that one of them had been found heir by an inquest of office, for, even if it was found in his favor, he cannot have livery upon this inquest of office without suing a writ or a commission in the nature of a writ.

As to the second question, whether the court may give judgment or not, it was held by all the justices of the King's Bench that they ought to give judgment to annul the commission found for the heirs male. Thereupon, judgment was given. The tenor of the judgment follows:

> At which day, before the lord king at Westminster, come both the aforesaid James Hobart, knight, who sues for the lord king, and the aforesaid Henry Ogan and Katharine, his wife, by Thomas Skrymsher, their attorney. And thereupon, the foregoing having been looked into and diligently examined and understood by the court here, the aforesaid lord king's serjeants at law and the same king's attorney having been called for and being present, it is decided that the aforesaid inquisition taken before the said commissioners should be deemed and reputed from henceforth to be vain and void in law and that the said present lord king's hands should from henceforth be removed from the possession of the same manors, lands, tenements, and advowson, with the appurtenances, with respect to having anything found in the aforesaid inquisition or any part thereof by reason or by occasion of that inquisition, and that no process or anything should henceforth be made out for him the said lord king or for his benefit or interest upon that inquisition taken before the same commissioners,

[1] YB Mich. 1 Edw. III, f. 18, pl. 2 (1327).

> and that the aforesaid Henry Ogan and Katharine his wife should have and pursue the due livery of the selfsame Katharine's share of the aforesaid manors, lands, tenements, and advowson, with the appurtenances, in due form of law, as they have above petitioned before the lord king in his Chancery aforesaid.

As to the third question, it was held that the justices in the King's Bench may not make livery, but he must have his livery in the Chancery. Therefore, it is immaterial that the finding for the heirs general was not certified out of the Chancery into the Bench, but the justices will now the send the record into the Chancery by a *certiorari*, and the party shall have his livery there.

Thus, it was adjudged in the King's Bench in Trinity term in the twenty-second year of Henry VII [1506].

138

Anonymous
(Ch. 1508)

Where a case is removed into a court of equity and it appears that the dispute is one of common law only, the court of equity cannot grant a final judgment.

Where a party is brought into a court by a writ of certiorari *or* habeas corpus cum causa *while he is in execution in the court below and is released on bail, he is thereby discharged of the execution*.

116 Selden Soc. 578

In Michaelmas term, 24 Hen. VII [1508], a plaint of detinue was removed out of London into the Chancery by [a writ of] *certiorari*, but the defendant was not in execution.

The Chancellor [Warham] proceeded to an examination of the matter in conscience until it was proved that the plaintiff ought to have judgment to recover the goods, and he had his judgment.

It was moved that this judgment was given wholly without warrant, because, when it appeared that the action lay, the plaintiff ought to have

been remanded to London, and, so here, the judgment is given without a due original.

It was agreed clearly that a judgment in Chancery given without an original, for instance without a subpoena, is as void as a judgment in the Place[1] without an original.

Query well whether the authority of the Chancellor in this case was without warrant, because there was no other original except upon the plea in London by virtue of the *certiorari*. (Query well, and study.)

The Chancellor [Warham] also moved this doubt. If this defendant is now in execution, may the chancellor release him upon surety by recognizance, upon condition that, if he cannot reach a settlement with the plaintiff, he will surrender his body to the Fleet [Prison] again for the said execution? And he asked the bar whether this could be done without annulling the judgment.

The bar were in doubt.

Then Brudenell [J.K.B.] came into court, and the case was recited to him. And he said that this court is not like other courts of record, for, in the other courts, if there is matter of discharge after the judgment, such as a release or such like, he may have a *scire facias* against the plaintiff, but he cannot have that here. So it seemed to him that the Chancellor may release him upon surety well enough. (The others agreed.) Where, however, he comes by *certiorari* or *corpus cum causa* while he is in execution in the court below and is released on bail, he is thereby discharged of the execution.

[1] I.e. the Court of Common Pleas.

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