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James Ravenscroft's Reports of Cases in the Court of Common Pleas (1623-1633)

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**JAMES RAVENSCROFT'S
REPORTS OF CASES
IN THE COURT OF
COMMON PLEAS
(1623-1633)**

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**JAMES RAVENSCROFT'S
REPORTS OF CASES IN THE COURT OF
COMMON PLEAS
(1623-1633)**

British Library MS. Lansdowne 1094

Edited by
W. H. BRYSON

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INTRODUCTION

James Ravenscroft was born in 1595, the son of Thomas Ravenscroft of Fould Park, Middlesex, and Bridget Powell. The Ravenscrofts were an ancient Flintshire family. (Thomas Ravenscroft (1563-1631) was a cousin of Lord Ellesmere's first wife, a member of Parliament in 1621, and a Cursitor in the Chancery.¹) James was admitted at Jesus College, Cambridge, in 1613, and received his B.A. degree in 1616. He was admitted to the Inner Temple on 29 May 1617, and he was called to the bar on 21 May 1626. James was married to Mary Peck; they resided in High Holborn, and had eleven children.² In addition to being a lawyer, he had a mercantile business. In 1679, he founded Jesus Hospital in Wood Street, Chipping Barnet, which was an almshouse.³ He had previously made a very generous donation to the rebuilding of the vestry of Barnet Church, where he was buried. He also established a trust for the maintenance of the parish church. James Ravenscroft died on 10 December 1680 at the age of 85.⁴

James Ravenscroft's reports of cases date from 21 Jac. I (1623) to 9 Car. I (1633). This set of law reports has survived in only one known copy, British Library MS. Lansdowne 1094. This manuscript is signed by James Ravenscroft on page 135. It was owned by Edward Umfreville (d. 1786) in 1727, and purchased in 1758 by William Petty, marquess of Lansdowne (1737-1805). Lord Lansdowne's extensive collection of manuscripts, including this one, was bought by the British Museum, now the British Library, in 1807.⁵

The cases reported here come primarily from the Court of Common Pleas. In addition, there are forty-one cases from the Court of King's Bench, four from the Court of Exchequer, two from the the Court of Star Chamber, two from the Assizes, one from the Court of Exchequer Chamber, and two from the Court of Chancery. At pages 12 to 17 is 'A charge to the Grand Enquest of Middlesex by Dandridge, Justice in the King's Bench'; this is not included herein. Ravenscroft did not report any cases from the year 1625, during which there was a virulent outbreak of the plague in London.⁶ He probably retreated from London to the country that year. There are only seventeen cases after 1631, the date of his father's death. A word-search of the English Reports Reprint comes up with no mention of him, thus, no mention of his being of counsel in any case. Perhaps, he left the practice of law to take over his father's mercantile business. Ravenscroft died in 1680, a wealthy man. However, this is speculation,

¹ A. D. Thrush and J. P. Ferris, *History of Parliament, House of Commons 1604-1629* (2010), vol. 6, pp. 15-16.

² Two of his children were George Ravenscroft, see C. MacLeod, 'Ravenscroft, George (1632/3-1683), merchant and glass manufacturer', *Oxford Dictionary of National Biography*, vol. 46, pp. 128-129; and Edward Ravenscroft, see L. A. Knafla, 'Ravenscroft, Edward (fl. 1659-1697), playwright', *Oxford Dictionary of National Biography*, vol. 46, pp. 126-128.

³ British Library MS. Harley 6379 (foundation and regulations for Jesus Hospital).

⁴ W. Ravenscroft and R. B. Ravenscroft, *The Family of Ravenscroft* (1915), pp. 16, 44; J. Venn and J. A. Venn, *Alumni Cantabrigienses*, part 1, vol. 3, p. 424 (1922); F. A. Inderwick, ed., *Calendar of Inner Temple Records* (1898), vol. 2, p. 155.

⁵ H. Ellis and F. Douce, edd., *Catalogue of the Lansdowne Manuscripts* (1820), vol. 2, p. 275.

⁶ Note *Denton v. Dean* (1626), see below, Case No. 124.

because the last case reported ends in mid-sentence at the bottom of page 149; thus page 150 has been lost, and there could have been much more text that might show a continued attendance at court.

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**JAMES RAVENS CROFT'S
REPORTS OF CASES**

1

Anonymous

(K.B. Mich. 21 Jac. I, 1623)

Where a single deed creates leases of several parcels of land, the rent for all issues out of each.

If a man demise and lease several lands for several terms, as if he demise Blackacre for two years and Whiteacre for three years and Greenacre for four years, rendering 10s. rent, and this is all by his deed, in this case, the rent is issuing out of all of the lands. And though the term of one parcel of land be expired, yet the lessor will have the entire rent out of the other parcels until the last term that continues, and it will be charged with the entire rent as if the leases of Whiteacre and Blackacre are expired, the lessor will have his entire rent of 10s. out of Greenacre, and it will be charged with it, [as held] by the justices.

2

Anonymous

(K.B. Mich. 21 Jac. I, 1623)

Where a lease has been made and the lessee will not enter, the lessor has an action of debt for the rent due.

Also, it was agreed by all of the justices in the King's Bench that, if a man lease a term for years [. . .], reserving rent, and the lessee will not enter, yet the lessor will have his rent. And, if he be not paid, he will have his remedy by an action of debt. Thus, if the lease be of divers parcels of lands and the lessee enters in one parcel and will not enter into another, the lessor will have his entire rent, and, if he not be paid, he can have [an action of] debt for it.

3

Medhurst v. Balam

(K.B. Mich. 21 Jac. I, 1623)

An action of defamation lies for an untrue statement that an unmarried woman is pregnant.

In an action upon the case against Balam, [it was held] *per curiam* an action would well lie for these words that Balam had said to the plaintiff, who was a virgin or maid, *scil.* that she was with child and spoke to one that he knew for physic.

[Other reports of this case: 1 Rolle, Abr., *Action sur Case*, p. 35, pl. D, 7.]

4

Anonymous

(C.P. Mich. 21 Jac. I, 1623)

Where a action for rent is grounded on a property right, the action is a local action, but, where it is grounded upon a contractual right, it is a transitory action.

In the Common Bench, this diversity was put by the justices, that, where an action was brought upon a lease for years where the rent was reserved, that, if it be by privity of estate, the action must be [brought] where the land is. But, if it be by privity of contract, the action must be brought where the contract was.

5

Anonymous

(C.P. Mich. 21 Jac. I, 1623)

If one joint tenant of a copyhold surrenders his right, the surrender is good, and the joint tenancy is severed.

In the Common Bench, these cases of copyholds were put by the justices. If two joint tenants [. . .] of copyhold land and one surrenders it to the use of J.S., it is good, and it will sever the jointure.

Also, if two joint tenants of a copyhold and one surrenders it to the use of his will, in this case, the lord or the steward will admit him again, and it will sever the jointure.

Also, if I surrender my copyhold land to the use of J.S. and, before the presentment of it in court, I surrender it to the use of J.N. and it is before the first surrender be presented in court, yet the first surrender will stand good and he will be admitted and the second will be void.

6

Anonymous

(K.B. Mich. 21 Jac. I, 1623)

The question in this case was whether an act already done can be the consideration necessary to support a subsequent contract.

In the King's Bench, the case was thus. Three men are bound to J.S. to pay a certain sum of money at a certain day. And one of the obligors and a stranger are bound to the other of the obligors to save him harmless and, afterward, this same who is obligor who is bound with the stranger and assumes to save the stranger harmless and does not save him harmless, upon which he brings his action upon his case.

And it was said for the defendant that an action should not be because this consideration is not any consideration because not made a the suit and request of the obligor [. . .] to be at the suit and request of the stranger, and thus it is not. And they cited the case of 10 Eliz., Dy., fol. 272, sect. 31, where the servant was arrested and was bailed by two citizens of

London, and, afterwards, the master wrote to the bail to save them harmless, and he did not save them harmless, upon which they brought an action upon the case against him and, because the consideration was null because the servant was not bailed upon this assumption, but, first, was bailed and then the assumption was [made], thus it is not consideration, and thus no cause of action.¹

And Justice DANDRIDGE put a diversity where the consideration is of a thing executed, as it is in this case of a master and servant and where upon a thing executory, as the case is in Dyer, *ibid.* 272, where an action upon the case was brought upon a promise of £20 made to the plaintiff by the defendant in consideration that the plaintiff *ad specialem instantiam defendentis* had taken to wife the cousin of the defendant, it was their cause, even though the marriage had been executed before the assumption and promise so that the marriage followed the request of the defendant. And, in the case of the servant and the master had assumed to save harmless the bail before they bailed his servant, it would be good or if he requested the bail, the bail of his servant though he performed after the bailment, yet he will be charged.

Thus, [it was held] by DANDRIDGE, if I, in consideration that, if you would be bound with me in an obligation to be made to a stranger, I promise to save you harmless, this is good consideration. So also, in the principal case, because the stranger was bound at the suit of the other obligor, now the defendant, (as it was in truth done), *ideo*, though the assumption be after, yet it is good. And, on account of this, DANDRIDGE and HOUGHTON, who only were on the bench, agreed that the consideration is good and the action well lies.

7

Saunders v. Harris
(Part 1)

(K.B. Mich. 21 Jac. I, 1623)

Where there is a lease of land that has a common appendant to it and the common is enclosed, the rent remains without any abatement.

A lease for years is made of land to which a common is appendant or appurtenant, and rent [is] reserved to the lessor. The question was, if the common be enclosed² so that the lessor deprived the lessee of his common, whether the rent be by this suspended.

And, on one side, it was said that the rent is suspended, because the rent is issuing out of the land and not out of the common and the rent is reserved out of the land and not out of the common.

But *e contra*, it was said that the common and the land is leased and profit is issuing out of the common as well as out of the land and profit arises to the lessee by his common and by reason of the profit that upon the common to the lessee the lessor reserved a more great rent. And the common and the land are entirely leased to the lessee. And they cited the case of 20 or 21 Hen. VII,³ where a man leased offerings [. . .] and, afterwards, the pope by his bulls took away the offerings so that they are gone or extinct, now the rent is gone.

And [. . .] Justice DANDRIDGE said, S. Herne leased a brewhouse with the utensils, as tubs, barrels, [. . .] etc., reserving rent, if the lessor take the utensils, the rent will not be

¹ *Hunt v. Bate* (1568), 3 Dyer 272, 73 E.R. 605.

² foreclosed MS.

³ *Dean of Windsor's Case* (1506), YB Hil. 21 Hen. VII, f. 6, pl. 5.

suspended by it. Also, by law, in the case at bar, when the land with the common was leased and the rent reserved, the rent is issuing out of the land and not out of the common and no rent reserved out of the common so that the foreclosure of the common is not a cause to suspend the rent.

And so his companion Justice HOUGHTON, who only was on the bench with him, agreed.¹

8

Rex v. Anonymous

(K.B. Mich. 21 Jac. I, 1623)

A witness for the crown upon an indictment for usury where the crown recovered can nevertheless be prosecuted for perjury in that trial.

A man was indicted in the Exchequer upon the Statute of Usury.² And one J. St. was one of the witnesses who gave in evidence for the king. And, by his oath, witness, and evidence, the king recovered, and had his money in his purse. And, afterwards, the party, against whom the recovery was had, indicted the witness, *scil.* J. St., for a false oath. Whether, now, the king, who had an advantage by this oath, will make this indictment against the witness, because, by this indictment, his oath will be found false perchance and the evidence that was given by him for the king and by which the king had advantage will be disproved.

And it was said that, in the common case, a man will not be allowed to assign this for error what is in his advantage. But it was admitted that he could very well bring his action upon the case upon this false oath because he was damaged.

And afterwards, at another day, it was agreed by all of the justices that he could well be indicted for this false oath at the suit of the party and the king, who sues for himself and for the king, because the king is as chief justice of all the realm [. . .] he will be party and judge. And as judge, he must do right to every subject. Thus, the indictment is good.

9

Anonymous

(K.B. Mich. 21 Jac. I, 1623)

The question in this case was whether the different names in the record of the land in issue was a mere idem sonans or not.

[An action of] debt was brought for rent upon a lease of land in Creike. And the lessor entered in a parcel of land called Creike. And, because, by this, the entire rent was suspended, the lessee did not pay any [?] upon which that the lessor had brought this action of debt. And, upon this, they are at issue. And it is found for the defendant.

And now, in arrest of judgment, it was urged that, where the bar was of the entry in Creike, in the *venire facias*, it was put Creeke, and, on account of this, they resembled it to the common mistake of Semon and Sement and Margaret and Marjerie. And the justices gave to them a day, and commanded them to bring in the record.

¹ For later proceedings in this case, see below, Case No. 17.

² Stat. 21 Jac. I, c. 17 (SR, IV, 1223-1224).

10

Anonymous

(C.P. Mich. 21 Jac. I, 1623)

Upon a release of one of several persons distrained for rent, the releasee being the one who made the avowry, this release does not bind the others.

Seven persons are distrained for a rent. And one of them, who made the avowry, [was] released. Whether this bound the others or not was the question.

And [it was] agreed not.

11

Anonymous

(C.P. Mich. 21 Jac. I, 1623)

The question in this case was whether the plaintiff had sufficiently alleged damages so as to plead a good cause of action.

An action on the case [was brought] by a commoner against the lord for the depasturing of his common with conies so that he could not provide the common with his beasts. And upon this, they were at issue. And [it was] found for the plaintiff.

And now, in arrest of judgment, it was moved by Serjeant *Harris* that judgment should not be [entered] because the plaintiff had not alleged in his declaration that he had any beasts or cattle upon the common, because, if he had not any cattle in the common which were hindered of their good pasture by the depasture of the conies, then, there was not any damage to him.

Et dies datus ulterius.

12

Cason v. Anonymous

(C.P. Mich. 21 Jac. I, 1623)

A writ of execution does not lie upon a recovery and an erroneous mittimus.

An action of debt lies against a sheriff for an escape.

A recovery was had against J. St. at the suit of one Codson, and, afterwards, [a writ of] *capias ad satisfaciendum* is awarded against him and the sheriff took him. And, afterwards, by [a writ of] *habeas corpus*, the sheriff brought him into the Common Bench, and made his return that he had taken him by a *capias* at the suit of one Cason on account of which he was committed to the Fleet [Prison] by a [writ of] *mittimus* out of the Common Bench.

And now, J. St. brought his *audita querela* to be dismissed out of the Fleet of this false imprisonment which was at the suit of Cason where Cason had not any action against him. And because it was the error of the court to commit him at the suit of Cason where Cason had not sued him, so that the court did this tort and the Warden of the Fleet had not any warrant to imprison him except the *mittimus* of the court, which was erroneously done. *Ideo*, the court

could reverse it and amend this error, for which the court awarded that he will be dismissed of his imprisonment.

Also, the recovery is had against J. St. at the suit of Codson and the *capias ad satisfaciendum* issued to the sheriff to take J. St., and he took him. And, afterwards, by *habeas corpus*, the sheriff brought him into court and returned that he had taken him at the suit of Cason by which he was committed to the Fleet by a *mittimus* made upon it. In this case, it is an escape in the sheriff, and Codson, at whose suit he was taken, could have [an action of] debt against the sheriff upon this escape.

13

Anonymous

(C.P. Mich. 21 Jac. I, 1623)

In the administration of a decedent's estate, creditors have priority of payment over legatees.

One sued in the spiritual court for a legacy. And the executors said that they had nothing except £10, which is due for a debt upon an obligation. And the spiritual court would not accept this plea of the executors, but refused it.

In this case, the executors will have [a writ of] prohibition because the debts upon obligations and specialties will be paid by the law before the legacies.

And one of the justices said that he well remembered that a prohibition was granted in this case.

And, afterwards, in another similar case, the two justices, who then only were in the court, agreed with this case.

14

Anonymous

(C.P. Mich. 21 Jac. I, 1623)

Where executors of decedent's estates are sued for legacies and they have insufficient assets to pay them after paying the decedent's debts, they must specifically allege the insufficiency of the estate.

And another case at this time was [thus]. Executors are sued in the spiritual court for legacies. And the truth was that the testator was indebted to another upon an obligation, and this debt was due at this time. But the executors did not know of it. And judgment was given in the spiritual court for the legacies against the executors.

And, now, they prayed [a writ of] prohibition because there were debts upon obligations by which their testator was indebted at the time of this judgment given in the spiritual court for the legacies and debts must be served before legacies and, if the execution will not be stayed by a prohibition, the debts of the testator will be by this means unpaid.

And [it was held] by the justices clearly prohibition does not lie in this case, because they must have taken notice of the debts of the testator and have pleaded it when they had time, because, now, it is too late.

And Justice JONES put this case. If, in this case, a recovery had been had against the testator and the executor did not know of this fraud [?] and suit for the legacies and judgment is given against them, if, now or afterwards, they submit this matter to have a prohibition, they will not have a prohibition.

And Serjeant *Bingham*, who moved for the prohibition, said that this is true, because this recovery is a matter of record, of which the executors can have notice, but, of debts upon obligations, they cannot have notice. And, on account of this, he prayed a prohibition.

But the same Justice JONES said that all is the same. And, for this, he put this case. If the testator be indebted upon an obligation and, afterwards, at common law, a recovery is had against the executors upon a contract made by their testator, they will never reverse it in default because the testator was indebted at the same time of this recovery upon the obligation of which they then did not know, and yet the debts upon obligations will be paid before the debts upon [simple] contracts.

Thus, at common law, if a recovery be had against a testator and, afterwards, a debt against the executors upon an obligation made by the testator judgment is given against them, they adjudge, not knowing of this recovery, they do not submit afterwards to reverse this judgment because a recovery was had at this time against the testator. And, thus, they will pray that execution be stayed and the judgment be reversed.

And by both of the justices, [it was held] where executors are sued in an ecclesiastical court for legacies and they say that their testator is indebted upon obligations and that they must satisfy the debts upon obligations before they pay legacies, this is not a [good] plea because they must admit that their testator is so indebted upon obligations and *ultra* assets to satisfy this debt they have *riens enter mains*, because otherwise, it could be that they have sufficient [assets] to pay the debts and the legacies also. And [if] the spiritual court would not accept this plea, they will have a prohibition; otherwise, not.

15

Anonymous

(K.B. Mich. 21 Jac. I, 1623)

It is not defamation to speak words that cannot be understood by the hearers, however evil those words might be.

In an action upon the case for slanderous and defamatory words, [it was held] by Justice DANDRIDGE, first, the words must be such that the auditors and circumstances understand and know the meaning of them, because, otherwise, they are not defamatory and available to maintain an action. And he cited for this two cases that were ruled before in this case. A parson or other scholar made a speech or declamation in Latin before divers unlettered people who did not know what he said, and it was much in defamation of a stranger who was present there and well understood what he said, but no others understood, and, [in] this case, an action upon the case for it was not maintainable. The other case was where two Welshmen were speaking Welsh in the company of divers Englishmen who did not understand Welsh and one spoke several very defamatory words of the other, who, on account of it, brought his action upon the case, and it was ruled not maintainable.

Secondly, the words must be spoken certainly and directly of him whom he defames, and not with an *innuendo* in no case nor *per prae fatum*, except in some special cases where in other first words, the certainty of the name appears.

But [it was held] by the Chief Justice [LEY], if *post colloquium habitum* between two persons of one J. at Stile, one says defamatory words of the said J. Stile as in such manner 'Mr. Stile is a thief and stole my horse' etc., these are certainly known whom he intended by them, because this Mr. Stile will be well intended J. Stile. And it is known that the principal case was thus. A. and B. hearing parlance of a false verdict or false witness or false and injurious words etc., the said A. said 'I know not who it was that spoke those words; if [it] was Bell who was a false perjured knave and, if I live, I will have his ears off for it and his tongue

cut out of his head.' And upon those words, the said Bell brought his action upon the case. And [it was held] by the justices the action is not maintainable, because it is not certain of which Bell he intended those words. But, if in [. . .] of their parlance, they had had communication of John Bell and then he had said those words 'I know who it was etc. it was Bell who is a false perjured knave' etc., then, by that which by relation, it could well be intended of J. Bell. *Ideo*, it is a good cause of action.

16

Dean v. Reeve

(K.B. Mich. 21 Jac. I, 1623)

In this case, the plaintiff pleaded and proved a cause of action based on a wager of proof of defamation.

An action on the case was brought by Den against Reve; the case was thus. Reeve had said that Den, who was a married man, had other issue, *videlicet* a child, than those children whom he had by his wife. And upon this, a wager was made between them. Den deposited in the hand of a stranger 10s., and also Reve deposited 10s. And Den [. . .] that, if Reve could prove that he had other issue or another child by any other woman than those that he had by his own wife, he would lose this 10s. and a further 10s. more, and Reeve *assumpsit* that, if he did not prove it, he would lose this 10s. and pay a further 10s.

Then, the defendant libeled in the spiritual court against Reeve for this matter because he had defamed him in saying that he had other issue or another child than those that he lawfully had by his wife. *Et ibidem*, the said Reve could not prove it, by which judgment was given against him.

And then Den brought his action upon the case in London for the 10s. which he had assumed to pay if he did not prove it. And Reve pleaded *quod non assumpsit*. And, upon this, they were at issue. And it was found for the plaintiff, *scil.* Den, by which, he had judgment to recover.

And now they brought [a writ of] error in the King's Bench, and there assigned divers things for errors, which were answered or not [. . .]. And, among other matters, they say that true it is that Reeve had assumed to prove that Den had had a child except those which Den had by his wife, but they said that, to prove it, he had time to prove it for all his life, because no time in certain is limited.

But this was disallowed, because it was said by the justices that, if he had any intention to prove it or if he [. . .] prove it, he should for his advantage have brought his action and so have proved it by his evidence given to the court and by the verdict of the jury, where, when the said Den had sued him in the spiritual court, he could then have proved it, because then he had a time to do it and this by a good and legal way. But he had neglected the means and the time that he could have. And, on account of this, he will not have another time afterwards.

And also it was said by the justices that, inasmuch as an action was brought against him in London, he has pleaded *non assumpsit* and denied the assumption, he upon the matter had confessed that he could not prove it; by this plea, he has waived the benefit of his proof.

[It was held] by Justice DANDRIDGE matters in fact will be proved three ways, *scil.*, first, by a jury; second, by a certificate; third, by witnesses. And the principal and most notorious of these is to prove a thing by a jury. And, on account of this, [if] I assume to prove a thing in fact, it will be by the more notorious proof, which is a verdict by a jury, as the books are of 17 Edw. IV [*blank*] and 7 Ric. II [*blank*]. But of other things, when it is a proper and usual way to prove a thing, he assumes in general to prove it, he must prove it by this proper and usual way, as, if I assume to prove a testament, it will be by a certificate of the ordinary.

[. . .] held to prove that such a man is the husband of such a wife, it will be by a certificate etc. Other things will be proved by testimony and witnesses. And this is their proper way, as, if I assume to prove that the husband of such a wife is living and not dead, I will prove it by witnesses.

17

Harris v. Sanders
(Part 2)

(K.B. Mich. 21 Jac. I, 1623)

An exception was taken because the case was thus.¹ A demise was made of a house [and] other tenements in Coston *simul cum gardino pomario etc. ibidem existent' ac [. . .] Lindon Close simul cum omnibus terris et tenementis eidem messuagio pertinentis ad tunc et ibidem usitatis*. [. . .] which words are doubtful, though these words *simul cum omnibus terris et tenementis eidem messuagio pertinentis ad tunc et ibidem usitate etc.* will be intended etc.

And [it was held] by Justice DANDRIDGE this word *ibidem* is an adverb of relation and unless that it be some place in certain to what it could be referred, it will be as void where there are divers places. And there is not any certainty to which it will be referred.

But [it was held] by one of the justices, in this case, it will be referred to the last place. But, in the case at bar, he held that there is a certain place that this adverb '*ibidem*' will be referred because he had in the first named a house in Coston to which this '*ibidem*' had a certain and sufficient relation.

And [it was held] by Chief Justice SIR JAMES LEY these last words have relation to the first, and when it is said '*simul cum omnibus terris et tenementis eidem pertinentis ad tunc et ibidem usitatis*', it will not have relation and reference to Lindon Close but to the house in Coston; thus, they will have relation to the first words, and will unite all. Also the intent of the party will be observed. And if a deed could be by a reasonable way be made good, it will not be defeated and made void.

18

Light v. Bridgeman

(K.B. Mich. 21 Jac. I, 1623)

A verdict can cure technical omissions in the plaintiff's pleading.

Executors are not personally liable for the contracts made by their testator.

A., possessed of an advowson, granted it to B. And [it was] acknowledged in court between them that, if B., his heirs, executors, or assigns would at any time part with it, that then A. will have the first proffer and refusal of it and will have it £5 cheaper than any other will have it. B. died possessed of this term. And his executors sold it to another without any proffer made to A., upon which, A. brought a writ of covenant against the executors, and they were at issue. And the jury found for the plaintiff, by which, he had judgment given for him. And the judgment was in the Common Bench *de bonis testatoris* of the principal and damages *de bonis testatoris* if he had [assets] and, if not, of the goods of the executors. Upon which, they brought a writ of error in the King's Bench.

¹ For earlier proceedings in this case, see above, Case No. 7.

And they assigned for an error that the plaintiff, in the writ of covenant, who now is the defendant, had not alleged in his declaration that the grant of the advowson was by a deed and, if the grant of the advowson was not by a deed, it is void, as the books agree.

But it was agreed by the justices that, inasmuch as the jury has found the grant and concession of the advowson, even though nothing is said of the deed of grant, yet it is good and that which lacks in the declaration is supplied and perfected by the jury, because the jury found the grant and, thus, it is good, and it will be intended that [. . .] it was by a deed.

Another error that was assigned was upon the judgment [. . .], because the judgment is *de bonis testatoris* and damages *de bonis testatoris* if he had [assets] and, if not, of the goods of the executors where all should be *de bonis testatoris tantum*.

But Justice DANDRIDGE said, where the plea is completely false by the act of the executor, judgment of damages will be *de bonis executoris*, because, otherwise, by the false plea of the executor, the goods of the decedent will be wasted and consumed, which is not reasonable.

Et dies datus fuit ulterius ad arguendum.

At another day, it was argued at the bar for the defendant that the judgment will not be reversed because the executors will be chargeable by the act that he had done, because the granting of the reversion was their act, for which they will be charged for the damages of their own goods if their testator had not [assets]. And he vouched divers cases, 15 Eliz., rot. 324,¹ where there was a covenant between the testator, who was a termor of a house, and his lessor that the house will be well repaired continuously by the testator, his executors, and assigns, the executors do not make reparations, it is their default and no act of them, and yet, in this case, judgment was *de bonis testatoris* if he had assets and, if not, *de bonis executoris*. Also, [in] the book of 15 Eliz., Dyer, where the executors, by their negligence, allow the house to be burned and consumed with fire, the judgment was *de bonis testatoris* if he had [assets] and, if not, *de bonis executoris* and, if for non-feasance, the executors will be charged of their own goods, *multo fortiori* for misfeasance.

Also, he cited the books of 34 Hen. VI, 6; 31 Hen. VI, 13; 13 Eliz. 324; 20 Jac., rot. 125; 14 Jac., rot. 715, in the Common Bench; and 8 Jac., the Case of Lord Rich, in the King's Bench; Coke 5 rep. 31; 6 & 7 Edw. VI, Dy., Trotman [?], to the *contra*, that judgment will be reversed, because it is only a non-feasance and, for a non-feasance, they will not be charged of their own goods, because, where the covenant was that they should offer it to the said Bridgman, now plaintiff in error, they did not do it, which is only a non-feasance.²

And he said that the executors will not be charged of their own goods in no case except in one and it is where they plead *ne unques executor* [or] *ne unques administrator*, because, there, they distance themselves from the will, and, in this case only, they will be charged *de bonis propriis*. And he cited for his part the books of 34 Hen. VI, 22, and 2 Eliz., rot. 185.³

Justice DANDRIDGE said at this time, where an executor pleads in bar a plea that is a perpetual bar that is false and, of this, he had notice and conusance, he will be charged *de bonis propriis*, as if he plead a release to himself that is a false release, judgment will be *de*

¹ *Anonymous* (1573), 3 Dyer 324, 73 E.R. 733.

² *Heuster v. Corbet* (1455), YB Mich. 34 Hen. VI, ff. 5, 6, pl. 16; YB Hil. 31 Hen. VI, f. 13, pl. 5 (1453); *Anonymous* (1573), 3 Dyer 324, 73 E.R. 733; *Lord Rich v. Frank* (1610), 1 Bulstrode 22, 80 E.R. 727, Croke Jac. 238, 79 E.R. 205, 2 Brownlow & Goldesborough 202, 123 E.R. 897; *Boddy v. Hargrave* (1599), 5 Coke Rep. 31, 77 E.R. 100, also Moore K.B. 566, 72 E.R. 762, Croke Eliz. 711, 78 E.R. 946, 140 Selden Soc. 1018; *Dean of Exeter v. Trewinnard* (1553), 1 Dyer 80, 73 E.R. 171.

³ YB Mich. 34 Hen. VI, f. 22, pl. 42 (1455).

bonis propriis and also he will be fined and he will be imprisoned for it and these damages will be *de bonis propriis*. But [it is] otherwise where he pleads a false plea which is not a perpetual bar of which had not notice, as if he plead a release to the testator that is a false release, for this he will not have a fine [?] or where he does not have notice of the falsity of his plea, but the plea is not a perpetual bar, in these cases, he will not be charged *de bonis propriis*.

And, to this, [it was said] by Chief Justice LEY, upon an [action of] covenant, the judgment will be *de bonis testatoris tantum*, because it is his covenant and he has put trust and confidence to perform it by these parties and, if they will not do it, it will be his folly to trust such to be his executors.

Et dies datus fuit ulterius.

And, then, the justices delivered their reasons for their opinion.

Justice CHAMBERLAINE: Where the executors plead a plea that is false and of which they have notice and plead it to delay the party, if it be a perpetual bar, they will be charged for their false plea. And he cited the cases where the executors negligently allow the house to be burned and where they do not repair the house where their testator had covenanted to repair it. And, by his opinion, the judgment will be reversed.

Chief Justice LEY: All these cases put of a non-reparation of the house of the lessee, the house be burned etc. are cases of non-feasance, where damages must be *de bonis testatoris tantum*.

Justice HOUGHTON: If, where [there is an action of] debt against executors, they plead *ne unques executor* [or] *ne unques administrator*, if the verdict be against them, the judgment will be of the goods of the executors, but, otherwise, if there be no verdict against them. And *ubicunque* the executors distance themselves from the will,¹ they will be [. . .] charged of their own goods, *quod fuit approbatum et confirmatum* by all the justices.

LEY: Our case is not of a non-feasance only, but of a misfeasance and of an act done by the executors and such an act by which they have disabled themselves at all times to perform the covenant, because, if it were only a negligence or non-feasance, that he not have made a proffer of the advowson to the grantor, they should have or, afterwards, at another time done it, but, as they have sold the term to another, they have done such an act that disabled themselves forever.

And [it was said] by him, if this covenant should be a covenant in gross, perchance, they would not be held to take notice of it, and, then, even though they have sold the advowson to another without a proffer of it to the grantor, it is not any fault in them, and, then, they will not be charged for it. But, where a covenant or sale is annexed to an estate, there, he who has the estate is held to take notice of the covenant or the sale, and, for this, he will be held to have notice in law. And the executors here, since they could have had notice that their testator was possessed of such an advowson, so also could they have notice of the covenant. And, thus, their own act will charge them in this case.

Justice HOUGHTON: Where the testator made a covenant, even though the executors not perform it, they will not be charged by it, because they could not be well intended that they had notice of it, because the deed containing the covenant is with the covenantee. And, if, in such cases, the executors would be charged of their own goods, they would be by such charges undone, but it is not reasonable that they will be charged in such cases of covenants of their testator. And he held that the judgment will be reversed.

Justice DANDRIDGE: In any case, judgment will be *de bonis testatoris* for the principal and also damages will be *de bonis testatoris tantum*, as where the executors are sued in an action of debt and they confess the debt, the judgment will be *de bonis testatoris tantum*. In some cases, judgment will be *de bonis executoris tantum*, as where they plead *ne unques*

¹ *I.e.* refuse.

executor [or] *ne unques administrator* so that they distance themselves from the will.¹ If the executors plead a false plea that is a final bar of which they had notice, the judgment will be *de bonis propriis*, as where they plead a release made to themselves. But it is otherwise where they plead a false plea that is a perpetual bar and of which they do not have any cognizance, as if they plead a false release made to their testator. But, where they plead a false plea of which they have notice, if it not be a final bar, judgment for the damages will be *de bonis propriis* [. . .], as where they plead excommunication [?] against the party, the judgment will be *de bonis testatoris* if he has [assets] and, if not, *de bonis propriis*. Thus, if the executors plead *plene administravit* and it be found against them, the judgment will be *de bonis testatoris* and damages also *de bonis testatoris* if he had [assets] and, if not, of the goods of the executors. And [it was held] by him that judgment will be reversed.

Chief Justice LEY: As the executors sold the term of the advowson, they have money in place of it, and this is assets and, for it, there can be a recovery, and this has made him to doubt that the judgment will not be reversed.

But, as to the last, they all agreed that the judgment will be reversed for this error because the judgment should have been *de bonis testatoris tantum*. And they said that, even though some precedents are that there have been such judgments, yet the greater number of the precedents in the King's Bench and also in the Common Bench is with them, and they will adjudge with the greater part of the precedents.

19

Anonymous

(K.B. Mich. 21 Jac. I, 1623)

Since the measure called a bushel varies in size from one place to another, in order to plead fraud by a false bushel in an action for defamation, it must be alleged that the defendant said that the plaintiff knew that it was a false measure and that he intended to deceive.

An action was brought upon the case for these slanderous words that the defendant had said to the plaintiff, 'you are cozener and a cheater, for you did cozen the poor by their corn in the market by an unlawful bushel which contained too little.'

And [it was said] by Justice DANDRIDGE the first words, *scil.* 'cozener and cheater' are general words, and will be a cause of action. And he cited a case 26 Eliz., *Widlocke's Case*, where it was adjudged that an action upon the case would not lie for calling one a cozener. Thus, the subsequent words 'you did cozen the poor by selling them corn with an unlawful bushel' does not prove him a cozener, because it is an offense against the Statute and he will be punished by it. But this does not prove him a cozener.

And *per curiam*: The words are not actionable. One reason for it was thus, that they are used by the realm and several places, several bushels, *scil.* bushels containing several quantities and measures, because, in some places, it has four perches to a bushel and, in other places five perches and, in another place, six perches to the bushel, and there is not a certain quantity in the bushel throughout the realm so that it could be that his bushel had a sufficient quantity and contained as much as it should and is required in this place even though it contained less than a bushel contains in another place. And he has not said that, where, by the custom of the place, a bushel should contain such a quantity, he has sold corn by a bushel that contains less.

Another reason was that, even though he has sold and offered corn by an unlawful container, containing less than it should and is used to contain in the place, yet it is not said

¹ *I.e.* refuse.

that he had notice and cognizance of it, that it was a false bushel, because, then, it is not a cozenage in him even though he sold corn by this bushel if he did not know that it was a false bushel and he sold by it with the intent to cozen and defraud people with it, because, perchance, he borrowed the bushel from another in the market, not knowing nor having notice that the bushel was insufficient and false.

And, for this, DANDRIDGE cited a case that had been adjudged in this court. One brought an action upon the case for these words 'you are a false fellow and a maintainer of pirates and do lodge and harbor them in their cause.' And [it was] adjudged that an action does not lie, because it was not said that he had cognizance that they were pirates, because, if he lodged and harbored them and he had not notice nor cognizance that they were pirates, it was no fault in him. But [it was said] by DANDRIDGE, if one said to a mercer or such a tradesman 'you are a cozener and do sell wares by false weights or measures', this is a good cause of action.

20

Anonymous

(K.B. Mich. 21 Jac. I, 1623)

In this case a right of way by prescription was properly pleaded by the plaintiff.

Upon an action upon the case for the stopping of a way that he and all whose estates he had have used to have from a house in St. Martin's in the Fields to the Thames [River]. He had a verdict. And, now, in arrest of judgment, it was moved that judgment should not be [given] because they counted of a way from the house to the Thames and did not show it is a way in certain and by what land it might lie, because, perchance, it was the common way and, thus, even though the defendant stopped it, yet this action would not lie, but an assize of nuisance. And he should have shown it in certain where it was and by what land.

And this exception Justice DANDRIDGE thought good, because he moved it first. And, also, he said that, if I claim a way from a house to a church and this way lies by a field of J. St. and another field of my own land and another field of J.N., I should not claim a way from my house to the church generally, but must make my claim of a way from my house to my close by the land of J. St. and of my land to the church by the land of J.N., because, if I claim it generally, I claim a way by my own land and, by my own land, I cannot have any way, because it is lawful to me to go at all times in it.

But this exception was disallowed by the residue of the justices, because he has claimed a way in St. Martin's from a house to the Thames so that he has well shown where the way lies, *scil.* in St. Martin's, and, on account of this, it is good.

And, as to the case that DANDRIDGE put, they denied it. And they put the case where a man had a way by a common close in which he and others of his vicinage had several parcels of land intermixed; in this case, he made a claim of a way by the whole common close, and [it was] good, as well by his own land as by the others.

And also in arrest of judgment, it was said that the prescription as he has prescribed is bad, because he had prescribed that he and all those whose estate he has from the time of which memory does not run have used to have a way etc., where he should make his prescription in such form as such a one and named who gave those houses and the land to the corporation was seised etc. used to have a way and gave it to the corporation and they whose estate were at all time seised etc. and leased to him and thus he and those whose estate he [. . .] of it seised until he was estopped from it.

Justices CHAMBERLAINE and HOUGHTON [held] that the prescription is good.

But Justice DANDRIDGE was *contra*, because a *chose* lies in grant and cannot pass except by a deed, and though they have had it from time of which memory does not run, yet they will

not prescribe in that which they and those whose estate they have had had it, but they should say how they came to it and show the grant of it, as an annuity, rent charge, and so of a way. Also, he put these cases. A prior had a *chose* that lay in prescription and in which he could prescribe that he [. . .] and all those whose estate they had used to have it from the time of which memory does not run; afterwards, he is made the abbot. There, he cannot prescribe thus, *scil.* that he and all his predecessors and those whose estate they had, because he never had any predecessor abbot. But he must show how one such prior of L. and all his predecessors have used from the time of which memory does not run and then show how he was made an abbot and, thus, they have it and thus he and all those whose estate he has, priors and abbots [. . .]. Thus, when the Knights Templars were deposed and their lands given to the Knights Hospitalers¹ in this case in a matter of prescription, they must prescribe by the special prescription and show how the Knights Templars etc., because they cannot prescribe that the Knights Templars are their predecessors, because they were not their predecessors.

SIR JAMES LEY held the contrary. And he said that the prescription is good. And his reason was that the prescription is not of a *chose* in the [. . .], but of a *chose* incident, and, also, in this action, the *chose* itself is not to be recovered, but only damages are to be recovered. And, also, he said that all *choses* in gross that lie in grant and do not pass unless by a deed, as annuities and such like, there, it is not sufficient to prescribe [. . .] estate, *scil.* that he and all those whose estate he has or used to have, but he must show how such a one was seised and granted etc.

21

Bearby v. Clerke

(K.B. Mich. 21 Jac. I, 1623)

Where a tree is blown down on leased premises, the tree now belongs to the lessee, not the lessor.

This case was put by Justice DANDRIDGE and granted at the bar, and not denied by any of the justices. If a lease be made of land with the trees except the cutting down [?] of them, reserving rent, and, for default of payment and want of distress, he will re-enter, afterwards, a great tree that is not timber is felled with the wind, the lessor is not paid the rent; [there is] not any cattle upon the land to distrain, yet he will not re-enter for want of distress, because this tree is a good distress. And this case, he said, Plowden put at the end in the time of Hall, and he held [?] thus. And that appeared that the lessee will have the tree that was blown down with the wind, and not the lessor.

22

Anonymous

(K.B. Mich. 21 Jac. I, 1623)

An outlawry can be reversed for very small and technical faults.

An outlawry was reversed for this cause, the exigent was returned that A., B., C., and D. did not *comparuerant*, because it was [. . .] where it should be that A., B., C., and D.

¹ Stat. 17 Edw. II, stat. II (SR, I, 194-196).

nec alia eorum comparuerant. Also, at the same time, an exception was [. . .] and the jury said *per sacramentum* A., B., C., D. [. . .] and it did not say *proborum et legalium hominem.* And this exception was allowed.

23

Persall v. Jones

(K.B. Mich. 21 Jac. I, 1623)

In this case, the contract in issue was in full force by its own terms and was not breached.

Jones, having a statute, had the land extended to himself. And, afterwards, he, being possessed of it, granted and assigned it over to Persall. And he entered a covenant for him that the statute, extent, and execution was in full force and undischarged by any act done by him. And, now, Persall assigned for breach of the covenant and says that, where he covenanted that the statute, extent, and execution was in full force and undischarged, he had granted over and assigned to another part of the extent before he assigned it to him and, as he had assigned over part of it before, the extent was not in full force.

To which, it was said by the counsel of the other side that, even though he had assigned part of it over, yet all of the extent is in force or undischarged and, thus, the covenant was not broken by it.

Justice HOUGHTON: The covenant was not broken by this grant over of part before, but [it would be] otherwise if he had assigned all the extent and the execution over; thus, it was not a breach of the covenant.

And all of the justices agreed that it is not a breach of the covenant, because, notwithstanding this first assignation of part, yet all of the statute and extent and execution was in force and not discharged.

Chief Justice LEY: The force and intent of this covenant was to bar the assignor that he will not release it or that he had not released. But [it was said] by him, if he had laid the breach of the covenant in general, it had been good. But, as it is laid specially that the breach was in these special words, that it will be in force and undischarged. And [it is] bad, because it was in force and undischarged.

24

Anonymous

(K.B. Mich. 21 Jac. I, 1623)

Persons cannot sue for a remedy in equity where they can have a good remedy at common law.

A contract made with a married woman is enforceable against her husband if he consented to it.

A., being in much debt by reason of the alum in which he had spent £3000, which was his whole estate, because he was one of the patentees or farmers of the alum mines, the king assumed the alum mines into his hands, the said lands from the Lady of Suffolk £500. And, for the security of this money, he had the bill of one B., now the defendant, who, at the request of the said lady, made this bill from her of £500. And he was the servant to the Lord Suffolk. And, thus, the said A. promised that, if the said lady would by the honorable favor of her lord [. . .] from the king [?] help himself to his money, that he would never sue upon this bill nor will take any advantage by it. And, afterwards, the said lord helped himself to her money,

and, afterwards, he sued upon the said bill and the said B. was at issue with him. And judgment was given against the defendant, and execution was had accordingly.

But the said B. sued in the Court of Requests to be relieved upon the equity of his case. And A. brought [a writ of] prohibition out of the King's Bench. And, now, they desired a [writ of] *procedendo* that they could be relieved, because they said that their intent was by no way to destroy their judgments or meddle in any [. . .] against this or defeat it.

But, inasmuch as the justices perceived it to be in effect an avoidance of their judgment, they would not grant it.

And Chief Justice LEY said that, in this case and many other such cases, they sue in the Court of Requests to be relieved by equity when they well enough could sue at common law in these courts and have a remedy by their action of the case and in their case upon which they now pray [?] a *procedendo*, they could as well have an action upon their case, notwithstanding that the bill was made by the servant. And the promise made to the wife is good because, though the bill was made by the servant, *scil.* B., yet it was at the request of the Lord and Lady of Suffolk. And [it was said] by him, where it is of a personal thing that lies in damages, a promise made to the wife is as good as if he made it to the husband.

And all this was not any way denied by any. And, thus, they were left to their action upon the case.

25

Anonymous

(K.B. Mich. 21 Jac. I, 1623)

The term 'good and sure' in a contract of sale create a general warranty.

One sold land, chattels with other things to another. And he promised and assumed to make them 'good and sure' unto the vendee or buyer.

Chief Justice LEY: These words among country people is a kind of general warranty.

26

Pole v. Carrel

(K.B. Mich. 21 Jac. I, 1623)

In this case, the cause of action for defamation was well enough set forth in the plaintiff's pleading.

An action on the case was brought for these words that the defendant had said to the plaintiff 'you are a knave and a forging knave and an extorting knave and a suborning knave for you did procure one to forswear himself before My Lord Chief Justice of England.' An exception was taken because he had said that he was perjured in a court of the king judicially and before the Chief Justice, because, if it was not before him in a court, it is not good.

But it was not allowed.

[Other reports of this case: 2 Rolle Rep. 410, 81 E.R. 884.]

27

Anonymous

(K.B. Mich. 21 Jac. I, 1623)

In this case, the plaintiff sufficiently pleaded a good cause of action for defamation.

Another action upon the case was brought for these words, 'you are a thief and a thievish knave, for you have stolen a roller'. And an exception was taken because this word 'roller' does not have any certain signification, because there are divers kinds of rollers.

And the counsel on the other side responded that, if it be a roller that they use in gardens or a roller that with which they roll sheep, it is the same.

And [it was held] by the justices that the action well lies.

28

Hickson v. Hickson

(C.P. Mich. 21 Jac. I, 1623)

An essoin does not lie in an action of dower after issue has been joined.

It was said by the justices that an essoin does not lie in [an action of] dower after issue is joined and it was the course of this court and always it has been used.

[Other reports of this case: Hutton 69, 123 E.R. 1107.]

29

Germine v. Anonymous

(K.B. Mich. 21 Jac. I, 1623)

Disputes over the election of a clerk of the parish are matters for the secular courts and not for the church courts.

The parishioners of Gonden prescribed to have the election and appointment of the clerkship of the same parish, and the clerkship [became] void by the death of the clerk, for which they elected and appointed one A. in his place to be the clerk and to execute the place and office of clerk of the same parish, which he thus was. And, afterwards, the minister, *scil.* the parson of the same parish would not allow him to execute his place, but claimed that he should put one in this place. And, upon this, he libeled against A. in the ecclesiastical court. And A. showed all the matter as how the parishioners have used to elect one to this clerkship and pleaded the prescription etc. But the ecclesiastical court would not allow it.

Upon which, he now prayed a [writ of] prohibition out of this court. And the court granted it to him. And, there, it was remembered that Crashawe, vicar of Whitechapel, had a prohibition is such a case.

[Other reports of this case: Palmer 380, 81 E.R. 1133.]

Wood v. Bincke

(C.P. Mich. 21 Jac. I, 1623)

The offense of keeping a house of prostitution is within the jurisdiction of the temporal courts, and not the church courts.

Finch, recorder and serjeant, moved at the bar that one had libeled against his client in the ecclesiastical court for these defamatory words, 'you are a bawd and an arrant bawd and you did keep a bawdy house in Ratcliff highway.' And he said that the keeping of a bawdy house was a temporal thing of which the spiritual court will not have a plea, upon which, he will pray [a writ of] prohibition.

And, it was thought by the opinion of the court that he will have a prohibition.

[Other reports of this case: W. Jones 44, 82 E.R. 24.]

Anonymous

(K.B. Mich. 21 Jac. I, 1623)

A prescriptive right of pasture is the right of a person, not the right of the cattle, as pleaded in this case.

One prescribed that, at all times, the beasts that go and depasture in such a common, *scil.* the place where he claimed common, which was a large field, *scil.* a town [?] field, having used to go out of it at his pleasure in the neighboring [?] lands that were not enclosed nor plowed nor sown etc.

And an exception was taken to this prescription, because he laid his prescription in his beasts, where all prescriptions are laid in the person, as all of his predecessors or he and all those whose estate he had in the place, as *quod talis consuetudo de tempore est* had been used *infra locum praedictam*.

And this exception was allowed by all of the justices, because one cannot prescribe in the beasts.

Anonymous

(K.B. Mich. 21 Jac. I, 1623)

A contract with a wife is enforceable by her husband.

The justices agreed that of a promise made to a wife, the husband will take advantage, and he will well have an action upon the case for it. And they said that it was adjudged the last term before.

33

Anonymous

(K.B. Mich. 21 Jac. I, 1623)

In this case, the plaintiff's claim was pleaded well enough.

In [an action of] debt upon an obligation against two, one of the defendants pleaded in bar how the obligation was made by Roger Townsend and his wife etc. and how the seal *ipsius Rogeri fuit advailsu[m] [?] etc.*

An exception was taken because he had not [. . .] *Rogeri sive Rogeri Townsend sive Rogeri sc.*; thus [it was] uncertain.

But it was not allowed because 'ipsius' will have relation *ad primam* antecedent and it will be understood the seal of Roger etc.

34

Dacrom v. Awbrey

(C.P. Mich. 21 Jac. I, 1623)

*A sale of a public office is void.**A sale can be executed by a surrender.*

[In an action of] debt between Dacrom, executor of Dacrom, and Awbrie, the case was thus. Dacrom, the testator, having the office of surveyorship of the lands of [. . .] agreed with Awbrie that, for £400 of money of which money £200 will be paid at the present and £200 by an obligation at such a day, he will surrender his office to the king and also procure the said office from the king for Awbrie, the latter sum to be paid after it, that he had procured him his office. Afterwards, Dacrom surrendered his office to the king, and accordingly procured it from the king for Dacrom. Then, Dacrom died before this money due upon the obligation was paid to him. For which money, Dacrom, the executor, sued Awbrie upon the obligation, who pleaded in bar of the action the Statute of 5 Edw. VI, cap. 16, made against the buying and selling of offices.¹ And whether this was within the Statute or not was the question.

And it was argued for Dacrom, the plaintiff, that it was not within the Statute. The first reason was because this office was only an office at will, because it was only *durante bene placito regis*, which is such an estate that cannot be granted over, and, because an estate at will cannot be granted over, then, it cannot be forfeited. Because that which cannot be granted over cannot be forfeited, thus, it is not within this Statute.

Second, another reason was that the Statute speaks only of the granting, bargaining, and selling of offices. But this office was not nor could be granted by him, but he only accepted money to surrender it, which could legally be done, because surrendering an office does not make any grant of it. *Ergo*, it is not within the Statute.

¹ Stat. 5 & 6 Edw. VI, c. 16 (SR, IV, 151-152).

Third, the last reason was because he was only to procure it from the king, and, there, the king granted it, and a grant of him is not such a grant that is within this Statute, because the king will not be within the Statute of Usury¹ and divers such [. . .] acts.

But the justices did not allow of these reasons. But all, *scil.* JONES, WINCH, and HUTTON, held clearly that it was within the Statute and, thus, the sale of the office was void and the obligation was void so that the action did not lie. And [it was held] by all of the justices, if an obligation be made or money given to one with the intent to have an office, it is utterly void and within the Statute. Also, if one bargain or give money or make an obligation with the intent to surrender his office and procure it from the king, this is within the Statute and utterly void. Also, a bargain that he will have and enjoy an office, this is within the Statute, according to HUTTON and WINCH.

And the justices and the other serjeants at the bar remembered a case directly in the point where one had accepted certain money and an obligation with the intent that he will surrender his office of Cofferership to Sir Arthur Ingram² and it was within the Statute and, thus, void, and yet, in this case, the office of Cofferer was only at will and of which he will not have a patent.

35

Clavell v. Anonymous

(K.B. Mich. 21 Jac. I, 1623)

Merchants can sue in the Court of Admiralty against the vessel where their goods were embezzled by the master.

The jurisdiction of the Court of Admiralty must be challenged before a final judgment is given in that court.

Sir William Clavell [1568-1644], having a ship or barque, loaded it with divers merchandises and put one Paris in it to be the master of the ship and to carry the goods in it to London, which he thus did. And, after he had unloaded the ship, he agreed with divers merchants to carry wood and other merchandise to another place or haven. And he had the goods loaded into his ship for this intent and safely to deliver them. But the said Paris did not do it, but embezzled the goods and merchandises and [went] beyond the seas to the Indies. Upon which, the merchants libeled in the Court of the Admiralty against the said Paris, who was the master of the ship and Sir William Clavell, and arrested the ship. And, in this court, judgment was given for the merchants.

And, now, Sir William Clavell prayed for a [writ of] prohibition out of this court because, for this matter, they did not have jurisdiction in the Admiralty, because it is not for a thing done upon the high sea, of which they have jurisdiction, but only of a thing done upon the Thames and, also, the agreement is laid in a certain place upon the land where the goods were delivered, *scil.* at Tower Wharf. And, also, they have arrested the ship of Sir William Clavell for the bad act of Paris, who had nothing in the ship.

But, on the other side, it was said that they should not have a prohibition, and this for they have pleaded to the jurisdiction of the court it is [. . .] *minis tarde*, because a sentence if given in the court and, also, they have admitted the jurisdiction of it.

¹ Stat. 21 Jac. I, c. 17 (*SR*, IV, 1223-1224).

² *Vernon v. Ingram* (1614 x 1615), E. Coke, *First Institute* (1628), f. 234a, E. Coke, *Third Institute* (1644), p. 154, C. Viner, *Abr.*, vol. 16, p. 127, pl. 6.

And to that which is said that Paris had nothing in the ship, it is not so, because the charge and care of it was committed to him and the merchants are not used to agree with the owner of the ship for the carriage of the merchandises but always with the master of the ship, and, if the ship will not be charged upon the agreement of the master of the ship, it will be a great mischief and prejudice to the merchants. And, on account of this, the prohibition should not be granted.

And [it was held] by the justices prohibition will not be granted in this case. And [it was held] by Justice DANDRIDGE they should have pleaded to the jurisdiction of the Court of Admiralty before, when they were in this court, and they have denied to do it before judgment or sentence was given, because, now, it is *minis tarde*, and, by this way, many sentences given in the Admiralty will be annulled if this will be allowed.

Also, the Court of Admiralty had power of this, because, even though the contract was made upon the land, yet the contract was for a thing to be performed *supra altum mare* and the performance of the promise and the agreement is to be upon the sea. And to that, that the ship will not be charged, it is not so, because, in such cases, this remedy is given by the civil law, which is a law now received in all nations. [. . .] and this law specially is grounded upon great reason.

And as to this, that the owner of the ship will not be charged for the master of the ship, he will be charged, because the master of the ship is the servant to the owner of the ship and the owner had the benefit and the profit of it, and, on account of this, he will be charged.

36

Mapes v. Sidney

(C.P. Mich. 21 Jac. I, 1623)

A forbearance to sue a claim is a good consideration to support a contract.

Mapes brought an action upon his case against Sidney upon an *assumpsit* upon a consideration. The consideration was to forbear to sue a stranger for a certain debt.

And *Hitcham* moved that it was void and no consideration, because a consideration must be a *quid pro quo*. Thus it is not here. Also, the words are *minis* general, because, if he forbore only for an hour, it is a forbearance which is not a consideration, nor is it of any value. And he said that, 35 or 35th Eliz., a consideration was that he will forbear *paululum temporis*, and it was adjudged no consideration. But, in 27 Eliz., rot. 488, in a case between Phillips and Sackfourdes, this same case was adjudged, *scil.* that it was some consideration.¹

And a day was given further for the counsel of the other side to be there.

But, at this time, Justice JONES put the case that, A. promised to B. that, where D. is indebted to him £10, he will forbear to sue him for it, and B., in consideration of it, *scil.* that A. would forbear to sue D. for this £10, he promised to pay to A. £10; now, A. will have an action upon his case against B. upon this promise made to him in a convenient time to come, because, thus, he must do it or otherwise he will not have any remedy if he should wait all his life. And, also, if A., after B. has paid him £10, will sue D. upon his debt, then B. will have an action upon his case against A. for his promise and assumption.

And, thus Justice HUTTON held and agreed with him.

[Other reports of this case: Winch 22, 124 E.R. 19, Croke Jac. 683, 79 E.R. 592.]

¹ *Phillips v. Sackford* (1595), Croke Eliz. 455, 78 E.R. 694, Owen 109, 74 E.R. 936, Moore K.B. 689, 72 E.R. 842, Jenkins 301, 145 E.R. 220.

Pleadal v. Gosmore

(C.P. Mich. 21 Jac. I, 1623)

A person can lawfully fetter a stray horse that will not stay within its paddock.

An action was brought because the defendant had taken his horse and fettered him with fetters by which the horse became swollen and bunched of a [. . .], by which the horse was *deterioratus ad damnum etc.*

The defendant said that he took the said horse as a wandering stray within his pound¹ and, because the horse was of great courage and mettle so that he would not stay within his lands, but broke the closes of his *vicines etc.*, he put on him fetters etc.

And it was urged for the plaintiff that he could not justify the imposing of the fetters upon him. And there was vouched for it a case in 8 Jac., rot. 1749, where one, having taken a horse as a stray because the horse was so courageous that that he would not dwell in any place, he fettered him with fetters to another horse and both horses fell into a ditch by which they were drowned, and it was adjudged that he who took the stray will pay for him.²

But it was said by all the justices that [there is a] diversity between these cases, because he should not fetter a stray with another horse, but he well could fetter him by himself if so it be he be so unruly that he would not stay within the closes.

[Other reports of this case: Winch 67, 124, 124 E.R. 57, 104, Hutton 67, 123 E.R. 1106.]

Anonymous

(C.P. Mich. 21 Jac. I, 1623)

Tithes are not payable for rabbits unless there is a local custom for it.

In a case where one had libelled in the spiritual court for tithe apples etc., a [writ of] prohibition was prayed for here. But upon this matter [that] they prayed a prohibition, [. . .] nor have a hearing [?].

But [it was held] by Chief Justice HOBART, and denied by none, where a man claimed tithe conies, he must lay the custom for it in prescribing for it because, otherwise, he will not have tithe conies unless by the custom and prescription. And so he said of tithe deer, as I believe. But he affirmed the law to be otherwise for tithe pigeons.

¹ *sequisria MS.*

² *Harvie v. Blacklolle* (1610), 1 Brownlow & Goldesborough 236, 123 E.R. 775.

39

Anonymous

(C.P. Mich. 21 Jac. I, 1623)

A general reply of covenants performed is sufficient, because, where the plaintiff was not a party to the covenants, he cannot know the particulars of them and should not have the burden of proof as to their performance.

[An action of] debt upon an obligation was brought against executors, who pleaded that there are two statutes made by their testator that are not yet satisfied and, *ultra* assets to satisfy them, they did not have any other.

The plaintiff replied that these statutes are to perform covenants, which covenants are performed.

And there was a demurrer because he replied that the covenants are performed and does not show specially the covenants.

And, now, WINCH and HUTTON, justices, only, being in court, WINCH said that he had well replied without a showing of the covenants specially. And he said that it is not doubted but for the matter of the plea it is good enough. Only the manner makes the doubt, because he did not allege the performing of the covenants in particular. And he said that the pleading of the covenants performed in general, in this case, is good without showing them performed in particular, because he is a stranger to the covenants, and, by reason of intendment, he could not have notice of them, but it will come from the other side to show them and to plead these covenants specially are not performed. And he said that it is not reasonable that such silent sleeping statutes that are only for the performance of conditions should estop a good debt or duty. Also, he cited Tresham's Case, in 9 Reports of Coke.¹ And thus both justices agreed that the replication is good.

40

Anonymous

(C.P. Mich. 21 Jac. I, 1623)

A conveyance by a fine will not be annulled after a long period of time has passed even though some of the documents cannot be found in the records of the court.

A fine was levied, and, afterwards, the conusee was in peaceable possession for the space of forty years. Now came the heir of the conusor, and he surmited that no such fine was levied to bar him of his right and inheritance, because he said that, even though the conusee had put the chirograph of it, yet the chirograph did not allow it nor any such thing, and, in his office, also, the *dedimus potestatem*, nor could he find [. . .] in the office of it, nor did it appear that any proclamations were made, because they have made a good and diligent search in all those offices and could not find them.

But, because they showed for the conusee a chirograph in the court and, also, because it certainly appeared that the king's moneys were paid, because, of this, they have certified

¹ *Brokesby v. Tresham* (1612), 9 Coke Rep. 108, 77 E.R. 891, also 1 Brownlow & Goldesborough 51, 123 E.R. 659, 1 Leonard 8, 74 E.R. 7.

from the roll, and because that there was forty years of peaceable possession following, even though there be negligence or a default in the officers, it will not be found in prejudice of the fine. And, on account of this, they will not discountenance the fine, but allow it, because they said that, divers times, there are [. . .]s in this court that they cannot find in the rolls.

41

Anonymous

(C.P. Mich. 21 Jac. I, 1623)

In a action for defamation for sexual misconduct, the plaintiff must allege special damages in order to recover.

An action upon the case was brought because the defendant had said to the plaintiff such words, 'you are a bitch whore and had a child as big as a cat.'

And it was urged by the counsel of the defendant that the words are not actionable because these words' senses are not actionable, because this word 'whore' is *minis* general and in itself is not a cause of action. Also, the words 'you had a child' are not actionable in themselves, because, in themselves, they are not defamatory and for this.

But the justices said that the action well lies for these words. And Justice WINCH said to the serjeant who moved for the defendant that he must show the whole case [. . .] though it is in the declaration and another showed how the woman to whom the words were said was a virgin and to be advanced and preferred by the marriage to one who, at this time, was a suitor to her, who forsook her upon the hearing of these words, by which the woman lost her marriage to her damage etc., because it is the entire cause of this action at common law and the words in themselves are not actionable unless in regard of it.

42

Anonymous

(C.P. Mich. 21 Jac. I, 1623)

A sheriff can amend his return.

The sheriff made a return of a grand cape that he had made a proclamation of the summons at the door of the church next to the lands etc. *juxta formam statuti*. And an exception was taken to this return because it [was] at the more great and usual door of the church, because thus are the words of the Statute 30 Eliz.¹

And *justiciarii dixerunt* that the return in itself is not good, but they will have the sheriff in the court, and he will amend the return.

¹ Stat. 31 Eliz. I, c. 3, s. 2 (SR, IV, 800).

43

Anonymous

(C.P. Mich. 21 Jac. I, 1623)

False Latin will not defeat a pleading where it is aided by an English explanation.

A mercer brought an action of debt, and he counted how the defendant had from him *tres uncias aurei licinii, anglice* gold fringe, and *duas uncias aurei licinii, anglice* gold lace, and *duas uncias sirici licinii, anglice* gal[. . .] lace.

And an exception was taken to it because *licinium* cannot signify all these things.

But the justices would not allow this exception, but said that favor should be shown to this manner of pleading by necessity because there is a want and scarcity of Latin words for many such things.

44

Linley's Case

(C.P. Mich. 21 Jac. I, 1623)

The Statute of 23 Hen. VI, c. 10, that limits sheriff's fees applies to mesne process, but not to writs of execution.

One brought [a writ of] *capias ad satisfaciendum* to an under sheriff of Yorkshire, and the under sheriff took from him 30s. *pro factione warranti* upon this *capias* where he should have only 4d. by the Statute of 23 Hen. VI, cap. 10, and, if he did otherwise, he will forfeit £40 by this Statute.¹ And, now, it was informed in this court against the under sheriff upon this Statute because he had taken 30s. to execute a warrant where he should have taken only 4d.

And it was said by the counsel of the sheriff that this Statute was made for bails to be taken for the sheriff and warrants made by the sheriff by this Statute where he should take only 4d. will be of warrants made upon mesne process and not upon executions; thus a warrant made upon a *capias ad satisfaciendum*, which is not a mesne process, even though he took more than 4d., is not within the penalty of this Statute.

And the justices agreed that the sheriff could be indicted for extortion in this case. But they varied in opinions, and doubted whether it be within the penalty of the Statute, because Chief Justice HOBART held that this is within the Statute, and he said that, if a sheriff, having one in execution, take an obligation from him etc. and take for it more than 4d., the obligation is void and the sheriff will forfeit £40.

But WINCH and HUTTON thought that it is not within the Statute, because the Statute is intended for warrants made upon mesne process etc.

Also, it was said by the counsel of the sheriff that the *capias ad satisfaciendum* was directed to the sheriff of York, who made a warrant upon it, and thus, he did not execute the warrant as sheriff or *per loco officii*, and, on account of this, he is not within the Statute. And the truth was that it did not appear that the *capias* was directed to any sheriff specially.

And the justices said that, if a *capias* be directed to the sheriff of Lancashire and it is brought by a ignorant person to the sheriff of Yorkshire and he take more than 4d. to execute

¹ Stat. 23 Hen. VI, c. 9 (SR, II, 334-336).

a warrant upon this, it is not within the Statute, but, where it is directed to no sheriff in certain and he executes a warrant upon it and takes more than 4d., for this, they doubted of it.

And, in this case, Chief Justice HOBART said that it is the common course, if one has recovered by a judgment against another who is not in any certain place or county, but is now in one county and now in another county, the usage is that he who recovered will take several [writs of] *capias* out of this judgment to several sheriffs with the intent to have execution in which county he will find him and where he finds him, there, he will serve the [writ of] execution upon him.

And, afterwards, at another day, the justices agreed that the information against the sheriff was not [good], because an information must be certain for all intents and it is not alleged in the information that the writ upon which he made this warrant was directed to him.

[Other reports of this case: Hutton 70, 123 E.R. 1108.]

45

Dean of Bangor v. Bishop of Bangor

(C.P. Mich. 21 Jac. I, 1623)

Disputes over land that is owned by ecclesiastics are to be litigated in the secular courts, not the church courts.

It was moved for the Dean and Chapter of Bangor to have [a writ of] prohibition to the [Court of] Arches. The case was thus. The Bishop of Bangor, at his ordinary visitation, cited the Dean and Chapter to be before him at the Chapter House to account to him for certain lands which he had for the maintenance of a school and poor scholars. They refused to come, and he proceeded to the excommunication of them, upon which, they appealed to the [Court of] Arches to stay and prohibit these proceedings of the bishop. And, now, they pray [a writ of] prohibition of it to the Arches, because it is a temporal case, the giving of the accounts and the lands are the lands of the dean and chapter, of which they do not have to give any account to the bishop. Also, this visitation of the bishop [is] to reform manners and not to meddle with manors, *scil. maneriis*.

And the court would not grant a prohibition, because the counsel of the bishop was not there, but only the counsel of the dean and chapel who moved it. But they will make an order to stay the proceedings in the Arches. And, thus, it was ended.

46

Anonymous

(C.P. Mich. 21 Jac. I, 1623)

Where a sheriff sells goods levied in execution, he can deduct his reasonable expenses and return the net amount.

A sheriff, having taken one hundred sheep in execution, kept and sustained them for divers days, during which, he could sell them, and he could not sell them unless he would warrant them, because, otherwise, none would buy them. And, at last, he sold them for £40, and he warranted them. And he made a return that he had levied £35 of money for the sheep that he had taken in execution. And the question was whether this return was void. And it was said that it was a false return because he sold the animals for £40 and returned only £35.

To which, the sheriff said and showed how he retained £5 for the sustenance and feeding of the animals which he sustained for good [. . .]. And, also, he now prayed not only the allowance of this £5 but [also] of another £5 because he showed how he could not sell the animals except that he warrant them because they were tainted with a rot or murrain and within a fortnight after the sale of them twenty-five of the animals died so that he paid for them £5 by reason of his warranty. And all this he proved by the depositions of good witnesses.

But [it was held] by the justices it was his folly to make such a warranty, because, if he could have sold them more cheaply [because] of this rot and this without a warranty and, if he could not sell them and if they had died in his hands, he will be at no loss; thus, in the strictness of the law, there will be no allowance for it. But yet, because he could not sell them without such a warranty and if he had not sold them but had kept them in his hands, they would have died in his hands so that the loss and failure¹ of it would otherwise have fallen upon him whose goods were taken in execution, the justices said that they would make to him all the favor that they could. And, as to his return, they held it good. But, if he had returned that he had levied £40 for the beasts and, afterwards, had suggested to the court that he had spent £5 in the feeding and keeping of the sheep and so prayed an allowance for it and detained the £5 for this cause, it will not be allowed, because, now, by his return, he has charged himself with £40.

47

Woodcock v. Freestone

(C.P. Mich. 21 Jac. I, 1623)

Copyholds are not be destroyed when the manor is alienated.

In a case between Woodcock and Freestone, it was agreed by all the justices that, if a fine be levied of a manor, if the copyholder not be ousted, he will not be bound by this fine.

48

Anonymous

(Ex. Cham. Mich. 21 Jac. I, 1623)

In this case, the object of the contract in issue was sufficiently described in the plaintiff's pleading.

An action of debt was brought, and the plaintiff showed how the defendant had bought from him *tres ferculas ficulorum, anglice* raisins.² And, now, in the [Court of] Exchequer Chamber, it was assigned for error that *ficulus* is put for raisin where this word *ficulus* had a certain signification and signifies a fig in English.

And the case was cited where one brought an action for three *ferculas pomorum, anglice* nuts, where *pomum* has a certain signification for an apple, and it will not be understood a nut, and it was ruled thus. But both cases were affirmed.

¹ loss et perde *MS*.

² reasons *MS*.

And the barons and the justices said that *ficulus* could well be taken for raisin, but *pomum* is a common word for an apple, and it is used in no other sense.

Anonymous

(C.P. Mich. 21 Jac. I, 1623)

A widow who sues successfully for her dower rights is entitled to interest where her dower vested before any lease or security for a debt was made.

[In a case of a] husband and wife, the husband, seised of land in fee simple there, acknowledged a statute of it that was executed and extended in his lifetime. Then he died, and the wife brought a writ of dower against the heirs and the conusees of the statute, who pleaded that her husband was never seised, which dower was found against them. And the wife prayed judgment for her dower and also for the damages etc.

And it was said that, in this case, she will not have damages, because, by the Statute,¹ she will not have damages unless her husband died seised of the fee and of the freehold, and he did not die seised *ideo*.

And *per curiam*, she will have damages, because her husband died seised, because [it was said] by them the case is not otherwise in effect but as if the husband, after the conusance, made a lease for years, in which case, notwithstanding the lease, he died seised, and there will be damages in this case.

And [it was held] by Chief Justice HOBART there is a diversity where a lease for years is made or a statute is acknowledged during the marriage, *scil.* after the title of the dower of the wife [vested], as it is in this case, because there will be damages, and, where a lease is made or a statute is acknowledged before the marriage and before the title of the dower goes [?], there, there will not be any damages.

Anonymous

(C.P. Mich. 21 Jac. I, 1623)

An executor can sue for goods of his testator that were taken out of the executor's possession without alleging his executorship.

An executor was possessed of certain goods of the testator, and a stranger took them out of his possession or the goods came into the hands of the stranger by trover. The executor brought an action upon his case of trover and conversion of them against the stranger. And an exception was taken because he brought his action as an executor and he did not show the letters testamentary.

And [it was] adjudged, that notwithstanding, the action is good, because he brought his action for his own possession and, should it be said [. . .] as executor, it is not material, but surplusage, and, thus, all this that depends upon it is surplusage.

And, [it was said] by some of the serjeants the executor will have an action upon his case for trover and conversion of the goods that his testator had in his possession. But it is clear that

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

he will have it for his own possession. And, in the Earl of Rutland's Case, [*blank*] Coke [*blank*], he will have an action *de bonis asportatis in vita testatoris*.¹

51

Utbar v. Goodge

(K.B. Mich. 21 Jac. I, 1623)

In this case, the plaintiff duly performed his part of the contract, and the court gave judgment for the plaintiff.

[Upon a writ of] error between Utbar, plaintiff, and Goodge, defendant, the case was thus. Utbar and Goodge had a communication between them that, where there was a difference among the parishioners of two parishes and the parish of which the plaintiff and the defendant were parishioners at which of the said parishes such a street belonged, the said Utbar promised and assumed that, if the said Goodge would exhibit a bill in Chancery [?] against the inhabitants of the other parishes who pretended to have the street belonging to their parish for the determination of the controversy, he would bear half the charges of the suit. And the said Goodge exhibited a bill in the Chancery against the inhabitants, *scil.* against two inhabitants of one parish and two inhabitants of the other parish. And, by the assent of the parties in the Chancery, a commission was awarded to certain knights and gentlemen of the said county to hear by proof and circumstances and witnesses to which parish the street belonged, who found that it belonged to the parish of which the plaintiff and the defendant were inhabitants, and so judgment was given in the Chancery accordingly. Upon which, the said Goodge demanded the moiety of his charges of the suit from the said Utbar, who refused, upon which the said Goodge brought his action upon his case. And he had a judgment to recover the charges.

And, now, the said Utbar brought a writ of error. And he assigned for error that Goodge had not used such means that could determine the controversy, because the Chancery did not have power to determine the right of it, but he should have brought a writ *de perambulatione faciendo*.

But it was not allowed by the court, because they said that is was the means appointed and agreed between Utbar and Goodge and it was a sufficient means to determine the controversy even though it was not a means to determine the right, because the right cannot be determined by this way.

And [it was held] by Justice DANDRIDGE, if the Chancery had dismissed the suit or that it was found against Goodge, yet the said Goodge will have the moiety of his charges from Utbar.

And [it was held] by Justice HOUGHTON an inhabitant cannot sue a *perambulatione faciendo* against another of the other parish.

¹ *Earl of Rutland v. Earl of Shrewsbury* (1608-1610), 8 Coke Rep. 55, 77 E.R. 555, also 1 Bulstrode 4, 80 E.R. 710, 2 Brownlow & Goldesborough 229, 123 E.R. 913.

Ascue v. Butts

(K.B. Mich. 21 Jac. I, 1623)

The question in this case was whether an infant is bound by a contract made by his predecessor in title.

One point was thus. A lease [was] made for years, and it was with a covenant or condition that the lessee will renew his term for a longer time within the four years next following. The lessee died, his issue under age, who did not review the term.

And it was argued by *Yelverton* at the bar that this is a forfeiture, because, even though he be an infant, yet he will be bound by it to renew. [For] this point, he cited the book of 4 Edw. VI, *Condition*, fol. 50; an infant was enfeoffed upon condition that he will not enfeoff J.S.; if he enfeoffed, he had forfeited his estate even though he could have avoided his own feoffment and do it as no feoffment. Also, he cited the book of 31 Ass., pl. 17, and Com. 375, a good case to prove this intent. Also, he put this case for good law, that, if an ecclesiastical person, as a bishop, dean, or parson make a lease for years without impeachment of waste, it is void and within the Statute of 13 Eliz., because it is an act to the disinheritance of the church.¹

[Other reports of this case: 2 Rolle Rep. 400, 81 E.R. 878.]

Anonymous

(K.B. Mich. 21 Jac. I, 1623)

Pleading by a specific name is good enough without saying 'aforesaid'.

The king, by his letters patent, granted the tithes of Blackacre and Whiteacre and Greenacre, excepting the tithes of Blueacre. The plaintiff declared in [an action of] debt brought for certain of the tithes that the king had granted to him the tithes of Blackacre etc., and, for part of the said tithes, he brought his action.

It was moved that the plea was not good, because he must have averred that the tithes of which he brought his action were part of the tithes granted in the patent and thus he has pleaded them by name and not with a *praedictus*. And to prove this were cited the books of Dier, fo. 87; Com., fol. [*blank*].² But against was cited the book of 36 Hen. VI, in an action for [. . .], the defendant said that A.B., the plaintiff who sued this [?] action should not be answered, because he said *quod praedictus A. excommunicatus est* and showed the letters of excommunication and [it was] adjudged that this by A. *praedictus* is a good as if he had [. . .].

¹ YB 31 Edw. III, Lib. Ass., f. 188, pl. 17 (1357); *Stowel v. Lord Zouch* (1562), 1 Plowden 353, 375, 75 E.R. 536, 569; Stat. 13 Eliz. I, c. 20 (SR, IV, 556).

² *Dean of Bristol v. Clerke* (1553), 1 Dyer 83, 87, 73 E.R. 181, 188; Plowden, *Commentaries*.

And [it was said] by DANDRIDGE and the Chief Justice [HOBART] it is perilous to plead *per nomen*, but the certain and best way is to plead *per praedictus*. But the Chief Justice [HOBART] said that it is otherwise where he pleaded in the Exchequer an office or inquest or patent against the king because, there, he must plead *per nomen* and not *per praedictus*. And, at the end, by all the justices, the plea was held good.

54

Perry's Case

(K.B. Mich. 21 Jac. I, 1623)

An insufficient pleading can be cured by a verdict.

In an action upon the case, because the custom was that each of the tenants etc. should expose his lands and allow them to be a common from [. . .] until Lady Day [25 March] and the defendant, before the day, had inclosed his land with a hedge and a ditch, by which the plaintiff could not have his common.

And an exception was taken because he had not alleged the continuance of the enclosure to this time at which he should have his common, so that he should aver the enclosure continued to this time, to which was said for the plaintiff that he had pleaded that he had enclosed so that he could not have his common, which will be intended to continue, because, otherwise he could not have his common, and, thus, he would not have a cause of action and it could be the defendant show [it] by himself, but he had alleged that the plaintiff enclosed *per quod* he could not have his common, which will be intended to continue as strong as if he had averred the continuance.

And the court held the plea to be good now, because, now, the jury have found for the plaintiff and, having found that the plaintiff could not have his common, which will be intended to be by reason of the enclosure so that the enclosure is also found and thus the jury have now perfected the pleading and made it good.

55

Anonymous

(C.P. Mich. 21 Jac. I, 1623)

Performance must be tendered in order to have the benefit of it.

There was a good case where I [James Ravenscroft] was not present at the beginning, and I heard this point in [. . .], that the first act must be of the party that would have advantage by the act. And the books that were cited to this intent [were] Wheler's Case, 14 Hen. VIII, where the lessee was to obtain the good will of a stranger etc., and also the books of 21 Hen. VI, 7; 46 Edw. III, 5; Coke 5 rep. 13.¹

¹ *Southwall v. Huddleston* (1523), YB Hil. 14 Hen. VIII, f. 17, pl. 6, 119 Selden Soc. 139, 150; YB Mich. 21 Hen. VI, ff. 6, 7, pl. 16 (1442); *Tyrel v. Mahone* (1372), YB Hil. 46 Edw. III, f. 5, pl. 15; *Countess of Shrewsbury v. Crompton* (1600), 5 Coke Rep. 13, 77 E.R. 68, also 140 Selden Soc. 1100, Croke Eliz. 777, 784, 78 E.R. 1007, 1014.

56

Cryer v. Glover

(C.P. Mich. 21 Jac. I, 1623)

In this case, the words spoken by the party were not defamatory as a matter of law, and a writ of prohibition to the ecclesiastical court was granted.

A husband and wife struck and beat a stranger, and the stranger said to the wife these words 'I was never struck by a whore's hand before'. And the stranger, upon this *abatus*, brought his action of battery in the Common Place. And, pending the action, the wife libeled in the spiritual court for a defamation.

And, now, a [writ of] prohibition was prayed for to the spiritual court to prohibit their proceeding because these words were annexed etc. subsequent to the battery and, thus, should be determined where the principal is. And it was compared to the Case of the Abbot of St. Albans in Edw. IV, where the abbot imprisoned a woman with the intent to have the woman to consent to his pleasure and lust; the woman brought [an action of] false imprisonment against the abbot, and the abbot libeled in the spiritual court for defamation, and, in this case, a prohibition was granted. But a difference was taken, that, in the case now at the bar, it was no consequence nor necessity even though the wife beat him, because he will be forced to say these words, as to say that she is a whore.

But, at last, because he did not say directly that she was a whore, but only that he was never before hit by the hand of a whore, which is not defamation, the prohibition was granted. And, in this case, it was agreed that to say 'you are a whore' is a good cause [of action], but, if the words had been 'you are a whorish queen', this is not a case nor any defamation. Thus, to say 'you are a queen', because this word 'queen' will have a double construction, because it could be taken for a scold or for a whore, but the word 'whore' has only a bad construction which tends in defamation.

And one or two of the justices said that, as they remembered, there is a custom in London that one can bring an action there for such defamatory words. And, for this, they said that this point is touched on the 4 rep. of Coke.¹

57

Anonymous

(C.P. Hil. 21 Jac. I, 1624)

A writ of prohibition to an ecclesiastical court will not be granted without hearing argument of counsel on both sides.

Serjeant *Hitcham* moved to have a [writ of] prohibition to the spiritual court because the parson had libeled in the spiritual court for the tithes of rent of a house where the custom of the town was that each man, for his house, will pay 4s. *per annum* to the parson in lieu of his tithe of it. Now, the parson relinquished this suit for his tithe of the rent, *scil.* the tenth part of the rent, which he will not have, because, for the houses, there will be no tithe except by the custom, thus, having relinquished his customary tithe, he should have no tithes. Another

¹ *Oxford v. Cross* (1599), 4 Coke Rep. 18, 76 E.R. 902, also 140 Selden Soc. 1011.

cause is that the parson has libeled for the tithe before his tithe was due, because his tithe was not due until the feast of Michaelmas and he libeled for it before the feast of Michaelmas. And, upon this point, they are at issue in the spiritual court. And also, they have often demanded of the spiritual court a copy of the libel and those of the spiritual court, being suspicious that they would get a prohibition upon it, would not give a copy, which refusal is a good cause for a prohibition, as has been always held and used.

And these causes were not disallowed by the court, but they gave a day to the other side to show cause why the prohibition should not be granted.

58

Anonymous

(C.P. Hil. 21 Jac. I, 1624)

A motion in arrest of judgment must set forth the alleged errors fully and completely.

It was moved in arrest of judgment in [an action of] debt upon an obligation, the condition [of which] was to stand to the arbitration of A., B., and C., so that they make an arbitration in writing by such a day *sub eorum manibus et sigillis*. And he averred that they *fecerunt tale arbitrium* in writing *sub eorum manibus* and did not aver it to be *sub eorum manibus et sigillis*, as the condition was.

And it was held *per curiam* that he should have averred the arbitration [was] *sub eorum manibus et sigillis*.

59

Anonymous

(C.P. Hil. 21 Jac. I, 1624)

Even though an executor de son tort afterwards gets letters of administration, his tort will not be purged thereby.

Justice JONES remembered a case that was adjudged in the reign of Elizabeth, if one be an executor *de son tort demesne* and thus administer the goods and, afterward, he had the administration committed to him by the ordinary, yet he will be charged as executor *de son tort demesne* and the legal administration committed to him will not purge nor excuse him of his tortious administration. And this was agreed by the other justices and by the serjeants at the bar, where Serjeant *Henley*¹ cited the book of 2 Ric. III to this intent.

Also, *eodem tempore*, [it was said] by Justice WINCH an executor *de son tort demesne* will be charged by the creditors of the estate and also by the droitual executors.

¹ Sic in MS. for Henden or Hetley.

Anonymous

(K.B. Hil. 21 Jac. I, 1624)

The question in this case was whether the avowry in issue was pleaded with sufficient specificity.

A writ of error was brought, and error was assigned because, where an avowry was made for £4 of the arrearage of rent, he had avowed for it as for another rent where, in fact, the arrearages of the said rent for which he avowed was in arrear, parcel in the lifetime of his father and due to him as executor of his father so he should for this parcel have averred severally as for assets due to him as executor and the other parcel of the rent was due to him in his own right as heir to his father. And, because they are general arrearages in several rights, he should have made several avowries. Another error was assigned because parcel of the rent for which he avowed was for arrearages in the lifetime of his father and thus to him as executor, of which he has not shown his letters testamentary, which is an error.

And a day was given peremptory to the other side.

Meskin v. Hickford

(C.P. Hil. 21 Jac. I, 1624)

A debt-creating instrument that does not contain a date of payment is valid and enforceable, the date of payment being upon demand.

The record: Easter 20 Jac., rot. 1517; in *audita querela*.

The point of the case was thus. A statute merchant was acknowledged, and no date of payment was put in it. And whether it was a good statute and warrantable by the statutes of Acton Burnell and *Statutum de Mercatoribus* was the question.¹

And Serjeant *Bridgman* argued yes, because the Statute of Acton Burnell and the Statute *de Mercatoribus* were made in favor and benefit of merchants and for assurance and speedy payment of their debts *et ideo*, as it was made in favor of merchants, thus, it should be expounded in favor of them also. And it is to be observed that, in the statute [. . .], there are some essential parts necessary to be observed in every statute merchant and some parts not material, but that can be varied and are not to be observed as strictly. The essential and material parts of the statute are these, first, it must be before the mayor and the clerk, second, the debt must be made and acknowledged, third, it must be in writing with the seals etc., fourth, there must be a time of payment, because it is necessary to be a time though it is not requisite that it be a special day in certain of payment and if there be no time specified in certain, as the day of payment mentioned by the parties, then the law appoints it and limits the time of payment, that the payment will be presently and this time that the law appoints is as good as any day is to be limited by the parties in certain, because, even though it is necessary to be a limitation of a time certain, yet it is not necessary that it be by a day in certain, because, if there be a statute and the payment is to be made within 1000 hours, it is good and yet there is no day expressed, but the time of payment is certain enough. Then, it is to be seen if there be any time

¹ Stat. 11 Edw. I (SR, I, 53-54); Stat. 13 Edw. I (Merchants) (SR, I, 98-100).

in certain in our statute. And it is, because, even though no day be expressed in certain by the parties, yet there is a time appointed by the law, *scil.* that the payment will be presently, as in the case of [. . .] obligations, if any obligation be made and no day of payment be expressed or the day of payment should be forthwith, as are the books of 4 Edw. IV, 29b; 9 Edw. IV, 22; 14 Hen. IV, 29, because, where the parties do not limit a day of payment, the law appoints the time, *scil.* to be made presently.¹ And, as the law appoints the time in certain, it is as good as if it be in fact expressed by the parties. Then, in our case, when he agreed with him, the substance of the Statute in the essential points and parts of it even though it not be agreed in all with the words, yet it is also good, because it is not necessary to observe all of the words of the Statute nor all these things mentioned in it that are not essential and material parts of the Statute, because the Statute is for merchants, as the words are. And yet a statute merchant acknowledged to another man or by another man is as good. And yet it is not according to the letter of the Statute. Thus, the parts of the statute that are not essential are not to be as strictly observed, because, if the writing of a statute merchant be not with the hand of the clerk, but it is written by another man, yet it is good.

And, as to this objection that has been made, that, if no day be limited, but that it must be paid presently, he could by this way take his goods and his body *eo instanti* in execution and also the goods and merchandises that he had sold to him where the intent was that he will have a time and respite of payment etc., it is answered that it is agreeable with the intent of the Statute that the payment will be made forthwith if no day be limited and expressed by their appointment for the advantage and benefit of the conusor, because, as the merchant has delivered his goods in the present, so he will have his money in the present if a day of payment not be appointed by them.

Also, the Statute of Acton Burnell was made in advantage of the merchants' creditors and for their sure and speedy payment and for the further mischief that was to the merchants' creditors, [who] could not have their debts sure and speedily paid, but they were delayed and defrauded of them.

Lately, there are divers precedents in many places and some at [. . .] of statutes in which no day of payment has been expressed and they were held good. And so he concluded that, though there be no day expressed in the statute merchant, yet it is good and not void and the payment will be presently.

Serjeant *Hawle*, to the *contra*: And he argued that the statute merchant, having no day of payment expressed in it, is not good, because he held that the day is an essential part of a statute and, on account of this, it should not be omitted. And, when an act of Parliament makes express mention of anything by express words and when it limits a form and order of doing anything, it must be strictly observed and pursued and there will be no variance from it. And to this intent, he cited *Stradlinge and Morgan's Case*; Coke rep. [*blank*].² And, in our case, the act of Parliament having declared and expressed a form of acknowledgement of statutes, it must be strictly observed and pursued in the form that it prescribes. And it is come to be observed as material and essential it is to have the day expressed in it, because it is to be seen that the Statute of Acton Burnell makes mention of [. . .] the day of payment five times, first, one in the preamble of the Statute, 'whereas merchants which heretofore have lent their goods to divers persons be greatly impoverished because there is no speedy way for them to have recovery of their debts at the day of payment assigned'; second, 'the merchant which will be sure of his debt shall cause his debtor to come before the Mayor of London or York etc. for to acknowledge the debt and the day of payment'; third, 'and, if the debtor do not pay at the

¹ YB Mich. 4 Edw. IV, f. 29, pl. 9 (1464); YB Trin. 9 Edw. IV, f. 22, pl. 24 (1469); Note, YB Pas. 14 Hen. VIII, f. 29, pl. 7, 119 Selden Soc. 192, pl. [8] (1523).

² *Stradling v. Morgan* (1560), 1 Plowden 199, 75 E.R. 305.

day limited'; fourth, 'and, if it be found by the roll and the bill, that the debt is acknowledged and that the day of payment is expired' etc.; fifth, 'if the debt be not paid at the day limited, such execution shall be awarded against the pledges' etc. Thus, it appears by the words of the Statute that there must be a day and time certain of payment expressed and, as it is necessary, it is well and sufficiently declared by the words of the Statute and the often recital made of it. Also, the necessity of the day appears by a case in Fitzherbert's *Natura Brevium*, 130 H, and B., *Statute Merchant*, 39.¹ If a man be bound in a statute merchant payable at divers days if he has failed of the payment at any of the days, the party could sue execution forthwith, and he will not be held until the other days are passed, as he will be upon an obligation containing divers days, and he urged that, because statutes merchant are general and common assurances of all men for their debts as well as of other men who are merchants, *ideo*, such assurance should be favored and aided.

And he said that, in all the books of the law he had seen, [there are] only two cases where this Statute will not be taken by equity. And one is Easton and Studd's Case [*blank*],² and the other is the book of 21 Edw. III, 20. And he denied the case of the statute where the payment will be within 1000 hours and where that writing will be by another than by the hand of the clerk, because he said that the clerk will fully write it and no other man for the trust and confidence that is put in him, he being appointed for it by the way [?] and the Parliament. And, if this exposition will be allowed, that, where no day is limited, the payment will be forthwith, much inconvenience and damage will ensue upon it, because the conuser will be imprisoned *ad libitum* of the conusee and his goods taken in execution and, perchance, even the goods that they have bought and for which he has acknowledged this statute, which is against law and reason.

And so he concluded the statute is not good.

And after Trinity term 22 Jac. [1624], this case being argued by the judges (but I was not there for this term), all of them agreed, except Hutton, that, notwithstanding the day was omitted, yet it was good enough.

[Other reports of this case: J. Bridgman 16, 123 E.R. 1167, Winch 82, 124 E.R. 69, W. Jones 52, 82 E.R. 28.]

62

Butler v. Anonymous

(C.P. Hil. 21 Jac. I, 1624)

A sheriff, not being a judicial officer, must obey all writs directed to him whether they be erroneous or not.

Butler brought [an action of] false imprisonment etc. And [there was a] demurrer because, where the defendant had a judgment against the plaintiff, the plaintiff brought [a writ of] error upon it and also [a writ of] *supersedeas* to the sheriff to stay the execution and it was delivered to the sheriff before he had made any warrant etc. And the writ of error bore *teste* 7 July 18 Jac. [1620]. And the *supersedeas* bore *teste* 5 July 18 Jac., but it was sued out 7 July 18 Jac., *scil.* the same day as the [writ of] error. And, upon this was the question and the [. . .].

¹ A. Fitzherbert, *Natura Brevium*; 2 Brooke, Abr., *Statute merchant*, pl. 39.

² *Eyston v. Studd* (1574), 2 Plowden 459, 75 E.R. 688, also Keilwey 214, 72 E.R. 395.

And it was urged that the *supersedeas* was good and sufficient to cause the sheriff to surcease execution, because, even though the *supersedeas* bore a date before the writ of error, yet the *supersedeas* is good etc. *licet erroneice emanavit* and it is not in the election of the sheriff to dispute whether it be good or not, but, as it is to him to take it as it is and to stay execution upon it. And *licet* be a variance between the dates of the *supersedeas* and the [writ of] error, yet the *supersedeas* is not void, but only voidable so that it will be in force until it be voided in fact. And the book of 4 Edw. IV, 4, was cited.¹

Also, the *teste* is not material, because the *teste* should be in term time and it could be sued out in the vacation time, as the usual course is.

And all this was not denied by the justices, but in effect agreed. And [it was held] by them, if the *supersedeas* agrees with the judgment, it is good.

And [it was held] by Justice HUTTON, if a judgment be for £40 and the *supersedeas* of £30, this is not good, but a void *supersedeas*.

And Justice WINCH held that, even though the *supersedeas* be erroneous and voidable, yet it is good as to the sheriff, and he must stay execution upon it, because it will not be in his power to dispute or determine where it be a good or void *supersedeas*.

And there was a subsequent case, a similar variance [. . .], the justices, *scil.*, if a judgment be for £8 and £2 costs and damages and [a writ of] error brought upon it and a *supersedeas* and the *supersedeas* is for a judgment of £10 and not for a judgment of £8 and £2 costs and damages, it is an erroneous *supersedeas* because there could be divers judgments, but it must directly agree with the judgment, and this was by the opinion of Chief Justice HOBART and the others.

63

Anonymous

(C.P. Hil. 21 Jac., 1624)

An infant defendant must be represented by a guardian ad litem.

[An action of] trespass was brought against one under age, and it was found for the plaintiff. And the defendant pleaded in arrest of judgment by his cause of non-age. And it was pleaded, by that, judgment passed against the defendant.

But it was said by the justices that there was error in the case, because the infant had pleaded by his attorney where he should have pleaded by a guardian [*ad litem*].

64

Anonymous

(C.P. Hil. 21 Jac. I, 1624)

Upon a writ of liberari facias seisinam, the sheriff should deliver seisin in fact, but, in a common recovery, a recital of seisin in sufficient.

Upon [a writ of] extent and [a writ of] *liberari facias seisinam*, the sheriff should not make execution nor deliver seisin to the demandant, but return that he had delivered seisin. This return of the sheriff will not be any benefit to the demandant who sued the *liberari facias*

¹ YB Hil. 4 Edw. IV, f. 44, pl. 4 (1465).

seisinam, because he is not in seisin of the land, nor can he enter upon the land unless the sheriff has delivered seisin to him in fact, *quod fuit concordatur* by justices WINCH and HUTTON, being alone on the bench.

But it was said at the bar that there is a difference between this case and the case of common recoveries, because, there, upon the *liberari facias seisinam*, if the sheriff return that he has delivered seisin, this is good, and it will make seisin to the conusee of the fine, and, on account of this, he can enter upon the terre tenant even though the sheriff has not delivered seisin in fact, *quod non fuit negatum*.

65

Note

(Hil. 21 Jac. I, 1624)

Quinque decem means fifteen, not fifty.

A writ of reprisal lies where an English creditor cannot get justice in a foreign court.

At the lecture of Mr. Pritherowe.¹

A man [was] bound to pay *quinque decem libras*. Whether this will be taken for £15 or for £50 was the point.

And *Coventry*, King's Attorney, [argued] strongly that it will be taken for £15, and not for £50, because, if it had been *quindecem*, it had been clear, and this is only the contraction of these two words, *quinque* [and] *decem*.

And *Croke* and the reader agreed with him.

Also [it was said] by *Edward Coke*, if a contract be between an Englishman and a man from another nation in another country and, upon this contract, the Englishman sue in the same country and could not have justice there, in this case, he will have the letters of the king, not letters of grace, but, *de jure*, he will have them, and the king will write for his subject that he should have justice, and, then, if he cannot have justice, he will have a writ that is in the Register of reprisal.

66

Note

(C.P. Pas. 22 Jac. I, 1624)

The Council of the Marches of Wales cannot determine common law title to land, but it can settle rights in a trust of land.

It was affirmed and admitted by all that the Council of the Marches of Wales does not have jurisdiction to hold a plea or determine the right and title of a freehold except that it be upon confidence, but only of the possession.

¹ J. H. Baker, *Readers and Readings* (2000), p. 97.

Theaker v. Duncomb

(C.P. Pas. 22 Jac. I, 1624)

If a wife be not apparently pregnant at the time of the death of her husband and if, after his death and within a small space of time, she marries another man, the infant that is born will be the infant of the second husband, but it is otherwise where she is apparently pregnant.

In a writ *de ventre inspiciendo* brought against Hester Theker, the case was thus. Hester Theker having a husband seised of divers lands and tenements in fee simple, the husband died. And, being pregnant with a son or a daughter and the husband dying the Tuesday and the same week, *scil.* upon the Thursday, she was espoused to another husband, and, then, the brother of the first husband entered in the lands and tenements as his brother and heir, supposing that the husband died without issue and being disturbed [by] the right of the infant of which the wife was pregnant, he brought a writ *de ventre inspiciendo* out of the Chancery returnable in the Common Bench.

And now, it was moved by Serjeant *Sir George Croke* to have effect of his writ and suit. And he showed how the sheriff had returned that the wife was greatly pregnant and within etc. a week of the time of her delivery. And now, he prayed that she could be committed to some hotel or place of restraint to be there guarded and conserved safely until the time of her delivery was past so that she could not have a supposititious child to defraud the brother of her first husband.

And he cited a precedent in such a case, and it was Hilary 39 Eliz., rot. 1250, in the Common Bench.¹ The case was thus. Lady Willoughby, the wife of Lord Willoughby, being pregnant, after the death of her husband, the brother of Lord Willoughby brought *de ventre inspiciendo*. And, upon this, the sheriff taking with him *duodecim militibus et duodecim mulieribus secundum tenorem brevis* directed to him, upon a view and inspection *per utera et ventrem*, returned that she was greatly pregnant, upon which return, the court awarded that Lady Willoughby will have her habitation in the house of one of the sheriffs [?] of London and that the gates and entrance of the house will be guarded by sufficient men and that every day two honest women of good credit and reputation will repair to the chamber [and] will view her and this will be done for all the time until she be delivered and, then, a return will be made accordingly when she is delivered. And, as the justices ordered at this time, thus it was done. And she was delivered of a daughter.

Also, he cited Bracton, *libro 2*, fol. 69, for the writ *de ventre inspiciendo*.²

Justice HUTTON, being alone there [in court] at this time, said that, as he remembered this Case of Lady Willoughby, it was that she was and continued a widow for the entire time from the death of her husband until her delivery. And, in this, it varied from the case at the bar, where the wife married forthwith after the death of the husband. And he said, as he remembered, the books are that, if the wife be not apparently and greatly pregnant at the time of the death of her husband, if after and within a small space, she marries another man, the infant that is born will be the infant of the second husband. And, afterwards, he gave a day further that the counsel of the other side could be present there etc.

¹ *Willoughby's Case* (1597), Croke Eliz. 566, 78 E.R. 811, Moore K.B. 523, 72 E.R. 733.

² *Bracton on the Laws and Customs of England* (S. E. Thorne, ed., 1968), vol. 2, p. 201.

[Other reports of this case: Croke Jac. 686, 79 E.R. 595, Winch 71, 124 E.R. 60.]

68

Anonymous

(K.B. Pas. 22 Jac. I, 1624)

Where a person has promised not to sue for a reasonable time, he must allege the precise time that he has forborne to sue before bringing a suit.

Where one is bound or promises or assumes for money or any other thing that he will forbear to sue upon such an obligation or in such a suit *paululam temporis* or a reasonable, convenient, or small time, in such a case, he cannot sue forthwith, but he should, as he should, show and plead by what time he has forborne the suit or to sue so the court could see if he had forborne a reasonable and convenient time and he will not say only that he had forborne *paululam temporis* or a reasonable time.

And Farrar, an ancient officer of the court, said that *paululam temporis* or convenient time will be construed and intended to be a space of six months.

69

Anonymous

(C.P. Pas. 22 Jac. I, 1624)

In this case, the writ of venire facias in issue was proper, and, even if it were not, it is amendable, being a mesne process.

In [a motion of] arrest of judgment, it was moved that the *venire facias* was erroneous, because it was *venire facias hic etc.* where it should have been *venire facias coram justiciarius nostras etc.* which is error, and not amendable by the Statute 18 [*blank*].¹

But Justice HUTTON, being there alone upon the bench, did not allow it, because here it is the effect of all when it said *venire facias hic, scil.* at Westminster, and even though it is not express at which court of Westminster, yet it well appears by the words in the end of the writ when it is said *teste Jacobo Hubbarde*,² by which it well appears that it will be to the Common Bench, which is the court where he is a justice. And so all is well expressed upon the matter. And it could be well amended by the Statute of 18, because it is in a mesne process and not in the original. And he cited a case that was here in the Common Bench where the *venire facias* was *venire facias duodecim etc.* and omitted was *quorum quilibit habit 4 libras etc.*, and yet it was held good.³

¹ Stat. 18 Eliz. I, c. 14 (SR, IV, 625).

² *I.e.* Hobart.

³ *Ferrers v. English* (1624), Winch 73, 124 E.R. 62.

70

Goldingham v. Some

(C.P. Pas. 22 Jac. I, 1624)

In an action of dower, the voucher must precede the judgment.

In [an action of] dower brought by Elizabeth Goldingham etc., it was agreed by the justices and serjeants that the voucher must be always before judgment.

[Other reports of this case: Hutton 71, 123 E.R. 1108, Croke Jac. 688, 79 E.R. 597, Winch 81, 88, 124 E.R. 68, 74.]

71

Anonymous

(C.P. Pas. 22 Jac. I, 1624)

Where public officers pay money out of their own pockets for public matters, they are entitled to be reimbursed by their successors in office if the latter have public moneys in their hands.

Churchwardens spent money for the bells, vestments, and other necessary things of the church, and, before they paid the clerk this money of the parishioners, their year expired, on account of which, they demanded and required it from the succeeding church wardens, who have sufficient [money] in their hands to pay, who refused, upon which, they sued in the spiritual court against the succeeding churchwardens, who brought [a writ of] prohibition. And, upon this, the ancient churchwardens prayed now [a writ of] consultation.

Justice WINCH: If the ancient churchwardens spend more than they have collected in necessary works of the church and, before they can collect it, their year expires, it is reasonable that the succeeding churchwardens will repay them if they have assets in their hands. With which Justice HUTTON agreed. But, if the succeeding churchwardens do not have anything in their hands, it is not reasonable that they will be charged, because they cannot make a collection of it without the assent of the parishioners and the ancient churchwardens could have chosen if they would to have spent their own money.

HUTTON: The churchwardens cannot make a collection without the assent and agreement of four of the principal parishioners.

And a day was given to show cause at another time.

72

Blount v. Hutchinson

(C.P. Pas. 22 Jac. I, 1624)

Where a husband and wife sue for something that is vested in the husband, the action does not abate for the death of the wife pendente lite.

Blount and his wife brought [an action of] *quare impedit* against Hutchenson, and they are at issue. The wife died, and this was suggested to the court, upon which, the death of the

wife was entered upon the roll. And the husband prayed a *venire facias* in his own name, upon which, the defendant demurred.

And, by the opinion of the justices and serjeants, the [. . .] was good, because the death of the wife will not abate the writ, because it was a thing vested in the husband.

73

Parker v. Anonymous

(C.P. Pas. 22 Jac. I, 1624)

In this case, the action for defamation was pleaded well enough, and the action well lay.

An action upon the case was brought by Roger Parker because the defendant had said 'I charge Roger Parker *praefatum Rogerum innuendo* that he has stolen a drag.' And it was moved that the action should not lie for the uncertainty of the word, because a 'drag' signifies divers and several things and has divers constructions, because sometimes it signifies a drag of a manor that contains all the parcels of a manor; also, it signifies a drag net and also a drag, *scil.* a sledge, upon which they carry their plows, and he has not put any Latin word in his declaration that could limit the signification of it.

Serjeant *Bridgman*: This word 'drag' is used throughout the country for a sledge upon which they carry their plows, and thus was the meaning of the plaintiff, because he was of counsel with the plaintiff.

Justice HUTTON: In an action upon the case, it is not necessary to put the English words into Latin except he must have done if he had brought an action of detinue.

WINCH: If it be any chattel that could be stolen and could be a felony, the action upon the case, it will be good, and, thus, the action is well brought.

HUTTON: It does not appear to us but that it is a chattel and, if it be not, it must so appear by your surmise.

Thus, [it was held] by them the action was well brought.

74

Anonymous

(C.P. Pas. 22 Jac. I, 1624)

The question in this case was whether a court of equity can enjoin a lessor from cutting down trees that are the botes of his lessee.

Land was leased to J.S., and it was covenanted in the lease, and, also, the custom of the place was, that all the tenants will have sufficient housebotes, hedgebotes, firebotes, plowbotes, etc. for their use without impeachment of waste. The lessor cut down several trees with the intent to cut down all the trees to have the timber of them. And the tenant sued in the Council of the Marches of Wales to be relieved in equity and that they will proscribe and stay the lessor from cutting down the residue of the trees.

And, now, it was moved at the bar by Serjeant *Harris*, whether he will be relieved in equity or if they could prohibit him to cut down the timber.

And justices WINCH and HUTTON, being alone there [in court], were divided in opinion. And WINCH said that, for the trees that are cut down, the tenant can well have [an action of] trespass against the lessor and, for those that he intended to cut down, the court will stay him, because, though he could recover in damages for the shade, boughs, branches, and other profits

of the trees allowed to him for haybote, firebote, plowbote, etc., yet, for those that remained, he will be relieved in equity that the lessor could not cut them down, because the site of the trees and the shade and other profits and benefits that he will have by the trees are more available and beneficial to him than the damages could be, and damages he could recover, but not the trees. *Ideo*, in equity, it will be provided that the trees that remain will be preserved for the lessee.

HUTTON held to the *contra* that, in equity, he will not be relieved. And he agreed that for the trees cut down, the lessee could have [an action of] trespass and recover the value in damages. And he agreed that, as the timber of the trees belonged to the lessor, thus the boughs, branches, shade, and other benefits accruing by the trees belong to the lessee, and, as the tenant could recover in value damages for the cutting down of the trees and have a remedy by the common law, that it is reasonable that he will be relievable in equity for a thing to come, because we put it that, [if] there be a lessor and lessee and the lessee cut down several of the trees, upon which, the lessor brought a writ of waste and, afterwards, he [fears] that the lessee would cut down the other trees, he would have an injunction out of the Chancery to prohibit the lessee from cutting down the other trees. Will he have an injunction in this case? *Minime quidam*; thus in our case. But the principal reason in our case is because it was covenanted between the lessor and the lessee that the lessee will have sufficient housebotes, firebotes, plowbotes, etc. for his necessary use so that the lessee is to have a remedy for his covenant against the lessor for the cutting down of the trees, and he will be well relieved by it. And, if he will not have a sufficient sum in the [actions of] covenant to recover for the damages, it is his folly so that he will not put a greater sum for a penalty in the covenants.

Also, it was said by him that, if there be a lessor and lessee and a stranger cuts down the trees and the lessee bring [an action of] trespass against the stranger and recover in damages the value of the trees and, afterwards, the lessor bring [an action of] waste against the lessee and recover treble damages against the lessee and also the place wasted, the lessee does not have a further remedy against the stranger to recover more damages against him, but he should have caused the lessor or allowed the lessor to sue first his writ of waste against him and then he could have brought [an action of] trespass against the stranger and have recovered all the damages that the lessor recovered against him and all that which he was damaged by the cutting of the trees.

75

Anonymous

(C.P. Pas. 22 Jac. I, 1624)

An administrator of a decedent's estate cannot sue in forma pauperis, but he can so defend.

An action upon the case for trover and conversion of goods was brought by an administrator, who sued *in forma pauperis*. And it seems by the opinion of justices WINCH and HUTTON, that an administrator will not be admitted to sue *in forma pauperis*, but, to defend a suit, he will be admitted.

Good v. Good

(C.P. Pas. 22 Jac. I, 1624)

A writ of prohibition does not lie to the Council of the Marches of Wales after a final judgment in that court.

A question in this case was whether courts of equity have jurisdiction over legacies.

Thomas Good had sued in the Court of the Marches of Wales for a legacy of £300, and he had a judgment for it against Henry Good. And, now, Henry Good moved to have a [writ of] prohibition to stay execution, surmitting that they did not have jurisdiction of it in the Court of the Marches of Wales.

And it seemed to the justices that this court did not have jurisdiction of the matter, because the instructions of the Court of the Marches of Wales does not extend to it. And a difference was taken that, if a legacy be payable out of lands etc. mixed with equity, in this case, a man could sue for this legacy in the Court of the Marches of Wales or another court of equity. But, if be out of the goods and chattels, always it should be in the spiritual court.

And it was said by the justices that, even though the Common Bench could not give a remedy in this case nor determine it, when they have prohibited it in the Court of the Marches of Wales by their [writ of] prohibition, yet they could well enough grant a prohibition in the court, as they can do in divers other cases.

Justice WINCH: Judgment is now given in the Court of the Marches of Wales and thus now *transit in rem judicatam*, and, on account of this, a prohibition will not be granted, because, thus, there will be no end of suits if, after a judgment given, a prohibition will be granted.

[Other reports of this case: Winch 78, 124 E.R. 66.]

Anonymous

(C.P. Pas. 22 Jac. I, 1624)

The question in this case was whether tithes be payable for old and rotten trees.

One libeled in the ecclesiastical court in Hereford for tithes *de grando* and great decayed trees that the defendant had topped, cut down, and grubbed up and cut and claimed to his own use and profit.

And, now, Price [?] sued [?] [a writ of] prohibition, because there will be no tithes for such trees, because, even though they are now decayed and perished, yet, in regard that they were once timber trees, they will be always discharged of tithes.

And Justice HUTTON said that he remembered such a case thus adjudged. And to this intent, he cited a case in Cooke, Bole's Case.¹

¹ *Bowles v. Bury* (1615), 11 Coke Rep. 79, 77 E.R. 1253, also 1 Rolle Rep. 177, 81 E.R. 413.

And a day was given further to the other side to show cause why the prohibition will not be granted.

78

Anonymous

(C.P. Pas. 22 Jac. I, 1624)

A confessed judgment has priority over a later judgment even though the action of the later judgment was filed before the judgment by confession was entered.

[It was held] by justices HUTTON and JONES, being alone there [in court], if [an action of] debt be brought against an executor and, afterwards, another action of debt is brought against the same executor pending the first action upon a legal debt of the testator and the executor confesses the latter action, it is a judgment upon it, and then judgment is given in the first action against the executor, it was held by them that the judgment given in the latter action, which was by confession, will be served first and execution will be made on it first.

79

Anonymous

(C.P. Pas. 22 Jac. I, 1624)

Where executors make contracts on behalf of their decedent's estate, the contract is that of the executor, and not the contract of the decedent or the decedent's estate.

An executor had a term for years that he had as executor of the testator. And he sold it to another for money. And, afterwards, for the money, he brought an action of debt in the *debet* and the *detinet*. And an exception was taken because it was brought in the *debet et detinet* also.

And the opinion of justices HUTTON and JONES, being there [in court] alone, was that it was good *eo quod* it is brought upon his own contract, not having relation to that which he had as executor or in the right of the testator and not upon the ancient contract of the testator.

Also, note [it was held] by them that, if executors sell goods of the testator for money and, for the money, they bring an action of debt, this will be in the *debet et detinet*, because it is upon their bargain and sale.

80

Anonymous

(C.P. Pas. 22 Jac. I, 1624)

The question in this case was whether the words in issue charging witchcraft were defamatory or not.

An action upon the case was brought for these words, 'you are a witch and have bewitched my child.'

Serjeant *Finch*: The words are not actionable, as in a case 16 Jac., in the < Common Bench >, between Hankes and Eyre,¹ where an action upon the case was brought for these words, 'she is a witch, and I have lost by her means a mare and a colt', and, there, it was held that those words were not actionable. Also, it is not said that she had killed the child by witchcraft, because, then, it would not be denied but that the words are actionable.

Justice HUTTON: If a man said to another 'you are a felon for you have murdered J.S.', these words are actionable even though, *in veritate*, J.S. is alive and not killed.

And, as to the principal case, it seemed to justices JONES and HUTTON, being alone there [in court], that the action is well brought. But a day was given further.

81

Note

(C.P. Pas. 22 Jac. I, 1624)

Pleading must be done with specificity.

Note by justices HUTTON and JONES, where an act is put to be done in a place certain and other subsequent acts are alleged to be done, it will not speak to all those acts *ad tunc et ibidem* where he will put a certain place and time, but it will be intended to be done at the same place and time unless the contrary be shown, because, where [an action of] trespass of battery is brought, when he says *insultum* [?], *scil.*, he will show a place certain, but, as to the *vulneravit, verberavit, et male tractavit*, that, without subsequent acts, no place will be shown, but it will be intended the same place.

82

Austin v. Beadle

(C.P. Mich. 22 Jac. I, 1624)

In this case, the bar that was pleaded by the defendant was insufficient for lack of specificity.

In [an action of] *ejectione firmae*, the plaintiff declared of an ejection in D. The defendant pleaded in bar that D. is within the Cinque Ports, and he prayed that the court would dismiss it. The plaintiff replied that D. is within the County of Sussex *absque hoc quod* it is within the Cinque Ports. And, upon this, there was a demurrer. And the truth of the matter was that D. was partly within the Cinque Ports and partly within the County of Sussex. And this place where the ejection was done was within that part that was in Sussex.

And it was held by all the justices *in plena curia* that the replication is good and the bar is bad and that he has well replied and traversed his bar, because it was the fault of the defendant that he did not distinguish the place at first and pleaded how D. is partly within the Cinque Ports and partly within the County of Sussex and that this place where the ejection was laid in that part that was within the Cinque Ports. Also, such a plea that goes to the jurisdiction of the court will be pleaded certainly and taken strictly, and, inasmuch as the bar was to the jurisdiction of the court, it will not be favored. Thus, it was adjudged that the replication and traverse was good and the bar was bad.

¹ *Hawkes v. Auge* (1619), Croke Jac. 531, 79 E.R. 455.

[Other reports of this case: Winch 113, 124 E.R. 95, Hutton 74, 123 E.R. 1110, Croke Jac. 693, 79 E.R. 601.]

83

Anonymous

(C.P. Hil. 1 Car. I, 1626)

In this case, the plaintiff's claim of a breach of a covenant of quiet possession was well alleged in the plaintiff's pleading.

The lessor was bound in an obligation to the lessee that the lessee will have possession and quietly enjoy without disturbance of the lessor or any other claimant by him. And, afterwards, one, by the commandment of the lessor, entered and took away his hay from the land. And it was moved that this is not a breach of the condition because he pleaded that another by command of the lessor, but he did not say that he took away the hay by the command of the lessor or that he ejected him or disturbed by the commandment of the lessor and, thus, a nude entry is not a breach of the condition, because it could be that a stranger, by the command of the lessor, entered to see if waste be committed.

But, by the judgment of the whole court, inasmuch as he entered and took away hay, it is a disturbance, and, inasmuch as he has pleaded that, by the commandment of the lessor, he entered and took away hay, it is copulative and conjoins it all to the command, and the command extends it to all this matter conjoined. Thus, [it was held] by the justices, it is a breach of the condition.

84

Anonymous v. Tyme

(C.P. Hil. 1 Car. I, 1626)

In this contract case, it has held that the obligor had sufficient notice of the accrual of his obligation to be held liable to the plaintiff obligee.

Tyme was bound to pay so much money at the day of the marriage of the obligee. For the non-payment of it, an action upon the case was brought. And it was moved for the obligor that he did not have notice of the day of the marriage.

But it was ruled by the justices, inasmuch as the obligee, before the action was brought, had demanded the money because he was married, this was sufficient notice.

And Justice YELVERTON cited a case that was in the King's Bench. The father promised to pay £10 upon the day of the marriage of his daughter; there, the father must take notice of the day of the marriage, because it was his daughter who was to be married. But, if he promised to pay so much money upon the marriage of another woman who is not his daughter, there, he must have notice of the day of the marriage. And, thus, he took, a difference where moneys are to be paid upon the act of a stranger obligor and where not.

Anonymous

(C.P. Hil. 1 Car. I, 1626)

Tithes are not payable for estovers, barren cattle, or stable horses.

Botes for fuel, hedges, and other necessary botes are not tithable, because no tithe botes will be paid. But, if any woods be felled for botes and if they are not employed to this use, but are sold, in this case, a tithe will be paid. [This was held] by the justices.

Also, [it was held] by justices YELVERTON and HUTTON, if a man mow a meadow and, afterwards, put in dry beasts, of these beasts, if they are beasts to be fatted and not [. . .] for plow and pale, tithes will be paid even though no tithe will be paid of the land, *scil.* of the after crops, as upon the mowing of the stubble and such like where tithe has been paid before of the former crop of the land. But, if sheep are put in the stubble, of these sheep, tithe will be paid, because the tithe is not to be paid in regard of land of which tithe was paid before, but in regard of the cattle etc.

Also [it was] agreed by all of the serjeants and justices that, of the barren cattle for plow and pale, no tithe will be paid, and, if a man buy or breed barren cattle to be used in his plow and pale, no tithe will be paid for them. But, if he fatten them and sell them, tithe will be paid. Also, of pack geldings to ride and other stable horses, no tithe will be paid.

Bishop of Chichester v. Freeman
(Part 1)

(C.P. Hil. 1 Car. I, 1626)

A member of the clergy cannot impair his endowment so that his successors will be in any way prejudiced.

The bishop granted the office of the parkership with the fee of five marks and also the pasturage for two horses etc. And, because he granted the pasturage for two horses, which is a thing more than was used to be granted with this office, the question was whether the grant was void by the Statute of 1 Jac.,¹ because this addition of the new fee and charge that put the successor in a worse state than his predecessor was.

And Serjeant *Henden* argued it is within the Statute and, thus, a void grant. He held that it is within the intent of the Statute, because the intent of this Statute was that no grant or act made by the predecessor should prejudice the successor. But this addition of the other fees in the grant of the parkership is a charge and prejudice to the successor, *ergo*.

Second, the bishop was not within the Statute of Westminster II that gives *contra formam collationis*, but, there, the remedy was given to the founder and not to the successor. But, now, by the Statute of 1 Jac., the remedy is given to the successor where the prejudice is to him.

It is plain that grants of offices are not only within the Statute but also within the words of the Statute where they are offices anciently used, but grants of new offices are outside the Statute and are utterly void. Also, ancient offices with new fees are within the Statute and void.

¹ Stat. 1 Jac. I, c. 3 (SR, IV, 1019-1020).

And he cited Nevill's Case, in the *Commentaries*. And also, he cited a case that was adjudged in 25 Eliz., where an annuity was held void. Grindall, archbishop of Canterbury, the case upon a grant of survivorships with a new fee or some addition of the fee or alteration of it which was prejudicial to the successor, and it was held a void grant; the grant was made by Parker, the predecessor of Grindall. Also, he cited the Bishop of Worcester's Case, which was at Reading, the last term. And he cited the Dean and Chapter of Worcester's Case, in the 6th Report, and also Lord Mountjoy's Case, in the 5th Report.¹

And he admitted that, where the thing added or altered in the grant is not in prejudice of the successor or is not of anything in substance, but only varies in circumstance the grant, it is good. He said that, though the grant be good at law, yet such grants are now restrained by the Statute of 1 [Jac.]. And, where it could be objected that the grant is good for the office and the ancient fee, yet it be void as to the new fee, he answered that the grant is an entire grant, and it will be taken all together, and, thus, it is void *in toto*.

And he cited a case in the 4th Report, a bishop, lord of the manor, granted a copyhold, reserving another rent in another tenure that was anciently reserved, and [it was a] void grant against the successor.

But, on the other side, Serjeant *Bridgman*, who had argued this case before, said that the grant is not an entire grant, as he supposed, but it is a grant of the parkership with the fee of five marks and also 20s. and the pasturage for two horses, thus, several clauses in the grant. Thus, the grant of the office with the fee of five marks is a good grant, and the residue can be avoided, yet the grant of the residue will stand.

And it was cited among them the Bishop of Salisbury's Case, 11 Jac., in the Common Bench.²

Et dies datus ulterius.

Also, *Bridgman* held that, though it be not an ancient office, yet, by this Statute, offices of decency and necessity he could grant, as if he had [. . .] he could make [. . .] and yet it is not [. . .] held to him and [. . .] the Earl of Salop's Case, Coke 9th Rep.,³ and, as to the objection that the fee is enlarged of [. . .], he granted that the usual fee is not [. . .] but good for the ancient fee only, [it is] similar to [. . .]'s Case [. . .] a lease of divers parcels of land [. . .] reservations, the defect in one does not vitiate the other. Thus, in the case at bar, *utile per inutile non vitiatur*.⁴

¹ *Nevil v. Attorney General* (Ex. 1570), 1 Plowden 377, 75 E.R. 572; *Dean and Chapter of Worcester's Case* (1605), 6 Coke Rep. 37, 77 E.R. 307; *Shephard v. Blackaller* (1589), 5 Coke Rep. 3, 77 E.R. 52, also Moore K.B. 197, 72 E.R. 528.

² *Stanton v. Green* (1613), 10 Coke Rep. 58, 77 E.R. 1013.

³ *Earl of Rutland v. Spencer* (1610), 9 Coke Rep. 42, 77 E.R. 793, also 4 Leonard 243, 74 E.R. 848, 2 Brownlow & Goldesborough 330, 123 E.R. 971, Yelverton 208, 80 E.R. 136.

⁴ For further proceedings in this case, see below, Case Nos. 117, 125.

87

Anonymous

(C.P. Hil. 1 Car. I, 1626)

A sheriff cannot execute a civil writ of capias at night.

It was held by the justices that the taking of sheep by the sheriff in execution upon a [writ of] *capias* in the night is bad because taken in the night. And our books are that a man cannot distrain for rent arrear in the night, but he can for damage feasant. 11 Hen. VII, 5a; 10 Edw. III, *Avowerie*, 137; Br., *Distress*, 99; 12 Edw. III, *Distress* [. . .]; 12 Edw. III, 14.¹

88

Anonymous

(C.P. Hil. 1 Car. I, 1626)

A writ of prohibition does not lie to an ecclesiastical court solely because it applies the two-witness rule of evidence.

It was moved for a [writ of] prohibition because the parson libeled in the spiritual court for tithes and the defendant proved payment of the tithes by one witness and the spiritual court would not admit this proof by one witness. On account of this, they prayed [a writ of] prohibition because they will not accept such proof by one witness for payment, which is sufficient proof in such a case at common law.

And it seemed to the justices that he will not have a prohibition, because the spiritual law could have another means of proof than this used and accepted at the common law.

And HUTTON and others of the justices affirmed that they have spoken with the civilians concerning such a case. They said that payment proved by one witness with the supplement of some other circumstances, as the hearing or knowledge of another man, is good proof in their law and it has been accepted in their courts, but the nude evidence of a sole man [is] not good proof.

89

Townley v. Steele

(C.P. Hil. 1 Car. I, 1626)

The question in this case was whether, when executors take nonsuits, they must pay court costs.

A testator died seised of a ward[ship]. And, for the taking of it in the time of the executors, the executors brought [an action of] ravishment of ward. And whether they will pay costs or not upon their nonsuit was the question.

¹ YB Mich. 11 Hen. VII, f. 5, pl. 18 (1495); YB Pas. 10 Edw. III, f. 21, pl. 37, 1 Fitzherbert, Abr., *Avowrie*, pl. 137 (1336); Pas. 12 Edw. III, 2 Fitzherbert, Abr., *Distresse*, pl. 17 (1338).

And, after the argument of it (which I [James Ravenscroft] never heard), it was the opinion of *Herne* and Justice CROKE that costs will not be given against them, because the right that they have is not their own right, but the right of the testator and, if they are held to try the right of their testator and if they see no right to their testator or that the other has the better right, they are bound to cease the action by their nonsuit, and, if, in such actions, executors would be charged with costs upon their nonsuits, they would be discouraged to sue actions and try the right of their testators, upon which much prejudice would ensue to the commonwealth.

And they said that, divers times, they have been urged that executors will pay costs upon their nonsuits in such actions, but, in no time, has it been granted by reason of this inconvenience. And, on account of this, it was the opinion of all the justices before these times that costs will not be given against executors in such cases nor will be now granted.

But justices HUTTON and YELVERTON were *in contraria opinione*. And they admitted that the right that the executors have to a wardship is the right of their testator and derives to them from him, but the right of action, *scil.* to have the [action of] ravishment of ward, was for the taking of the ward in their own time, and, for being nonsuited in such actions that accrue to them for the tort done in their own time, costs will be given against them, and they are within the statutes of 23 Hen. VIII and 4 Jac.¹

And Justice YELVERTON so argued it. His first argument was, [in] every action founded upon a statute, [for] the nonsuit in such action, costs will be given by the Statute of 23 Hen. VIII. But this action of ravishment of ward is an action founded upon a Statute,² because, at common law, the taking of the ward was punishable by an action of trespass, but, by the Statute of Westminster, this action of ravishment of ward was given and the difference between the writs is that one is *cepit et abduxit* and, in the other, it is *rapuit et abduxit*, *ergo*, upon this nonsuit in an action upon a statute, costs will be given against them.

His second argument was each immediate tort done to the plaintiff [?], and upon a nonsuit in an action for it, is within the Statute of 23 Hen. VIII, as this ravishment of ward is an immediate tort done to the executors, *ergo*, upon their nonsuit in this action, costs will be given against them. But, if the taking of the ward was in the time of the testator, it will be otherwise.

And, by default of the Chief Justice, there being no Chief Justice of the Common Bench, *nihil ultra* was resolved at this time, but left at large until there be a Chief Justice of the Common Bench.

[Other reports of this case: Hutton 78, 123 E.R. 1113, *sub nom.* Peacock v. Steele, Croke Car. 29, 79 E.R. 630.]

Anonymous

(C.P. Hil. 1 Car. I, 1626)

A marriage ceremony performed by a ordained Anglican priest is valid even though he has converted to Roman Catholicism.

[It was said] by Justice YELVERTON and not denied, if a minister of England be a fugitive and is a converted seminary priest or a Jesuit, if he marry any husband and wife in England,

¹ Stat. 23 Hen. VIII, c. 15 (SR, III, 380); Stat. 4 Jac. I, c. 3 (SR, IV, 1141).

² Stat. 13 Edw. I (Westminster II), c. 35 (SR, I, 88-89).

it is a good and lawful marriage by reason of his former lawful orders that still remain in him not destroyed. But, if any other priest or Jesuit who never had taken orders in England, a marriage made by him of any persons in England is not a lawful marriage but void, and, upon such a marriage, upon an issue taken of this, it will be held not joined in lawful matrimony.

91

Compton v. Wray
(Part 1)

(C.P. Hil. 1 Car. I, 1626)

The question in this case was whether the indentures in issue were proper deeds of partition and mutual conveyances among the coparceners and their husbands.

In a writ of partition brought by Compton against Wray, one point was thus. Land descended to two women who were coparcenaries and married with husbands. An indenture was made between them and their husbands that they will have a moiety of the lands descended, *scil.* such manors, lands, etc. to her and her husband and the heirs of the wife and that the other heir will have the other manors and lands to her and her husband and the heirs of her husband. And, also, it was covenanted each of them levy a fine with cognisance of right to the other. And, accordingly, fines were made [and] acknowledged. And, afterwards, a writ of partition was sued etc. And whether a good partition was made by this indenture or not was the question.

And Serjeant *Davenport* argued that this indenture did not make any partition, but that, notwithstanding it, they still remain coparceners. And, on account of this, his reason upon which he insisted was that this indenture did not divide the inheritance nor part[ition] the estate, but it is only declaratory of the uses. Thus, no partition being made by this indenture, they yet remain coparceners. Also, [an action of] partition is suitable to divide things that are, *scil.* of things present, and not of things to be, *scil.* things *in futuro*. And he said that there is a temporary partition that does not divide the inheritance and a perpetual partition that divides the estate and the inheritance. Also, he urged that a partition is suitable to divide the estate between the coparceners and not to divide or give it or the inheritance of it to a stranger. But, if this indenture will be a partition, it would give the estate and the inheritance [. . .] moiety to a stranger, *scil.* the husband of one of the coparceners, but every good partition must divide the estate and give such an estate to one coparcener as the other has. But this partition does not divide the estate, but it gives a moiety of the estate to one solely and it gives the other moiety to the other coparcener and another, because the other coparcener had only for life and her husband had the inheritance, *ergo*. And always, the coparceners should by the rules of partition in every good partition have equal estates. And as a partition will be taken by the rules of partition, he cited the books of 2 Hen. VIII, 5a, and 21 Ass., pl. 1. But he admitted this case, if the partition had been that one sister and her husband will have the moiety of the lands to them and the heirs of the wife not speaking of the other sister and her husband, this would make a good partition, because, by implication, the other moiety is relinquished to the other sister and her husband and the heirs of the wife in the same manner as the other sister had, and so it would be good. And he cited these books of 45 Edw. III, 20, 21; and Dier 98; and Dier 162; and 18 Edw. II, *Ayd*, 171.¹ And he said that a partition bad and void for one part is also

¹ YB 21 Edw. III, Lib. Ass., f. 74, pl. 1 (1347); YB Trin. 45 Edw. III, f. 20, pl. 23 (1371); *More v. Uvedale* (1554), 1 Dyer 98, 73 E.R. 214; *Wingfield v. Littleton* (1558), 2 Dyer 162, 73 E.R. 352; Trin. 18 Edw. II, 1 Fitzherbert, Abr., *Ayde*, pl. 171 (1324).

bad and void for the other part, as thus the partition is utterly void and thus the fine that is not in [force] could not make it good or perfect that it was completely [. . .] and void in all. *Ergo*, it seemed to him that, notwithstanding this indenture by which partition is surmised to be done, no partition is made. But they remain coparceners, and the writ of partition is well brought.

Serjeant *Bridgman*, to the *contra*: And he argued that the indenture contained a good and perfect partition. And this he proved by the intent and express words of the indenture, *scil.*, first, that it is agreed between the parties to have a partition, second, the partition so made shall remain of force and strength, third, one part in certain is allotted to one and another part in certain allotted to the other, fourth, that the one grants in consideration of his part the other that have the other part and *e contra*.

And he held that the partition does not give any estate, but saves and sets apart the portion and part that each will have of an estate. And also, he held that the subsequent fine will be in confirmation and corroboration of it. And, if the partition had been that one will have such manors and lands for her part and the other will have such manors and lands for her part, not making mention of any estate that one or the other will have, this is a good partition, and they will have by the law of partition such estates as are descended to them. And the indenture made a good division of their parts and portions of the lands. The limitation of the estate that one will have to her and her husband and her heirs and that the other will have to her and her husband and the heirs of the husband is a void limitation. And the law of partition will judge of their estates and will give to them such estates as are descended to them.

And he cited the books of Com. 25; 14 Hen. VI, [*blank*]; and 15 Eliz. 319; 2 Hen. VII, 5; 15 Hen. VII, 4; Commentaries 134.¹ Thus [it was said] by him the partition divided the estate and did not give a new estate. Thus, there being a good and perfect partition, the subsequent fine is in confirmation of it. And he cited the books of 3 Edw. III, 19 and fol. 63, in the new printed book; 8 Ass. 33; 6 Ric. II, *Estoppel*, 111; 4 Rep. 7, *Hinde's Case*.²

Thus, the intent of his argument was that the indenture made a good division of the part and parts to the coparceners and [it was] good as to this but void as to the limitation of their estates that will be by the estates [?] of the partition such as be descended to them. And the subsequent fine confirmed the partition of the lands in the indenture and the estate given by the law of partition.

Et dies datus fuit ulterius.³

¹ *Colthirst v. Bejushin* (1550), 1 Plowden 21, 75 E.R. 33; *Anonymous* (1572), 3 Dyer 319, 73 E.R. 723; YB Mich. 2 Hen. VII, f. 4, pl. 17 (1486); YB Mich. 15 Hen. VII, f. 14, pl. 5 (1499); *Browning v. Beston* (1555), 1 Plowden 131, 75 E.R. 202.

² *Carlton v. Pole* (1329), YB Pas. 3 Edw. III, f. 19, pl. 35; *Gisors' Case* (1345), YB 19 Edw. III, Lib. Ass., f. 63, pl. 8; YB 8 Edw. III, Lib. Ass., f. 19, pl. 33 (1334); *Anonymous v. Garnon* (1382), YB Trin. 6 Ric. II, Ames Found., vol. 2, p. 47, pl. 34, 1 Fitzherbert, Abr., *Estoppel*, pl. 211; *Libb v. Hynde* (1591), 4 Coke Rep. 68, 76 E.R. 1037, also 138 Selden Soc. 602, 1 Anderson 285, 123 E.R. 475.

³ For later proceedings in this case, see below, Case Nos. 109, 114.

Hodgkinson v. Wood

(C.P. Hil. 1 Car. I, 1626)

Where a testator devises land and then makes a lease of the same land, the lease is not an ademption of the devise.

A man made his will, being seised of lands in fee. And, by his will, he devised it to his eldest son and the heirs male of his body and, for default of such issue, the remainder to the heirs male of the body of the testator and, for default of such issue, the remainder to the right heirs of the testator. And, after this devise, he made a lease for years of the same land.

And, in this case, two points were moved. The first point was whether this making of the lease for years be a countermand of the devise.

And it was resolved that it is not a countermand of the devise.

The second point was upon the words of the devise of the remainders etc., whether they are words of purchase or of limitation.

And it was held that they are not words of purchase, but of limitation. But the justices respited their judgment until the next term.

[Other reports of this case: Croke Jac. 691, 79 E.R. 599, Croke Car. 23, 79 E.R. 625.]

Wray v. Anonymous

(C.P. Pas. 2 Car. I, 1626)

A devise by a joint tenant does not sever the joint tenancy, but a surrender or a conveyance in trust does.

[In an action of] trespass by Wray, by justices HARVEY, CROKE, and YELVERTON, it was held that, where there are two joint tenants of a copyhold, one of them surrenders to the use of his will and for a devise of it by his will and he died, the survivor will not have the entirety, because this surrender is a good severance of the joint tenancy. Thus, of joint tenants etc., if one make a feoffment in fee to the use of such persons as he will name by his will etc., it is a good severance of the jointure, because, in these cases, the severance is made by the act of the surrender and the feoffment, and not by the demise, because, where there is only a devise by a joint tenant, it is not a severance of the joint tenancy.

Smith v. Wade

(C.P. Pas. 2 Car. I, 1626)

The question in this case was whether clerical errors in writs of nisi prius, venire facias, or habeas corpora are amendable.

It was said by the justices, that, where the roll is good, the [writ of] *habeas corpus* against the jurors [is] mistaken, and the [writ of] *venire facias* [is] good, it is not error. But, where the *venire facias* is bad, all is error. Thus, where the *nisi prius* is bad etc., all is bad and more etc.

And, at another day, it was said by HUTTON and his companion justices that the fault of the *habeas corpus* being the fault of the clerk, it is well amendable by the Statute.¹

And Justice YELVERTON put this difference, that, where the fault is in a *habeas corpus*, it is amendable, but, where the fault is in the *nisi prius*, it is not amendable.

And the truth of this case, as Serjeant *Henden* showed, was that the record of the *nisi prius* was right and good; thus also was the entry of the *venire facias* and also the entry of the clerk of the juries, only, in the *habeas corpora*, one of the names of the parties, *scil.* the plaintiff, [was] mistaken, and it is merely a mistake of the clerk, that then it could be amended. And he cited the book of 11 Eliz., Dier, Wotton's Case.²

[Other reports of this case: Hutton 81, 123 E.R. 1115, Croke Car. 32, 79 E.R. 631.]

95

Anonymous

(C.P. Pas. 2 Car. I, 1626)

A pleading for the taking of a specific thing need not allege its value.

One counted of the taking of a piece of gold, and he did not say *ad valentiam*. It is good, because it could be a piece of a ring of gold or piece [of] coin etc. And, especially, it will be good, being after a verdict.

96

Travers v. Michelbourne

(C.P. Pas. 2 Car. I, 1626)

A scire facias lies against a sheriff for taking insufficient pledges.

Travers brought *scire facias* against Milchbourne, sheriff etc.

It was argued by Serjeant *Henden* that, the sheriff having taken insufficient pledges etc., *scire facias* well lies against him, because the taking of the insufficient pledges and no pledges is the same. And he cited the Statutes, upon which the case is grounded, *scil.* Westminster II, cap. 2, by which Statute it is provided that sheriffs and bailiffs shall not only receive of the plaintiff's pledges for the pursuing of the suit before they make delivery of the distress but also for the return of the beasts if a return be awarded and, if any take beasts otherwise, he shall answer for the price of the beasts etc. The other Statute [is] Westminster II, cap. 45, that gives

¹ Stat. 14 Edw. III, stat. 1, c. 6 (SR, I, 283).

² *Wootton v. Cooke* (1568), 3 Dyer 280, 73 E.R. 629.

execution of things recovered and, after the year, *scire facias* for them.¹ And, even though, at common law, as appears by the books, [an action of] *detinue* lies against the sheriff for the cattle, yet, now, the cause of action being apparent upon the matter of record, the recovery of it can be by a *scire facias*. And thus it is in our case etc. [It is the] same in [an action] brought [for an] annuity; the party will not be put to another [?] writ of annuity if it be in arrear, but he will have a *scire facias* upon the former writ of annuity, because the matter is come of record. Thus, in [an action of] debt against executors who plead no assets etc., then, *toties quoties*, when the executors support [?] assets, he will have *scire facias* against them etc. And he cited the books of 26 Hen. VI, 7; and 7 Hen. IV, 20, etc.; and 5 Hen. VII, 7, *scire facias* lies upon the return of the sheriff; and 2 Hen. VI, 15, where the pledges be insufficient, *scire facias* lies against the sheriff.² And, as to that which has been objected that the pledges could have been sufficient and of ability at the time that the sheriff took them and, afterwards, could have become insufficient, [it is] no reason that the sheriff will be charged for it, he granted that the sheriff could have this matter in a plea and it will excuse himself etc.

And the opinion of justices HARVEY, CROKE, and YELVERTON was that the taking of the insufficient pledges and no pledges is the same, and the *scire facias* was well brought against the sheriff if the pledges be insufficient.

[Other reports of this case: Hutton 77, 123 E.R. 1112.]

97

Crump v. Barne

(C.P. Pas. 2 Car. I, 1626)

To call a shoemaker a bankrupt is actionable defamation.

Crompton brought an action upon the case for slanderous words. The words were 'Crompton is a bankrupt rogue.' And he pleaded that the words [that] were spoken was a slander.

And Serjeant *Haskins* [?] argued [?] that the action does not well lie. And he said that he could only be a bankrupt who gains his living by buying and selling. And the calling of him a bankrupt rogue is the same as that he spent all his roguery, because 'bankrupt', the adjective, will have relation to the substantive 'rogue'. But, if one call a merchant a bankrupt merchant or a grazier a bankrupt grazier, an action would well lie. And it is not within the matter. But, if he had called him a bankrupt shoemaker, an action would have well lain.

But [it was held] by the justices it appears by the declaration that Crompton, the plaintiff, is a citizen and tradesman, *scil.* a shoemaker, and his trade is buying and selling leather and shoes, and, the word 'rogue' is an addition, making the matter the worse, because slander is added to slander by this, *ideo* that, [it was held] by them the action would well lie.

And Justice HARVEY remembered a case that was in the King's Bench, and it was that, where a gentleman having [. . .] pasturage in his own lands used to graze cattle in it for his greater benefit, and, for calling him a bankrupt etc., he brought an action upon the case, and [it was] well.

¹ Stat. 13 Edw. I (Westminster II), c. 2 (SR, I, 72-73); Stat. 13 Edw. I (Westminster II), c. 45 (SR, I, 93-94).

² YB Hil. 27 Hen. VI, f. 7, pl. 4 (1449); YB Hil. 7 Hen. VI, ff. 19, 20, pl. 2 (1429); YB Trin. 2 Hen. VI, f. 15, pl. 15 (1424).

[Other reports of this case: Croke Car. 31, 79 E.R. 630.]

98

Dixon v. Anonymous

(C.P. Pas. 2 Car. I, 1626)

One cannot forge a will of a living person, wills being ambulatory.

Dixon brought an action upon the case because the defendant said of Dixon, the plaintiff he had forged a will of one Hooper. And, now, in arrest of judgment, it was moved, first that he did not show that it was his last will that he had forged, second, he has not shown that any freehold was devised by this will, because the Statute [. . .]¹ is that he who forges any deed or will for any freehold estate, third, the words are *minis* general, because he must have said that he falsely forged a will or that he forged a false will, because thus it is intended by the Statute, fourth, also, he said that he forged Hooper's will and he did not show that Hooper is dead, and, so, if Hooper was alive, he could not forge a will of him who was alive.

And, as to this exception, the justices said that he should have shown that he was dead.

99

Note

(K.B. Pas. 2 Car. I, 1626)

An original writ can bear date out of term time, but a mesne common law writ cannot.

Justice DANDRIDGE: An original writ that is issuing out of the Chancery can well bear a date out of the term, because the Court of Chancery is always open. But all mesne processes that issue out of this court or another court must bear a date within the term only and not out of this time, because these courts are open only in the term.

Also, DANDRIDGE, this same term, said that the rule of this court [is] that after judgment, you have [?] four days following to speak in arrest of judgment. But, now, the four days are past and execution is taken out, and even though it be in the same term, yet it is too late to speak in arrest of judgment now, but you must bring your writ of error if you have any matter of error etc.

¹ Stat. 5 Eliz. I, c. 14 (SR, IV, 443-445).

100

Wade's Case

(K.B. Pas. 2 Car. I, 1626)

Where a title to land is pleaded, the pleader must allege precisely what the estate in issue is.

[*blank*] that entitled him etc. by a lease made by a dean and chapter, and he said the dean and chapter being seised and he did not say that they were seised in his demesne as of fee or otherwise show how they were seised, but generally that they were seised.

And, by all the justices, it was held vicious and insufficient, because he must have shown of what estate the dean and chapter were seised, because it is by way of pleading and also it is his title, which must be shown in certain.

101

Millen v. Fawdry

(K.B. Pas. 2 Car. I, 1626)

One can use self help to drive off cattle belonging to another person out of one's own land, and this can be done with the assistance of a dog.

William Millen brought an [action of] trespass against Fawdry; the case [. . .] in 22 Jac., rot. 1079.

[An action of] trespass [was brought] by Millen for molesting his sheep in Bosel etc. The case was thus etc. The sheep of Millen were damage feasant in the land of Faudrie, *scil.* in cutting and bruising his pas[tur]e and grain, and, he with a small dog, chased them out of his land. And the sheep were in Bosel which was the land of a stranger and next adjoining to the land of Faudrie and no hedge or fence was between their lands. The dog pursued them out of his land in Bosel, and he berated and chided the dog that forthwith was stopped. And, upon this chasing in Bosel, the action concerned, and, upon it, he demurred etc.

And *Littleton* of the Inner Temple argued that the [action of] trespass will not lie. And he cited *Terringham's Case*, in the 4th Rep., by which it appears that a man can chase sheep etc. out of his own land.¹ And, thus, in our case, even though he could lawfully chase them out of his own land with his small dog, for the pursuing of the dog, that was against his will, he will not be punished for it. He cited the book of 43 Edw. III, 8, where deer escaped out of a park or chase and came into the land of another man, who chased them out of his land with a dog, and the dog pursued them into the park or chase, and whether the owner of the land or the dog that thus first chased or pursued them and encouraged the dog etc. he will not be punished for it. And he cited the books of 22 Edw. IV, 8; 21 Edw. IV, 64; 21 Hen. VII, 28; and 28 Hen. VIII, Dy. 25.²

And [it was] resolved by all of the justices that the [action of] trespass does not lie.

¹ *Phesant v. Salmon* (1584), 4 Coke Rep. 36, 76 E.R. 973.

² YB Hil. 43 Edw. III, f. 8, pl. 23 (1369); YB Pas. 22 Edw. IV, f. 8, pl. 24 (1482); YB Mich. 21 Edw. IV, f. 64, pl. 37 (1481); YB Trin. 21 Hen. VII, ff. 27, 28, pl. 5 (1506); *Anonymous* (1537), 1 Dyer 25b, 73 E.R. 53.

DANDRIDGE said that, in [an action of] trespass, there must be a voluntary act and a *damnum et injuria* [. . .] fault here, because his dog chased them in Bosaiel without his will. And he and all of the other justices held that it was lawful in him to chase them out of his own land with a small dog and no tort. And he put the case that, if a butcher is driving his beasts by the city and some of them enter into the house of a man, he could well pursue them and enter into the house and re-take them; thus, if he drive them by the road and they escape into the land of another man, he could immediately pursue and re-take them. Also, he said, if a stag or deer stray out of the chase or park and come into my land etc. and I with a dog chase it out, the dog pursues it, and kills the stag or the deer in the park or other land, I will not be punished for it, but, if it be in the chase or park that it is thus killed by the dog, if I blow my horn, this is sufficient to give notice to the keepers and, then, they will not take my dog, nor will I be punished, and this is by the forest laws. Also, if a man hunt and chase a fox, he can pursue the fox himself or his hounds into the lands of other men, because the fox is a nuisance and a harmful beast and it is good for the public weal to have it killed. And, in such a case in trespass brought for chasing into the land of another man, it was adjudged that the action does not lie, as he said. And he said that, if a tree with apples or fruit grow in my hedge and, in gathering them, some of them fall into the land of another man, I can enter and take them, and [it is no] trespass.

Justice JONES: A man can chase the sheep in his own land and from his land to the neighboring road or common or into the land of the owner of the sheep. But it is not lawful to a man to chase them out of his own land into the lands of another man, a stranger, because this is a wrong to him. But the pursuing of the dog and chasing into another land was done against his will, and, thus, it is no trespass in him who did it. Also, [it was said] by him, if a man [is] in the cutting of a tree [and] the tree, against his will, fall into the land of another, this is no trespass.

[Other reports of this case: Benloe 171, 73 E.R. 1033, W. Jones 131, 82 E.R. 70, Latch 13, 119, 82 E.R. 250, 304, Popham 161, 79 E.R. 1259, Paynell K.B. 70.]

102

Anonymous

(C.P. Pas. 2 Car. I, 1626)

The question in this case was whether the devise in issue was a valid remainder or not.

The Serjeants' Case argued by *Henden*.

The first point of the case was thus. A man, seised of land in fee, devised it to A. and his heirs upon condition that, within the first year after the death of the testator, he will pay £100 to B. and, if he not pay, that then it will remain to B. and his heirs. And whether this devise of the remainder be good was the question. And he held yes, because it is a good will and in the nature of an executory devise and to take effect upon the condition. And he said that, at common law, lands in gavelkind were devisable and lands in borough English and also that a copyholder could surrender to the use of his will, and, by this way, he could devise his land. And a *cestui que use*, before the Statutes of Uses, could have devised his use. Thus, by this, it appears that almost all lands, before the Statute of Wills,¹ were by some way or another devisable by a will. And he also inferred as much out of the opinions of Bracton, Fleta, and Glanvill, who say that the father, in the extremity of illness without the assent of the heir, could

¹ Stat. 27 Hen. VIII, c. 10 (SR, III, 539-542); Stat. 32 Hen. VIII, c. 1 (SR, III, 744-746).

not devise nor, in his good health, could he alienate to another without the consent of the lord. Thus, in his health, he could well devise, as he inferred. Then, he so argued that, if, of lands devisable by the custom, such a devise be good (as he said that it was), then this is not in any manner void by the Statute, because the Statute makes good and allows such estates devised as they could be devised by the custom, and it enacts that all other lands will be devised in the same manner. And he cited 11 Hen. VI, 14, 15.¹

His second reason was thus. Such an estate that a man of sane memory could [. . .] by an act executed in his lifetime by his counsel, he could do by a will, but such a conveyance he could make by an act executed in his lifetime, *ergo*. And he cited a case, 13 Eliz., rot. 300, where such a limitation is good.

[It was] objected that one fee cannot depend upon another.

But he answered this is not our question, but ours is of an executory devise. And he said that it has been held that such executory devises are good. And the point was never adjudged in terms, but have often times been moved and questioned, but always left at large.

And he said that such limitations and contingent remainders will be good in the case of a devise of a term. But it, granting a term, could not be entailed over etc. *Ideo* Hilary 20 Jac., in error in the King's Bench, Giles and Bealy; a devise of a term in tail, the remainder over was void, because the gift of it in such a manner in his lifetime was void at common law. But a devise of a term for life, the remainder for life was good. And he cited 14 Eliz., Dier 331,² where an executory devise was good. And he cited a case between Hammersmith and Frett; the case was thus. A devise to the elder son in fee upon condition to pay the daughters £100 by such a day etc. and, if he will not pay, that then the daughters will enter and have it, and it was adjudged a good devise. And, in this case, it was agreed that the devise to the heir in fee upon condition that he will pay by such a day £100 and, if he not pay, that then his executors will enter and sell the land, if the heir not pay, the executors could enter and sell the land. And he cited Easter 33 Eliz., rot. 423, Vauxe's Case.³

And, as to the objection which is that such devises tend in perpetuity, he answered that such possibilities that those in the remainder have could be released and extinguished by them in the remainder, as has been adjudged. Lampet's Case,⁴ as he said. Thus, he concluded that such an executory devise is good.

The second point of the case was thus. A husband and wife; of the gift of the ancestor of the husband with a remainder etc.; they have issue; the husband levies [a fine], and he dies. The heir levies a fine also etc. The wife enters, and suffers a recovery. Whether this recovery bars the remainder was the question. And he held not. And he said that, by the entry of the wife, the remainders are vested in them in the first remainders, because the wife is a tenant in tail and those in the remainder will take the benefit of the entry of the wife. And he cited Beaumont's Case, and a case 15 Jac., in the Common Bench, rot. 988.⁵ Also, the power of the

¹ YB Hil. 11 Hen. VI, f. 14, pl. 4 (1433).

² *Clache's Case* (1573), 3 Dyer 330, 73 E.R. 748, also 110 Selden Soc. 288, 136 Selden Soc. 22, 131, 145.

³ *Rex v. Vaux* (1591), 4 Coke Rep. 44, 76 E.R. 992 [this case does not seem to be on point].

⁴ *Lampet's Case* (1612), 10 Coke Rep. 46b, 77 E.R. 994, *sub nom.* *Lampit v. Starkey*, 2 Brownlow & Goldesborough 172, 123 E.R. 880.

⁵ *Beaumont's Case* (1612), 9 Coke Rep. 138, 77 E.R. 928; *Duncombe v. Wingfield* (1617), Hobart 254, 80 E.R. 400, 2 Rolle Rep. 447, 81 E.R. 908.

wife is tolled by the fine of the husband. And he said that she is outside of the Statute 4 Eliz., of fines levied by a tenant for life,¹ because she is a tenant in tail.

He agreed that she could make leases for three lives by the Statute 32 [Hen.]. And, also, she will be dispunished for waste. He cited a case Easter 21 Eliz., rot. 411. She [. . .] and will have all of the advantages of an estate tail, yet, as to this recovery, her power is taken away by the former fine of the husband. And, admitting that, in our case, the husband and wife have an equal power to alienate, yet the husband having first alienated it, prevented the wife. Also, he said that the words of the Statute are in the affirmative that amounts also to a negative as to the wife, because the Statute in this is introductory of a new law and not in affirmance of the ancient law. *Morgan and Stradling's Case*, Com.; and *Foster's Case*, 10 Rep.²

But YELVERTON, *quod fuit affirmatus* by the other justices, said to him that he [. . .] put several cases to prove the principal case that are [. . .] the principal case was.

103

Anonymous

(C.P. Pas. 2 Car. I, 1626)

Where a defendant admits an executorship in his pleading, he is estopped to argue that the plaintiff did not allege his own executorship in his initial pleading.

An executor brought an action of debt etc., and he omitted to show *litteras testamentarias*. The defendant pleaded to him, and they were at issue. And [it was] found for the plaintiff. And, after the verdict, it was moved in arrest of judgment that he did not show *litteras testamentarias hic in curia*. But, inasmuch as his plea was in affirmation of his executorship and he admitted him executor and confessed his title as executor, *ideo*, the exception was not allowed.

104

Lord Petre v. Anonymous

(C.P. Pas. 2 Car. I, 1626)

The question in this case was whether a person can be required to attend two leet courts.

The case between the Lord Peters and a college of Oxford [was thus]. The college had a leet [court] for the tenants of their manor by prescription for the time of which [memory does not run] etc. And the Lord Peters had also a leet court by prescription from the time of which [memory does not run] etc. And it appeared by his court rolls that he had at his leet amerced the tenants of the seignory [?] of the college, and divers other presentments and defaults were shown etc., which were presented at the leet of the Lord Peters.

And the justices agreed that there could well be two leets, of which one will be the superior and superintendent and the other inferior etc. And the defaults omitted in the inferior could be presented in the superior and the misdemeanors etc. of the lord of the inferior leet

¹ Stat. 4 Hen. VII, c. 24 (SR, II, 547-548).

² *Stradling v. Morgan* (1560), 1 Plowden 199, 75 E.R. 305; *Shoyle v. Foster* (1614), 11 Coke Rep. 56, 77 E.R. 1222, also 1 Rolle Rep. 88, 81 E.R. 349, 2 Bulstrode 324, 80 E.R. 1158.

will be presented and punished in the superior, because the lord of the leet cannot be presented and amerced in his own leet but in the tourn of the sheriff, as [in] 21 Edw. III,¹ it was adjudged.

Ideo, it was held that this superior and superintendent leet is in the nature of the tourn of the sheriff, and one of cause of the presentable things that are omitted in the inferior leet could as defaults be presented in the superior leet. And the case between the lord of Northumberland and the lord of Devonshire was remembered where the lord of Northumberland had one such superior and superintendent leet.

And the case was further that the Lord Peters had used to hold his leet upon Whitsun Monday and the college to hold their leet upon the Feast of the Commemoration of St. Peter, which was *circa* the last day of June, upon which the counsel of the Lord Peters inferred that, even though both leets are by prescription and, thus, time of which memory will not run, the leet of the Lord Peters seems to be prior in time upon computation of the [. . .] and in his court will be presented all things done between the Feast of the Commemoration of St. Peter and Whitsun Monday and the things that happen between Whitsun Monday and the Feast of St. Peter will be presented in the leet of the college.

And this opinion was urged the more strongly and held the more probable, because the leet of the Lord Peters was the superior and superintendent and *ideo* the more worthy and ancient.

Then, Serjeant *Richardson*, of counsel with the college, moved that a man cannot have but one residence and not two residences and *ideo* could not be attending and do service at both leets.

But *Henden* was of a contrary opinion. And he said that was not the case of the Lord of Northumberland, remembered above. And, also, he strongly insisted upon the book of 18 Hen. VI, that was agreeing.²

And [it was] held by justices CROKE and YELVERTON that a man well can be attendant at both leets and will do service at both courts being held at several days *praesertim* being that the leets are by custom.

But Justice HUTTON was of the contrary opinion to them. And he held that a man will not be attendant at two leets etc. But he said that, where there was a superior and inferior leet, there, the constable and four men of the inferior leet will come and be attendant at the superior leet for all, as it will be in the case of the tourn of the sheriff etc.

YELVERTON said that it is a matter of the ease and favor to the inferior leet that the constable and four men will come to make attendance at the superior leet for all.

Ideo, [there was] no conclusion etc.

[Related cases: *Eve v. Wright* (1627), *Hetley* 21, 124 E.R. 309, *Croke Car.* 75, 79 E.R. 667.]

¹ YB Mich. 21 Edw. III, ff. 32, 33, pl. 17 (1347).

² YB Trin. 18 Hen. VI, f. 11, pl. 1 (1440).

105

Anonymous

(C.P. Pas. 2 Car. I, 1626)

In this case, the obligee was not required to give a special notice of the accrual of the obligation in issue.

A. is bound to B., or assumed to B., to pay him £10 at the day that B. will come to York or within three days that next follow. In this case, A., the obligor, must take notice of the coming of B. to York. Thus, if the obligation was to pay to the obligee £10 at the day of the oblig[ation], the obligor must take notice of this day, because, thus to do, he has taken it upon himself. And [there is] no difference in this case between an obligation and an assumption as to the notice.

[This was held] by justices YELVERTON, HUTTON and CROKE.

And, as I [Ravenscroft] believe, in this case, etc., the money was demanded at the day of the marriage or after etc.

106

Benbow's Case

(C.P. Pas. 2 Car. I, 1626)

The Court of Common Pleas cannot stop the suffering of a common recovery.

Thomas Bembo being tenant in tail, the remainder in tail to John Bembo, Clerk of the Crown, Thomas Bembo granted and promised to John Bembo, for good considerations from himself moving to him, that he never would suffer a recovery or do another act to bar the [tenant] in tail; in respect of which, John Bembo purchased divers parcels of land adjacent to the lands entailed. And, afterwards, John Bembo died, having issue, a son, an infant. Thomas Bembo, being decrepit and *multum provenus* in estate, suffered a recovery.

And, now, to stay the finishing of the recovery, it was moved on the behalf of the infant that, in regard of the former grant and promise and other considerations and in respect of the decrepit age of the said Thomas Bembo, the infant being heir to him and heir to the tenant in the remainder, that the recovery will stay until the next term to see if a mediation could be made by friends *in pais*.

But, on the other side, it was moved that the Court of Common Bench was the principal fair and market of England for the bargaining and selling of land and, *ideo*, they should not prejudice their market. Also, it was the right and due of the tenant in tail to suffer a recovery at his pleasure and [. . .].

But the judges, though they do not intend to prejudice their court in tolling the right and power of the tenant in tail to suffer a recovery, yet, as to this special case, they gave way and [. . .] respite for the friends of the infant to mediate that Thomas Bembo will not suffer a recovery. And they remembered one such precedent in the Case of the Lord of Arundel.

107

Anonymous

(C.P. Pas. 2 Car. I, 1626)

The existence of a modus decimandi in lieu of tithes in kind can be proved by any evidence however slight.

[It was held] by Justice YELVERTON and the other justices some proof, though it be utterly small and slender proof, will serve to prove a *modus decimandi* upon the Statute of 2 Edw. VI.¹ The case was [that] one pleaded a *modus decimandi* and proved the *modus decimandi, scil.* 1s. for the land of which the tithe in question was demanded and also for other lands adjacent in discharge of all lands etc. And it was held good proof.

Thus [it was held] by Justice CROKE, where one pleads a *modus decimandi* for Blackacre and proves a *modus decimandi* for Blackacre and Whiteacre, this is good proof for a *modus decimandi* in Blackacre.

108

Anonymous

(C.P. Pas. 2 Car. I, 1626)

In this case, the plaintiff sued the defendant twice for two separate causes of action, and the second case was not barred by the verdict in the first.

An action upon the case upon trover and conversion [was brought]. And the case was thus. A. brought an action of trespass *quare cepit et abduxit centum oves et carrectum frumentam*, and the trespass was laid to be *primo Aprilis*, in which action, the plaintiff recovered 2d. damages etc. And, afterwards, he brought an action upon the case upon trover and conversion for selling his sheep and converting the money to the use of the defendant. And he laid it to be *ultimo Aprilis*.

Justice CROKE held that he could well have this latter action notwithstanding his recovery in the former action of trespass, because the actions are brought for two distinct things done at separate times, because the trespass was *primo Aprilis* and the trover and conversion *ultimo Aprilis*. Also the recovery in the former action will not bar him, because he had recovered only 2d. damages that could not be intended the value of the goods, *scil.* of the hundred sheep etc., but it only compensates for the trespass, *scil.* the taking and the fugation of them.

Justice YELVERTON to the *contra*: Upon *cepit et fugavit*, the jury cannot give damages for the value of the sheep unless it appears to them that the sheep are spoiled or dead, as the book of 11 Ric. II, Fitz., *Barr*, is.² And, if they otherwise give damages to the entire value, [an action of] attain lies against them. But, for *cepit et abduxit*, the jury can give damages of the entire value, and, thus, they have given damages; the presumption will stand *prima facie* that they are damages for the entire value. And, thus, he had full satisfaction; thus, satisfaction

¹ Stat. 2 & 3 Edw. VI, c. 13 (SR, IV, 55-58).

² *Mason v. Kerver* (1387), YB Trin. 11 Ric. II, Ames Found., vol. 5, p. 36, pl. 11, 1 Fitzherbert, Abr., *Barre*, pl. 242.

being once made, as we must intend, it appears fully to us that this recovery in the personal action will bar him in another personal action. *Ideo*, this action upon the case upon trover does not lie.

Justice HUTTON, to the *contra*: And he agreed in opinion with CROKE. And he said that abduction is more than fugation, because fugation is included in abduction. And we cannot intend that 2d. damages could be given for the entire value and in satisfaction of the hundred sheep. And he put the case that, if I bring [an action of] trespass (as I can where the sheep are come back to my hands) and I recover 2d. damages for the caption and abduction of my sheep, could the defendant retake my sheep again intending that I have recovered damages to the value and in satisfaction of my sheep and thus the sheep belong to him? I say not.

(And so Justice CROKE agreed.)

109

Compton v. Wray
(Part 2)

(C.P. Pas. 2 Car. I, 1626)

Serjeant *Crewe* argued¹ that this indenture to make a partition was an assurance or conveyance, and not a partition, because the indenture or covenant is to make a partition *in futuro* and not *in praesenti*. Second, the land is to be set out and to be allotted, and it is not well set out and allotted. Third, the partition that is there pretended to be made is to one and her husband and to the heirs of the wife and to the other and her husband and the heirs of the husband. Thus, it is a conveyance to the [heir] and husband and not a partition. Thus, the estate is limited to a stranger and not parted between the coparceners, as it must be by the rules of the law. And he cited the book of 45 Edw. III, Fitz., title *Eschange*, 1; and 4 & 5 Mary, Di., fol. 162; and Brooke's Cases, *temp.* Hen. VIII, title *Frankmarriage*; and 8 Eliz., Di. 251; and 45 Edw. III, 19.²

110

Anonymous

(C.P. Pas. 2 Car. I, 1626)

Where a second writ of elegit is taken out, the judgment creditor will have the entirety of the judgment debtor's land.

The moiety of the lands of A. are taken in execution by [a writ of] *elegit*. And, afterwards, another *elegit* is taken out. Now, in this case, he will have the entire residue of the land, *scil.* the entire moiety that remained and not the moiety of this moiety, because the relation will be according as his lands were at the time of the conusance of the statute etc.

¹ For other proceedings in this case, see, Case Nos. 91, 114.

² YB Trin. 45 Edw. III, f. 20, pl. 23, 1 Fitzherbert, Abr., *Exchaunge*, pl. 1 (1371); *Wingfield v. Littleton* (1558), 2 Dyer 162, 73 E.R. 352; *Anonymous*, Brook's New Cases 104, 73 E.R. 892; *Anonymous* (1566), 2 Dyer 251, 73 E.R. 554; YB Trin. 45 Edw. III, f. 19, pl. 16 (1371).

111

Anonymous

(C.P. Pas. 2 Car. I, 1626)

The two-witness rule in the civilian courts can be satisfied by one direct witness and some other indirect evidence.

[It was] moved by Serjeant *Crewe*. The surmise to have a [writ of] prohibition to the spiritual court was because it was there libeled to have the tithes of colts that were bred for the improvement of husbandry where it was never used between us to pay any tithes for these colts etc. And the prohibition was granted.

Another surmise was that the libel was in the spiritual court for tithes apples and we never denied to pay our tithes of them, but we proved by a witness in the spiritual court that we have paid our tithes for them, and they of the spiritual court would not allow our proof, because they say that one witness is no proof in their law, and such proof is allowed in our law. *Ideo*, we pray a prohibition.

HUTTON and HARVEY, the senior judges: Those of the spiritual [court] say to us that they will allow proof by one witness be it helped with some circumstance, as where another will depose that the evidence of this sole witness is true as he believes.

112

Anonymous

(C.P. Pas. 2 Car. I, 1626)

An action does not lie at common law for the non-payment of small tithes.

A man cannot sue at common law upon the Statute of Edw. VI *pro minutis decimis*, as chickens, eggs, butter, cheese, etc.¹

113

Anonymous

(C.P. Pas. 2 Car. I, 1626)

In an action for land, the plaintiff must plead with certainty what specific land is in dispute.

It was moved by Serjeant *Athow* in arrest of judgment, because the declaration is '*de una parcella terrae continentae in longitudine decem pedes et in latitudine 12 pedes sive plus sive minus*' so that all is uncertain.

And the exception was allowed by the justices.

¹ Stat. 2 & 3 Edw. VI, c. 13 (SR, IV, 55-58).

Compton v. Wray
(Part 3)

(C.P. Trin. 2 Car. I, 1626)

Serjeant *Henden* argued¹ that they were not tenants in common but that a good partition was operated by the indenture, because the indenture did not operate as a declaration of the uses but to make a partition. First, their intent was to have a partition and not a declaration of the uses, second, it was agreed among them that it will remain and will separate and continue a portion. *Ergo*, [it is] no declaration of the use. Third, it was agreed to have a partition between them of all lands and tenements descended to them as sisters and heirs to their ancestor. Fourth, there was a special purview and provision for equality and equal value of their parts.

But it has been objected one part is to the husband and wife and the heirs of the wife [and] the other part is to the husband and wife and the heirs of the husband, which shows it to be a limitation and declaration of the uses and no partition.

Response: The intent and the subsequent act shows that it was not a limitation of uses. Second, this limitation of the estate to the husband and his heirs was a misprision of the clerk, as it will be understood, and it was against the intent of the wife and *ideo* void and revokable by the wife. And he cited a case, Di. 307. Third, there are not any words in the whole indenture of uses or intent or purpose to limit uses. And he cited to this intent Dier 190 and a case that was between Buckler and Simons, in the Common Bench, 18 Jac., rot. 2120.²

He said that it is apparent that it is an indenture of partition as to one part, *ergo*, the same indenture cannot enure to give a limitation of uses as to the other part because an indenture cannot enure to two intents. And he cited 23 Eliz., Dy. 374, and 20 Eliz., Dy. 362, and a case that was in the Common Bench, 14 Eliz. or Jac., rot. 37, it was Brasbridge's Case.³

Objection: It is a void limitation to the husband and his heirs, *ergo*, no partition as to this part, but void. And, if for part, for all.

Response: No degree⁴ is made by the limitation of the estates between coparceners, but they are in of the estate of their ancestor. And such a limitation of the estate between coparceners is not requisite, but it is surplusage and the estates limited upon the partition is not material but only a division of the lands, because the law will put them in their estates.

And he said that equality of estates is not material, but the partition is to stand good until it be defeated. And he cited Fitzherbert, *Natura Brevium*, 62, and *tempore* Edw. I, title *Partition*, 21, and [. . .] Fitzherbert, *Natura Brevium*, 62. And he cited 20 Hen. VI, 14.⁵

¹ For other proceedings in this case, see above, Case Nos. 91, 109.

² *Vavisor's Case* (1572), 3 Dyer 307, 73 E.R. 694; *Butler v. Lady Bray* (1560), 2 Dyer 189, 190, 73 E.R. 418, 419, also 1 Anderson 5, 123 E.R. 323, Benloe 82, 123 E.R. 63; *Buckley v. Simonds* (1622), Winch 35, 59, 124 E.R. 30, 50.

³ Perhaps *Gerrarde v. Worseley* (1580), 3 Dyer 374, 73 E.R. 839, also 1 Anderson 75, 123 E.R. 361; *Anonymous* (1578), 3 Dyer 362, 73 E.R. 812.

⁴ Sic in MS.

⁵ A. Fitzherbert, *Natura Brevium*; 2 Fitzherbert, Abr., *Particion*, pl. 21; YB Mich. 20 Hen. VI, ff. 13, 14, pl. 26 (1441).

Lastly, he urged that the exposition of the indenture to make the indenture a partition for one part and a declaration of the use for the other part is a bad exposition that *corrumpit textum* because the deed is overthrown and destroyed by such an exposition. And he cited Baldwin's Case, 2 rep.¹

115

Gaylor v. Hale

(C.P. Trin. 2 Car. I, 1626)

The plea of not guilty is a good plea to any action sounding in tort.

[An action of] debt upon an escape was brought by Gaylour against Hale, the sheriff, who pleaded not guilty. And it was moved that this was not a good issue.

But YELVERTON answered and the other justices agreed that, in any case, where the action supposes a tort, not guilty is a good issue. *Ideo*, in this case, the issue is good.

116

Raymond v. Ockham Hundred

(C.P. Trin. 2 Car. I, 1626)

In the case of a robbery of the goods of a person that were in the possession of his agent, the process required by the Statute of Hue and Cry can be done by either the principal or the agent.

Raymonde against the hundred of Ockem in Surrey upon the Statute of Hue and Cry.²

The case began 1 *Caroli* or 22 *Jacobi*. And now this term [Trinity 2 Car. I], they were at issue, and, this term, it was tried at the bar, and the hundred was found guilty. And all that which was lost by the robbery was given in damages and costs at 12d.

[In] an action upon the Statute of 27 Eliz., cap. 13, of hue and cry,³ by Raymonde against the hundred of Ockem in Surrey, it was moved that the action was not maintainable, because the Statute is that, before the action can be, the party must be sworn and make his oath etc. before a justice of the peace etc. But Raymonde, who now brings the action, never had been sworn etc. before any justice of the peace nor was he robbed, but his servant was robbed and made the oath. Thus, the servant must have brought the action and not Raymond.

But the justices held that the master well could bring the action and the robbery was of the money of the master and the servant should take the oath and not the master, and this oath will avail the master, because the Statute was made for the good of the public. And, *ideo*, it will be construed more favorably for the subject. Also, the servant or the master could well bring the action. And divers precedents of the usage [were] brought. And it will be much mischievous and prejudicial to the master if he could not bring the action, because the servant

¹ *Baldwin v. Morton* (1589), 2 Coke Rep. 18, 76 E.R. 430, also 1 Anderson 223, 123 E.R. 442, 139 Selden Soc. 909.

² Stat. 13 Edw. I (Winchester), c. 2 (SR, I, 96).

³ Stat. 27 Eliz. I, c. 13 (SR, IV, 720-722).

could release the action or go out of the realm and, so, the master would be barred of his remedy.

Also, they held that, if the servant be robbed of the money of the master and he made his oath before a justice etc. and then died within the year, the master will well bring the action within the year and the oath of the servant will avail him.

Also, it was moved that the town where notice was given of the robbery was not the closest town to the place where the robbery was committed and, also, the notice was not given within the hundred, but in another hundred.

But it was held by the justices that it was good notwithstanding this, because the robbers were out of the hundred where the robbery was committed and, well pursuing the robbers, they went into another hundred and, in their pursuit, gave notice at the nearest thoroughfare town to which they came, because they must pursue the robbers as much as they can and thus to give notice at the nearest town that they came to, because it will be [. . .] to return after their pursuit and remain [?] at the place where the robbery was made or the nearest place to it and to give [. . .] notice. And though this town where the notice was given was five miles from the place where the robbery was made, yet it was the nearest through town to which they came in pursuing the robbers, and though there be divers scattered and dispersed houses and small hamlets or villages more near to the place where the robbery was done, yet this town was the most notorious town that was the more near to the place where the robbery was done.

And the justices said that a juror should not take conusance of a thing of his own knowledge¹ to inform his companions, but, if he had conusance of something material, he should give evidence of it upon his oath to inform his companions publicly and before the justices.

And, afterwards, it was moved in arrest of judgment that the words of the Statute mean that whoever is robbed etc., before that he will have an action against the hundred must be sworn, but the master, not being sworn, will not have an action, but this express allowance² by the justices of the oath of the servant suffices and that the master has an action upon this oath. A precedent was cited in the *New Book of Entries* of Coke.

117

Bishop of Chichester v. Freeman
(Part 2)

(C.P. Trin. 2 Car. I, 1626)

More of the case of the grant of a parkership with the ancient fee and the addition of a new fee etc. between the bishop of Chichester and Freeman, before.

Serjeant *Lloyd* argued that the grant was good for the ancient fee and void for the addition. And he held that, at common law before the Statute,³ such a grant by a bishop and confirmation by the dean and chapter was good against the successor without any doubt. And, if the bishop had made an addition of a new fee with a clause that it will be only for the life of the bishop, it is not doubted but that the grant was good and the addition will not bind the successors, because it ends with the death of the bishop, *eadem ratio* where the addition ceases and ends by act of law.

¹ *teste* MS.

² disallowance MS.

³ Stat. 1 Jac. I, c. 3 (*SR*, IV, 1019-1020).

And, where it is objected that it is all one grant and all is contained in one same deed and *ergo*, if void for part, void for all, he answered that there are separate, distinct clauses and of separate natures, *ergo*, it could be void for part and good for the residue. And he cited for this purpose 30 or 13 Edw. III, *Itinera North.*, Fitz., *Title*, 175; 22 Hen. VI, 10; 3 Edw. III, *Title*, pl. 22; Coke 8 rep. 50.¹ And he put the case that an infant and a man of full age entered into a warranty, the warranty, in this case, is void for the infant and good to bind the person who is of full age, because *utile per inutile non vitiatur*. *Ergo*, the addition being of a thing of another nature and distinct from the ancient fee and contained in a separate clause by itself and thus as a separate grant, it could well be void and the residue of the grant good.²

118

Anonymous

(C.P. Trin. 2 Car. I, 1626)

It is no act of trespass to enter into the land of another person to apprehend one who shoots a gun in violation of the Statute 33 Hen. VIII, c. 6.

If a man sees another shooting in a warren contrary to the Statute³ etc. and he goes into the land of a stranger to apprehend him and carries him before a justice of the peace, as the Statute of 33 Hen. VIII, cap. 6, allows and the stranger brings [an action of] trespass *pedibus ambulando et conculcando* his grass etc., he can well justify his entry into the land by force of the Statute to apprehend etc., and he will be by this excused for the trespass, because he entered to execute a statute and for the public good; *ergo*, it will be surmised harmless by it, *et ideo* no trespass to enter into the land of any man to apprehend one who shoots a gun *contra* to the Statute.

119

Anonymous

(C.P. Trin. 2 Car. I, 1626)

A sheriff can be liable to a judgment creditor for a false return of a writ of execution.

If a sheriff return *nulla bona testatoris etc.* when there be goods, the party will have an action upon the case against the sheriff and will recover all in damages.

*Post 58.*⁴

¹ YB 13 Edw. III, Lib. Ass., f. 38, pl. 1, YB Pas. 13 Edw. III, Rolls Ser. 31b, vol. 2, p. 186, pl. 12, 2 Fitzherbert, Abr., *Title*, pl. 6 (1339); *Norris v. Connesbrook* (1443), YB Mich. 22 Hen. VI, f. 9, pl. 13; *Webb v. Knyvet* (1608), 8 Coke Rep. 45, 50, 77 E.R. 541, 547.

² For other proceedings, see, Case Nos. 86, 125.

³ Stat. 33 Hen. VIII, c. 6, s. 13 (SR, III, 834).

⁴ See *Anonymous* (C.P. 1626), below, Case No. 131.

Fawkner v. Bellingham
(Part 1)

(C.P. Trin. 2 Car. I, 1626)

The question in this case was whether the rent in issue was a rent seck or a rent service.

A chantry priest was seised of land in fee held by a rent service and other services. Afterwards, all of the lands of the chantries were given to King Edward VI by an act of Parliament, 1 Edw. VI, cap. 14, 'saving to all strangers their rights, title, claim, possession, interest, rents, annuities, etc. in such like manner, form, and condition to all intents, respites,' etc. Fawkner who derived his title etc. had a rent nor alleged seisin of it within forty years according to the Statute of Limitations, 32 Hen. VIII, 2, but avowed in distress for the rent without alleging any seisin of it within forty years.¹ And, upon this, it was demurred. And the sole question was if the avowry be good in this case without alleging seisin of the rent within the time of the limitation.

And it was argued by Serjeant *Henden* that the avowry was good without alleging seisin etc. And he held that this rent is a rent seck distrainable of common right, because it could not be a rent service because the king could not hold of anyone. Also, by the saving of the Statute of 1 Edw. VI, cap. 14, the rent is saved etc., but it could not be saved for being as a rent service, but this saving is as a grant of the rent arrear to the party who had title etc. And this grant will be in as beneficial a manner as was before the dissolution and suppression etc. that it will be a rent seck distrainable of common right, and, thus, in avowry for such rent, it is not necessary to allege seisin of it within the time of limitation. And he cited for his purpose 14 Eliz., Dy. 313; C. 8 Rep. 118; Coke 1 Rep. 47; Coke 8 rep. 64; and a case that was 20 Jac., between Randall and Stevens.²

Serjeant *Henden* argued to the *contra*, and he said that the Statute of 1 Edw. VI did not give the rent, but saved it only. And the rent that is saved by the Statute is saved to be a rent in such manner as was before, because the words are 'saving etc. in such like manner etc.' *Ergo*, it must be saved as a rent service and, in another manner, it cannot be saved and, of a rent service etc., seisin must be alleged within the time of limitation. *Ergo*, not having alleged seisin etc., the avowry is not good. And he held that the rent is a rent in the nature of a rent service though there will be no service by which the land is held.³

¹ Stat. 1 Edw. VI, c. 14, s. 17 (SR, IV, 29); Stat. 32 Hen. VIII, c. 2 (SR, III, 747-748).

² *Stroud's Case* (1572), 3 Dyer 313, 73 E.R. 709; *Attorney General v. Bushopp* (1600), 1 Coke Rep. 26, 76 E.R. 64, also 140 Selden Soc. 1061, Jenkins 251, 145 E.R. 178, 2 Anderson 154, 123 E.R. 596, *sub nom. Welshe's Case*, Moore K.B. 413, 72 E.R. 664; *Cowper v. Foster* (1608), 8 Coke Rep. 64, 77 E.R. 571, also 1 Brownlow & Goldesborough 169, 123 E.R. 734.

³ For later proceedings in this case, see below, Case No. 154.

121

Anonymous

(C.P. Trin. 2 Car. I, 1626)

In this case, the offensive words spoken were not slanderous, but they were only spoken in anger.

[There was] a libel in the spiritual court for defamatory words that the defendant said, *scil.* that the plaintiff in the spiritual court was a whore and a witch. And now, in this court, [a writ of] prohibition was prayed. And [it was] granted, because the words are only words of heat and anger which women often use in scolding and they are not here scandalous though they are malicious.

And Justice HUTTON put the case, it was Baxter's Case, as he remembered, where a woman sued for the speaking of these words 'she is a piperly whore and went about the country with a piper.' And a [writ of] prohibition was granted in this case. And the words were held only troubling and chiding speeches of women and not slanderous.

122

Anonymous

(C.P. Trin. 2 Car. I, 1626)

An ecclesiastical court does not have the jurisdiction to adjudge whether a confessed judgment be fraudulent or not.

If an executor confesses or acknowledges a judgment and gives it in his account to the ordinary in the spiritual court, in this case, the spiritual court cannot try or examine whether the judgment was covinous and fraudulent, but, if they proceed to examine it, if it be covinous and fraudulent, [a writ of] prohibition will be granted to it.

Also, Justice YELVERTON said that the spiritual law is such that, if an executor puts in his account in the spiritual court, he could of his will add to it what he pleases and it will be good to excuse himself etc. of a false account. But, if a creditor sue him there, in this case, he cannot add to it or put in other of the goods etc.

123

Banister's Case

(C.P. Trin. 2 Car. I, 1626)

The confirmation of a parson's lease made by a patron and bishop is binding on the patron's and bishop's successors in office.

If a parson make a lease etc. and, afterwards, it is confirmed by the patron and the ordinary, it is not material whether it be the same patron and ordinary who were at the time of the grant or making of the lease, but another man etc. be the patron or another ordinary who

was not at the time of the grant or making of the lease by the parson; the confirmation of them is good, as all the justices held and agreed. And he cited for this Newcomen's Case, Rep.¹

[Other reports of this case: Croke Car. 38, 79 E.R. 637.]

124

Denton v. Dean

(C.P. Trin. 2 Car. I, 1626)

Where a writ of process is delivered after the return date, it is a void writ, and no return should be made by the sheriff.

A defendant can voluntarily waive service of process.

Sir Thomas Denton v. Den.

A writ is purchased. And the contagious sickness of the plague was so outrageous that carriers nor other men did not travel from London to the country, so that they could not send the writ to the sheriff before the day of the return of it, but, after the day of the return, they delivered it to the sheriff, who did not make any return of this writ.

The court was moved that the sheriff shall return it late.

And Justice YELVERTON thought that he should return [it], because the delay came by an act of God, that they could not deliver the writ to the sheriff before the day of the return. And he cited a case in 9 Edw. III, title *Barr*, where the plague was a dispensation for the tenants, that they will not be impeached in [. . .] by their lords. And, also, he said that, after that the return of the writ was thus past, the defendant having notice that the plaintiff had a writ against him, he said that he would appear by such a one, his attorney, and, upon this promise, it seemed to him that the defendant will be compelled by the court to appear.

And the justices said that, if this promise could be proved, they will compel the defendant to appear. But that the sheriff will be compelled to return a *tarde* [*venit*] where etc., they are in a contrary opinion. And they said, *scil.* HARVEY and CROKE, that, if a writ be delivered to the sheriff after the day of the return of it, it is a void writ, and a *tarde* will not be returned. But, where the writ is delivered to the sheriff before the day of the return of it and, then, if it be delivered so late and so near to the day of the return that he had not enough² space to execute it, he will return a *tarde, quod non fuit contradictus*.

And [it was held] by CROKE, if the writ be delivered to the sheriff the day of the return of it, the sheriff will not return *tarde* or another return of it, because it is delivered to him too late and it is like a void writ.

125

Bishop of Chichester v. Freeman
(Part 3)

(C.P. Trin. 2 Car. I, 1626)

¹ *Hodges v. Newcomen* (Ex. 1588), 5 Coke Rep. 15, 77 E.R. 71, 137 Selden Soc. 392.

² *mesne* MS.

Serjeant *Davenport* argued that the grant is void *in toto*.¹ And he said that, if a bishop makes an office *de novo* with a reasonable fee, yet, even though it be an office of utility and benefit to the bishop, yet, if it not be an office of necessity, the grant of such an office is void to charge the successor. And, though it be an office of necessity, yet the fee must be reasonable or otherwise the grant of the office is void. And, where it has been urged that there are separate clauses etc., I say that the grant is such, *scil.* of the office of the parkership with the fee of five marks and a robe or livery or 13s. 4d. for it *necnon cum pastura pro duobus equis* so that there is the grant of a robe etc. in another clause than the grant of the pasture is contained and thus it was several grants.

Also, he averred that the office was an ancient office etc. and the fee of five marks was an ancient fee etc. But he did not aver that the livery was an ancient fee etc.

And to this, also, that it was said that the grant was of several things etc., he granted and admitted that an assize could be brought for the one, but he said that, in respect of the fee, they are all one thing, because they all are one fee.

And he cited the books of 30 Ass., pl. 4; 32 Hen. VI, 11; Coke, 8 rep. 49, Webb's Case; and the book of 8 Edw. IV, 22, where the recovery of the office was the recovery of the fee.

Also, [it was said] by him, if a bishop makes a lease etc. and he reserves 20s. to him[self] for his life and, after his decease, £20 to his successor and £20 was the ancient fee, it is a void grant by the Statute,² because such is prejudicial to hospitality for the time of the life of the bishop and the act was made for the remedy of hospitality etc.

And as to the construction that they will be made of this grant, that the grant will be good against the grantor but not against his successor and that [it is a] good grant for part and void for the other part, he said that the law does not allow such fractions and parcellings of times and things. And, also, such a construction is contrary to their intent, because the intent of the grant was that it will be a good grant in the present and future time also; thus, to make a construction by such fractions that it will be a good grant in the time of one and not of the other or for one part and not for another part, this is contrary to their intent and purpose.

And, for another reason, the grant is void, because the grant is that he will distrain for his fee in all the lands and tenements of the bishop and not only in the park of which the office is; thus, the grant in this point is unreasonable, because reason is that, for one part and particular office, that in no manner concerns all the bishopric, but a particular part of it, a fee will be granted to charge all the lands of the bishop. And he put the case that, [if] a bishop granted the office of surveyorship of a manor, it is not reasonable that he will grant that, for the fee of it, distress will be in all the manors of the bishop. And, by all his argument, he frequently cited the Bishop of Sarum's Case, 10 rep. 60.³

¹ For earlier proceedings in this case, see above, Case Nos. 86, 117.

² Stat. 1 Jac. I, c. 3 (SR, IV, 1019-1020).

³ *Stanton v. Green* (1613), 10 Coke Rep. 58, 77 E.R. 1013.

126

Royston v. Maulster

(C.P. Trin. 2 Car. I, 1626)

The question in this case was whether one can create an entail in copyhold land without a custom of the manor that allows it.

[There was a] surrender of copyhold land to the use of one in tail, the remainder over etc. The point of the case was whether the lands or copyholds could be surrendered to the use of one in tail etc. without there being such a custom in the manor that they could so surrender.

And Serjeant *Athow* held and argued that the Statute of Westminster II, *de Donis Conditionalibus*, does not extend to copyhold lands so that, if there not be such a custom in the manor for making such surrenders etc., the surrender to the use of one in tail with the remainder over is void. And he said that the attainder for treason etc. does not extend to copyhold lands and, also upon a statute merchant, statute staple, or *elegit*, copyhold land will not be extended. And a wife will not have dower nor a husband will not be a tenant by the curtesy of copyhold lands unless that it be by the special custom of the manor. And he cited Heydon's Case, 4 rep., fol. 8, where, *per totam curiam*, the Statute *de Donis Conditionalibus* extends not to copyhold lands.¹ And, because the common practice and experience is that copyhold lands are not within the Statute *de Donis Conditionalibus*, he, thus, concluded briefly.

Serjeant *Hitcham*, to the *contra*: And he argued and held that copyhold lands are within the Statute *de Donis Conditionalibus* and that there could be an estate tail of copyhold land by custom and by statute. And he argued that it is not denied but that there could be an estate tail of copyhold land and all experience shows it. But they said that it is not by the Statute, but by the custom of the manor. But this cannot be, because there were not estates tail before the Statute of Westminster II, *de Donis Conditionalibus*, which Statute created the estates tail, which were not before. Now, the time of the beginning of the estate tail being known and within the time of memory, though any such custom could be laid, because of customs the beginning need not be known but must be of a time of which memory does not run, *ergo*, the beginning of the estate tail being within the time of memory, no custom can be alleged for it. And he cited the book of 34 Hen. VI, 36, that no prescription could be etc. within the time of memory. And he cited 8 Eliz. 247; Coke, 5 rep. 82.²

Also, he argued that the Statute *de Donis Conditionalibus* extends to copyholds, because the Statute extends to uses, which are not any estate in the land. Also, the Statute of Merchants, 4 Hen. VII, extends to copyholds, and so the Statute of Limitations and the Statute of

¹ Stat. 13 Edw. I (Westminster II), c. 1 (SR, I, 71-72); *Attorney General v. Heydon* (Ex. 1578), 3 Coke Rep. 7, 76 E.R. 637, also Moore K.B. 128, 72 E.R. 485, 137 Selden Soc. 253, E. Coke, *A Booke of Entries* (1614), 'Information', pl. 10, f. 372.

² *Prior of Tikeford v. Prior of Caldwell* (1456), YB Pas. 34 Hen. VI, f. 36, pl. 7; *Marshall v. Wilkinson* (1566), 2 Dyer 247, 73 E.R. 546; *Snelling v. Norton* (1595), 5 Coke Rep. 82, 77 E.R. 179, also Noy 53, 74 E.R. 1021, Croke Eliz. 409, 78 E.R. 652, 139 Selden Soc. 824.

Fraudulent Conveyances, 27 Eliz., extends to copyholds. And by Hayden's Case, Coke, 4 rep., 9a, the Statute of Gloucester, which gives receipt, extends to copyholds.¹

Et dies datus ulterius.

127

Anonymous

(C.P. Trin. 2 Car. I, 1626)

In an action against an administrator of a decedent's estate, if the defendant alleges that there was a will, the defendant must also deny that the decedent died intestate.

A. brought an action as administrator of B. against C., who pleaded in bar that B. made a testament and appointed by it one D. executor of this testament, which testament, D. proved and [had] administration of the goods etc. But he did not traverse *absque hoc quod* B. died intestate.

And [it was held] by justices CROKE and YELVERTON (only being there [in court]) he must traverse the [allegation of] dying intestate etc. Thus is the book of 9 Hen. VI.²

128

Anonymous

(C.P. Trin. 2 Car. I, 1626)

Where the husband of an executrix wastes the goods of the decedent's estate, both the husband and the wife are liable for the waste.

A woman executrix, took a husband; the husband wasted the goods; this is a waste of the wife also, and both are liable to [an action of] *devastavit*.

129

Anonymous

(C.P. Trin. 2 Car. I, 1626)

It is not actionable to call a person a common drunkard.

An action upon the case [was brought] for these words, 'you are a common drunkard.' And the words are not actionable, notwithstanding that the Statute is [. . .] for drunkards.³

¹ Stat. 13 Edw. I (Westminster II), c. 1 (SR, I, 71-72); Stat. 11 Edw. I (SR, I, 53-54); Stat. 21 Jac. I, c. 16 (SR, IV, 1222-1223); Stat. 27 Eliz. I, c. 4 (SR, IV, 709-711); *Attorney General v. Heydon* (Ex. 1578), *ut supra*; Stat. 6 Edw. I (Gloucester), c. 11 (SR, I, 49).

² YB Pas. 9 Hen. VI, f. 7, pl. 17 (1431).

³ Stat. 4 Jac. I, c. 5 (SR, IV, 1142-1143); Stat. 21 Jac. I, c. 7 (SR, IV, 1216-1217).

Brown v. Taylor

(C.P. Trin. 2 Car. I, 1626)

Where a person makes a will reserving a power to appoint trusts, the disposition is a devise and not an inter vivos transfer.

In ejectione firmæ.

A man, seised of land held *in capite*, made a feoffment of it to the use of such a person and for such estates as he will appoint or declare by his last will. And, afterwards, by his will, he devised this land to another in fee. The question was whether he has now disposed of this land according to his power reserved to him by this feoffment so that it will not be taken as by devise, but as by conveyance, *scil.* by the declaration of the uses, and thus it is good for all the land or it will be taken as by devise inasmuch as he has devised it generally without any reference or relation to the feoffment. And he has power to devise it and dispose it as owner of the land, and, thus, it will be good only for two parts.

And notwithstanding the resolution of this point in Sir Edward Cleere's Case, Coke, 6, 17-18,¹ that it will be as a declaration of the uses and a disposition of it according to the power reserved upon the feoffment and not by devise, yet it was adjudged by justices HUTTON, HARVEY, and YELVERTON (Justice CROKE being in doubt) that the land passes as by devise and not as a disposition of it according to the power reserved upon the testament. *Et justiciarii dixerunt quod fuerunt semper in dubitationem super illud casum.*

And, in their private opinions, they were always against the resolution of it in Sir Edward Cleere's Case.

Serjeant *Davenport* said that, when a man makes such a feoffment of land to the use of such persons and for such estates as he will limit by his will, before the declaration of his will, he is seised of a qualified fee and, if he take a wife after such feoffment etc. and, by his will, declare the uses to another and die, in this case, the wife will have dower.

And [it was said] by him, if a man make a feoffment in fee to the use of such persons as he will appoint by his last will and, by his will, he devise a rent, he could not by his power reserved upon the testament devise a rent, because he had a power to dispose of the land and declare estates [. . .], but not charge it with a rent. But, as owner of the land, he could devise a rent by a will.

And this was not denied, but granted and agreed by justices HUTTON and YELVERTON.

¹ *Parker v. Clere* (1599), 6 Coke Rep. 17, 77 E.R. 279, also Moore K.B. 476, 567, 72 E.R. 706, 763, Croke Eliz. 877, 78 E.R. 1102, Croke Jac. 31, 79 E.R. 24, 140 Selden Soc. 1015.

131

Anonymous

(C.P. Trin. 2 Car. I, 1626)

A sheriff can be liable to a judgment creditor for a false return of a writ of execution.

If the sheriff return *nulla bona etc.* where there are goods, the party will have an action upon the case against him etc. *Ante* 54.¹

132

Bayntun v. Partridge

(Star Cham. Mich. 2 Car. I, 1626)

A copyholder owes fealty and respect to his landlord.

In the case of one Sir Edward Baynton,² it was said by COVENTRY, Keeper of the Great Seal, etc. the case was thus. Partridge, the father, copyholder of Sir Edward Baynton, had a common in a waste ground of Baynton and, in the same common, Baynton had a warren of conies by a charter of King Edward II etc. Baynton gave a license to Partridge, the father, to take conies in the warren for his house. Partridge, the son of the said Partridge, the father, with a crossbow bent etc. was in the common etc. Baynton, with his two servants, seeing him, commanded one of his servants to take the crossbow, which thus he did. The son showed this to his father, after Baynton and his servants were gone. The father with his son were [. . .] and [. . .] the time when Baynton and his servants came back this way, and, they coming, the father, with his hat in his hand, prayed Baynton to have the crossbow back. And, upon this, when the servant who had the crossbow came riding by him, he put his hands upon the crossbow and, in striving for it, he threw the servant from his horse. And the son aiding his father, Baynton aided his servant, and he and the other servant beat the father, who had a paddlestaff in his hand and he [. . .] it, the son took it and with it pushed at Baynton [. . .] The wife of Partridge, the father, seeing all this in his house, came and would have struck Baynton and said that, if she had his [. . .], she would stab him with it. And, upon this, Baynton commanded his servant to push her off, who with his hunting [. . .] beat the wife, and Baynton called her a whore, upon which she said to Baynton 'you are a rogue, a base knight, a corrupt justice of the peace that for a basket of chickens will do anything.' And Partridge, the father, said to Baynton 'I am as good a man as you, and my wife as good a woman as your wife and she is honester than some of the Baynton's wives have been.' Now, it is to be known that Baynton then was a justice of the peace and a deputy lieutenant of the shire.

And the lords in the Star Chamber, upon this riot and affront in [. . .]ing Baynton and misusing of him by Partridge, who was his copyholder, who owed fealty and respect to him

¹ See *Anonymous* (C.P. 1626), above, Case No. 119.

² A. Thrush and J. P. Ferris, *History of Parliament: the House of Commons 1604-1629* (2010), 'Bayntun, Sir Edward (1593-1657)', vol. 3, pp. 163-166; A. Wall, 'Baynton Family', *Oxford Dictionary of National Biography*, vol. 4, pp. 483-484.

etc., sentenced the father to a £100 and the wife to a £100 and the son to £50 and that the wife and the father will submit and will beg his forgiveness in their parochial church and at the Quarter Sessions etc.

And some of the lords would have given to Baynton £100 damages for these outrageous words. But COVENTRY, Keeper etc., said that, for the words, Baynton had his remedy at common law. And, if the Court of Star Chamber will punish such words, they will be infinitely pestered with such cases [. . .] the courts of the common law complain of the abundant and ever frequent bringing of actions upon the case for such words. And, on account of this, the Star Chamber, being as high a court, will not meddle with words that tend to the defamation of particular persons. But he said that defamatory words spoken of a prelate or a peer of the realm that are *scandalum magnatum* and is punishable by the statutes of the realm¹ the Court of Star Chamber will take it. Also, scandalous and abusive words spoken to a judge or of him or to a justice of the peace that concerns the execution of his office and touches his doing of justice will be also punished there. But, in the case in question, the words were words of anger and mixed with riot and he aggravated it, and he was thus punished in it.

133

Franklin v. Bradell

(C.P. Mich. 2 Car. I, 1626)

An act already done for the benefit of a promisor is a good consideration for a subsequent promise to pay for it.

An action upon the case was brought upon an *assumpsit*, because the defendant promised and assumed to the plaintiff that, in regard that the plaintiff was his maidservant and had done good service to him and to his wife, who was dead at the time of the promise, he, in consideration of this, promised and assumed to give her 20 marks at her marriage etc.

Athow moved in arrest of judgment that the assumption is in consideration of service performed and past before the assumption so that, it being past and performed before the promise, it is no good consideration, as in the common case of 13 Eliz., Dy.² A stranger, seeing my servant arrested, bailed him, and, after that, I say to him 'you have done me a neighborly and a friendly part in bailing of my servant; I thank you for it [and] promise you to pay you your charges you have been at herein.' An action upon the case brought upon this promise and assumption will not lie, because the consideration is past and gone.

Justice CROKE: There is a difference when the assumption is in consideration of service and a thing to a stranger, as in the case of the bailment made to the servant, who was a mere stranger, and not to the master, who was the party who promised. And, when the thing is made for the party himself, as in the case at bar. And there is a good reason that the servant being retained by himself and who did the service to himself, it will be a good consideration notwithstanding the service be past and performed already.

Justice HUTTON said that this case of 13 Eliz., Dy., is a hard case. And he doubted whether it be [good] law. And, as to the case at bar, he agreed with CROKE, and he held it a good consideration and that there is no doubt but that, though the service be past [. . .] a man had built a house for me and, after the building of the house, I promise to him that, in regard of his good service and that he had built the house well and according to my wish, I will give

¹ Stat. 3 Edw. I (Westminster I), c. 34 (SR, I, 35).

² *Hunt v. Bate* (1568), 3 Dyer 272, 73 E.R. 605.

to him £20, there is no doubt but that this is a good consideration and a good assumption to give an action upon the case.

Also, [it was held] by him and CROKE, if a man having married my daughter and, after the marriage, I promise to him that, in regard that he had married my daughter, I will give him £20, [there is] no doubt but that an action upon the case will be well brought upon it.

[Other reports of this case: Hutton 84, 123 E.R. 1117.]

134

Anonymous

(C.P. Mich. 2 Car. I, 1626)

In an action of trespass, contra pacem should not be alleged if the tort was done to an incorporeal right or done in the time of a deceased king.

[An action of] trespass *quare liberam piscariam suam fregit* etc. is good. But *contra pacem* is not good, by *Finch*, Recorder of London, who said that it was so agreed in the case of one Sir John Fishlay, and it was not denied by anyone. And, [it was said] by *Finch* trespass alleged in the time of King James and said *contra pacem domini regis nunc*, the action being brought in the time of King Charles, it is bad, *quod fuit affirmatus per omnes justiciariis*.

135

Anonymous

(C.P. Mich. 2 Car. I, 1626)

Where a solicitor refuses to pay to a client money that belongs to the client, the solicitor will be ordered peremptorily by the court to pay over the money.

A solicitor who solicits business in the Court of Common Bench received money that he had recovered for his client, who was a blind man. And, on account of this, he had the use of another to solicit his business for him, and the solicitor detained the monies in his hands and would not pay it to his client, upon which the court granted an order that, upon the showing of it to him, it will be peremptory to him to attend the justices at their next sitting, and, if he not come upon this, [a writ of] attachment will be granted against him.

136

Anonymous

(C.P. Mich. 2 Car. I, 1626)

An issue roll can be amended to cure a clerical error.

A question in this case was whether the nature of a pie powder court must be pleaded with specificity or not.

An action upon the case was brought against a sheriff upon an escape of one who was condemned in debt in a court of pie powder. And they were at issue. And it was found for the plaintiff against the sheriff. And, now, it was moved by the counsel of the sheriff in arrest of

judgment, first, because he said that he had recovered in a court of pie powder at Gloucester and he did not show where they have such a court by prescription or charter of it, as he must have done, as 12 Edw. IV, 8b, is and Coke, 8 rep., Turner's Case.¹

Second, he did not show how they have a market or fair etc., which he must have done, because without a market or fair, they could not have such a court, and this court is not to hold a plea but of things in the market or fair etc. 10 rep., fol. 73.²

Justice CROKE: It appears that the plaintiff has laid that they have at Cirencester [?] a court of pie powder from the time of which memory [does not run] etc. is; this is thus pleaded in the imparlance roll. But the truth is that the prescription is omitted in the issue roll, and the imparlance roll being thus, it will be good notwithstanding the omission of it in the prescription roll.³

Justice YELVERTON agreed with him. And he [CROKE] said further there is a difference among them who are judges and ministers and parties in the court of pie powder. And, first, to the charter or custom of it and ancient cognizance of their charter or custom, because, if they return an issue etc., they must show their court to be by a charter or by prescription, but it is otherwise of one who is a stranger to the court and who, by intendment, does not have cognizance of it, whether it be by charter or by custom.

Justice HARVEY: The imparlance roll being good, all is good. And the issue roll will be amended by the imparlance roll. And [it was held] by him by [. . .], charter, or custom, they could have a special court of pie powder or a court in the nature of a court of pie powder that could be held at another day than a market day or fair day and this is good, as there is such a court of pie powder at Hide⁴ in Kent.

Justice HUTTON agreed with them that, if the imparlance roll be good, it is well and the issue roll will be amended by it. Also, he agreed with YELVERTON where a recovery [?] etc. is had in such a court by a stranger or against him etc. and he sues etc. upon it in a higher court, he will not be compelled to show their charter or custom of such court. But [it is] otherwise of those who are judges of the court or who have notice and be privy to their charter or custom etc. They will be compelled in showing the title of their court to show that they have it by charter or by prescription etc.

137

Hearn v. Allen

(C.P. Hil. 2 Car. I, 1627)

The words modo spectantibus in a conveyance are insufficient to convey anything appendant to the land.

Every warranty that gives a voucher also gives a rebutter.

In ejectione firmæ.

¹ *Prior of Lantony v. Anonymous* (1472), YB Pas. 12 Edw. IV, f. 8, pl. 22; *Turnor v. Lawrence* (1610), 8 Coke Rep. 132, 77 E.R. 673.

² *Hall v. Stanley* (1612), 10 Coke Rep. 68, 73, 77 E.R. 1027, 1034.

³ Sic in MS.

⁴ *i.e.* Hythe.

The first point [was] Herne devised a messuage with which he had occupied two acres of meadowland lying four miles distant from the house. And he devised it by these words of devise, of a messuage *cum omnibus pertinentiis inde vel aliquo modo spectantibus*.

And Serjeant *Henden* argued that the acres passed with the messuage, because *spectantibus* will not be taken [. . .] as of a thing appendant that has been used with the house always, but it will be construed according to the intention of the devisor, *scil.* that it was *spectantibus* by occupation and by his usage and not as a thing appendant, as in a lease for years of a messuage etc. [. . .] etc. land, that is usually occupied with the house, passes, as, in a feoffment, it passes if it had been used time of which memory does not run.

But [it was held] by all of the justices this two acres will not pass with the house by this devise any more than in the case of a feoffment, because never had they occupied with the house usually, but only by the feoffor during his life.

Second, the other point of the case was thus. Herne devised his land to his wife *durante viduitate sua*, and, afterwards, that his elder son will have it to him and his heirs *in perpetuum et pro defectu haeredum praedictis etc.*, the remainder to B., his daughter, and her heirs *in perpetuum et pro defectu haeredem praedicti B.*, the remainder to his younger son and his heirs *in perpetuum*. Whether, by this estate made in fee simple, it be devised was the question.

And Serjeant *Henden* strongly argued that it was an estate in respect that thus [. . .] the intent of the devisor to be, and, though the words 'of the body' are omitted, yet the intent and implication of it by the other words supply it, because it could be a good estate tail omitting the words 'of the body', as where a limitation is to the heirs of J.S. or *ex J.S.* etc. So, also, where the heirs are expressed and 'the body' implied, it is good. And 18 Ric. II, *Briefe*, 836, a devise to J.S. *et haeredibus procreatis etc.*; and 9 Edw. III, title *Taile*, 21, a similar case.¹ Also, when he devises to one and his heirs and, for default of his heirs, the remainder to another and his heirs, it will be intended that the devise intends the particular heir and not the general and that to this, that it can be objected that he had devised it to him and his heirs *in perpetuum*, this word *in perpetuum* shows that he intended it absolutely to him without any limitation or restriction of time of ending etc.

But, to this, it is answered that this word *in perpetuum* does not alter the case or augment the estate as a devise to one for the term of his life *in perpetuum* and, thus, a devise of an estate tail *in perpetuum*. And he cited 7 Edw. VI, B., *Devise*; and 18 Eliz. Dy., 333, *Chapman's Case*; and Coke, rep. 9, 128.²

And [it was held] by justices YELVERTON and CROKE this seems a good estate tail. And [it was held] by CROKE a devise to the elder son etc. and, if he die without an heir, that, then, his younger son will have it etc., this is a good estate tail.

But Chief Justice RICHARDSON and HUTTON and HARVEY held that this is not a good estate tail, because there are not the words '*de corpore*' (without which they agreed that the estate could be if they are implied) nor words that are tantamount as *de et ex* or *de sanguine etc.*

The third point was thus. He devised to A., his wife, *durante viduitate*, the remainder to B., his son etc. in tail (admitting it to be in tail), the remainder to C., his son, in tail; B. enters and disseises A., and makes a feoffment in fee with a warranty.

And Serjeant *Henden* argued that this warranty does not bar, because it was no discontinuance and it was a particular warranty, upon which no voucher lies, but only a rebutter.

¹ YB Trin. 18 Edw. II, f. 621, 1 Fitzherbert, Abr., *Briefe*, pl. 836 (1325); Mich. 9 Edw. III, 2 Fitzherbert, Abr., *Taile*, pl. 21 (1335).

² 1 Brooke, Abr., *Devise*, pl. 39; *Chapman's Case* (1574), 3 Dyer 333, 73 E.R. 754; *Sonday's Case* (1611), 9 Coke Rep. 127, 77 E.R. 915.

But *per curiam*: Every warranty that gives a voucher gives also a rebutter. And [it was said] by them this warranty bars without question, upon which *Henden* did not argue [?] more of it.

[Other reports of this case: Croke Car. 57, 79 E.R. 652.]

138

Anonymous

(C.P. Hil. 2 Car. I, 1627)

Tithes are not due for rabbits if they are not sold, but eaten by the land owner.

A parson libelled in the spiritual court for tithes of conies. And a [writ of] prohibition was prayed, because the person who is sued for the tithe conies is a gentleman of good quality and he had three or four burrows of conies, which he preserved for his use and he spent them in his house and did not sell or make any profit of them.

A prohibition was granted by justices HUTTON and YELVERTON, being then only there [in court], because, [it was said] by them, tithes will not be paid for conies that are spent in his house any more than of wood that is felled for his fuel.

[Other reports of this case: Littleton 13, 124 E.R. 112, 1 Gwillim 427, 1 Eagle & Younge 357.]

139

Anonymous

(C.P. Hil. 2 Car. I, 1627)

A lessee of a copyhold who enters the land before the day that the lease was to begin is a disseisor, and the reversion to the lessor is destroyed thereby.

A copyholder made a lease for a term of years to begin at a day to come etc. And, before the day, he entered in the land and occupied it. The copyholder, after the entry of the lessee and before the day in the lease, surrendered his reversion to a stranger, who was admitted.

And Serjeant *Henden* began to argue that this was good to pass the reversion and would have begun to prove that the entry of the lessee before the day made him a tenant at will and, thus, the reversion of it could be granted etc.

But all of the court countered him, because all the justices held that the copyholder who leased had no reversion, because the lessee, by his entry before the day, is a disseisor and he gained to himself the fee and, thus, no reversion could remain in the lessee.

140

Fenner v. Nicholson

(C.P. Hil. 2 Car. I, 1627)

Any sum of money, however small, that is given for a presentation to a church is simony.

Quare impedit etc. Mildmay's Case.

In [an action of] *quare impedit* [. . .] the plaintiff made his title *quod ecclesia vacavit per resignationem* of one such, then parson, etc. And the defendant said that the church [was] void by a simoniacal contract and a corrupt bargaining for the benefice against the Statute [blank] etc.,¹ *absque hoc quod ecclesia vacavit per resignationem*.

And Serjeant *Henden* urged that this traverse of the avoidance by resignation was surplusage and makes the plea vicious. The first reason was, where a plea in bar is confessed and avoided, there will not be a traverse of it. And, for this, he cited 2 rep., Coke, The Archbishop of Canterbury's Case, and 26 Hen. VIII, 4. And, in our case, the presentation being traversed and avoided, he [can] never traverse the manner of the presentment. And he cited 3 Hen. IV, 15; 15 Hen. VI, *Quare impedit*, 77.²

The second reason [was that] he has avoided the presentation by matter in law, *scil.* for a simoniacal contract against the Statute, *ergo* he will not now traverse the presentment etc. And he cited 8 Hen. VI, 4; 5 Hen. VII, 14, by Hussey.³

The third reason [was] the bar is a sufficient and absolute bar to all purposes; *ergo*, it will be no traverse. And, for authority in this case, he cited 43 Eliz., the *New Book of Entries*, title *Quare Impedit*, the first case;⁴ and Easter 14 Jac., rot. 1206, in the Common Bench. And he said that, where one is in by simony, there, it is as if no incumbent exists and the admission, institution, and induction are utterly void. Then, he argued that, where there is no use of a traverse and he takes a traverse, this makes the plea double. And he cited Coke, 6 rep., Hylliard's Case; 33 Hen. VI, 18; 22 Hen. VI, 52; 1 Edw. III, 2; the *New Book of Entries*, title *Quare Impedit*, fol. 555.⁵ And he said that, if he had pleaded the general plea of simony without mention or relation of the Statute, there, peradventure, it could have been doubted of the traverse. But, otherwise now, where he has pleaded it void by simony by the Statute [. . .] exception to the manner of the finding of the simony, because he has pleaded it etc., that he has *pro quadam pecunia summa* and he has not pleaded in certain what sum of money it was, and the sum is material, because, peradventure, he had given only a farthing for a benefice of the value of £1000 *per annum*.

But all of the justices [held] against this exception, because he will not be [. . .] to show the certain sum, inasmuch as he is a stranger to the contract and also the Statute is that, if anyone give any sum of money, etc.

Serjeant *Bramston* argued against *Henden*, and he held that, in our case, it is a necessary traverse and, if it might not have been necessary, still it would not make the plea double. And he agreed that, if the avoidance by resignation of the office be fully confessed and avoided and,

¹ Stat. 31 Eliz. I, c. 6, s. 4 (SR, IV, 803).

² *Green v. Balsler* (1596), 2 Coke Rep. 46, 76 E.R. 519, 139 Selden Soc. 693, 1 Gwillim 189, 1 Eagle & Younge 113; YB Trin. 26 Hen. VIII, f. 4, pl. 16 (1534); YB Pas. 3 Hen. IV, f. 15, pl. 5 (1402); Hil. 15 Hen. VI, 2 Fitzherbert, Abr., *Quare Impedit*, pl. 77 (1437).

³ Perhaps YB Mich. 8 Hen. VI, ff. 3, 4, pl. 9 (1429); *Carew v. Ewarby* (1490), YB Hil. 5 Hen. VII, ff. 11, 14, pl. 4.

⁴ *Hele v. Bishop of Exeter* (1601), E. Coke, *Booke of Entries* (1614), 'Quare impedit', pl. 1, f. 467.

⁵ *Helyar v. Whitier* (1599), 6 Coke Rep. 24, 77 E.R. 290, also 140 Selden Soc. 1027, Croke Eliz. 650, 78 E.R. 889, Moore K.B. 551, 72 E.R. 752; YB Pas. 22 Hen. VI, f. 52, pl. 22 (1444).

then, it be traversed, this makes the bar double. But it is otherwise where it is not confessed, but [it is] only by argument (as it is in our case). And he cited 7 Hen. VII, 14, and 1 Edw. IV, 9; 3 Eliz., Dy. 202; 4 Hen. VII, 13. And, for authorities for his opinions in the case, he cited 23 Eliz., Dy., the last case; Hilary 7 Jac., rot. 3459, Saie [v. South]'s Case, in the Common Bench; in the *New Book of Entries*, fol. 491; Coke, 4, 117; Trinity 15 Jac., rot. 2051; also, he cited the 8 rep., The Earl of Rutland's Case; 9 Hen. VI, 16; Hilary 37 Eliz. 458, in the Common Bench; 44 Eliz., Adams and Lambert's Case.¹ And he held that, as our case is, be the resignation traversed or not traversed, the bar will not be by it vicious or double, the precedents being both ways, but it will be good, one way or the other.

Et dies datus est ulterius etc.

[Other reports of this case: Croke Car. 61, 79 E.R. 656, Littleton 14, 124 E.R. 113.]

141

Mady v. Osan

(C.P. Pas. 3 Car. I, 1627)

An award that goes beyond the submission is void pro tanto.

Where legal notice is required to be given to a person, it can be given at that person's dwelling place.

In [an action of] debt upon an obligation brought against Meredith Osser and others etc. upon an obligation endorsed upon a condition that Osen and the other obligors and all others of the same parish will stand to the arbitration etc. concerning the differences of tithes between the obligee, parson of the parish, and Osen and others etc. The arbitrators awarded that the parson will have his tithe of wool in kind and that the parishioners give notice to the parson of the times of their shearing to the intent that the parson or his deputies could be there. And the breach was assigned that Osen and others of the parish etc. did not give notice of the time of their shearing.

Chief Justice RICHARDSON: If any things in the arbitration are within the submission and others out of the submission, the arbitration [is] good for that which is within the submission and void for that which is outside.

Justice HUTTON said that the arbitration in this case is void for uncertainty inasmuch as they have not awarded any place where notice will be given, as if the arbitrators awarded that one etc. will make an obligation to another etc. and does not limit any sum, this award [is] void for the uncertainty. Thus, in the case at bar, it is uncertain in what places the notice will be given. And it is greatly mischievous that he will seek out the parson by all places where he will go or otherwise will bother [?] such a parson.

¹ YB Trin. 7 Hen. VII, f. 14, pl. 1 (1492); YB Mich. 1 Edw. IV, f. 9, pl. 17 (1461); *Clere v. Bartue* (1561), 2 Dyer 202, 73 E.R. 446; YB Trin. 4 Hen. VII, f. 13, pl. 10 (1489); *Anonymous* (1581), 3 Dyer 377, 73 E.R. 846; *Lord Say and Sele v. Bishop of Peterborough* (1610), E. Coke, *Booke of Entries* (1614), 'Quare impedit', pl. 10, f. 491; *Regina v. Bishop of Peterborough* (1603), 4 Coke Rep. 117, 76 E.R. 1107, also Moore K.B. 678, 72 E.R. 834; *Pascal v. Clark* (1617), Noy 22, 74 E.R. 992; *Earl of Rutland v. Earl of Shrewsbury* (1608), 8 Coke Rep. 55, 77 E.R. 555, also Jenkins 283, 145 E.R. 205, 2 Brownlow & Goldesborough 229, 123 E.R. 913, 1 Bulstrode 4, 80 E.R. 710; YB Trin. 9 Hen. VI, f. 16, pl. 8 (1431); *Adams v. Lambert*, Moore K.B. 648, 72 E.R. 815.

Justice CROKE held the contrary, because the place where he will give notice is certain enough, because by intendment the parson is always dwelling in his parsonage house, as, by law, he must. And *ideo* notice given there is good enough, and it will save the penalty.

And the other justices thought with him in opinion.

But *dies datus ulterius*.

[Other reports of this case: Hetley 4, 124 E.R. 296, Littleton 30, 124 E.R. 121.]

142

Paston v. Manne

(C.P. Pas. 3 Car. I, 1627)

An enclosure by a hedge and a ditch by a lessee for years is waste.

An [action of] *ejectione firmæ* by Paston [was thus]. The lord of the manor had a fold course for 500 sheep by all the land of his tenants when it lies fallow. And the custom of the manor is that no tenant could enclose without a license from the lord and, upon a license, he will pay a fine to the lord, and, if he enclose without his license, he will be amerced and will have his hedges thrown down. A copyholder enclosed without a license with a quickset hedge and a ditch six feet broad and four feet deep, but he left a space or gaps in four separate places of nine feet in longitude for the sheep to pass. And all this was found by a special verdict. And whether this enclosure be a forfeiture or not was the question.

Serjeant *Athow* argued yes. It appears by the books that a copyholder has an estate *secundum consuetudinem manerii*. And as [is] 4 rep., *Browne's Case*, 21; he is said [to be a] tenant at will, because, if he breaks the custom, then, it is his estate at the will of the lord, because he could enter for the forfeiture.¹ And he cited 42 Edw. III, 25.² And a feoffment in fee by a copyholder is a disseisin to the lord, and he can enter for the forfeiture, as all the books are. But, in our case, this enclosure of the copyholder is a disseisin of the fold course of the lord, because he has a freehold in the fold course and, upon the disseisin of it, he will have an assize. Thus, in a case of a new enclosure so that the lord could not enter to distrain, it is a disseisin to the lord, upon which he could have an assize. Thus a denial [?] of the rent or any of the distress by a copyholder or enclosure by the copyholder so that the lord cannot distrain is a forfeiture. 10 Edw. III, *Assise*, 88; 49 Ass., pl. 5; 44 Ass., pl. 19; 8 Edw. III, *Assise*, 374.³ A man seised of land to which there is only one way to go, a stranger makes a distress, crosses the way, this is a disseisin of the land. And, if the terre tenant, in such a case, makes such a distress by which the lord cannot enter to distrain for rent, he is disseised. [It is] otherwise if there be another way to go to the land or the whole way not be stopped.

But it would be objected that it is found by the verdict that the copyholder had left a gap of nine feet etc. so that the sheep could go through it into the land and the lord may have his fold course, but he answered that it is prejudicial and hurtful to the lord, because the sheep

¹ *Brown's Case* (1581), 4 Coke Rep. 21, 76 E.R. 911, also Moore K.B. 125, 72 E.R. 483, 1 Leonard 2, 74 E.R. 2.

² YB Mich. 42 Edw. III, f. 25, pl. 9 (1368).

³ YB Mich. 11 Edw. III, Rolls Ser. 31b, vol. 1, p. 260 (1337), Fitzherbert, Abr., *Assise*, pl. 88; YB 49 Edw. III, Lib. Ass., p. 318, pl. 5 (1375); YB 44 Edw. III, Lib. Ass., p. 287, pl. 19 (1370); Mich. 18 Edw. II, 1 Fitzherbert, Abr., *Assise*, pl. 374 (1324).

will be hurt [?] by the driving and their [. . .] torn by the hedge and many other inconveniences will ensue to the lord and by the same reason that he will enclose, all the other copyholders could in the same manor enclose and then all the sheep of the lord will be of no value.

And, for another reason, the copyholder may not enclose, because the lord must have a fine for his license to enclose and the fine will be before the license and the license before the enclosure. And there is a difference where the lord is bound to admit a copyholder, as upon a descent or surrender, because, there, he will not have a fine before the admittance, but he could but otherwise in a case where a copyhold escheats to the lord or be surrendered to the lord himself, because, there, upon the admittance of the new tenant, he will have his fine before, because he is not bound to admit him.

But it would [?] be also objected that the custom is that the lord can amerce the tenant for the enclosure and, thus, a penalty is put for the enclosure, *ergo*, there will be no forfeiture for it, but, to this, he responded that, where the custom is that the lord will amerce the copyholder if he allows the house to decay and does not repair it by a certain day, in this case in waste made by the tenant in allowing the house to decay, the lord can also enter.

Another reason that he has forfeited is that, in the making of this ditch upon the land, he has committed waste and this waste is a forfeiture and it is also waste in casting the soil of the ditch and allowing it to lie upon the other land. *Ideo Fitz.*, title *Waste*, 48; [an action of] waste was brought for the digging of clay and in allowing it to lie upon the ground, but if he put it upon the houses, it is not waste inasmuch as it is for the bettering of the copyhold. And he cited 41 Edw. III, *Waste*, 82; Dier 361; 2 Hen. VI, 16. The turning of meadow into arable land is no waste, because the land is ameliorated by it.¹

Also, he held that, if the lord will not admit his copyholder, that his proper remedy is to sue him in the Court of Requests (as I remember), because it is a court of equity and it is equity that he will be admitted etc.

Serjeant *Henden* argued to the *contra*. And he held this is not a forfeiture, because to make a forfeiture, three things are requisite, first, a voluntary act of the tenant, second, an act that is to the disinheritation of the lord, third, an act that is done against the custom, because the breach of the custom is a forfeiture, because he has his estate *secundum consuetudinem*. As 21 Hen. VII, Keil. 77; Dy. 221; *Waste*, 59; 5 Hen. V, 2. A general act or an act, if it be not voluntary, does not make a forfeiture. *Ideo*, in the *New Book of Entries*, 288, Cromwell's Case. Not coming to the court of the lord upon a personal summons made to a copyholder, if it be negligent and not voluntary, is no forfeiture. Thus, a failer of the payment of the rent to the lord by the copyholder, if it not be absolutely denied of the rent, is not a forfeiture of the copyhold. And he cited Dy. 322.²

Secondly, the act must be to the disinheritation of the lord; otherwise, it is not a forfeiture. *Ideo*, the writ etc. is *ad exhaeredationem etc.*

Thirdly, it must be against the custom of the manor. And for this, it has been held by all of the justices in this court etc. that an enclosure is not a forfeiture if it be not contrary to the custom.

¹ YB Mich. 22 Hen. VI, f. 18, pl. 34, 2 Fitzherbert, Abr., *Wast*, pl. 48 (1443); Pas. 41 Edw. III, 2 Fitzherbert, Abr., *Wast*, pl. 82 (1367); *Altman's Case* (1578), 3 Dyer 361, 73 E.R. 810, also 2 Leonard 174, 74 E.R. 454; YB Trin. 2 Hen. VI, f. 10, pl. 1 (1424).

² *Tropnell v. Kylllyk* (1505), Keilwey 76, 72 E.R. 237, also 116 Selden Soc. 489; 9 Hen. IV, Fitzherbert, Abr., *Wast*, pl. 59 (1407 x 1408); *Barker v. Carre* (1609), E. Coke, *Booke of Entries* (1614), 'Error', pl. 16, f. 288; *Anonymous v. Lord Cromwell* (1573), 3 Dyer 321, 73 E.R. 727.

The other reason is that there is a penalty; *ergo*, this mitigates the forfeiture, and there is no reason that he will have both. And he cited 8 rep. 8.¹

Also, [if an] enclosure be a forfeiture, yet the leaving of such gaps amends it. And it is no disseisin of the fold course, because he put a passage for the sheep so that he could use his fold course. 8 Ass., pl. *ultimo*. The stopping of all of the water of a mill is a disseisin of the mill, but, if it be of part of the water, it is not a disseisin. Thus 18 Hen. VIII, *casu ultimo*. The difference [is] between all of the way is stopped and where only part.²

Also, the enclosure of the copyhold is not a forfeiture, because it is not a thing done to the disinheritation of the copyhold, but of a thing outside, as to take a profit. Thus, the fold course is a thing outside and collateral to the copyhold.

And, as to the objection that this is waste and, *ergo*, a forfeiture, he agreed that waste done by a copyholder is a forfeiture, but he denied that this enclosure or making of the hedge or of the ditch is waste, because it was made for the enclosure of the copyhold and, thus, in the bettering of the copyhold, because waste must be to the disinheritation and this is not to the disinheritation. 20 Hen. VI, 41. And, inasmuch as the copyhold is not prejudiced or deteriorated by the enclosure, but ameliorated and the lord is not hindered of his fold course in regard of the gaps, *ideo*, this is no forfeiture.

And the justices did not give an opinion, but that which moved them the most strongly was that the enclosure made of the copyhold will not be a disseisin of the fold course, which is a collateral thing. But, inasmuch as all of this country was in pasturage of sheep and such enclosures would be much in prejudice of fold courses of the lords and, thus, in prejudice of the public good, they would be advised of it.

Et dies datus est ulterius. But all of the justices agreed that an enclosure by a lessee for years with a hedge and a ditch is waste.

[Other reports of this case: Hetley 5, 124 E.R. 296.]

[Related cases: Paston v. Utber (1629), Hutton 102, 123 E.R. 1131.]

143

Awbrey v. Anonymous

(C.P. Pas. 3 Car. I, 1627)

The question in this case was what was the extent of the release that was in issue.

Awbrey brought [an action of] debt etc., and against him was shown a deed of release that he made to the defendant. The release was made by such words: 'know ye that I have remitted and released all manner of errors and all manner of actions, suits, and all writs of error whatsoever.' The question was whether this release extended only to errors, suits of errors, and writs of error.

And Serjeant *Henden* argued yes. And, first, he urged that the intention of the parties was that the release will be particular and extend only to errors. And all the words that are the doubt are these words put *in medio, scil.* 'all manner of actions and suits'. But the exposition must be made upon all of the matter. And *ex antecedentibus et consequentibus fit optima interpretationem*. Thus, he beginning with 'errors' and concluding with 'errors', the middle

¹ *The Prince's Case* (1606), 8 Coke Rep. 1, 77 E.R. 481.

² *Yarford v. Holyman* (1523), YB Pas. 14 Hen. VIII, f. 31, pl. 8, 119 Selden Soc. 193.

words will have reference to them, and, thus, the exposition being made upon all, it appears fully errors are to be released.

Also, when the cause is particular and all particular words for it and also general words, those general words will have relation to the particular words and the particular cause. And he cited 28 Hen. VIII, Dy. 29; 7 Hen. VI, 8; 10 Hen. VII, 8; and a case that was Easter 36 Eliz., in the King's Bench, Peigione against Gibson. And, also, he cited Sir Edward Altham's Case, 8 rep.¹

Serjeant *Henden* argued *e contra*: And he said that it is a good release to extinguish all actions, suits, etc. in general, because the words are as general as could be. And, also, the deed will be taken most strongly against the grantor. And he cited 19 Hen. VI, 4.²

Chief Justice RICHARDSON said that, if, in the last clause, the words 'writs of error' had been used to be omitted, then the words 'suits and actions' will have relation to the precedent words 'of errors'. And thus it would have been a sufficient release and not extend to errors only.

144

Anonymous

(Ex. Pas. 3 Car. I, 1627)

One cannot prescribe to have a common for sheep in the lyse of a forest or generally in a forest, but they can so prescribe for the lawns and outparts of a forest.

Noy held and said that the law was always thus, that commoners could not prescribe to have commons for sheep in the lyse of the forest or generally for all of the forest, because such a common they will not have in the forest. But they can prescribe to have a common for their sheep in the lawns and outparts of the forest. And this was not contradicted by anyone.

145

Beare v. Hodges

(C.P. Pas. 3 Car. I, 1627)

The question in this case was whether there could be a distress for rent and a heriot before a demand made for the rent and before the election made as to the heriot in issue.

In [an action of] replevin, the case was thus. [There was a] lease for 99 years if A., B., C., or any of them will live so long, rendering rent etc. and, after the death of A., B., and C. and each of them, the feoffor to have for a heriot the best cattle or £5 at his election. At the day of the payment of it, the lessee tendered it by the whole day upon the land, and no one came to receive it. Then, the lessee, at another day, tendered it, and the lessor refused to receive it. And after[wards] the lessor not demanding it or his bailiff or commanding his bailiff,

¹ *Abbot of Westminster v. Clerke's executor* (1537), 1 Dyer 27, 73 E.R. 59; *Anonymous v. Popham* (1428), YB Mich. 7 Hen. VI, f. 8, pl. 14; YB Mich. 10 Hen. VII, f. 8, pl. 16 (1494); *Pidgeon v. Gibson* (K.B. 1594); *Lawrence v. Altham* (1610), 8 Coke Rep. 150, 77 E.R. 701, also 1 Brownlow & Goldesborough 62, 123 E.R. 666.

² YB Mich. 19 Hen. VI, ff. 3, 4, pl. 7 (1440).

the bailiff distrained for the rent and also for a heriot, upon which, the lessee brought [an action of] replevin, and the bailiff justified as bailiff etc.

First, the first point was whether, when rent is tendered upon the land at the day etc. and it is afterwards tendered again and refused by the lessor, whether the lessor could distrain for it without demanding it.

And Serjeant *Davenport* argued and held not. And he said, where the distress is tortious, the party, who had his goods so taken, will receive damages in replevin for them. And he put a difference between a distress for rent and [an action of] debt brought by the lessor for rent arrear, because, in debt, there will be no damages. And, as to the point in question, he, the lessee, having done all this he could have done, it is against reason, no default being in him, the lessor will come into his land and will distrain in his absence for rent that was not arrear by any default of the lessee. And he cited the cases 6 Hen. IV, 4; 19 Ric. II, *Dett*, 178; 17 Edw. III, 58; 21 Edw. IV, 17; 2 Edw. III, 8; also more direct 7 Edw. IV, 4, which book is that distress in such a case will not be without a demand; and 20 Hen. VI, 31; 7 rep. 28.¹

And he insisted upon the words of the Statute of Westminster, cap. 9, *non habeat domini capitalis intestatem distringendi tenens dummodo offerat servitia debita et consueta*. And also he cited Fitzherbert, *Natura Brevium*, 69; and 8 rep. 147; and 5 rep. 76. Thus, he held and argued that the lessor could distrain without a demand, yet the bailiff could not distrain without a demand etc.²

Second, the other point was whether this reservation of the taking the best cattle be a heriot, because only a thing [is] reserved as a heriot, and he held not, because a heriot is properly due upon the death of the tenant, thus, upon this reservation when the lessor is to have a heriot or £5 in money at his election, whether the lord could distrain before his election, and he held and argued not. And he cited for this 2 rep. 36; 8 rep. 92.³

Third, but admitting that the lord could distrain before an election, yet the bailiff without a special commandment cannot, because, where he does a thing not incident to his office, he cannot justify generally as a bailiff, but he must do it by a special command. Also, this is an arbitrable thing, in which case, he must have a special command. And he cited 1 Edw. III, 26; 21 Edw. III, 62; Dy., 3 Eliz., 222.⁴

Et dies datus ulterius.

[Other reports of this case: Hetley 12, 16, 124 E.R. 302, 305, Littleton 33, 34, 70, 124 E.R. 122, 123, 142.]

¹ YB Hil. 6 Hen. IV, f. 4, pl. 25 (1428); Pas. 19 Ric. II, 1 Fitzherbert, Abr., *Dette*, pl. 178 (1396); YB Mich. 17 Edw. III, f. 58, pl. 44 (1343); YB Hil. 21 Edw. IV, ff. 16, 17, pl. 12 (1482); YB Pas. 2 Edw. III, f. 8, pl. 1 (1328); YB Pas. 7 Edw. IV, f. 4, pl. 10 (1467); YB Pas. 20 Hen. VI, f. 31, pl. 31 (1442); *Maund v. Gregory* (1601), 7 Coke Rep. 28, 77 E.R. 454.

² Stat. 13 Edw. I (Westminster II), c. 9 (SR, I, 78-79); A. Fitzherbert, *Natura Brevium*, 69; *Vaux v. Newman* (1610), 8 Coke Rep. 146, 147, 77 E.R. 695, 698; *Paget v. Cary* (1593), 5 Coke Rep. 76, 77 E.R. 170, 138 Selden Soc. 562.

³ *Heyward's Case* (1595), 2 Coke Rep. 35, 76 E.R. 489, also 2 Anderson 202, 123 E.R. 621, Popham 95, 79 E.R. 1205, 138 Selden Soc. 624; *Milner v. Fraunces* (1609), 8 Coke Rep. 89, 77 E.R. 609, also 2 Brownlow & Goldesborough 277, 123 E.R. 940.

⁴ *Suckflet v. Bonvill* (1327), YB Mich. 1 Edw. III, f. 25, pl. 27; *Burnel v. Burnel* (1347), YB Mich. 21 Edw., III, f. 60, pl. 8; *Ayer v. Orme* (1562), 2 Dyer 221, 73 E.R. 490, also Benloe 129, 123 E.R. 99, Moore K.B. 51, 72 E.R. 434.

146

Reading v. Anonymous

(C.P. Pas. 3 Car. I, 1627)

It is actionable to accuse a woman of procuring an abortion.

Alice Reade brought an action upon the case for scandalous words that the defendant had said of her, being a maiden, *scil.* that he said 'Alice Reade was with child and took physic and did destroy it.'

Serjeant *Finch* moved that the words were not actionable, because he did not say that she took physic to destroy it, but laid the words generally. Thus, if she took physic for another malady by reason of which *ex consequenti* the child was destroyed, this was not a thing punishable in our law nor any danger or scandal could ensue upon it.

But all the justices [held] against him, because they all held that the words were actionable.

[Other reports of this case: Hetley 18, 124 E.R. 306.]

147

Gammon's Case

(C.P. Pas. 3 Car. I, 1627)

A person cannot be required to incriminate himself.

The spiritual court took an obligation of a man that he will not come in the company of a suspicious woman etc. unless it be in the church or the market. And, afterwards, they of the spiritual court summoned him and would examine him of this whether he was in the company of this woman or not. And, also, they summoned other men to examine them as witnesses to prove it. And, upon this matter showed, the judges of the Common Bench granted a [writ of] prohibition.

And Chief Justice RICHARDSON said that the course of the Chancery is thus, that, if any man be sued there upon a penal statute, the examination upon interrogatories will not be administered to make him guilty etc.

[Other reports of this case: Hetley 17, 124 E.R. 306.]

148

Anonymous

(C.P. Pas. 3 Car. I, 1627)

In this case, the devise in issue created a tenancy in common and not a joint tenancy.

A man devised land and houses to A., B., and C. *habendum* to them and their heirs and that each of them will have a part and portion of it *aequaliter*.

Justices HUTTON, HARVEY, and YELVERTON, being only there [in court], held that they are tenants in common, and not joint tenants. Also, if land be devised to three *habendum* to them and their heirs equally, there, they are tenants in common.

149

Anonymous

(C.P. Pas. 3 Car. I, 1627)

The king cannot give a court a greater jurisdiction than that given to it by the statute that created it.

An assault and battery was made upon a minister of the church. And he sued in the High Commission Court *pro reformatione morum*, and not to recover any damages for the battery. And [a writ of] prohibition was prayed upon it by Serjeant *Athow*, who said that, by the new commission that they have given to them, they have power over such matters, but it was not within the Statute of 1 Eliz., cap. [*blank*]¹ that enables the power and erection of this court and the Statute limits the power and jurisdiction of this court and their commission cannot enable them to more than is given by the Statute and contained in it.

And the justices inclined to the motion of *Athow*. And it seemed to them that the power of the High Commission Court is by the Statute of 1 Eliz. And, if it not be of a thing contained within this Statute, the Court of High Commission does not have power over it, even though the thing be contained within their commission, because, if their commission be of other things than are contained within the Statute, it is not warrantable as to them, because this court is by the Statute and their power is limited by the Statute. And the commission must be according to the Statute, and there cannot be a mixed authority in the commission *partim* by the Statute and *partim* by the prerogative of the king, but only by the Statute.

Et dies datus est ulterius ad ostendere quare prohibitio non emanavit.

150

Humbleton v. Buck

(C.P. Trin. 3 Car. I, 1627)

In this case, the plaintiff alleged a good cause of action upon a contract to defend the defendant's and his own mutual interests in a separate lawsuit.

One Paulmer enclosed a seabank as his proper soil where Humbleton and others have used to have a common in it from the time of which memory does not run, *scil.* to depasture it with their cattle and to cut the grass or hay growing upon it and taking it away at their pleasure. Humbleton, upon this enclosing, broke the hedge of the enclosure. And Paulmer brought [an action of] trespass against him. And, pending this suit, Bucke, the now defendant, promised to Humbleton ' that, if he will go on with his suit in that action in the maintenance of their title of common, that then he will bear half the charges or give him £4. Afterwards, Humbleton, in this suit, pleaded not guilty, and the jury found him not guilty. Bucke did not pay him the moiety of his costs nor the £4. And, upon this, he brought against him an action upon the case upon his *assumpsit*. In which action, Bucke said that he has not maintained the title of their

¹ Stat. 1 Eliz. I, c. 1, s. 8 (SR, IV, 352).

common, nor has by this plea put the title of their common in issue, and *ideo*, he cannot have an action by him.

But [it was held] by all the justices, inasmuch as the intention was to maintain the action begun by Paulmer against Humbleton, this plea is a good plea in this action and a sufficient maintenance against Paulmer and the proper issue to be taken in this action. *Ideo*, the action well lies.

[Other reports of this case: Hetley 4, 21, 124 E.R. 295, 309, Littleton 38, 124 E.R. 125, Hutton 89, 123 E.R. 1121.]

151

Whitaker's Case

(C.P. Trin. 3 Car. I, 1627)

Even though one of two joint judgment debtors has escaped, making the sheriff liable for the judgment debt, the other joint judgment debtor remains liable to the judgment creditor until the latter is fully satisfied.

Two were bound jointly and severally in an obligation, and both [were] in execution etc. one, by the sufferance of the jailer, escaped, upon which, the obligee brought an action against the sheriff for allowing him to escape voluntarily. The other, who remained in execution is not discharged by it until satisfaction.

And Blumfield's Case, 5 rep.,¹ was cited, where, in such a case, two were in execution etc., one escaped, the other will not have an *audita querela* for the escape of him, but will remain in execution, because, though the obligee could have this remedy against the sheriff, yet perchance the sheriff will not have sufficient [assets] to satisfy it, and, *ideo*, until satisfaction, he will not be discharged.

152

Gammon's Case

(C.P. Trin. 3 Car. I, 1627)

The question in this case was whether a court can enforce the execution of a judgment given in another court.

Judgment in [an action of] debt upon an obligation was given in the Great Sessions of Wales, and he against whom the judgment was given died in intestate. And the record etc. was removed by [a writ of] *certiorari*. And, upon this, a *scire facias* issued out of this court, and a *devastavit* was returned against the administrators. And, upon this, [a writ of] *fieri facias* issued against the administrators. And whether execution could be thus awarded out of this court was the question.

And Serjeant *Henden* argued briefly not, because this court will not be the instrument to execute a judgment given in an inferior court. And he cited 14 Hen. IV, 10, for proof of it, in

¹ *Blomfield v. Wythe* (1596), 5 Coke Rep. 86, 77 E.R. 185, also 140 Selden Soc. 944, Moore K.B. 459, 72 E.R. 693, Croke Eliz. 478, 555, 573, 78 E.R. 730, 800, 817.

which books it is also said that an issue taken in an inferior court will not be removed by a *certiorari* to be tried here in this court.

Also, the power of this court in Wales was founded and created by the Statute 26 Hen. VIII,¹ which Statute gave them power to hear and determine the thing. *Ergo*, of a judgment given there, execution will be there, because, otherwise, the determination will not be there.

And, lastly, there is no precedent in all of the law for it.

Justice CROKE seemed to be of the same opinion with him, because he said that this court will not be an instrument to execute a judgment given in an inferior court.

Also, the party, having sued the execution, could be there only for the goods and lands there, but, if this court will grant execution upon a judgment given there, then all goods and lands in other places not liable to execution before will be now by this way made subject to the execution where the intent of the party by suing there was given execution of the goods and lands there.

Also, it will be prejudicial to the purchasers who, by this way, cannot so certainly find the judgments with which lands to be purchased will be chargeable.

Et dies datus ulterius, because Chief Justice RICHARDSON was *in contraria opinione*.

[Other reports of this case: Hetley 26, 124 E.R. 313, Littleton 39, 124 E.R. 125.]

153

Owen v. Price
(Part 1)

(C.P. Trin. 3 Car. I, 1627)

The question in this case was whether a lease of church property to three persons successively instead of jointly is valid or not.

In an action upon the case upon trover and conversion of goods by Dorothy Owen against Thomas ap Rice, the case was thus. A bishop, seised in the right of his bishopric of a parsonage, leased the rectory, being usually demised, to A., B., and C., *habendum a die datus* for their three lives successively, *scil.* to A. for his life and then to B. for his life, and then to C. for his life, rendering the ancient rent. And, afterwards, he made a letter of attorney and [it was] two days afterwards to deliver livery and seisin. And the lease was confirmed by the dean and chapter. The bishop died, and his successor accepted the rent, and he died. Another successor accepted the rent, and, after the acceptance of the rent and before entry, made another lease for three lives warrantable by the Statute 1 Eliz.,² and he died. And another successor, before acceptance of the rent, entered and made a lease for three lives warrantable by the Statute. And which of these leases will stand good was the question.

And Serjeant *Finch* argued that the last lease will stand, that the other leases were voidable leases by the successor. The first point was whether this lease was warrantable by the Statute of 1 Eliz. And he held not, because the lease, being made to three *habendum* to them successively, be to one for his life and then to another for his life and so to the third for his life, it is not to them jointly, as is required by the Statute, successively and by way of remainder, and such a lease clearly is out of the Statute. And he cited the Dean and Chapter of Worcester's Case, 6 rep., and Dyer 311 [?] and divers [year] books. But he cited a case

¹ Stat. 34 & 35 Hen. VIII, c. 26 (SR, III, 926-937).

² Stat. 1 Eliz. I, c. 19, s. 4 (SR, IV, 381-382).

that was between Wheeler and Danby, where it was adjudged in point that a lease by way of remainder, by which a joint estate was not given, was not actionable by the Statute 1 Eliz.¹

The second point was in effect such. [There was a] feoffment in fee, *habendum a die datus* and, two days after, the letter of attorney was made to make livery and seisin *secundum formam chartae*. And it was held not good. And he said that livery cannot operate *in futuro*. And he cited Com. 56 and Coke 5 rep. 94. And it is as a grant *in esse* that cannot be granted *in futuro*. And he cited 8 Hen. VII, 3, and Com. 197.² And he held that a feoffment *habendum a die datus* and livery is made by a letter of attorney the same day is bad. But, if the feoffor himself makes livery and seisin the same day or the day after, this is good, because the freehold there is not in expectancy. And he cited a report Trinity 16 Jac., rot. 1089.³ Thus, he held the first lease was not warrantable by the Statute, but voidable. And, if the successor accepted the rent and did not make an entry in the land, he has not evicted the first lease, but he made it good for his time. And, thus, his lease made was not good.

The third point was upon the words of the Statute that says that leases made otherwise than the Statute expresses will be utterly void and of no effect to all intents and purposes. And, *ergo*, the first lease being absolutely void could not be made good by any way afterwards nor will it bind anyone nor will a request to enter avoid that which the Statute makes void. As to this, he said that *qui haberet in litera haberet in cortice*, because the rule of the law is that an estate of freehold will not be avoided except by an entry, but an estate for years could be. *Ideo*, a construction will be made according to reason and not according to the precise letter, because, thus, by the letter of the Statute, the lease will be void presently as to the bishop himself, which is not [good] law, because it will be a good lease against the person who made the lease though voidable by the successor. And he cited a case that was in the Common Bench, Hilary 4 Jac., rot. 1246.

Also, the Statute was made for the benefit of the successors; *ergo*, the lease will not be presently void, but voidable at the election of the successor, who could make it continue if it be for his benefit.

Et dies datus ulterius for the other side to argue the same term.⁴

¹ *Dean of Worcester's Case* (1605), 6 Coke Rep. 37, 77 E.R. 307; *Wheeler v. Danby* (1608), Croke Car. 96, 79 E.R. 685, 1 Rolle, Abr., *Confirmation*, pl. D, 1, p. 476, 5 Viner, Abr., *Confirmation*, pl. D, 1, p. 364.

² *Wimbish v. Tailbois* (1550), 1 Plowden 38, 56, 75 E.R. 63, 91; *Attorney General v. Barwick* (1597), 5 Coke Rep. 93, 77 E.R. 199, also 139 Selden Soc. 770, Moore K.B. 393, 72 E.R. 649; *Anonymous v. Abbot of Tewkesbury* (1493), YB Trin. 8 Hen. VII, f. 1, p. 1; *Wrottesley v. Adams* (1560), 1 Plowden 187, 75 E.R. 287, also 2 Dyer 177, 73 E.R. 177.

³ *Greenwood v. Tyler* (1618-1620), Hobart 314, 80 E.R. 456, Croke Jac. 563, 79 E.R. 482.

⁴ For later proceedings in this case, see below, Case No. 158.

Fawkner v. Bellingham
(Part 2)

(C.P. Trin. 3 Car. I, 1627)

More of Bellingham's Case¹ for a rent saved by the Statute of 1 Edw. VI, of Chantries, where the seisin of it must be alleged within forty years according to the Statute of 32 Hen. VIII, of Limitations.²

And Serjeant *Crawley* argued not, because, first, it is a new rent [. . .] by the Act of Parliament of 1 Edw. VI and not by an ancient rent.

Second, even though it not be an ancient rent, yet there is a new remedy given for it by the Statute 1 Edw. VI. And he held that such a rent will be as a rent seck distrainable of common right.

But, then, it would be objected, though this new rent will be part of the seignory and [it is] to pass with it, to that, he answered that, by the saving of the Statute, the lord will have the rent in the same manner and form as before, but it was part of the seignory before, *ergo* and in the same manner, it will continue part of the manor.

Third, lastly, by the Statute, the limitations will have a reasonable construction [?] etc. And he cited 8 rep. 65.³

But Serjeant *Hitcham* argued to the *contra*. And he said that the question is only whether the rent be a new rent newly created by the Statute of 1 Edw. VI or the ancient rent. And he held that it is the ancient rent, and, *ergo*, seisin within forty years must be alleged.

His first reason was that the Statute saves the rent to the party, and it does not give it to the king. And, *ideo*, it is no work of the petition to the king. And this saving is as a reservation that will be of a thing *in esse*. And he cited Com. 163; 14 Eliz., Dy. 313.⁴ *Ergo*, this saving is to be of a thing *in esse, scil.* the ancient rent.

Second, if the Statute had made any alteration of the rent, it had not tolled the rent, but only clipped it in quality and not in quantity. Thus, admitting that this would have been only of a rent seck, by this, it would have been within the Statute of Limitations, because a rent seck by prescription is within the Statute of Limitations, as he held clearly.

Third, lastly, the Statute of Limitations will be liberally and largely expounded, because it is for the benefit and quiet of the subjects and the peace of the commonwealth.

And the justices took time to deliver their opinions.

[Other reports of this case: Hetley 28, 36, 124 E.R. 315, 323, Littleton 42, 124 E.R. 127, Croke Car. 80, 214, 79 E.R. 79 E.R. 671, 787, W. Jones 231, 82 E.R. 122.]

¹ For earlier proceedings in this case, see above, Case No. 120.

² Stat. 1 Edw. VI, c. 14, s. 17 (SR, IV, 29); Stat. 32 Hen. VIII, c. 2 (SR, III, 747-748).

³ *Cowper v. Foster* (1608), 8 Coke Rep. 64, 77 E.R. 571, also 1 Brownlow & Goldesborough 169, 123 E.R. 734.

⁴ *Throckmerton v. Tracy* (1555), 1 Plowden 145, 75 E.R. 222, also 2 Dyer 124, 73 E.R. 272, 124 Selden Soc. 93; *Stroud's Case* (1572), 3 Dyer 313, 73 E.R. 709.

155

Wilcocks v. Bradell

(C.P. Trin. 3 Car. I, 1627)

The Chancellor of Oxford's Court does not have jurisdiction to try cases between persons who are not members of the University of Oxford, though their husbands and fathers be so.

The king cannot take away or limit the jurisdiction of a court of common law without a statute.

One Willcocks, being a master of arts and a fellow of a college, called the wife of the master of the college 'bawd and old whore,' and he called his daughter 'jade and young whore.' And, upon this, they sued Wilcocks in the Court of the Chancellor of Oxford. And Wilcock's purchased a [writ of] prohibition out of the Court of Common Bench. And now, it was prayed for a [writ of] *procedendo* for the Chancellor of Oxford. And it was shown how the University had an ancient charter to try pleas of divers things etc. where any scholar is one of the parties and that no others of the justices of the king will intermeddle. And, if they intermeddle, that then, upon a certificate of the Chancellor, a [writ of] *supersedeas* will issue, and they will surcease. And it was granted to them by the same patent to proceed in such cases of which they have jurisdiction according to their customs and the law there anciently used, which law was the civil law. And this charter of privilege was confirmed in the times of Henry VIII and Queen Elizabeth by an Act of Parliament.¹

Chief Justice RICHARDSON held that [a writ of] *procedendo* will be granted, because he observed that, in every case where a scholar is a party, the Court of the Chancellor will have jurisdiction etc. But, in this case, a scholar is one of the parties, *ergo*. And he observed that, by their patent, if another justice intermeddle, then, upon a certificate of the Chancellor, a *supersedeas* will issue to them, *ergo*, in the case of which they have jurisdiction, their jurisdiction will be allowed and not impeded. And such a privilege and jurisdiction well could be allowed, because, though the letters patent [. . .] only could not do it, yet, being confirmed by an act of Parliament, it is as they used to be granted by Parliament.

Justice HUTTON: Whether the Court of the Chancellor of Oxford will have jurisdiction in this case where the parties must be scholars and if, in our case, Wilcocke [. . .] not used to be a scholar, they will not have jurisdiction at Oxford, because the wife of a scholar or the daughter will not have this privilege to sue there nor the Court of the Chancellor will have such jurisdiction in this case. And, *ideo*, he agreed the case put before by Serjeant *Henden*, who also argued to the *contra*, which case was Easter 1 Jac., rot. 381, in the King's Bench, in an action brought by a scholar and his wife against another who was not a scholar upon a contract made to his wife before marriage, this privilege was not allowed for the wife, because the contract or thing upon which the controversy arose must be between a scholar and a scholar or a scholar and another. And, *ideo*, in this case [a writ of] prohibition was granted to the Court of the Chancellor.

Justice HARVEY agree with them. But he doubted whether, before the matter appeared to them by matter of record by pleadings, the privilege and the jurisdiction will be allowed.

Justice CROKE: The prohibition being granted and passed, a prohibition will not be granted upon such a verbal surmise, though the cause be just and good to grant a *procedendo*, because they being judges of record, they must judge upon matter of record. And so he held that they will be remanded without pleading etc.

¹ Stat. 13 Eliz. I, c. 29 (SR, IV, 585-586).

Justice YELVERTON held that, as this case is, it will be well done to remand it without pleading, because it appears by their charter that, if other justices intermeddle in things within their jurisdiction that, upon a certificate of the Chancellor, a *supersedeas* will issue to them, *ideo*, there is no use that the matter will appear by the pleading, because the certificate will be sufficient.

And the justices awarded that a certificate will be awarded by the Chancellor of Oxford to certify the matter and, though Wilcocks be a scholar at the time of the words said, because, otherwise none of the parties being a scholar, the prohibition will well stand. Thus, they agreed to have the certificate recorded, and, upon this record, they would adjudge and award a *procedendo*.

And, in this case, the justices all agreed that the king could not give such a privilege and jurisdiction by his charter only, because the king could not alter the law of the realm. As the king could not make land in gavelkind to be descendible as other land at common law, but this, being confirmed by an Act of Parliament, is as a grant by an act of Parliament and thus good.

[Other reports of this case: Hetley 27, 124 E.R. 314, Littleton 40, 124 E.R. 126, Croke Car. 73, 79 E.R. 664.]

156

Anonymous

(C.P. Trin. 3 Car. I, 1627)

Clerical errors made by clerks of a court can be amended.

Where the lease is of forty acres of land and the ejectment of forty and the declaration and all the proceedings are of forty acres and the judgment is entered of eighty acres, this is a misprision of the clerk, and it will be amended.

157

Anonymous

(C.P. Trin. 3 Car. I, 1627)

Tithes of pigeons and acorns are payable only if they are sold.

A parson libeled in the spiritual court for tithes of pigeons and acorns. And [a writ of] prohibition was prayed because the pigeons were spent in his house and his peacocks ate his acorns. And prohibition was granted because, of the pigeons spent in his own house and acorns that are allowed to fall and are eaten by his peacocks, a man will not pay tithes. [It was held] by justices HARVEY, CROKE, and YELVERTON. But, if the pigeons are sold or the acorns gathered to conserve or sell, tithes will be paid. The acorns are tithable, as Coke, 11 rep., is.¹

[Other reports of this case: Hetley 27, 124 E.R. 314, Littleton 40, 124 E.R. 126, 1 Gwillim 428, 1 Eagle & Younge 358.]

¹ *Stamp v. Clinton* (1614), 11 Coke Rep. 46, 77 E.R. 1206, also 1 Rolle Rep. 95, 81 E.R. 354.

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Owen v. Price
(Part 2)

(C.P. Trin. 3 Car. I, 1627)

It was now argued on the other side by Serjeant *Bramston*.¹ And he agreed to that which was before agreed by Serjeant *Finch*, who argued before him, *scil.* that, where a lease is made successively to three, *scil.* to A. for his life and, then, to B. for his life and, then, to C. for his life, it is not good, because it is by a void remainder to B. and C. and not a joint estate to them. And, *ergo*, it is a lease outside of the Statute of 1 Eliz.² and, thus, void. And, also, he admitted that this lease, as it is made, is not warrantable by the Statute, because it is a lease dispunishable of waste. And he argued to maintain that the second lease was good and the others void. And in the case, he argued two points.

The first was whether the first lease was void. And he held yes. And he argued that it was void by the common law in two respects, first, in respect of the limitation, it being to three successively etc. to them for life, the remainder, and, thus, out of the Statute.

Secondly, he held it void in regard that there was no good livery, because the livery was void, being at another day and by a letter of attorney. And he held that the livery should have been made in person the same day. This would have been a good livery, because, there, the livery operates upon his estate to pass an estate out of it. But, where livery is made by a letter of attorney *secundum formam chartae*, there, it related to the deed and, if it be void or the estate not good that is given by it, the livery also will be void.

And he intended a difference between the cases cited of 43 Eliz., 402, Meldre's and Maye's Case; and Trinity 13 Jac. and Trinity 16 Jac., rot. 1089, Greenwood and Tilen's Case; and Michaelmas 15 Jac., rot. 874, Bowles's Case; and 5 Jac., rot. 1042.³

Also, he held that the livery was void, being by a letter of attorney, because the attorney has not followed his authority, because he has given livery, as it appears, only to one where his authority was to give livery and possession to three. And he cited 11 Hen. VII, 13, and Perkins, in his chapter of feoffments, where he allows the diversity there taken by Perkins, where he does more than his authority, because, there, that, which he did more than his authority was, will be void, for it is surplusage *tantum* and good for the residue.⁴ But, where he does less than his authority was to do, it will be void in all.

For the second point that the deed of such bishop was a lease not warrantable by the Statute of 1 Eliz., and he died, the question [was] whether the lease be absolutely void by his death so that [there was] no operation of the entry where it is voidable *tantum* and not void until an entry. And he argued that it was absolutely void and [there was] no operation of the entry to void it. And he relied upon the words of the Statute that are that leases not warrantable by

¹ For earlier proceedings in this case, see above, Case No. 153.

² Stat. 1 Eliz. I, c. 19, s. 4 (SR, IV, 381-382).

³ *Mellow v. May* (1601), Moore K.B. 636, 72 E.R. 808, Croke Eliz. 874, 78 E.R. 1099; *Greenwood v. Tyler* (1618-1620), Hobart 314, 80 E.R. 456, Croke Jac. 563, 79 E.R. 482; *Smith v. Bowles* (1617), 3 Bulstrode 290, 81 E.R. 243; *Overton v. Sydall* (1597), Popham 120, 79 E.R. 1226, Croke Eliz. 555, 78 E.R. 801, Gouldsborough 120, 75 E.R. 1036.

⁴ YB Hil. 11 Hen. VII, ff. 12, 13, pl. 4 (1496); J. Perkins, *A Profitable Book*.

this Statute will be absolutely void to all intents and purposes and of no effect. And he cited Coke 8 rep. 34, Paine's Case; and Dy. 177; and 39 Eliz.; Dy. 94; and Coke 5 rep. 118.¹

Justice CROKE said that there is a diversity between a thing void by the Statute and void by common law. And he cited the report of a case, that was Kirkeman's Case. A bishop made a lease of tithes, reserving the ancient rent, and he died. And his successor accepted the rent. There, it was adjudged, first, that such a lease of tithes made by a bishop was not within the Statute of 1 Eliz., because, there, there is no remedy for the rent; second, it was adjudged that, though the successor accepted the rent, yet it was not the good [. . .], because it is void by the Statute and it could never be made good.

Et dies datus ad arguendum ulterius usque termino Sancti Michaelis.

[Other reports of this case: Hetley 22, 29, 124 E.R. 310, 315, Croke Car. 94, 79 E.R. 684.]

159

Fawne's Case

(C.P. Trin. 3 Car. I, 1627)

Writs of process cannot be issued in the Court of Common Pleas before an original writ has been obtained.

An attorney who sued in the Court of Common Pleas without having an original writ will be disbarred from practice as an attorney.

Fawne, an attorney of the Common Bench, sued process without an original [writ].

Chief Justice RICHARDSON: This is contrary to your oath of attorney and in a great deceit of the king, who should have a fine and, by your own confession, you have sued in five separate causes processes without originals of any of them. *Ideo*, our judgment will be that you will be, first, put out of the roll of attorneys and, then will be pitched over the bar and utterly disabled to practice as an attorney, and you will be remanded to the Fleet [Prison]. And, accordingly, it was done.

And RICHARDSON cited 41 Edw. III, 1, that an attorney who had recovered in [an action of] debt was committed to the Fleet [Prison], because he had not put in his warrant of attorney before the verdict; and 20 Hen. VI, 37a, an attorney of the Common Bench had made a *capias* of which [there was] no original [writ], and, for this, he was committed to the Fleet for one month and fined to the king and his name struck out of the roll of attorneys and disabled to practice as an attorney in any court of the king.²

[Other reports of this case: Hetley 29, 124 E.R. 317, Littleton 46, 124 E.R. 129.]

¹ *Paine v. Sammes* (1587-1588), 8 Coke Rep. 34, 77 E.R. 524, also 1 Anderson 184, 123 E.R. 420, 1 Leonard 167, 74 E.R. 154, Gouldsborough 81, 75 E.R. 1009; *Wrottesley v. Adams* (1560), 2 Dyer 177, 73 E.R. 391, also 1 Plowden 187, 75 E.R. 287; *Chasyn v. Lord Sturton* (1553), 2 Dyer 94, 73 E.R. 205; *Edrich v. Smith* (1603), 5 Coke Rep. 118, 77 E.R. 238.

² YB Hil. 41 Edw. III, f. 1, pl. 3 (1367); YB Trin. 20 Hen. VI, f. 37, pl. 6 (1442).

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Note

(K.B. Trin. 3 Car. I, 1627)

The day on which a king dies is considered the first day of the reign of his successor.

Where the king died 2 June, this day will not be accounted in the time of the reign of the king who died, but it will be the first day of the reign of the succeeding king.

161

Anonymous

(K.B. Trin. 3 Car. I, 1627)

The question in this case was whether a writ of error lies upon a partial judgment before entry of the final judgment.

In [an action of] *ejectione firmae*, the judgment is *quod recuperet terminum etc.* and *quia nescitur ad quod damnum ideo etc.* And, upon a writ of enquiry of damages, it will be etc. The question was moved where, upon this judgment, before the writ of enquiry of damages had issued, whether a writ of error could be brought upon it.

And, for one side it was said that it will not be brought, because it is not a plain and perfect judgment until the damages be found, and error will not be brought but upon an entire and perfect judgment.

On the other side, it was said that [a writ of] error well can be brought, because, otherwise, if the party that recovered would not sue a writ of enquiry of damages, he will have the term by virtue of this judgment and no error will be ever brought of it.

162

Stevens v. Holmes

(C.P. Trin. 3 Car. I, 1627)

In this case, the court held that the land in issue was held by socage tenure in capite.

One held of the king by the payment of a rent of 8s. to the Warden of the Castle of Dover *annuatim*. And whether this was a tenure in socage *in capite* or tenure in chivalry *in capite* was the question.

And *Crawley* argued that it was socage *in capite*. And he held that, in such a case, if the heir be of full age, the king will not have primer seisin. And that it was tenure in socage, he cited Littleton, sect. 121, that such tenure is in socage. And, also, he cited Fitzherbert, *Natura Brevium*, 155, where Fitzherbert left it a question, but the opinion of Littleton, which is a more authentic authority of the law, put it without doubt.¹ And he held similarly to him it is not so great a doubt in the case that requires a long argument.

¹ T. Littleton, *Tenures*, s. 121; A. Fitzherbert, *Natura Brevium*.

Serjeant *Athow* argued *e contra*. And he held that it was a service in chivalry *in capite*. And he said that it appears by an ancient record that he had seen that those who held of the Castle of Dover by these services were in ancient times accustomed to send and maintain knights to guard the castle and, then, in times afterward, it was at the request of the tenants changed and converted into a rent and with this rent the Warden of the Castle of Dover found wardens for the guard of the castle. And, in those times, Bollen, who was a nobleman, had fifty-six fees and, for this, he furnished fifty-six men for all the year to guard the castle. And one Aubricke had twenty-one fees and found twenty-eight men; Fobert had twelve fees; Achite [?] had twenty fees; Court had twelve fees; Marmouth had twenty-five fees, of which this manor now in question was; one Traverquer had twenty-four fees. And all of these anciently used to find such a number of men by all weeks in the year to guard the castle. And so it continued until the time of King John [1167-1216], at which time, Hubert de Burgh [d. 1243] changed the fees into rents of 20s., *scil.* 10s. for each fee. And this was in lieu of the personal services etc., not to change the tenure. And all this matter appears by the records of the Exchequer and of the Court of Wards. And, by the custom and usage of these courts, these services have been accounted knight's service *in capite*, and the ancient and constant usage of it makes it now law. And he agreed that land given to hold of the castle, paying rent, is only socage, but otherwise it is where it is to hold to guard the castle, paying rent; this is tenure in chivalry. And it is as to hold of the king, paying rent, to guard the castle, which tenure is not castle guard, but tenure in chivalry. And the king can give land to hold of him, paying rent, to a common person. This is not tenure of the common person. And this payment of the rent to the common person that is a thing collateral does not alter the tenure. And he cited 6 rep., Wheeler's Case; and the 9 rep., Lowe's Case, where a grant of the land by the king *absque aliquo inde reddendo* will be a tenure *in capite*; and 13 Edw. III, 17; and 38 Hen. VI, 24; and Com. 243; and long 5 Edw. IV, 126, where tenure of the king and a collateral service to be done to a castle will be knight's service *in capite*.¹ He held that, where the tenure is in socage *in capite*, if the heir at the time of the death of his ancestor be under the age of fourteen years and in by descent, the king will not have primer seisin. But [it is] otherwise where the heir is beyond the age etc. He also cited 10 Eliz., Dy. 362; and Fitzherbert, *Natura Brevium*, 261. And he insisted upon the clause of socage *in capite* in the Statute of 32 Hen. VIII, upon which clause, he inferred that the [. . .] tenant in socage *in capite* [. . .] will be sued.²

Chief Justice RICHARDSON: Though we could take cognizance of the custom and usage of the Court of Wards or the Exchequer, but we must judge according to law as to any matter coming before us.

And, at the end, all the justices agreed that this is socage tenure *in capite*, but they gave them respite until the next following day if they have other matter to say.

[Other reports of this case: Littleton 47, 124 E.R. 130.]

¹ *Wheeler's Case* (Ex. 1601), 6 Coke Rep. 6, 77 E.R. 262; *Lowe's Case* (Wards 1609), 9 Coke Rep. 122, 77 E.R. 919; perhaps YB Trin. 13 Edw. III, Rolls Ser. 31b, vol. 2, p. 317, pl. 17 (1339); YB Pas. 38 Hen. VI, f. 24, pl. 1 (1460); *Willion v. Berkley* (1562), 1 Plowden 223, 74 E.R. 339; YB Mich. 5 Edw. IV, Long Quinto, f. 127b (1465).

² Note (1578), 3 Dyer 362, 73 E.R. 813; A. Fitzherbert, *Natura Brevium*; Stat. 32 Hen. VIII, c. 1 (SR, III, 744-746).

163

Anonymous

(K.B. Mich. 3 Car. I, 1627)

In this case, the plaintiff's pleading was held to be insufficient.

[In an action of] trespass *quare clausum suum fregit et unum tumulum facit, in anglice* one haycock, *cepit et asportavit et 50 barbitts ididem existentem fugavit et chasiavit etc.*, an exception was taken because he did not say *tumulum suum* or his sheep, because it is not a trespass to him. And it seemed a good exception to the court.

164

Manners v. Vesey

(K.B. Mich. 3 Car. I, 1627)

Where a person contracts to use his horses and carts for the service of another person, he is not required thereby to acquire horses and carts if he does not already have them.

Sir Roger Manners leased land, and it was covenanted between the lessor and the lessee. And, *inter alia* conditions, it was covenanted 'that the lessee shall do any reasonable boon, service, or request with his cart and carriages or otherwise as he, the said Sir Roger, shall desire of him at any time.'

Sir Roger Manners required the lessee to carry three loads of coals for him, the lessee not having then a charrett or horses. And whether the lessee be by this excused of his covenant or must hire carts to carry the coals was the question.

And it was urged that, if he had not carts and carriages, he must hire [them] and this by force of this word 'or otherwise'.

But the opinion of the court was that he will not be compelled to hire charretts and horses if he did not have any of his own. And these words 'or otherwise' will be intended of other boons and services, as to reap his corn or gather his apples etc.

[Other reports of this case: Latch 202, 82 E.R. 346.]

165

Anonymous

(C.P. Pas. 4 Car. I, 1628)

The question in this case was whether there must be a prior demand for a rent that is in arrear.

Chief Justice RICHARDSON: Where a rent is granted out of Blackacre and, afterwards, by another deed, he grants that, if it be arrear, he will distrain for it in Blackacre, there, it is a rent seck, and the distress is only a *nomine poenae*. Thus, if a rent be granted out of Blackacre and, then, by another deed, it is granted that he will distrain in Whiteacre or, at the same time, it is granted that he will distrain for it in Whiteacre, it is a rent seck, and the distress is only *nomine poenae*. And, in all these cases, a demand [must be made] of such rent, as it be actual

and special, as by an express demand etc. and not a general demand in law, as by distress or the bringing of the action. But, where a man grants a rent out of Blackacre and, by another deed delivered at the same time, grants that he will distrain for it in Blackacre if it be arrear and legally demanded, there, it is a rent charge *ab initio*.

Also, [it was held] by him where the demand of the rent is restrained to the person of the grantor or to some certain time or certain and particular place, there, there must be an actual and special demand, as in the case at bar where rent was granted payable at Michaelmas and Lady Day and it is further granted, if the rent be arrear at any of the said feasts and fourteen days after and demanded at the mansion house of the grantor that is not parcel of the land or tenements out of which the rent issues, there, there must be a special and actual demand of this rent.

But [it was held] by Justice YELVERTON, where the grant is at first a rent seck and, then, distress is granted for it, there, there must be an actual demand of such a rent. But, otherwise it is where it is a rent charge at first, because the general demand or a demand in law will serve.

Justice HUTTON: If a rent be granted and no land be limited out of which it will be issuing and there is a grant further by the same deed that, if the said rent be [arrear], the grantor will distrain for it in Blackacre, this is a rent charge issuing out of Blackacre. *Quod non fuit negatur*.

166

Anonymous

(C.P. Pas. 4 Car. I, 1628)

Where a person sells hay before paying the tithes of it, the purchaser must pay the tithes.

Where a man mows his grass and makes hay of it and puts it in haystacks and then sells it to a stranger before any tithes are paid for it, there, he who bought the hay must pay his tithes of it. And, if the parson libel for the tithes of it, he must libel against the person who bought this hay, because the person who took away the hay must set forth the tithe of it before the taking of it. [This was held] by all of the justices.

167

Anonymous

(C.P. Pas. 4 Car. I, 1628)

A modus decimandi for an orchard in lieu of tithes in kind extends to any and all trees in that plot of land, but not to trees in an expanded plot of land added to the original orchard.

A man had an orchard containing an acre of land. And he prescribed *in modo decimandi* as to pay 1d. for this orchard there though he planted new trees in the place of those that died or perished where, if he planted other trees between the old trees, there, the *modus decimandi* will extend to it, but, if he added other land to his orchard to increase it, he will pay tithes for this parcel of it that is added and the *modus decimandi* will not extend to it.

[This was held] by all of the justices.

168

Anonymous

(C.P. Pas. 4 Car. I, 1628)

The question in this case was how customary exemptions from tithes should be pleaded.

Chief Justice RICHARDSON: *Per legem terrae*, cattle conserved and nourished for the plow and pale will be excused from tithes, but, there, it must be pleaded to be *per legem terrae et consuetudinem loci*.

Justice CROKE held that to say *per legem terrae* suffices, because the law will take cognizance of a tithable thing.

RICHARDSON: If it has been used from time of which memory does not run to pay 1d. for every cattle bred and nourished for the plow and pale, there, such a tithe will be paid etc. *Ideo*, the custom of the place must be alleged.

CROKE admitted that, where it had thus been used to pay tithes for such cattle, there, the tithe will be paid. But the consequence, he did not admit.

Justice HUTTON, at the same time, remembered a case where a husbandman had a gelding upon which he rode to view his husbandry business. He sometimes [. . .] three or four days in a year, he put him to plow. And the parson libeled in their court for tithes of this horse. And, upon a surmise of this matter, [a writ of] prohibition was granted.

169

Linn v. Ingram

(C.P. Pas. 4 Car. I, 1628)

The party at whose suit an arrest was made or the sheriff from whom the rescue was made can sue those who made the rescue.

Linn against Ingram *et uxorem eius*, in an action upon the case, where a man was arrested upon a *capias* and he was rescued, the party at whose suit he was arrested will have an action upon the case against those who rescued him, because the principal damage was to him, [as held] by Chief Justice RICHARDSON, and justices HARVEY and CROKE.

But justices HUTTON and YELVERTON were *in contraria opinione*. But inasmuch as three justices were against two in opinion, *ideo* the party plaintiff had his judgment by the consent of all.

And [it was held] by RICHARDSON, HARVEY, and CROKE the party at whose suit the arrest was made or the sheriff from whom the rescue was made could have his action upon the case against those who made the rescue. Fitzherbert, *Natura Brevium*, 130 B.

170

Anonymous

(C.P. Pas. 4 Car. I, 1628)

The king can grant a petition of review to a judgment of the Court of High Commission.

Where a party is aggrieved by a sentence given in the High Commission Court, the party aggrieved must petition the king to have a commission of review, which has been granted divers times in such cases. And this is the proper remedy for the party aggrieved in such a case, [as held] by Chief Justice RICHARDSON, *quod nemo dedixit*.

171

Anonymous

(C.P. Mich. 4 Car. I, 1628)

Where the crown presents a rector to a church in its prerogative right, it is not a usurpation, and there can be no lapse during the incumbency of the crown's presentee.

Serjeant *Athow*, in an argument, cited a case of Sir Henry Gawdie,¹ which was thus. Southwell was seised of a manor to which an advowson etc. was appended. He presented to it, and his clerk was instituted and inducted. The incumbent died. And, within a fortnight afterwards, the queen presented one *ratione praerogativae*, who thus was cited in his letters patent. The presentee of the queen continued in possession thirty years. Southwell conveyed the manor to which the advowson was appendant to Sir Henry Gawdie. The incumbent of the queen died, and the queen presented again. And Sir Henry Gawdie brought [an action of] *quare impedit*. First, [it was] adjudged that this presentment of the queen will not be a usurpation, because it was *ratione praerogativae* and not by reason of any title of the queen that will be a usurpation. Second, it was adjudged that this presentation of the queen will save all avoidances so that no lapse will arise by avoidance during this incumbency but that the church was full to prohibit all and not void, so that there will be no lapse, because it will give a title to the bishop or the metropolitan to collate.

172

Lord Pembroke's Case

(C.P. Mich. 4 Car. I, 1628)

A person who was disabled to accept a presentation to a church because of a plurality can be presented again, but not a person who was disabled because of simony.

In the Lord Pembroke's Case, in [an action of] *quare impedit*, after the judges had delivered their opinions in this case etc., it was moved by Serjeant *Berkeley*, and the case was thus. A parson, having a benefice with cure, accepted another benefice with cure of souls and

¹ *Gawdy v. Archbishop of Canterbury* (1620), Hobart 301, 80 E.R. 445.

beyond the annual value of £8, by which the former benefice became void by the Statute of 21 Hen. VIII, cap. [*blank*].¹ The patron presented the same person again.

And if this presentment was good or not was moved by *Berkeley* inasmuch as the Statute said that the benefice will be void and the patron could present *aliam personam*, but here the same person was presented *et non alia persona ergo*.

But all of the justice [held] against him. And [it was held] by them the same person is another person as to this purpose to be presented again, because he is not disabled *ullo modo* to be. But [it is] otherwise in an avoidance for simony, because the same person cannot be presented again to the same benefice etc., because he is disabled to it by the Statute of 31 Hen. VIII.²

173

Turner v. Hodges

(C.P. Mich. 4 Car. I, 1628)

In this case, the custom of a manor as to short term leases was held good.

The case was thus. The custom of a manor was that a copyholder could lease for a year without a license, and the custom also was that, if such a copyholder die within the year, that the lease will be void and the heir of the copyholder will enter and will have the land. The question was whether this custom was good.

Chief Justice RICHARDSON: The custom is good. And he said that the beginning of a copyhold estate is the custom and thus the custom is the continuance of it, because the custom is the soul of the copyhold estate. And he held that it is not by the common law that a copyholder could lease for life, but inasmuch as in such manors they have such a custom, *ideo*, it is a general custom in all of England and well allowable by the law.

Justice HUTTON: It is a good custom, because that which could be in estates at common law by a condition, it could be by the custom in copyhold estates, but such a condition at common law could be that, if the tenant die within the year, that his estate will be void and will cease. *Ideo*, it could be thus in copyhold estates by the custom.

Justice HARVEY: The custom is good and reasonable and beneficial to the lord and the tenant, because it is for the benefit of the lord to have a fine and it is for the benefit of the tenant to have the land to levy the fine out of the profits of the land.

YELVERTON: It is a good custom. And he agreed in reason with HUTTON that, inasmuch as such an estate could be by a condition at common law, *ideo*, such an estate could be in a copyhold estate by the custom. And he cited 21 Hen. VII;³ a man leased land for twenty years *proviso* that the lessor could enter at any time during the lease and re-have it; this is a good *proviso* and the lessee had an estate for years determinable at the will of the lessor. And he cited a case that was cited before by HUTTON and adjudged in the Exchequer Chamber. The custom of a manor was that the executor will have the land of the copyholder for the time of one year after the death of the copyholder; this was adjudged a good custom, because it is good and reasonable that the executors will have an interest in the land for [. . .] to remove

¹ Stat. 21 Hen. VIII, c. 13, s. 9 (SR, III, 293).

² Stat. 31 Eliz. I, c. 6, ss. 4, 5 (SR, IV, 803).

³ YB Trin. 21 Hen. VII, f. 26, pl. 3 (1506).

and dispose of the goods of the decedent. *Ideo*, as the custom could create and continue an estate to a stranger for such a time, by the same reason the custom could abridge the estate.

Thus, *una voce*, they agreed the custom was good.

[Other reports of this case: Hetley 126, 124 E.R. 396, Littleton 233, 124 E.R. 223, Hutton 101, 123 E.R. 1130.]

174

Coventry's Case

(C.P. Mich. 4 Car. I, 1628)

Disturbances of church services should be punished in the Quarter Sessions and not in the Court of High Commission.

Certain bailiffs of the sheriff came into a church where a preacher was in the pulpit and had finished his sermon but had not given the benediction. Two of the bailiffs stood *ad ostiam ecclesiae* and two stood by the pulpit, and they said to the minister that they had a process to arrest him and to require him to come with them and, if he would not come, they would take him. And, accordingly, they took him etc. And, upon this misdemeanor, they were sentenced in the High Commission Court that all will be excommunicated and that two of them will be fined at £500 apiece and two at £400 apiece *in partem poenae* and they will be also imprisoned.

And upon this sentence, they prayed [a writ of] prohibition to the High Commission Court, because so he said that they did not have power to impose fines and imprison, because [it was said] by Serjeant *Ashley*, who moved for the prohibition, the ecclesiastical courts have power in two cases only to imprison, *scil.* in a case of heresy and incontinency of the clergy, and this power is given to the ecclesiastical courts by an Act of Parliament¹ that enables them to it, because they must inflict punishment only *in reformationem morum et salutem animae* and they do not have power to make pecuniary punishments. Also, by the Statute,² power is given to us in our courts to inflict such a punishment; *ideo*, the spiritual court cannot.

HUTTON, HARVEY and YELVERTON: You will have a special [writ of] prohibition in the *quoad* as to the fine, to which Chief Justice RICHARDSON agreed *tandem*. And he said that, as to the imprisonment, *scil.*, if they be imprisoned, they could have [a writ of] *habeas corpus*.

YELVERTON: Let them be [for the] misdemeanor and disturbance of the minister indicted at the Quarter Sessions before the justices of the peace.

¹ Stat. 31 Hen. VIII, c. 14 (SR, III, 739-743); Stat. 32 Hen. VIII, c. 10 (SR, III, 754-755).

² Stat. 25 Hen. VIII, c. 14 (SR, III, 454-455).

175

Thorall v. Holden
(Part 1)

C.P. Mich. 4 Car. I, 1628)

The question in this case was whether a commission of review can be granted after a commission of a court of delegates has been granted.

The question was whether, after a commission of Delegates granted out of the Chancery, a commission of review, *scil. ad revidendum et audiendum et de novo examinandum*, could be granted, because such a commission was granted out of the Chancery.

All of the justices agreed that, before the Statute of 25 Hen. VIII, c. 29,¹ the king could have granted a commission of review, because such a power was in the pope etc., because when, upon an appeal, a definitive sentence is given by the commissioners delegates, no other appeal will be nor other commission to review, because this sentence will be definitive by the Statute of 25 Hen. VIII.

All the justices agreed that no appeal further could be after a sentence given by the commissioners delegates.

And RICHARDSON said that the Statute made their sentence definitive, but not final, and [there is a] difference when the sentence will be definitive and when it will be final, because, if the words had been that it will be final, the question is to be at an end. *Vide* the Statute 8 Eliz., cap. 5; and 22 Edw. IV, tit. *Consultation*.²

Henden: As to that which is said that this new commission of review has in it a *non obstante aliquo statuto*, this *non obstante* is of no force or effect, but void, for the private interest of the party, *quod fuit concessit* by all. And [it was said] by him the king cannot dispense with simony by a *non obstante*.

Et dies datus ulterius ad audiendum other arguments.³

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Anonymous

(C.P. Mich. 4 Car. I, 1628)

A court of equity cannot enforce a contract that was not supported by some consideration.

Upon a *nudum pactum*, they should not decree in a court of equity, and, if they will proceed, [a writ of] prohibition will be granted, [as held] by all the justices.

Chief Justice RICHARDSON: If a court of equity will compel an heir to pay a debt of his father upon a specialty out of land descended to him where the heir was not mentioned in the specialty, as where the father did not bind him and his heirs, they will always grant a

¹ Stat. 25 Hen. VIII, c. 19, s. 4 (SR, III, 461).

² Stat. 8 Eliz. I, c. 5 (SR, IV, 488); *Corbet's Case* (1483), 1 Fitzherbert, Abr., *Consultation*, pl. 5, also 7 Coke Rep. 44, 77 E.R. 477.

³ For later proceedings in this case, see below, Case No. 188.

prohibition. If the father be awarded by arbitration to enter into an obligation and to procure his son and heir to enter also in the obligation with him and the son at the request of the father agree and promise to enter into an obligation with him, it is a good consideration to charge the son in a court of equity, [as held] by all of the justices.

177

Anonymous

(C.P. Mich. 4 Car. I, 1628)

A plea of payment can be pleaded without an oath, but a plea of release must be made under oath.

Chief Justice RICHARDSON: An obligation was made to pay such a sum at London, and the obligee arrested him at Newark, where the obligor pleaded payment at London. This plea must be accepted without an oath, because [it was held] by him, in all cases, where they plead not a foreign plea, but the condition performed, there, the plea will be accepted without an oath. But, where he pleads a release at another place or pleads some other foreign plea, there, they can refuse to accept his plea without an oath.

178

Wilson v. Peck

(Part 1)

(C.P. Mich. 4 Car. I, 1628)

A salaried employee can be a solicitor without committing the crime of maintenance, but not an independent contractor.

In an action upon the case for fees and a salary for being his solicitor, the case was of a general solicitor.

RICHARDSON and HARVEY: He will have a salary, because he deserved it by his pains and it is not maintenance to solicit, because solicitors are for the benefit of subjects who are remote. And the Statute of 3 Jac., cap. 7, mentions solicitors as attorneys.¹ *Ideo*, they are allowable.

HARVEY said that a judgment was given recently in the King's Bench in the same point where the justices took this diversity that, where a solicitor is an attorney allowed and he is retained for his client, be he an attorney of the King's Bench or of the Common Bench, he could solicit for his client in the Chancery, Exchequer, or another court where his client has causes. And this is legal and not maintenance, and it is in regard of his profession, because he is *homo legis*. But it is otherwise of another man who has not such a profession, because, if he solicits for another, it is maintenance in him.

Justices HUTTON and YELVERTON: A solicitor will not have wages for soliciting, because it is maintenance in him to meddle in causes, because he is not a man of the law nor the court nor takes cognizance of him as solicitor, nor is he attendant at court. And it is more convenient and also beneficial to the commonwealth that those who have businesses of one will retain inner barristers to be of counsel with them and to advise them in their businesses and take care of it and it is more fitting for them to see to the businesses of men and to prepare businesses for

¹ Stat. 3 Jac. I, c. 7 (SR, IV, 1083-1084).

the grand counsel. And they could put their clerks to offices and other places in businesses of their clients and also they are of more credit and fitter to be trusted with the businesses of men than an ignorant and vagrant solicitor, and it is fitting that such inner counselors be trained up in businesses under the grand counsel for the enabling of them the better.

Also, they are dispersed in each county so that men could easily [?] repair to them and, by this means, a £1000 will accrue each term to the inner counsellors for their encouragement. Thus, if any other than these who are professors of the law will solicit a business, the other men do it at their peril, because [it was held] by them it is maintenance in such solicitors.

But it was agreed by all that, if a man retain one to be his servant and to solicit his business for him, this is not maintenance, but it is a good consideration and, upon such a retainer, he will have his salary and an action upon the case to recover it. But it is otherwise where he is not his servant.

Also, it was agreed by all that it is not legal for a solicitor to spend money in a suit for another man, because, if he do it, this is maintenance.¹

179

Anonymous

(C.P. Hil. 4 Car. I, 1629)

The question in this case was who was entitled to have letters of administration of a decedent's estate.

In [an action of] prohibition to the Prerogative Court, a man died intestate and without issue, having three brothers. The younger brother prayed letters of administration, and the ordinary granted them to him. And, after his account to the ordinary, he would distribute part of the residue of the goods to the two brothers, upon which, it was moved to have [a writ of] prohibition. And a day was given to show cause why prohibition should not issue.

And now, Serjeant *Henden* moved against the prohibition. And he relied upon the Statute of Magna Charta, upon the saving *liberis etc.*²

But Serjeant *Davenport*, of counsel with the other side, said that it does not extend to brothers, but to issue.

And so it seemed to the judges.

And *Henden* agreed that, if the ordinary grant the administration to the younger son of the intestate, there, the ordinary can make a distribution and given portions to the other sons.

Justice HUTTON: If the ordinary grant the administration to the wife of the intestate, he cannot revoke it nor grant it to another. But, before the administration granted to the wife, he can join one with the wife.

Justice HARVEY: We, in our law, always have held that, after the administration granted, the ordinary cannot meddle with any distribution, because all is settled in the administrator.

Serjeant *Davenport*: This is true.

HUTTON: The usage now is that the ordinary, before he grants the administration, takes bonds of the party to allow such part of the goods to be disposed and distributed by the ordinary *in pios usus*.

Justice HARVEY: This was recently done by Sir Henry Martin etc. But the opinion of the judges was against such proceedings, and Sir Henry doubted of his action in doing it.

¹ For later proceedings in this case, see below, Case No. 243.

² Stat. 25 Edw. I (*Magna Carta*), c. 18 (SR, I, 116).

And [it was held] by HUTTON there will not be *rationabile parte bonorum* but where the custom is thus.

HARVEY: If administration be granted legally and according to the Statute 21 Hen. VIII, the ordinary cannot revoke it and grant it to another.¹ But, if the ordinary grant the administration to a brother of the intestate and, then, the wife of the intestate prays the administration, he can revoke the first, and grant it to the wife. And, thus, where he grants the administration to a stranger, it can be revoked and granted to the stranger.

Et dies datus ultra, quia only those two justices were there [in court].

180

Wood v. Greenwood

(C.P. Hil. 4 Car. I, 1629)

The extent of altarage fees is determined by each local usage and custom.

In the composition anciently made between the parson and vicar, it was agreed *quod vicarius hababit omnia alteragia*. And what things will be comprehended within this word '*alteragium*' was the question.

And Serjeant *Berkeley* said that this word '*alteragium*' is expounded by this place of scripture, *viz. qui servit altari venit de altare*.²

But Justice HARVEY said that it has been twice ruled in the Exchequer that this word '*alteragium*' will be taken and will include those things that have been used by the custom, because such things that the vicar has had by usage from the time of which memory does not run, those things will be said to be included within this [word] '*alteragium*', because, in the Exchequer, after argument by the civilians concerning the exposition of this word, the civilians themselves were doubtful of the exposition of this word '*alteragium*'. *Ideo*, the judges there ruled that '*alteragium*' will be taken and construed according and having regard to usage and custom.

[Other reports of this case: Hetley 135, 124 E.R. 402, Littleton 243, 124 E.R. 228, 1 Eagle & Younge 368.]

181

Anonymous

(C.P. Hil. 4 Car. I, 1629)

Ecclesiastical courts have jurisdiction over defamation.

Serjeant *Digges* moved to have [a writ of] prohibition to the spiritual court because a wife libeled against a man for calling her a whore and the truth of the case was that she threw stones at him and misused him and gave to him bad words by which he, in his choler and anger, said 'you are a whore for saying so to me.' And these words being only brabbling words and spoken in choler and anger, he prayed a prohibition.

¹ Stat. 21 Hen. VIII, c. 5 (SR, III, 285-288).

² I Corinthians, chapter 9, verse 13.

Chief Justice RICHARDSON: The word outside [this] is much scandalous and defamatory, and it is firstly to be punished in the spiritual court, and *ideo* prohibition will not be granted if they proceed upon this word there. But if additions had been put to the word 'whore' as saying 'you are a patched whore' or 'you are a piperly whore', as these additions mitigate the word 'whore' and make it not so heinous and for these words prohibition will be granted.

Quod fuit agreed.

Justice HARVEY: If the truth of your case be that he has said 'you are a whore for saying so to me' and these subsequent words mitigate the former and, for them, you will have a prohibition, *quod non dedicitur*.

But, inasmuch as it does not appear by the libel that there were such subsequent words, *ideo*, they did not grant the prohibition.

182

Anonymous

(C.P. Hil. 4 Car. I, 1629)

A written contract is not complete without sealing and delivery.

If an obligation of £20 be in writing and, before the sealing and delivery, a condition is added to it or a memorandum endorsed that this obligation is for the payment of £10, it is good. But if it be added after the sealing and delivery, it is void and no condition to bind, [as held] by Justice HUTTON and conceded by all.

183

Anonymous

(C.P. Hil. 4 Car. I, 1629)

Where it is contracted that an arbitral award be signed by the arbitrator, the award is void if it be not signed, though it be sealed and delivered.

Two [persons] referred themselves to arbitration. And it was agreed that the arbitration will be in writing and under the hand and the seal of the arbitrators. And the arbitration was put in writing and under their seals, but not under their hands. The arbitration was thus void.

Justice YELVERTON : [. . .] it was recently adjudged in the King's Bench.

184

Anonymous

(C.P. Hil. 4 Car. I, 1629)

The granting of alimony to a wife is within the jurisdiction of the bishop's court and not the Court of High Commission.

It was moved to have [a writ of] prohibition to the High Commission Court in a case of alimony.

Chief Justice RICHARDSON: We usually grant prohibitions to the High Commission Court if they will grant alimony to the wife etc., because this is outside of the course of the law for

them there to appoint alimony to the wife etc. And, *ideo*, we grant a prohibition to put things aright. But, if you will proceed the true way and that the ordinary gives alimony, there we will not grant a prohibition in disturbance of the ordinary to do so, which was not denied.

185

Starkey v. Taylor
(Part 1)

(C.P. Pas. 5 Car. I, 1629)

An action of defamation lies for a false accusation of barratry.

Chief Justice RICHARDSON: If a man procure another to indict one for a common barretor and he is acquitted of it, he will have an action upon the case against him who procured him to be indicted, with which the justices agreed.¹

186

Baugh v. Coxe

(C.P. Pas. 5 Car. I, 1629)

The date of a lease is the day that the lease and possession was delivered to the lessee.

In [an action of] *ejectione firmæ* by Baugh against Coxe, the plaintiff declared of a demise made 30 April and the lease bore date 30 April and the lease was written and sealed by the lessor himself the day and also the letter of attorney was made bearing date, the same day, to deliver the lease as the deed of the lessor and to give possession accordingly. And the deed was delivered 1 May, and the possession was given accordingly. This was not a lease or the deed of the lessor until the first day of May. And, on account of this, the case being thus, they must have declared of a lease 1 May. And, upon this misprision, the jury being empaneled, the plaintiff, seeing the opinion of the court against him, was nonsuited.

187

Webb's Case

(C.P. Pas. 5 Car. I, 1629)

Parish churches must be kept in good repair whether it is convenient to the parishioners or not.

The Court of High Commission has the jurisdiction to require parish churches to be kept in good repair.

Serjeant *Ashley* moved for [a writ of] prohibition to the High Commission Court because the parishioners of A. were sued in the High Commission Court for the profaning of and the not repairing of their parish church. And the parishioners have there pleaded that, from the time of which memory does not run, there was not any church within their parish, but they have

¹ For later proceedings in this case, see below, Case No. 191.

used from the time of which memory does not run to go to the parish church of B. next adjoining to them and to hear divine service and have there paid 6s. 8d. *per annum* to the said parish of B. for the repairing of the church and for the sustenance of the poor. And, because this is a matter of a prescription, it is not a thing triable in the High Commission Court, but at common law. And he moved for [a writ of] prohibition for it.

Chief Justice RICHARDSON and HARVEY (being there [in court] only): We will not grant a prohibition against the building and repairing of churches. And this matter of profaning and not repairing of churches is proper to the spiritual court and also the High Commission Court.

Ashley: The matter is proper for the ordinary's court or the spiritual court, but this does not belong to the High Commission Court.

RICHARDSON and HARVEY: You will appeal from the ordinary's court and, by your appeals, there will be no end of suits. And it is a matter so general for all of the realm and deplorable to see many such ancient chapels, churches, and chancels to be decayed and profaned. And a complaint of this was [made] to the last Parliament and the bishops said that they were thus stayed and stopped in their courts by [writs of] prohibition that they could not remedy the matter.

And, *ideo*, the justices said that they would not grant prohibitions in this case, because, if there had been a parish church, though, from the time of which memory does not run, it was decayed and utterly defaced and the parishioners have gone to another parish, yet this being a distinct parish by bounds and the church being presentative and their being parishioners, the church must be repaired and re-built. And, by any record or authentic thing, it can be proved that there was a church in the time of King Richard I, even though from the time of which memory does not run, the church has been decayed and utterly ruined so that there is no memory of the church there, yet they will never grant a prohibition to stay the High Commission Court or the spiritual court to force them to repair or re-build such church. *Ideo*, you can plead what matter you will in the High Commission Court.

[Other reports of this case: Littleton 263, 124 E.R. 238.]

188

Thorall v. Holden
(Part 2)

(C.P. Trin. 5 Car. I, 1629)

The case was between Thorall and Holden, which was before moved the term of St. Michael *anno 4 Caroli regis*.¹ And the case was thus. Marie Haver sued in the spiritual court and libeled against Thorall *pro jactitatione matrimonii*. Thorall appealed before the sentence to commissioners delegates in the Chancery. And the commissioners proceeded upon the *gravamen* and upon the merits of the cause also, and gave a sentence that the marriage that was pretended by Thorall was void and that the said Marie will be at liberty to marry with whomever she wished, upon which, afterwards, the said Marie intermarried with Houlden. And, afterwards, the said Thorall petitioned the king to have a commission of review, and Houlden prayed [a writ of] prohibition in the Common Bench. And the point was whether a commission of review will be granted after a commission of delegates.

Serjeant *Berkeley* held that a commission of review can be granted after a commission of delegates, because the pope could have granted it and, *ideo*, the king could, because now the

¹ Earlier proceedings in this case are reported above, see Case No. 175.

same power is given to the king by the Statute.¹ And he took a difference between a review and an appeal, first, because a review cannot be upon the first sentence, but after an appeal properly. Second, an appeal can be after a sentence given; a review always is after. Third, an appeal can be had of common right and course, but a review must be obtained by a petition to the king. And he cited a case in 38 & 39 Eliz., Jervis and Hallingworth's Case.

RICHARDSON said to him that the king will not have all this that the pope usurped here, because the pope presented divers times by provision to bishoprics and abbeys that the king now cannot do, but those things that the king could have legally done and that the pope had usurped from him, these things are now restored to the crown and to the king. And he also said that a commission of review could not be granted after a commission of review and that, by his prerogative, the king could not grant a commission of review.

Henden held that the prohibition will be granted, because, after an appeal to the commissioners delegates, the sentence of the commissioners delegates will be definitive, as are the words of the Statute of 35 Hen. VIII that gives the commission of delegates in the Chancery.² And, by the same reason that a commission of review will be granted, infinite commissions, one after the other, could be granted. Also, [children] that, at common law, are legitimate and inheritable to land will be bastardized and the course of the descent changed. And, in our case, Holden had issue by the said Marie. And he urged upon the Statute of 8 Eliz., cap. 5,³ which Statute would be frivolous, if, before it, the king could have granted a commission of review *in causis transmarinis*.

RICHARDSON said to the counsel of both parties that they will speak now to two points: first, whether a commission of delegates in the Chancery be not given in lieu of the commission of review; second, whether this commission of review be good without a clause in it of *non obstante*.

Et dies datus ulterius.

Lady Butler v. Lady Wootton

(C.P. Trin. 5 Car. I, 1629)

A bishop can grant administration of a decedent's estate, but he cannot supervise the distribution of a decedent's estate.

The Lady Wotton took letter of administration of the goods of her husband, an intestate. And the ordinary would have intermeddled to have made a distribution etc., upon which matter surmised to the Court of Common Pleas, [a writ of] prohibition was granted that they will not proceed to the sentence and, if they have given a sentence, that, then, they must discharge the same sentence. And, afterwards, it was suggested to the Court of Common Pleas that the proceedings in the spiritual court were only to have the Lady Wotton make a perfect inventory and an account, upon which matter, [a writ of] consultation was granted. And the ordinary proceeded and taxed the costs of the suit at £50 with a reference *ad retroacta*.

Chief Justice RICHARDSON and Justice YELVERTON: When the ordinary had granted administration, he had put it out of himself, and he has not now to intermeddle to make a

¹ Stat. 25 Hen. VIII, c. 19, ss. 4-6 (SR, III, 461).

² Stat. 25 Hen. VIII, c. 19, ss. 4-6 (SR, III, 461).

³ Stat. 8 Eliz. I, c. 5 (SR, IV, 488).

distribution. Also, when a prohibition is granted in the *quoad*, if the ordinary tax costs with relation to all, the giving of costs is void, and he will be stayed by [a writ of] prohibition to do it.

190

Worthley v. Savile

(C.P. Trin. 5 Car. I, 1629)

An imparlance roll can be amended before an order of recordatur is made but not afterwards.

Sir Francis Wortley [was the] plaintiff in [an action of] trespass for assault and battery against Thomas Savil, sheriff, who pleaded *de son assault demesne*. And the jury found for the plaintiff, and gave him £3000 damages. And, now, it was moved that they, intending to have moved in arrest of judgment, that the day, month, and year that the trespass was done were omitted in the imparlance roll and, after the verdict, they were amended by the clerks, who confessed the amending of it and that they have allowed blanks in the roll for the amendment of it.

And [it was said] by *Brownlow*, *Gulston*, and *Moyle*, prothonotaries, the usual course and practice at all times has been to allow blanks in the roll and to amend it and to make the roll true, and this after a verdict if there not be an order of the court or *recordatur* entered in the roll to the *contra*.

Chief Justice RICHARDSON said thus our books are seen with a difference where it is said in them that the imparlance roll will not be amended after a verdict, *scil.* where a *recordatur* is entered to the *contra*.

[Other reports of this case: Littleton 278, 124 E.R. 245, Hetley 142, 124 E.R. 408.]

191

Starkey v. Taylor

(Part 2)

(C.P. Trin. 5 Car. I, 1629)

[In an] action upon the case for words,¹ Starkey being an attorney of the Common Bench, one, speaking with him upon business concerning his attorneyship, said to him 'you are a common barretor.' And the action well will lie.

Serjeant *Berkeley* argued, and he cited divers cases, one 4 Car., rot. 870, in the Common Bench, *Lidnam's Case*, and also *Disnel's Case*, 5 Eliz., [rot.] 1106, Common Bench, for saying 'he is a false knave', speaking of an attorney.

And Justice YELVERTON remembered a case that was recent, and it was *Sir Miles Fleetwood's Case*,² who brought an action upon the case against one for saying 'he was the king's deceiver' where he was the receiver of the king, and he had great damages given in this case.

¹ For earlier proceedings in this case, see above, Case No. 185.

² *Curle v. Fleetwood* (1620), 2 Rolle Rep. 147, 81 E.R. 716, Croke Jac. 557, 79 E.R. 478, Palmer 69, 81 E.R. 982.

And, as to the case at bar, all of the justices agreed that the action was well maintainable.

[Other reports of this case: Hutton 104, 123 E.R. 1132, Hetley 139, 143, 124 E.R. 406, 409.]

192

Watts v. Maydell

(C.P. Trin. 5 Car. I, 1629)

An acceptance of a second lease of the same land from the same lessor does not make a surrender of the first lease.

Roome v. Madewell.

A. leased to B. for twenty-one years, the lease to begin *in futuro*. And, before the beginning of it, he leased the same land to C. by a deed indented for eight-nine years, and this lease was to begin *in praesenti*. C. entered and occupied etc. B., before the beginning of his first lease, accepted a second lease for twenty-one years and a half and this was to begin *in praesenti*. The question was whether this acceptance of the second lease by B. be not a surrender of his first lease.

It was argued that it was not a surrender. And the difference was taken where a first lessee who had a lease to begin *in futuro* accepted a second lease during the time that the lessor was in possession of the same estate not changed or altered, because, there, it will be a dissolution of the first lease and a surrender in law of it. But [it is] otherwise where the estate of the lessor should be changed and altered, as where he was seised in possession of an estate in fee at the time of the lease made and, before the second lease, his estate was changed and he was seised only of a reversion, because, in our case, he was, because the lease made to C. was to begin *in praesenti* and, thus, now he was seised but of a reversion only. And, as Coke, *Institutes upon Littleton*, 48,¹ when a lease is made to begin *in futuro*, the lessor has no reversion before the beginning of the lease, and he cannot grant the reversion of it, because he has no reversion before the lease begins.

Also, on the side of the lessee, [it was said] he cannot surrender before the lease begins, because the lessor has not a reversion, nor can the lessor release to the lessee before. Thus, we see what was granted; he leased by an indenture to C. for eight-nine years to begin *in praesenti*; now, when C. entered, he had an entire lease and an entire term. And, if the lease or the contract had been by parol, then C. would have had two terms, one the term of B. and the other to be after the term of B. ended. And a great diversity in law is made by parol, by a deed poll, and by a deed indented. *Vide* Com. 433b and 434a.²

Afterwards, at another day, by the opinion of all of the justices, this acceptance of the last lease by B., as this case stands, was not a surrender of his first lease.

[Other reports of this case: Littleton 268, 279, 124 E.R. 240, 246, Hutton 104, 123 E.R. 1132.]

¹ E. Coke, *First Institute* (1628), f. 48.

² *Smith v. Stapleton* (1573), 2 Plowden 426, 75 E.R. 642.

193

Sheriff of Surrey v. Alderton

(C.P. Trin. 5 Car. I, 1629)

A person can be rescued, but goods cannot be rescued.

An action lies against a person who prevents the legal execution on goods by an officer of the court.

Upon [a writ of] *fieri facias* directed to the sheriff, he made a warrant to his bailiff to make execution. The bailiff being disturbed and prohibited to make execution, the sheriff returned a rescue that he rescued the goods from him.

[It was held] by Chief Justice RICHARDSON and Justices HUTTON and YELVERTON this is not a rescue, because a rescue must be of a person and not of goods, but, in such a case, an action upon the case lies against the person who disturbed and prohibited the execution to be done.

[Other reports of this case: Littleton 296, 124 E.R. 255, Hetley 145, 124 E.R. 410.]

194

Anonymous

(Ex. Mich. 5 Car. I, 1629)

Where a rector of a church obtains a second presentation in order to confirm his title to the parsonage, he must pay first fruits again.

Serjeant *Henden* moved that a parson was presented to a benefice and compounded for his first fruits. And afterwards, the parson, being informed that the king had a better title, obtained a presentation by the king. And now, he moved the court whether the parson will pay first fruits another time for this second presentation inasmuch as it seemed to him the second presentation will serve only as a confirmation of the first presentation. And admitting that the second presentation voids the first, then, what reason [is there] but that he will be discharged of the payment of the first first fruits.

But barons DENHAM, TREVOR, and VERNON were against him, that he will pay them both, and thus it has [been] ruled by this court before,¹ as Baron DENHAM said.

And *Edwards*, at the bar, cited the case remembered by Baron Denham.

¹ Perhaps *Curtis's Case* (Ex. 1628), Paynell Exch. 152, 243, Littleton 139, 124 E.R. 176.

Allinson v. Ayres
(Part 1)

(C.P. Mich. 5 Car. I, 1629)

In order to be a valid conveyance, a common recovery must be filed in the office of the Custos Brevium.

Upon a recovery had in the Common Bench, [a writ of] error was brought in the King's Bench. And the error assigned was that, in this recovery, there as not any writ of entry in the *post* nor any writ of seisin. And the Custos Brevium, being examined, affirmed that there never was any writ of entry filed in his office, and the justices of the Common Bench certified accordingly to the justices of the King's Bench that there was not any writ of entry.

Serjeant *Hitcham* moved and affirmed that there was a writ of entry and seisin also had upon the recovery and the Prothonotary knew it well.

Brownlow, Prothonotary, affirmed it also, and [said] that he saw the writ of entry in the *post* and examined it himself.

Ideo, *Hitcham* moved that the matter be examined, because it was the fault of the Custos Brevium, who did not file it. And it will be mischievous if, for the default of the officer in filing it or the attorney being negligent and losing the writ of entry, the estate of a man will be lost.

Chief Justice RICHARDSON and all of the court [said], if you can make it to appear by any record that there was a writ of entry and seisin, it will be good, and we will certify this matter. But we will not allow any other examination. And it is good for purchasers to see that their attorneys do not lose the writs, but carry them to the Custos Brevium and that he file it for the security of their assurance.

*Et dies datus ulterius.*¹

Cole v. Stephens

(C.P. Mich. 5 Car. I, 1629)

A writ of partition lies against a tenant in possession but not against him in remainder or reversion.

Trinity 4 Car., rot. 1560.

Cole was tenant in common with Aylott, who was tenant for term of his life, the remainder over in fee to Stephens. Cole brought a writ of partition against Aylott, and he had a judgment.² But being persuaded that it bound only for the term for life and not the inheritance in remainder, by the advise of his counsel, he brought another writ *de partitione faciundo* against Aylott and Stephens. The attorney of Aylott pleaded *non sum informatus*, and Stephens pleaded *quod nihil tenet pro indiviso etc.*

¹ For later proceedings in this case, see below, Case No. 207.

² *Cole v. Aylott* (1629), Littleton 299, 124 E.R. 256.

Serjeant *Henden* argued that the writ of partition upon the Statute well lies against one in remainder and binds his remainder. He cited 8 Eliz., Dy. 175, and the *New Book of Entries*, folio 409.¹

But I [Ravenscroft] did not mark his argument, which was short, inasmuch as the opinion of the whole court was against him, and said that he never could maintain it.

And all of the justices held that a writ of partition lies always against the tenant in possession and not against him in remainder or reversion. And [it was held] by them the partition will be good only for the life of the tenant for life and will not bind him in remainder, but the writ will abate against him in the remainder.

Henden: Then we have our judgment in this writ against the tenant for life.

Justice YELVERTON: It is not good for you, because, perchance, the writ will abate for all. But the best and the surest way is to take your judgment etc. in the first writ of partition against the tenant for life.

197

Ringwood's Case

(C.P. Mich. 5 Car. I, 1629)

An action for a battery upon a member of the clergy for self defense lies in a court of common law and not in the Court of High Commission.

A parson sued in the High Commission Court divers persons for battery of him and for calling him a devil and rogue. The defendants pleaded that they were with their master and in his barn and they heard that the parson was in the trampling of the hay of their master and he would by force enter into his close and that they would have stayed the parson from the breaking of the hay and he assaulted them, upon which, in defense of their master and of themselves, they beat him. Thus, the harm that he had was *de son assault demesne*. But the High Commission would not allow this plea.

Upon which, Serjeant *Crawley* moved to have [a writ of] prohibition, because they in the High Commission Court will give damages and a fine to the king. And he conceived that, if any offense was to be punished by the spiritual judges, it lies properly before the ordinary.

Justices HUTTON and YELVERTON, being only there [in court], granted to him a prohibition. And, upon the view of the Statute *de Articuli Cleri*² for the putting of violent hands upon a man of the Holy Church, they were in opinion that, as this case is for the battery, it being *de son assault demesne*, it is not a thing belonging to the spiritual court, but to the temporal court, because the Statute says that the man of the Holy Church in such a case will have his remedy in the courts of the king.

Serjeant *Aylofffe*: The ordinary proceeds only *in salutem animae et pro reformatione morum*, and the calling of a parson a devil and rogue were bad words.

Justice YELVERTON: The words were words of choler and anger and the beating of a parson upon his own assault is not any sin, as it seemed to him.

¹ Stat. 31 Hen. VIII, c. 1 (SR, III, 718); Stat. 32 Hen. III, c. 32 (SR, III, 787-788); *Anonymous* (1565), 3 Dyer 243, 73 E.R. 538; *Wotton v. Cocke* (1566), E. Coke, *Booke of Entries* (1614), 'Partition', pl. 1, f. 409, also 136 Selden Soc. 24, 127, 129, 3 Dyer 260, 337, 73 E.R. 577, 761, 109 Selden Soc. 202, Benloe 152, 228, 123 E.R. 117, 161, 1 Anderson 53, 123 E.R. 349.

² Stat. 9 Edw. II (*Articuli Cleri*), c. 3 (SR, I, 171).

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Flower v. Vaughan

(C.P. Mich. 5 Car. I, 1629)

Tithes are not payable for deer, rabbits, fish in ponds, wood, or pigeons eaten or used by the landowner.

Justice HUTTON said that, for deer, coney, and fish in ponds, no tithes will be paid, *quod non fuit dedictam*.

Justice YELVERTON said that, of pigeons spent in his house, no tithes will be paid, and he will not prescribe *in non decimando* but he will prescribe *quod, per legem terrae*, no tithes are paid for pigeons spent in his house, as, *per legem terrae*, he will pay no tithes of wood for fuel in his house.

[Other reports of this case: Littleton 311, 124 E.R. 262, Hetley 147, 124 E.R. 412, 1 Eagle & Younge 370.]

199

Anonymous

(C.P. Mich. 5 Car. I, 1629)

Only the next tenant in remainder has an action of waste against the tenant in possession.

A tenant in possession can be enjoined from committing waste even though he could do so at common law.

[It was held] by justices HUTTON [and] YELVERTON and Chief Justice RICHARDSON, if a tenant for life, the remainder for life, the remainder in fee, the first tenant for life commits waste during the life of him in remainder for life, this waste is not punishable by him in remainder in fee, but he can after the death of the second tenant for life punish the waste done by the tenant for life in the time of him in remainder for life and also what was done after.

RICHARDSON said that, in such a case, the Chancery has prohibited the tenant for life to do waste though, by the [common] law, he be dispunishable for the waste during the lifetime of him in remainder for life. And he cited Sir William Cope's Case in the Chancery; by a decree, it prohibited a tenant for years that he will not plow, having a meadow, or will not commit waste in a case where it was dispunishable for waste.

200

Attorney General v. Suffolk Inhabitants

(K.B. Mich. 5 Car. I, 1629)

The inhabitants of the county have the ultimate responsibility to keep their bridges in good repair.

In an information by Sir Robert Heath, Attorney of the King, against the inhabitants of Suffolk for the decay and not repairing of a bridge called Catworth Bridge, it was agreed by

all of the justices that where no particular town, hamlet, or place or particular person is chargeable with the reparation of a pont or bridge, there, it will be repaired at the costs and charges of the county and the inhabitants, because, *de communi jure*, they are bound to repair all bridges etc. unless they can show that some particular place or particular person is chargeable with it.

Jermyn, being of counsel for the inhabitants of Suffolk showed an ancient record in 14 Edw. I that certain land containing thirty acres was given for the maintenance and reparation of the said Catworth Bridge and that the owners of this land were divers times to be presented at Ipswich in Suffolk at the quarter sessions there for the not repairing of the said bridge and where to be found chargeable for it by divers juries.

Noy and [*Heath*], the Attorney of the King, being of counsel against the inhabitants, said that the inhabitants themselves presented it and found it and [it is] not a marvel if they, in their own case, were partial. But they said that, notwithstanding the presentment of the terre tenants, yet, by the order of the judges and justices of the county, the inhabitants have always of late repaired the bridge themselves.

JONES and the other judges said that this is not much material, because, at all times that such a bridge is in decay, they charge the county with the reparation of it whether *non constat* that some particular place or person must do it or until the inhabitants could find what certain place or what certain person should do it.

Noy and [*Heath*], Attorney of the King, confessed that the inhabitants could distrain the terre tenants for aid to the repair of this bridge, which was affirmed by the court.

201

Thomas v. Morgan

(C.P. Mich. 5 Car. I, 1629)

A conveyance of land of a certain value is not valid until the land be described by metes and bounds.

Edward Thomas against Thomas Morgan and others in [an action of] *ejectione firmæ*.

The plea began Easter 3 Car., rot. 1339, in this court. The case was thus. Richard Thomas, father of Edward Thomas, the now plaintiff, being seised of lands of which the time [of memory does not run], now in question, was parcel by reason and in consideration of a marriage between Edward Thomas, son of the said Richard Thomas, and the daughter of the bishop of Llandaff, by indenture, covenanted that a fine will be levied and a recovery will be suffered of all his lands to Thomas Morgan and this upon trust and confidence and to the subsequent uses contained within the same indenture, and, first, that the said Thomas Morgan will stand seised of part of the land, *scil.* of so much that will amount to the value of £30 *per annum* beyond all charges and expenses to the use of the said Edward Thomas and the said daughter of the bishop of Llandaff for the term of their lives and the survivor of them and this to be limited by metes and bounds by the covenantor within one month after the said indenture and before the fine and recovery etc. And the estate made to the said daughter of the bishop was for the jointure of the daughter of the bishop. And he limited divers remainders over of the said reversion etc. And, as to the residue of all the other land, other uses, several contingents were limited, and the uses were many and intricate, as all of the justices said.

And in the [action of] *ejectione firmæ*, they being at issue etc., the jury found that the lands contained within the indentures were *in toto* to the value of £80 *per annum* and that the land of the value of £30 *per annum* was not limited by bounds and metes, but the fine and the recovery were had before the land limited by bounds or metes etc.

And, upon a demurrer, the principal and chief point of the case was whether, upon this limitation of the land of the value of £30 *per annum*, no metes or bounds being made of it, any use or estate will be raised.

And, by all of the justices, it was held that no use arose upon it, but it was all utterly void.

Justice YELVERTON: Until the land be set forth, here, it was only a possibility of a use that was not executed until it came into possession. Also, the Statute of 27 Hen. VIII¹ did not operate upon the value of the land, because the value of the land was a thing unknown and uncertain. And we put that, at common law before the Statute, [if] a man had bargained and sold the value of £30 *per annum*, this does not raise any use. And he cited Kalloway, fol. 84.² Thus, no use being raised before the Statute upon such a conveyance but this, it is a thing only in a covenant; the Statute cannot raise any use. But, upon such a conveyance before the Statute, the Chancery would have aided it in regard of the trust and confidence, but, [it is] otherwise, now. And he cited 6 Rep. 116. And [it was held] by him, if any valuation of the land had been made in the conveyance, as that all the land contained etc. was of such a value with more particularity, that all the meadow was of the value of 10s. the acre and all the arable of 5s. the acre and all the woods of 40s. the acre etc. But, in our case, no valuation being made in the conveyance but it being to be limited and put in certain by the covenantor, this not being so done, all is void. And he cited Coke, *Institutes*, fol. 20 and 34.³

Also, in our case, it being limited to the wife for her jointure and the jointure being in lieu of dower, there must be a certainty of the lands so that the wife, by such certainty, can enter into her jointure.

Justice HARVEY argued to the same effect. And he cited Bullock's Case, 20 Eliz., Dy. 281; a feoffment of a house and seventeen acres of woods to be taken out of a great woods of 1000 acres, the grantee can make an election of his seventeen acres and this made the grant certain.⁴ And he concluded that the land not being limited by bounds before the fine etc., no use could be raised of it.

Justice HUTTON [held] to the same effect that no use is raised because of the uncertainty. He said that, in all expositions of deeds, three things are to be observed, as is said [in] 7 Rep., fol. 49, first, that there be an exposition made agreeable and according to the law; second, that it be according to the intent and meaning of the parties, and he cited Dy. 361;⁵ third, that it be so expounded that part could stand if it be possible. We put that, [if] a man limited twenty acres of his manor of Dale to A. and twenty acres to B. and the residue of it to C., it is a good grant and certain enough, and they are all tenants in common. And, in ancient grants, it was usual to grant £30 of land to the use of one and his heirs, and [is was] well [made]. And, for them, *praecipies* have been brought.

And he agreed that, if, in the indenture, it had been left at large and not limited that the covenantor or any other will make limits and bounds of it, there, the election will be to the wife by the operation of the law. But, now, it being to be bounded by the covenantor etc., it tolls

¹ Stat. 27 Hen. VIII, c. 10 (SR, III, 539-542).

² *Mareschall's Case* (1506), Keilwey 84, 72 E.R. 247, 116 Selden Soc. 525.

³ E. Coke, *First Institute* (1628), ff. 20, 34.

⁴ *Bullock v. Burdett* (1568), 3 Dyer 280, 73 E.R. 630, also Moore K.B. 81, 72 E.R. 455, Benloe 148, 123 E.R. 113, 1 Anderson 11, 123 E.R. 326, 136 Selden Soc. 110, 111.

⁵ *Beamond v. Deane* (1578), 3 Dyer 361, 73 E.R. 810, also 2 Leonard 10, 74 E.R. 315.

the operation of the law. And, for this, he cited 20 Hen. VII, 8; Kelloway 84; Bullock's Case, Dy. 281; and 2 Rep. 36; and 44 Edw. III, 43.¹

If I grant to you twenty acres of my demesne and twenty houses in my manor, this is good, and you will have the election. In all cases of uses, the rule of the common law is to be observed in them, because they are guided and must be limited now according to the rules of the common law. And *ideo*, no estate will be good in use that will not be good in possession. *Ideo*, if one will make an estate to the use of A. for years and, afterwards, to the use of B. and his heirs, this is void. And he cited to this purpose [. . .] 10 rep. 85; and Lovell's Case; and *vide* 30 Hen. VIII, Br., *Uses*, 3.²

Chief Justice RICHARDSON agreed with the others that, in our case, no use could be raised for the uncertainty nor an estate executed by the Statute. 6 Rep., Bishop of Bath's Case; 20 Hen. VII, 8, by Kingsmill; 21 Hen. VII, Kelloway 84; Coke, *Institutes*, 5.³ If a man will grant £20 of land or 100 marks of land, there, land of such a value will pass by this grant. He agreed to this case, because, there, by the livery made of the land granted, it is made certain what land the grantee will have. And he said that land could pass by more uncertainty by a grant than it could by uses. In our case, the estate being limited to the wife for a jointure that is in lieu of dower, it must be certain (as dower will be) by metes and bounds. And they will not be tenants in common in our case, because neither value nor acres will make tenants in common, as my brother YELVERTON has said, as in Bullock's Case, Dy. 281. If the feoffee had made an election of his seventeen acres of woods, he will not be a tenant in common with him who had the remainder of the woods. And, in this Case of Bullock, he held that the grant of seventeen acres of woods was good, though it was not expressed where it will be taken, be it against the mother or the father, [?] but his election makes it a certain and good grant. And he cited Sir Francis Caulthrop's Case, 17 Eliz., Dy. 335.⁴

But the cases upon which he relied and which are direct in the point and the first case was Hilary 38 Eliz., in the King's Bench, rot. 1221, and it was Sir James Woodhouse's Case, of which he showed a report made by Judge Owen; a covenant upon a marriage to be had etc. to levy a fine of the land, being of the value of 400 marks and this to the subsequent uses, if of land of fifty marks *per annum*, he levied the use to be to his son and the wife of the son for their lives and other land of the value of fifty other marks to another use and the residue he limited to other uses etc.; there, the uses well rise because [?], there, in the premises of the deed, the certainty is put etc. Another case that he cited was Hilary, 33 Eliz., King's Bench, rot. 662, Gibbons v. Warner and Price, in [an action of] *ejectione firmæ*; one, in his will, recited that where he is seised of lands in such a place of the annual value of £50, he devised it to A. [and] his heirs upon a condition to be performed etc.; then, he devised it to his

¹ YB Mich. 20 Hen. VII, f. 8, pl. 18 (1504); *Mareschall's Case* (1506), *ut supra*; *Bullock v. Burdett* (1568), *ut supra*; *Heyward's Case* (1595), 2 Coke Rep. 35, 76 E.R. 489, also 138 Selden Soc. 624, 2 Anderson 202, 123 E.R. 621, Popham 95, 79 E.R. 1205; YB Mich. 44 Edw. III, f. 43, pl. 53 (1370).

² *Prowt, ex dem. Lovies v. Worthen* (1613), 10 Coke Rep. 78, 77 E.R. 1043, also 2 Brownlow v. Goldesborough 103, 123 E.R. 839; *Nichols v. Nichols* (1575), 2 Plowden 477, 75 E.R. 711, also Benloe 245, 123 E.R. 173, 110 Selden Soc. 258, 136 Selden Soc. 22, 45, 94, 130, 132, 138.

³ *Bellamy v. Fish* (1605), 6 Coke Rep. 34, 77 E.R. 303, also Croke Jac. 71, 79 E.R. 61; YB Mich. 20 Hen. VII, f. 8, pl. 18 (1504); *Mareschall's Case* (1506), *ut supra*; E. Coke, *First Institute* (1628), f. 5.

⁴ *Skelton v. Dunch* (1574), 3 Dyer 334, 73 E.R. 756, also Moore K.B. 101, 72 E.R. 468.

executors and that they will stand seised of it to the subsequent uses declared in his will, *scil.* for £10 *per annum* of it to the uses of B. and his heirs and for £20 *per annum* of it to the use of C. and his heirs and thus limited over the uses of the residue; there, the devisees can enter without an assignment of the lands of such a value to them by the executors, and, after their entry, they are tenants in common. *Ideo*, [it was held] by him, where the deviser mentioned in his will that, where he is seised of land of the value of £20 *per annum* and he devises £10 *per annum* of it to another, the devisee could enter without an assignment of anyone, because, by the certainty put in the premises of the value of the land, it is as if he had devised to him the moiety of the land.

Ideo, he held with the other judges that, where the value of the land is put in certain in the premises of the deed, *scil.* of what value it is, there, the grant of a parcel of land of such a value etc., it is good, for the certainty that appears in the premises by the agreement of the parties.

And, as to the limitation of the residue of the land in the principal case, he held it void, because it is utterly uncertain, as if I devise that A. will have the residue of my goods not devised in my will and I do not make a devise of any goods in this will, it is a void devise.

Thus [it was] adjudged that the limitation of the land to the value of £30 *per annum* did not raise any use for the uncertainty of it.

[Other reports of this case: Hetley 67, 124 E.R. 347.]

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Anonymous

(C.P. Mich. 5 Car. I, 1629)

Court costs are payable by a person who sued as an executor where, in fact, he was not an executor.

[If] one brought an action as executor and it is found by an issue that he was not an executor, the costs will be allowed against him, [as held] by HUTTON, HARVEY, and YELVERTON.

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Freeman v. Stacy

(C.P. Mich. 5 Car. I, 1629)

An action of debt for arrearages of rent due upon a written lease is not within the Statute of Limitations.

In [an action of] debt for arrearage of rent, the question of the case was whether an action of debt for arrearages of rent due upon a lease by a deed were within the Statute of Limitations of Actions in what times they will be brought, *scil.* the Statute of 21 Jac.¹

Chief Justice RICHARDSON held that it is, because it is within the express letter of the Act, because, in the recital of the actions, it is said 'all actions of debt whereof no specialty is, all

¹ Stat. 21 Jac. I, c. 16 (SR, IV, 1222-1223).

actions of account, debt for arrearages of rent, etc.' Thus, debt for arrearages is within the express letter.

YELVERTON: When the Statute says debts upon contract whereof no specialty is, actions of account, debt for arrearages of rent etc., there, it is an enumeration and such actions that are for debts due upon contract without specialty, so that in this place etc. [it is] intended debts for arrearage of rent upon a contract or lease without a specialty or deed, that is to say of a lease by parol.

HUTTON agreed with YELVERTON. And he said that debt for arrearages of rent in this Statute is to be intended upon a lease by parol and not of a lease by a deed or writing, because a lease upon a specialty or debt upon contracts upon a specialty, as a lease by a writing is, must be intended *extra* this Statute, because all arrearages of this rent are always due by reason of the contract in writing and the plaintiff must declare of a debt due upon a contract by specialty, *scil.* the lease in writing, and without the lease, he cannot maintain his action. And he cited 14 Hen. VI, 31, and he also cited 4 Hen. VI; that, if a man lease to the abbot etc. for eighty years by a deed, it is mortmain, but it is otherwise if it not be by a deed.¹

HARVEY agreed with them. And he said that, it being a debt upon a lease in writing, it is a contract by specialty. The debt is a debt by specialty, and, thus, it is outside of the Statute.

And, then, RICHARDSON, by the opinion of them, gave judgment with the plaintiff. Thus, it was adjudged by this court that the action of debt for arrearages of rent due upon a lease by a writing was not within this Statute of Limitations.

And all of the justices agreed that this was a mischievous Statute to the subject in divers cases and good to be corrected by the next Parliament that will be.

[Other reports of this case: Hutton 109, 123 E.R. 1135.]

204

General Rule of Court

(C.P. Mich. 5 Car. I, 1629)

Juries can determine and award court costs in actions for defamation.

RICHARDSON, Chief Justice of the Common Bench, said in open court that the judges of this bench and all the other judges were agreed upon a conference had among them to have it as a constant rule in the time to come that costs in actions upon the case for slanderous words by the jury will be good, be the cases less or more, and the judges will not in this case give damages *de incremento*.

¹ *Anonymous v. Topcleff* (1426), YB Hil. 4 Hen. VI, f. 17, pl. 1; YB Mich. 4 Hen. VI, f. 9, pl. 1 (1425).

Bloeberry's Case

(C.P. Mich. 5 Car. I, 1629)

Courts of common law, and not the ecclesiastical courts, have jurisdiction to determine cases of marital affrays where both spouses are alleged to have committed assaults upon each other.

The wife of Bloeberry came before the ordinary and complained to him against her husband *propter saevitiam* for beating and mistreating her so that she could not live with him in safety and so prayed to be severed *a mensa et thoro* and that she could have alimony from her husband.

The husband said that the beating of his wife was not outrageous, but moderate and for the remediation of her as by the law allows and justifies to him that the battery that she had at these times of which she complains was upon *son assault demesne*.

But the ordinary, notwithstanding this, afterwards, *scil.* the next day, made an act of it and proceeded to the examination of witnesses upon this matter moved before him *ore tenus* and separated the wife from the husband and gave alimony to her and excommunicated the husband for the refusal to obey his sentence. But, at the time of this imparlance in them, the said Bloeberry appealed by parol from the ordinary to the [Court of] Arches. And, there, they proceeded upon it in the Arches.

And, now, he prayed [a writ of] prohibition to them.

Chief Justice RICHARDSON: It appears here that the ordinary had cognizance, Bloeberry [was] before him, and he had proceeded *ore tenus* without articles or a libel and Bloeberry had pleaded *ore tenus* such a plea that is a good justification at common law and, if there had been articles or a bill put in against him, if he used to have put this answer in writing and they utterly refused it or have proceeded upon it, we would have granted a prohibition. But, now, be the order that the ordinary had notice and produced the [. . .], if they will show cause why the prohibition will not be granted. And [. . .] the three or four surmises to have your prohibition, because several surmises could be put.

Rex v. Archbishop of Canterbury

(Prust's Case)

(Part 1)

(C.P. Mich. 5 Car. I, 1629)

Statutes do not lose force by long non-use.

Where a parson is presented to a second benefice, the first benefice becomes void thereby. A pardon cannot affect something that is void, non-existent, and a nullity.

The plea began Trinity 4 Car., rot. 416.

The king pleaded in [an action of] *quare impedit* against the archbishop of Canterbury, the ordinary, and Pruste, the incumbent. The case was thus. Shilstone being the vicar of Kyngstone, to which he was presented, instituted, and inducted according to the law and this vicarage being a benefice with cure beyond the value of £8, 15 Jac. [1617 x 1618], he accepted another benefice, *scil.* the vicarage of Holcomburne, to which he was admitted, instituted, and

inducted, and he continued the possession of it until the General Pardon of 21 Jac.,¹ by which the king pardoned all cause, quarrels, suits, etc. not excepted afterwards. And, afterwards, the king excepted all titles and actions of *quare impedit* other than such titles and actions of *quare impedit* as his majesty has or may have by reason of lapse incurred above three years past for or concerning any benefice or ecclesiastical living whereof any incumbent is or the last day of this session of Parliament shall be in actual possession by presentation of any patron or collation of any ordinary. And, afterwards, 3 Car. [1627 x 1628], Shilstone resigned the vicarage of Kyngstone to Prust. Now, the defendant was presented to it by the true patron and was instituted and inducted to it. The king presented, and, his incumbent being disturbed, the king brought [an action of] *quare impedit*.

And HUTTON and YELVERTON argued and held against the title of the king and that the *quare impedit* was not well brought.

But Chief Justice RICHARDSON and HARVEY [held] to the contrary.

The doubt of the case arises upon the words of the Statute of 21 Hen. VIII, cap. 13,² by which Statute, it is enacted:

that if any person or persons, having one benefice with care of souls being of the yearly value of £8 or above, accept and take any other with care of souls and be instituted and inducted in possession of the same, that then and immediately after his possession had, though the first benefice shall be adjudged in law to be void, and that it shall be lawful to every patron having the advowson thereof to present another and the presentee to have the benefit of the same in such manner and form as though the incumbent had died or resigned.

And the question of the case was whether the first benefice was thus void by the Statute of 21 Hen. VIII that he is not the incumbent so that the pardon of 21 Jac. does not extend to it.

And HUTTON and YELVERTON held that the first benefice is not thus void, but that he remains the incumbent of it until he be removed and the General Pardon extends well to him and it is pardoned by the General Pardon.

YELVERTON: The Statute of 21 Hen. VIII is only a declaration and confirmation of an ancient constitution made by the pope and an addition to it, and it does not take away the ancient constitution. And he said that, before the Statute, no usurpation could be had in such a case of a plurality for the immediately privity that remains between the patron and the incumbent. And, also, at this day, no usurpation could be had upon the patron in such a case. And, if he will not be an incumbent until he be removed, many inconveniences will ensue, because it will avoid all the ancient charges of churches, as annuities etc., and one will say that the church is void, and he is not the incumbent. *Ideo*, he will not be charged. He, also, will be non-resident, and one will say that he is not the incumbent. Also, the action brought against him for part of the glebe, one will say that he is not the incumbent; thus, no action shall be against him. But the church is not so void, but he remains the incumbent until he be removed. And he is such an incumbent that he will have the tithes, and it is not a plea against him if he sue the parishioners for the tithes to say that he is not the incumbent, because he serves the cure, and he will administer the sacraments *et rationabile est quod qui servit altari vivat de altare*.³ And he said the incumbency will not be defeated until there be a new incumbent. He cited 11 Hen. IV, 78. If a parson accept a second benefice that is litigious, it

¹ Stat. 21 Jac. I, c. 35 (SR, IV, 1269-1275).

² Stat. 21 Hen. VIII, c. 13 (SR, III, 292-296).

³ I Corinthians, chapter 9, verse 13.

is not within the Statute of 21 Hen. VIII, but he will stand incumbent. And he cited 2 Eliz., Dy. 248, and 5 Eliz., Dy. [. . .], and he cited 23 Eliz., Dy., *casu ultimo*.¹ A parson accepted a second benefice, the first being of the value of £8 etc. and he will subscribe to the Articles of Religion, the avoidance in this case will be by death. And he cited Fitzherbert, *Natura Brevium*, 49, and Coke, *Institutes* [. . .]² Two prebends had a parsonage so that they were only one parson; afterwards, one accepted another benefice, the first being beyond the value of £8; this will not harm the other prebend, because he had the freehold in it and, if one be deprived, it is not a deprivation of the other, and this case would not be denied, as he said.

Also, he insisted much upon the penning of the subsequent acts of Parliament and that they are not only that the church will be void, but the avoidance is enforced in them with particular words of avoidance, as the Statute of 13 Eliz. that, if the parson refuse to read the *Articles* etc., he will be *ipso facto* deprived and all his ecclesiastical promotions shall be void as if he then were naturally dead, and 31 Eliz., that:

upon a simoniacal promotion, such presentation, collation, gift, and bestowing and every admission, institution, investiture, and induction there upon shall be utterly void, frustrate, and of none effect in law and that it shall and may be lawful for the queen's majesty, her heirs, and successors to present, collate unto, or give or bestow every such benefice, dignity, prebend, and living ecclesiastical for that one time or turn only.

So that it well appears that the judgment of the Parliament was that to say that the benefice will be void, not make such an avoidance in fact that he will not be the incumbent, but they, by particular and plain words in the one case, make the benefice void as if he were dead and [. . .] in the other case make the admission, institution, and induction all void and of no effect, so that the incumbency is eradicated *a principio* by those words.³

But now, admitting that, here, it was in our case an avoidance in fact and that he is not the incumbent so that the pardon does not extend to him, yet the title of the king fails, as your case is, for another reason, and this by reason of the Statute made in 25 Edw. III, cap. 1.⁴ The words are:

and as touching presentments to be made by our sovereign lord the king or any of his heirs to a benefice of Holy Church in another's right by the old title, our sovereign lord the king, to the honor of God and the Holy Church, wills and grants of the assent of the Parliament that, from henceforth, he nor any of his heirs shall not take title to present to any benefice in another's right of any time of his progenitors nor that any prelate of his realm be bound to receive any such presentment to be made nor to do thereof execution nor [. . .] of the one place or of the other may not nor ought not to hold pleas nor give judgment upon any such presentment to be made.

¹ *Rex v. Bishop of Salisbury* (1410), YB Trin. 11 Hen. IV, f. 76, pl. 18; perhaps *Anonymous* (1563), 2 Dyer 221, 73 E.R. 489; *Anonymous* (1581), 3 Dyer 377, 73 E.R. 846.

² Stat. 13 Eliz. I, c. 12 (SR, IV, 546-547); A. Fitzherbert, *Natura Brevium*.

³ Stat. 13 Eliz. I, c. 12, s. 1 (SR, IV, 546); Stat. 31 Eliz. I, c. 6 (SR, IV, 802-804).

⁴ Stat. 25 Edw. III, stat. 6, c. 1 (SR, I, 325).

And, by this Statute, the title of the king, being an ancient title, accrued in the time of his father, his predecessor, and in another right, his title is taken away by this Act, and this Act is not expired or repealed, but, as it seems to him, stands well in force. And he cited the case of 11 Hen. IV, 8, out of which book, he there collected three things, first, that this Statute was pleaded to an action against the king, second, that it was pleaded to the jurisdiction of the court, and, third, that it was a Statute in force and not repealed. And all these three things were allowed in this case.¹ And so he concluded against the title of the king.

Justice HARVEY, to the *contra*: And he held that the benefice is thus void, by which he is not the incumbent and he will not take any benefit of the pardon. And he cited Digby's Case, 6 rep., and Dy. 237, and, also, he cited Foster's Case, which was in the Common Bench, where a parson, being *simoniace promotus*, procured a pardon from the king, yet it did not restore him to his benefice. And, also, he cited Paschall's Case, where the case was that Paschall being an incumbent in a benefice by the space of forty years, there was found in his study a simoniacal contract between him and the ordinary, the king, coming to the notice of it, avoided him, and presented another, and the presentation of the king was held good.² And he held that, by the acceptance of the second benefice, the first was absolutely void, so that he was not the incumbent nor that the tithes belonged to him in this case. And he was not restored by the Pardon of 21 Jac., because the king was not informed of the thing granted. But the king, by express words, can pardon it.

HUTTON argued to the *contra*. And he agreed in opinion and argument with YELVERTON, because he held that the benefice was not thus void, but he remained the incumbent for all intents and purposes until he be avoided by the patron or him who had title and that he was the incumbent capable of the pardon and within the compass of it and outside of the exception of it. He said that the Statute of 21 Hen. VIII is only a declaration of the constitution of the pope, and does not take it away but adds a greater penalty to it. And we see that it was the law before this Statute by the ancient constitution of the church. It was not void until the deprivation, and, after the ordinary has deprived him, then he ceases to be the incumbent, but, until deprivation, he remains the incumbent. And, after deprivation, the ordinary must give notice to the patron of the avoidance, or, otherwise, there, it is not perilous to the patron to lose his presentment, because the patron will have time to present from the time of the notice and not from the time of the deprivation. But the patron, if he would, could take notice of the deprivation and avoidance of the church and present another parson, if he would. But now, by the Statute of 21 Hen. VIII, the patron, at his peril, must take notice of this avoidance that is by the Statute, to which every man is a party and must take notice of it, and because, other notice, he will not have from anyone inasmuch as the church becomes void by the Statute, but, before the Statute, he must have notice, inasmuch as the patron is not made cognizant of the acts made in a court Christian. And, notwithstanding that the Statute says that the church will be void, yet this is not such an avoidance in fact but he will remain the incumbent until he be removed, because a release made to such an incumbent is good.

(Which HARVEY agreed and said that the reason is because he will take for the benefit of the church in such a case.)

Also he [HUTTON] said that he is such an incumbent as remains subject to all charges to which the church is subject and, also, he will pay tenths and subsidies. And he agreed with YELVERTON in his reason that he urged of the penning of the subsequent statutes to make a

¹ *Rex v. Bishop of Coventry* (1409), YB Mich. 11 Hen. IV, f. 7, pl. 20.

² *Robins, ex dem. Wickham v. Gerrard* (1599), 4 Coke Rep. 78, 76 E.R. 1054, also Moore K.B. 434, 72 E.R. 678, Gouldsborough 162, 75 E.R. 1066, Jenkins 273, 145 E.R. 197, 140 Selden Soc. 960; *Anonymous* (1565), 2 Dyer 237, 73 E.R. 524; *Pascal v. Clark* (1617), Noy 22, 74 E.R. 992.

plain and clear [?] avoidance of the church. And he agreed with YELVERTON that he is such an incumbent who will have the tithes. But he agreed that a parson who is *simoniace promotus* is a parson to no purpose and that he did not have a right to the tithes, but the successor of such a parson will have the tithes and profits due in the vacancy. And he cited Benedict Winchcomb's Case, that was Easter 14 Jac., rot. 1306. And an avoidance can be for any purpose for any parsons and for any time, as the Statute *de Donis Conditionalibus*; [. . .] *quod ipse [. . .] sit ipso jure nullus*.¹

Also, he cited Doctor Hutchinson's Case, where the king pardoned the simony, yet he could not restore him to the benefice.² And where he had, it was objected against the pardon that the king was not informed of the thing granted, but that, if he had pardoned it by express words, that it had been good. He held that, this being a general pardon, it is as strong as if this defendant be pardoned by express words or with any *non obstante*. And he cited Dy. 249 and 5 rep. 19.³

Lastly, he held strongly that, if this had not been pardoned, yet, by the Statute of 25 Edw. III,⁴ the title of the king is taken away, because this plurality and title to present for it accrued in the time of King James and so the king that now is cannot present for this title, because it was a title to present in another right and in the time of the predecessor. But he agreed that it is otherwise in the case of *simoniace promotus*, because it is not within this Statute, because, there, the king does not present in another right, but in his own right, because, in a case of simony, [neither] the patron nor the ordinary can present, but the king, because the Statute of 31 Eliz. gives the title to present to the king. And he cited the book of 11 Hen. IV, 8, upon this Statute of 25 Edw. III, and he said that, in 44 Edw. III, 14, this Statute is first mentioned in our law.⁵

Chief Justice RICHARDSON argued to the *contra*. He held the contrary, and agreed with HARVEY that the pardon does not extend to him to take away the title of the king to present for the lapse, because, by the words of the Statute of 21 Hen. VIII, the first benefice became void in law and void in fact and, as void in fact as it could be [. . .] the words are 'that then and from thenceforth the benefice shall be adjudged in law void', which words are as strong as can be, because they are that it will be adjudged in law void and not void in law which are not as strong, because it is a qualified avoidance, but it will be adjudged in [. . .] void so that the judges must adjudge the law to be that the first benefice will be void. And this Statute will not be construed favorably for the patrons, because it was not made for the benefit of them, but it is strict against them. And, on account of this, they will take notice and will present at their peril. And the subsequent clause that the patron will present etc. is only informing of the declaration of the avoidance, and it is not by this it is enacted for the benefit of the patrons.

And [it was held] by him there are five manners of avoidances of churches, which also Littleton recites, *scil.*, first, by resignation; second, deprivation; third, creation, as where he is created a bishop etc.; fourth, cession; fifth, death. And he cited Dy. 255. And he said that,

¹ *Winchcombe v. Bishop of Winchester* (1616), Hobart 165, 193, 80 E.R. 313, 340, Noy 25, 74 E.R. 995, 1 Brownlow & Goldesborough 164, 123 E.R. 731; Stat. 13 Edw. I (Westminster II), c. 1 (SR, I, 71-72).

² *Hutchinson's Case* (1612), 12 Coke Rep. 101, 77 E.R. 1376, Godbolt 202, 78 E.R. 122.

³ *Brereton's Case* (1566), 2 Dyer 249, 73 E.R. 550.

⁴ Stat. 25 Edw. III, stat. 6, cc. 1, 3 (SR, I, 325).

⁵ Stat. 31 Eliz. I, c. 6, s. 4 (SR, IV, 803); *Rex v. Bishop of Coventry* (1409), YB Mich. 11 Hen. IV, ff. 7, 8, pl. 20; *Biland v. Kilgrene* (1371), YB Pas. 44 Edw. III, f. 15, pl. 34.

after the avoidance of the church and before another be presented, the ancient incumbent to some intents and purposes remains the incumbent and, to other purposes, he is not the incumbent, because he is not the incumbent *quoad beneficium*, but *quoad officium et quoad churacterum*, *scil.* for serving the cure and administering the sacraments. And he cited Weston's Case, 18 Eliz., Dy. 347. And the continuance of the incumbent in possession of the church does not make him the incumbent in our case any more than in the case of a deprivation. *Vide* Dy. 129, pl. 66.¹

And [it was held] by him, if a man having a benefice etc., accept a second benefice and the patron does not present within six months, the incumbent dies, now, the ordinary will present and not the patron, because it was the neglect of the patron. And it is to see that this Statute of 21 Hen. VIII was made against the pluralities upon divers good reasons and considerations, as, by the preamble of the Statute, appears, because this plurality is *pestis ecclesiae* and against the public good.

Now, as to one place to see the avoidance of the church, we see the subject of that which is an advowson, and we consider that an advowson is *haereditas incorporea* in which there cannot be an entry, but it must be claimed and when an incumbent is in it, he cannot be removed but by [an action of] *quare impedit* or a writ to the bishop. And, on account of this, the avoidance of it could well be by the words of the Statute without another ceremony of entry or ousting of the incumbent, because it is a thing incorporeal and not corporeal, as land etc. And he agreed that, to make the first benefice void, he must be the actual and legal incumbent in both of the benefices, and he must necessarily be inducted in the second benefice, though it is not as necessary that he be inducted in the first.

As to that which has been urged on the other side that, if subsequent statutes to make the avoidance etc. are penned otherwise and more strongly than the Statute of 21 Hen. VIII, which the Parliament will not have made if the thinking that the words of 21 Hen. VIII or the like had been sufficient to make such an avoidance, he answered to it that the Statute of 17 Eliz., for not reading the Articles, and 31 Eliz., cap. 6, of *simoniace promotus*, were made to prevent him to be the parson and to make his presentation void and his admission and institution void, but our Statute is to avoid his being now the incumbent and it is not requisite to have as strong words to avoid his being an incumbent as to prevent him that he will not be an incumbent *omnino*.

And he said that a presentation made simoniacally is not a claim to an advowson, as it is in the *Institutes*. And, as to the inconveniences that were said to be in the case if he will not be an incumbent etc. by YELVERTON, he said that a greater inconvenience will ensue if he will be allowed to be the incumbent and such an incumbent who is not within the exception of the Pardon, because from it, it will ensue that he will hold both of the benefices and he will have a plurality without a qualification against the very scope and intent of the Statute of 21 Hen. VIII. But as it seemed to him, he will not be the incumbent in our case to be capable of the Pardon, because to be the incumbent is to be the legal incumbent, because if he be not the legal incumbent, he is not an incumbent, as Doctor Hutchinson's Case was. *Ideo*, the Pardon does not extend to him by reason of the exception in it, because he is not the incumbent [. . .] possession [. . .] is a legal incumbent and in legal possession.

Lastly, as to the Statute of 25 Edw. III, he held strongly that our case is not within it, because, upon a good consideration of the words of this Statute, it appears that the king granted that he will not present for old titles and in another right etc., but where the king presents [. . .] as supreme ordinary, as our case is, he does not present in another right (which

¹ *Anonymous* (1566), 3 Dyer 255, 73 E.R. 566; *Weston's Case* (1576), 3 Dyer 347, 73 E.R. 780, also Jenkins 243, 145 E.R. 171; *Agard v. Bishop of Peterborough* (1556), 2 Dyer 129, 73 E.R. 282, also Benloe 43, 123 E.R. 34, 1 Anderson 15, 123 E.R. 329, Moore K.B. 12, 72 E.R. 406.

YELVERTON denied privately) and though he presents of a title for a lapse accrued in the time of his predecessor, yet it was not an old title but *de parvo tempore* and not *de multis annos*. And, because the first words of the Act of 25 Edw. III are 'as touching presentments to be made by our sovereign lord the king or any of his heirs to a benefice of Holy Church in another's right by old title' etc., thus it must be in another right and of an old title.

Thus, upon all the matter, he concluded that he is not as the incumbent in the first benefice, as it is void absolutely, and the Pardon does not extend to it nor is it within the Statute of 25 Edw. III, and, thus the title of the king is good and the [action of] *quare impedit* was well brought.¹

207

Allinson v. Ayres
(Part 2)

(C.P. Mich. 5 Car. I, 1629)

And, afterwards,² the judges upon a conference had among themselves, being urged by the counsel, who said that, if they would, they will see the opinion and the intention of the judges there, being HUTTON, HARVEY, and YELVERTON there present, and RICHARDSON, as it seemed to them, was of the same opinion. And they said that, in a recovery, if the writ of entry be not filed *omnino*, it is error [so as] to avoid the recovery and the writ will not be filed after the year passes, because the Statute³ has appointed an officer to be the Custos Brevium and an office in which the writs will be filed and preserved for the security of the purchasers and it is the fault in the negligence of themselves that the writ was not filed. But, if the writ had been filed once, even though it be taken off the file, yet it could be examined and enquired of and filed again, as appears by many precedents of it.

208

Nurse v. Pounford

(C.P. Hil. 5 Car. I, 1630)

Where an action upon the case is brought for words, the words must be scandalous in themselves so as to bear damages to the party.

Nurste, barrister of Gray's Inn, brought an action upon the case against Pownesforte, and he declared how he, being of good fame and in good practice of the law and being steward to the Lord Berkeley of twenty manors and also his receiver etc., the defendant Pownesforte falsely and maliciously wrote a letter to the Lord Berkeley, the substance of which letter was that, where Nurste had sued divers actions against the defendant and he named particularly in the letter the actions, and greatly vexed and troubled him with divers suits in law, the defendant prayed the said Lord Berkeley that he will not countenance or favor the said Nurste in such businesses. And he declared that, by force of this letter, he was removed from his office of

¹ For later proceedings in this case, see below, Case Nos. 227, 253.

² For earlier proceedings in this case, see above, Case No. 195.

³ Stat. 23 Eliz. I, c. 3, s. 6 (SR, IV, 662).

stewardship and receivership *ad damnum etc.* The defendant pleaded not guilty, and, by the jury, he was found guilty.

But notwithstanding the finding of the jury and that the plaintiff was damaged by the removal from his offices, yet, by the Chief Justice [RICHARDSON] and by HUTTON and HARVEY, being there, [it was held] by them all the action was not maintainable because the defendant had not spoken nor written any slanderous or defamatory words of him in his office or profession. And, in all cases where an action upon the case is brought for words, the words must be scandalous in themselves so as to bear damages to the party.

[Other reports of this case: Hetley 161, 124 E.R. 421.]

209

Babington v. Wood

(K.B. Hil. 5 Car. I, 1630)

A bond by a parson to resign his benefice upon request is not necessarily a corrupt bargain.

The patron, before he presented his incumbent, took an obligation from him that he, at any time to come, would resign the benefice upon request by the patron. And, being requested by the patron, he refused, upon which, he brought [an action of] debt upon the obligation. [. . .] the incumbent demurred etc.

And *per curiam*, the obligation was good and not void, and they adjudged that the action upon this obligation was well brought, because it is not simonaical, inasmuch as there does not appear [to be] any corrupt bargain, because the resignation could be intended to be for the benefit of the incumbent who the patron would present him to a better benefice.¹

210

Bourcher v. Anonymous

(C.P. Hil. 5 Car. I, 1630)

A final judgment in an action for a modus decimandi is not res judicata where it was entered by default where the defendant had no notice of the date of trial.

In the Case of Sir John Bourcher, who prayed [a writ of] prohibition to the ecclesiastical court of the Commissary of the Bishop of York, where the *modus decimandi* was pleaded in the spiritual court, a prohibition was granted out of the Common Bench, and they being at issue at the assizes, the plaintiff in the prohibition was not provided with this time for the trial, by which the trial passed against him upon the evidence given on one side only. In this case, if he be sued the next year for tithes, he can plead this same *modus decimandi*, and he will have a prohibition anew upon it and he will try it *de novo*. But it is otherwise if the trial was had upon the same plea and upon the evidence of both parties, because, there, he will not have a prohibition upon the ancient surmise *de modo decimando*. But, upon a new surmise or new matter, he could have a prohibition again, [as held] by justices RICHARDSON, HUTTON, and HARVEY.

¹ For related proceedings, see below, Case No. 230.

211

Anonymous

(C.P. Hil. 5 Car. I, 1630)

An ecclesiastical court has the jurisdiction to enforce an established modus decimandi.

Where a *modus decimandi* is had in the parish, if they do not pay their tithes according to it, he well can could sue in the spiritual court, and no [writ of] prohibition will be granted against them.

212

Anonymous

(C.P. Hil. 5 Car. I, 1630)

In this case, there was some consideration on both sides of the contract in issue as to the dower rights of a widow.

A wife, having title of dower, by an indenture made between her and the heir, released her dower, and, by the same indenture, the heir assigned to the wife part of the land of which she was dowable and also a rent of 20s. *per annum* for seven years if she should live so long, and this was for the amendment of her dower and that her third part will be equal with the residue. This assignment of the rent is good, and the wife will have it during the term, [as argued] by Serjeant *Berkeley*, who cited the book of 18 Edw. III, 20.¹

And Justices HUTTON and HARVEY, being only there [in court], agreed with him.

213

Anonymous

(C.P. Hil. 5 Car. I, 1630)

Generally, an action for defamation does not lie in the absence of an allegation of special damages.

Anne Davies's Case was cited in Nurste's Case,² [which was] resolved this same term. If a man speaking of a maid says that she was and is a whore, these words are not punishable at the common law unless it be declared in an action upon it that she was to be married and, by reason of these words, she was thus defamed so that she lost her marriage. This matter of a temporal loss accruing to her by reason of these words maintains the action at common law, because, otherwise, it is only punishable at common law.

¹ YB Pas. 18 Edw. III, f. 20, pl. 35 (1344).

² *Davis v. Gardner* (1593), 4 Coke Rep. 16, 76 E.R. 897, 138 Selden Soc. 558, Popham 36, 79 E.R. 1155; *Nurse v. Pounford* (1630), see above, Case No. 208.

214

Anonymous v. Harris and Challoney

(Ex. Hil. 5 Car. I, 1630)

A statutory action lies for using timber trees to make iron.

A [writ of] *venire facias* was awarded *viceneto forestae* of Dean.

And [it was held] good by all of the barons in an information upon the Statute of 1 Eliz., c. 13, upon converting of timber into fuel for the making of iron.¹

215

Anonymous

(Ex. Hil. 5 Car. I, 1630)

Navigable rivers can be either fresh water or salt water.

[It was held] by the Chief Baron [WALTER] and not denied by anyone that the rivers within the realm, both sweet and salt, are to be called navigable rivers though they are only streams. And thus, by them all, [it was] adjudged.

216

Vavisor's Case

(Ass. 1629)

A modus decimandi in lieu of the payment of tithes in kind cannot be created after the Statute of 13 Eliz. I, c. 20.

At the York Lent Assizes 1628[29], a vicar prescribed in tithes in specie, and he showed an endowment in the time of Edward II and that the tithe was so paid in specie in the time of Edward IV.

The justices directed the jury that a composition is to be intended with the parson after the time of Edward II and before 13 Eliz.,² and so they directed the jury, by which it passed with Vavisor, who pleaded a *modus decimandi* from the time [of which memory does not run].

¹ Stat. 1 Eliz. I, c. 15 (SR, IV, 377).

² Stat. 13 Eliz. I, c. 20 (SR, IV, 556).

217

Anonymous

(Ass. 1629)

A modus decimandi in lieu of the payment of tithes in kind cannot be created after the Statute of 13 Eliz. I, c. 20.

At the Assizes of Somerset, Lent 1628[/29], a parson took a lease of the tithes of the vicar, who was endowed of them by an ancient endowment, even though he thought that, in point of prescription, the tithes were paid to the vicar.

Yet, for the discontinuance then and after out of memory, the justices of assize directed the jury that a composition will be intended before 13 Eliz.¹

218

Lord Savile v. Lord Wentworth

(Star Cham. Hil. 5 Car. I, 1630)

An action lies for the filing in a court of law of a scandalous pleading that pended without prosecution for a long time.

The Lord Savile exhibited a scandalous bill against the defendants, and he did not sue forth any subpoena except against one of the defendants, and he did not serve him with the process. And then, the plaintiff permitted the suit to pend four years without any prosecution against any of the defendants.

[It was] resolved in the Star Chamber that this bill will be intended to be a libel in effect and the plaintiff to be a libeler because he had not prosecuted this bill in so much time and that it was put upon the file with the intent of scandal of the defendants and not to prove the misdemeanor in the bill. And, for this, the plaintiff was fined, to the king in £100, to Wentworth in £100.

219

Anonymous

(C.P. Pas. 6 Car. I, 1630)

An allegation of non decimando must be pleaded with specificity.

Serjeant *Darcy* moved to have a [writ of] prohibition to the ecclesiastical court, because the parson sued for tithes of land that were part of a dissolved priory.

Chief Justice RICHARDSON: This does not suffice to be discharged of tithes, because the lands were part of a religious house. But you must show your deeds in writing and allege how you are discharged of tithes, *scil.* first, either *ratione compositionis realis*, [or], second, *ratione unitatis perpetuo et constantis*, [or], third, *ratione privilegii seu ordinis*.

¹ Stat. 13 Eliz. I, c. 20 (SR, IV, 556).

220

Spalding v. Spalding

(K.B. Pas. 6 Car. I, 1630)

In this case, the devise in issue created an entail.

The point adjudged was thus. The father devised to the elder son and to the heirs of his body in fee and, if he dies in the lifetime of his mother, the wife of the devisor, then to the younger son and his heirs. The father died, the elder son died in the lifetime of his mother, having issue of his body.

It was adjudged that, by this devise, the elder son had an estate tail and, though he died in the lifetime of his mother, yet the issue of the elder son will have the land, because the intent of the devisor will be construed to be that, if he died without issue in the lifetime of his mother, that, then, the younger son will have it.

[Other reports of this case: Croke Car. 185, 79 E.R. 762, 1 Eq. Cas. Abr. 188, 21 E.R. 979.]

221

Fulbeck v. Anonymous

(C.P. Pas. 6 Car. I, 1630)

The question in this case was whether an action for defamation lies where a defendant accused the plaintiff of a felony and, afterwards, the plaintiff was indicted and acquitted.

Fulbeck brought an action upon the case in the nature of conspiracy against one who falsely and maliciously, as he declared, indicted him for felony, upon which the defendant demurred. And, in the argument at the bar, the books of 27 Hen. VIII, 11, and the Poulterer's Case, in the 9 Reports, were cited with some brief reasons.¹

Chief Justice RICHARDSON: The action well lies in this case, because an action will be maintainable upon the charging of one with a crime of felony without any prosecution but in name. He charged him with a felony and arrested and indicted him of a felony and give evidence against him upon this indictment and also the jury has found *ignoramus*, which proves a false indictment. And he cited Smithe's Case,² where an action upon the case in the nature of conspiracy was brought for indicting one of treason where the jury had found *ignoramus*; *ergo, a multo fortiori* in our case.

But HUTTON thought *e contra*, because, then, every man will be so charged of indicting of offenders that felons and serious offenders will go without being questioned for offenses.

HARVEY: If he had said 'he is a thief; he stole a mare' and never indicted him, still, for these words, an action upon the case will lie.

¹ YB Pas. 27 Hen. VIII, f. 11, pl. 27 (1535); *Stone v. Waters* (1610), 9 Coke Rep. 55, 77 E.R. 813, also Moore K.B. 813, 72 E.R. 923.

² *Smith v. Cranshaw* (1622-1626), W. Jones 93, 82 E.R. 48, 2 Rolle Rep. 258, 81 E.R. 785, 2 Bulstrode 271, 80 E.R. 1115, Latch 79, 82 E.R. 284, Palmer 315, 81 E.R. 1100, Croke Car. 15, 79 E.R. 618.

Justice DAVENPORT seemed to be of opinion with RICHARDSON that the action well will lie, because the defendant, by his demurrer, has confessed all the matter and has admitted that he had falsely and maliciously indicted the plaintiff.

222

Downs v. Winterflood

(K.B. Pas. 6 Car. I, 1630)

If a jury give a verdict contrary to the evidence given to them or if they give outrageous damages, an action of attaint lies against them.

A plaintiff in an action of attaint cannot give additional or other evidence than he gave to the petit jury.

Winterflood against Downes in [an action of] *ejectione firmae*, Hilary 5 Car., rot. 119; Hare's Case, in attaint against the petit jury.

If the jury give a verdict against the right title and contrary to the evidence given to them or if they give outrageous damages, there, an attaint lies against them as well for the false oath given in the point of damages as in point of right and title.

And also [it was held] by the justices, in an attaint, it is not necessary to prove that the petit jury gave a false verdict maliciously or willfully, but that they gave their verdict contrary to the evidence or that they gave outrageous damages, because, if the matter be pregnant or apparent for one part and they will say against it, they will be attained.

And note that the plaintiff in the attaint will not give more evidence or other evidence than he gave to the petit jury. And, in our case, even though the petit jury gave £10 damages in an [action of] *ejectione firmae* for the bare ejection, yet the grand inquest of twenty-four men would not attaint them. And yet the judges held the damages outrageous, and would have the petit jury to have found more small damages.

[Other reports of this case: Croke Car. 202, 79 E.R. 778.]

223

Wentworth v. Earl of Cleveland

(C.P. Pas. 6 Car. I, 1630)

Where the length of a lease is a matter of months, a month will be taken to be twenty-eight days.

In [an action of] *ejectione firmae*, the condition in the lease was that, if the lessor will not pay his rent at Michaelmas or two months after and a legal demand be made for it, that, then, it well will lie to the lessor to re-enter. There, they must account twenty-eight days to the month, excluding Michaelmas day.

And, also, [it was held] by the justices, if his lease be made to begin at the end or expiration of a former lease, there, if no such lease exist or if the precedent lease be misrecited, the second lease is not void, but it will begin immediately.

224

Bill v. Lake

(C.P. Pas. 6 Car. I, 1630)

If the consent of a husband for the contract of his wife be precedent thereto, an action of debt lies against him.

A question in this case was whether an action for assumpsit lies also.

Bill against Sir Arthur Lake in an action upon the case.

And he declared how Sir Arthur Lake, the now defendant, in consideration that the plaintiff, at the request and *ad instantiam* of Lettice, the wife of the defendant, *emeret et provideret* certain apparel for the said Lettice, he, *scil.* the defendant, would upon request pay that which will be due to Bill, the plaintiff. And, for the non-payment, being requested, Bill brought an action upon the case.

Justice DAVENPORT: An action of case does not lie, but [an action of] debt [does], because the *assumpsit* and consent of Lake is precedent and thus it is the contract of the husband and not of the wife, and *ideo* debt lies.

HUTTON and HARVEY, to the *contra*: And they agreed that, if a husband commands a tailor to make apparel for his wife, such which the wife will require him to make, there, an action of debt lies against the husband. And they all agreed that, if the assent of the husband and his *assumpsit* be precedent, there debt lies against him. But, where it was subsequent, there, an action upon the case lies, because, where the contract of the wife was precedent and then the husband consented to it and agreed upon the subsequent request of the wife that the tailor provide apparel accordingly for the wife, there, an action upon the case will lie. But it is otherwise where the consent of the husband is not precedent.

And, in the principal case, Chief Justice RICHARDSON, who was then absent, was thought to be of opinion with DAVENPORT, as was said by DAVENPORT.

[Other reports of this case: Hetley 138, 124 E.R. 405, Littleton 307, 124 E.R. 260, Hutton 106, 123 E.R. 1134.]

225

Betts's Case

(C.P. Pas. 6 Car. I, 1630)

A writ of prohibition will not be issued before notice given to the defendant or his lawyer or the lower court.

In [an action of] prohibition to the High Commission Court, [it was held] by all of the justices that prohibition in no case will be granted upon a rule unless notice be given to the Register or to the proctor or him who prosecutes the suit in the ecclesiastical court etc. And an affidavit will be also made that notice was given. And this was the ancient rule, and it will be hereafter always observed for a constant rule.

226

Anonymous v. Marriott

(C.P. Trin. 6 Car. I, 1630)

An execution of a writ of fieri facias is good, whether a return be made of it or not.

Serjeant *Crewe*: After [a writ of] *fieri facias* to execute a judgment in an action of debt, a [writ of] *capias ad satisfaciendum* can be taken if the *fieri facias* be not returned.

RICHARDSON, Chief Justice of the Common Bench: If the *fieri facias* be executed or any goods taken upon it, no *capias ad satisfaciendum* will be awarded upon it, though the *fieri facias* be not returned. And execution upon the *fieri facias* is good, though no return be made of it.

Serjeant *Hitcham* moved on the other side, against *Crewe*. And he said the truth of the case is that the plaintiff has a judgment in debt against Marriott, the defendant, and, upon this judgment, he took a *fieri facias* to execute it. And the sheriff executed it, and took in execution some of the goods that were the proper goods of Marriott and some goods that were not the proper goods of Marriott, but goods that Marriott had as executor to one. Thus, the execution not being good as to the goods that he had as executor, on account of which, they did not return the *fieri facias*, but they took a *capias ad satisfaciendum* upon the former judgment. And they took the body of the said Marriott in execution for the entire judgment, who had put the money here into court. Now, we pray that which will be only reasonable that for our goods that they have taken in execution by the *fieri facias*, they be continued for as much of the debt as they be of value. And, for the residue in arrear, they take so much of the money out of the court as will satisfy the entire judgment and the residue of that which is now in the court be re-paid to us, so that, for so much of the debt that was not levied by the *fieri facias*, it be levied by the *capias ad satisfaciendum*.

And it was allowed by RICHARDSON, HUTTON, and HARVEY, being only there [in court].

227

Rex v. Archbishop of Canterbury

(Prust's Case)

(Part 2)

(C.P. Trin. 6 Car. I, 1630)

Serjeant *Crawley* moved,¹ and argued that this Statute 25 Edw. III, cap. 1, was an obsolete statute and not now in force. And he said that no use had been made of it nor any mention made of this law in our books except in 43 Edw. III, 14; 29 Ass., pl. 32; and 11 Hen. IV, 8 and 10.² And, from the time of Henry IV, no mention is made of it in any of our books where this Statute ever is taken in force. And statutes well can be obsolete by non-usage. And he cited for this Egerton's *Post Nati*, fol. 47; *leges humanae nascuntur, vigentur, et moriuntur*

¹ For other proceedings in this case, see Case Nos. 206, 253.

² Stat. 25 Edw. III, stat. 6, cc. 1, 3 (*SR*, I, 325); *Rex v. Norwich* (1369), YB Pas. 43 Edw. III, f. 14, pl. 6; YB 29 Edw. III, Lib. Ass., p. 163, pl. 32 (1355); *Rex v. Bishop of Coventry* (1409), YB Mich. 11 Hen. IV, f. 7, pl. 20.

*et habent ortum, statum, et occasum.*¹ And, also, the common law is, in some points obsolete, altered, as well in civil causes as in criminal.

Also, he argued that the king is the supreme patron and paramount patron, as it is said in the *Commentaries* 498 and in the second book of *Doctor and Student*. And, when the king presents by a lapse, he presents *ratione praerogativae suae regiae*. And for authority that, [when] the lapse occurs *tempore praedecessoris*, the successor will take advantage, he cited the *New Book of Entries*, title 'information', 7, where the lapse occurred *tempore Elizabethae reginae*, King James will take advantage to present by lapse.²

As to the other point, that it is not pardoned, he held that it is not, because the lapse is not merely a chose in action, because [if] the lapse occurred in the time of the wife, the husband will take advantage after the death of the wife. And he cited 14 Hen. IV, 12; 38 Edw. III, 35.³

228

Alexander v. Porter

(C.P. Trin. 6 Car. I, 1630)

When an advowson is in the king by reason of a wardship and he presents a parson to the church, he presents in his own right.

Michaelmas 4 Car., Common Bench, rot. 1703, in [an action of] *quare impedit*; Potter's Case.

The case was thus. The father was seised of lands held by knight service *in capite* and also of an advowson in gross of the same tenure. He died seised, having issue a son of full age. An office is found for the king, and the heir is found of full age. The heir, 21 Jac. [1623 x 1624], tendered livery in the Court of Wards. The church becoming void in the time of King James, King Charles presented, and his presentee was instituted and inducted. The heir granted *proximam praesentationem*, and, then, he sued livery *una cum exitibus et proficuis etc.*

The first point was upon the Statute of 25 Edw. III, cap. 1, whether the king will present in another right for lapse occurred *tempore praedecessoris sui*.⁴

And Serjeant *Crawley* argued [that] the case here, as to this point, differs from Pruss's Case,⁵ because, there, the king presented by a lapse accrued by reason of the plurality. That was a presentation *ratione jure praerogativae regiae* and so in his own right. But, in our case here, he presented in another right, because he had the presentation by reason of the wardship; thus, he presented in the right of the ward, and thus King Charles could not present, because the lapse occurred in the time of King James etc.

¹ T. Egerton, *Speech of the Lord Chancellor Touching the Post Nati* (1609).

² *Grendon v. Bishop of Lincoln* (1577), 2 Plowden 493, 498, 75 E.R. 734, 741, also Benloe 293, 123 E.R. 206, 110 Selden Soc. 318, 136 Selden Soc. 64, 77; *Bridgeman, qui tam v. Sutcliffe* (1605), E. Coke, *Booke of Entries* (1614), 'Information', pl. 7, f. 368.

³ YB Mich. 14 Hen. IV, f. 12, pl. 12 (1412); YB Mich. 38 Edw. III, f. 35 (1364).

⁴ Stat. 25 Edw. III, stat. 6, cc. 1, 3 (SR, I, 325).

⁵ *Rex v. Archbishop of Canterbury* (1629-1630), see Case Nos. 206, 227, 253.

But the court was against him in this. And they said that, when the king presents by reason of the wardship etc., he presents in his own right. And, thus, there is no diversity as to these causes.

And Serjeant *Athow*, who argued against him, did not speak to this point for the reason of the opinion of the judges in *Pruste's Case*.

The second point was whether, when the heir tendered delivery and the church was void and then he sued livery and the livery is had *una cum omnibus exitibus et proficuis a tempore mortis antecessoris etc.*, whether the king or the heir will have this presentation. And note that, from the time of the tender of livery until the time of the livery sued, there were four years.

And *Crawley* argued that the heir will have the presentation, because, after the tender of livery, he pursued and livery was had accordingly and, when livery is had, it will relate to the tender. And the livery being *una cum omnibus exitibus et proficuis a tempore mortis etc.*, he will have all of the profits and mesne rates and, if the profits are not collected or if they are collected and [are] in the hands of the escheator, yet, if they are not in the coffers of the king, the heir will have them. And he said that it is usual that, after a tender of livery in the Court of Wards, the heir can present his churches, they becoming void after the tender, and not the king. And, in his argument, he cited *Hale's Case*, in the 8 Rep., fol. 171; Fitz., title *Quare Impedit*, 10 and 150, and title *Grants*, 50.¹

Serjeant *Athow* argued to the *contra*. And he said that, where any tender of livery is made in the Court of Wards, there must be a prosecution and continuance of it, and the livery must be sued within six months where the heir is of full age and within the space of a year where the heir is under age etc. And the constant usage of the Court of Wards is that the prosecution will be within six months after the tender, and the clause in it is *ita quod prosequatus* within six months, and, then, from the six months, there must be a continuance or, otherwise, the king will have the mesne rates. Thus, the Court of Wards being a court of record, the Court of Common Bench must take notice of the orders of this court, he thought, as in the case of 2 Ric. III, 9.²

And, in our case, it being apparent by the pleading that the prosecution of the livery was not within four years after the tender of livery and they have not pleaded any continuance made of it, the tender will be void. And, thus, the mesne rates will be to the king, and, by the same reason, the presentation also. And he cited *Hale's Case*, 8 Rep., fol. 172, for the tender of livery and the time for pursuing livery.

Also, in our case, though there be a livery *una cum exitibus etc.* by which he will have the profits of the land not received or, if they be received, yet if they are only in the hands of the escheator and not in the coffers of the king, the heir will have them. But, if they be in the coffers of the king, the heir will not recover them unless by a special order of the Court of Wards. Yet the presentation is a thing different from the profits of the land, because it vests in the king forthwith and the king will have it.

But *tandem*, upon another matter, [it was] found by the justices. A day was given to answer to it or, otherwise, judgment will be given.

[Other reports of this case: Littleton 337, 124 E.R. 274.]

¹ *Hale's Case* (1610), 8 Coke Rep. 172, 77 E.R. 732, also 1 Leonard 157, 74 E.R. 146; *Rex v. Roofe* (1350), YB Trin. 24 Edw. III, f. 28, pl. 16, Fitzherbert, Abr., *Quare impedit*, pl. 10; *Rex v. Wigton* (1344), YB Pas. 18 Edw. III, f. 21, pl. 39, Fitzherbert, Abr., *Quare impedit*, pl. 150; Pas. 46 Edw. III, Fitzherbert, Abr., *Graunt*, pl. 50 (1372).

² YB Mich. 2 Ric. III, f. 9, pl. 21 (1484).

Sherwin v. Cartwright

(C.P. Trin. 6 Car. I, 1630)

An action de rationabili parte bonorum upon a custom is not within the Statute of Limitations.

Sherwin brought a writ *de rationabili parte bonorum* upon the custom etc. And whether this action *de rationabili parte bonorum* be within the Statute of 21 Jac., of Limitation of Actions,¹ or not was the sole question.

And Serjeant *Ward* argued that it was not. And he held that it is outside the words of the Statute and also outside the meaning or equity of it. If this action will be comprised within any words of the Statute, it will be contained within the action of debt or detinue, but it will not be under debt, because he, for part of the money [?], did not have property in the thing. Nor will it be detinue, because this, by the law, must be of a thing certain, and, *ideo*, detinue will not be for *pecuniis numerates* for the uncertainty. But, if the money be in a bag, detinue could be brought for it. But, in a writ *de rationabili parte bonorum*, the plaintiff demands by his writ a *tertiam partem*, but this is uncertain.

Also, the Statute does not say all actions of debt generally, but it limits certain cases in which debt will lie; thus, it is not particularizing of them; it leaves the generality at large, and, thus, an action of debt brought for other causes than are limited in the Statute is outside the Statute.

Also, [it was said] by him this Statute of Limitations will be taken strictly and not by equity, because it is in abridgment of the liberty of the subject to bring his action. And, for such a matter, he cited *Bevill's Case*, 4 rep.²

Serjeant *Athow* argued to the contrary. And he said that a writ *de rationabili parte bonorum* is an action within the Statute of Limitations and it must be brought within six years. And he held it to be as an action of detinue. And he cited 20 Edw. III, fol. 2, where an action of detinue was brought etc. *quod reddat catalla ad valentiam etc.* and he declared upon the custom to have a reasonable part of the goods etc. Also, he cited 30 Edw. III, 25; a wife brought a writ of detinue for the moiety of the goods and she counted upon the custom etc. to have *rationabili parte bonorum*. And, also, he cited 39 Edw. III, fol. 9. He also cited 7 Edw. IV, 20 and 21, and 28 Hen. VI, 4.³

Chief Justice RICHARDSON: This writ *de rationabili parte bonorum* is an original writ, and the action is grounded upon the custom, and you never confound two original writs to make them only one or to comprehend one in the other or under the other.

And then, by all of the justices, *scil.* RICHARDSON, HUTTON, and HARVEY, being there present, they gave judgment for the plaintiff in the writ *de rationabili parte bonorum*. And they singly agreed that a writ *de rationabili parte bonorum* is not within the Statute of 21 Jac., of Limitations of Actions.

¹ Stat. 21 Jac. I, c. 16 (SR, IV, 1222-1223).

² *Parker v. Francis* (1583), 4 Coke Rep. 6, 78 E.R. 860, also 1 Anderson 57, 123 E.R. 352.

³ YB Mich. 30 Edw. III, f. 25 (1356); YB Pas. 39 Edw. III, f. 9 (1365); YB Mich. 7 Edw. IV, f. 20, pl. 23 (1467); YB Mich. 28 Hen. VI, f. 4, pl. 20 (1449).

[Other reports of this case: Hutton 109, 123 E.R. 1136, Littleton 341, 124 E.R. 276.]

230

Babington v. Wood

(Ch. Trin. 6 Car. I, 1630)

A court of equity will not give a remedy against a common law judgment where no collateral, additional matter is alleged.

The case was in the King's Bench, and it was thus.¹ The patron, before he presented, took an obligation from the incumbent that he, at anytime upon the request of the patron, will resign the benefice etc. And, for the refusal of the incumbent, the patron brought an action of debt. And [it was] adjudged that the action well will lie, because it did not appear to be any simoniacal contract in the case.

And, now, the incumbent sued in the Chancery to be relieved against this obligation. And it was overruled in the Chancery, because COVENTRY, Lord Keeper of the Great Seal, would not relieve him against a legal bond, it not being alleged or surmised that there was any collateral matter, as the paying of money or to perform any simoniacal contract for which this obligation was made. But the obligation being adjudged good at common law, he would not constrain or relieve him against it.

[Other reports of this case: Croke Car. 180, 79 E.R. 757, W. Jones 220, 82 E.R. 117, Hutton 111, 123 E.R. 1137.]

231

Jennings v. Pollard

(C.P. Trin. 6 Car. I, 1630)

In this case, the intention of the lease in issue was that the lessee would enjoy his term for three lives, and, if he be evicted during the three lives, that he will have a recompense for his loss.

In an action of covenant, the Lord Norris being tenant in tail of the gift of the king, the reversion being in the king, the Lord Norris made a lease for three lives after the Statute.² And he covenanted, first, that the lessee will quietly enjoy it during the aforesaid term without any disturbance by him or anyone claiming under him. And, also, he, secondly, covenanted that, if the lessee be legally evicted during the aforesaid term, that, then, he or his executors will make amends for the loss and damage that will be to him by this eviction. The Lord Norris died without issue, and the king entered and ejected the lessee, who brought an action of covenant against the executors of the Lord Norris.

And Serjeant *Athow* moved that the action of covenant will not lie. And the question, he said, was solely upon this second covenant, which was that, if the lessee be legally evicted during the term etc., but he was not evicted during the term, because, by the death of the Lord Morris, the reversion being in the king, the lease for lives ended by the death of the Lord

¹ For related proceedings, see above, Case No. 209.

² Stat. 21 Jac. I, c. 2 (SR, IV, 1210-1211).

Norris without issue, and, thus, the entry of the king and the eviction was not done during the term, but after the end of it. But he held that it would have been otherwise if the covenant was if he be evicted during the three lives.

HUTTON: This covenant was made to warrant him that he will not be evicted during the three lives and that the lease will continue during the three lives without an eviction, and thus was the intention of the parties in this covenant.

HARVEY agreed that the intention of the covenant was that the lease will continue without an eviction for three lives and, if he be evicted from his term during the three lives, that he will have a recompense for it.

Justice DAVENPORT: Here is an eviction within the term. And he held a diversity between an *habendum* made for the limitation and the continuance of an estate and a covenant for the continuance of an estate, because a covenant will be taken *secundum limitationem expressam*, but a covenant will be construed *secundum intentionem* and, thus, the intention of the covenant was that the lessee will enjoy his term for three lives, and, if he be evicted during the three lives, that he will have a recompense.

And, thus, the court held that the lease was ended by the death of the Lord Norris, tenant in tail, without issue, and the entry of the king. And they adjudged that the action of covenant brought upon this covenant for the eviction was well brought.

[Other reports of this case: Littleton 335, 124 E.R. 273.]

232

Mattock's Case

(C.P. Mich. 6 Car. I, 1630)

Tithes of rabbits are due only by some prescriptive right but not of common law.

Conies are not tithable *sua natura quia sunt ferae naturae*. But, if the parsons have used from the time of which memory [does not run] etc. to have the tithes of them, then, the tithes will now be paid of them and, there, the tithes of them is due by prescription and custom and not *de jure*, and, *ideo*, the parson in such a case must entitle himself to the tithes of them and similar things by prescription, because, *per legem terrae, decimis non debentur* of conies, deer, pigeons, and things of a similar nature, [as held] by justices HUTTON, HARVEY, and DAVENPORT.

Serjeant *Henden*: If conies of the warren be sold, tithes will be paid for them.

Justice DAVENPORT: There, the suit will be not for the tithes of conies, but for the profit of conies and so of the deer. And, in these cases, it will be by prescription.

Serjeant *Hitcham*: The truth of our case is that we, being sued for the tithes of conies, have pleaded in the ecclesiastical court that the place out of which this tithes for conies was demanded is a warren and it was the ancient possession of an abbot and that the abbot and all his predecessors will hold this land from the time of which [memory does not run] discharged of tithes and, from this time, no tithes have been paid, upon which matter, he showed in this court here we should have had a [writ of] prohibition. And now the issue has passed against us, and it proves that tithes have been paid for this land. But yet we now pray that no [writ of] consultation will be granted, because, though, upon the issue, the prescription is found against us, thus, the suggestion and cause of our prohibition disproves and annuls [it]. Yet, inasmuch as it appears to us adjudged by the libel contained and rejected in the prohibition that the suit in the ecclesiastical court is for the tithes of conies that *per legem terrae* are *indecimabiles sua natura*, we now pray that you will not grant a consultation.

To which the justices answered that they will establish the profits [?] and not grant a consultation though the matter of surmise upon which the prohibition is founded be disproved, if the matter is to be as Hitcham moved. But, in the libel, he, the parson, entitled himself to the tithes of the conies by prescription.

Et dies datus ultra for Serjeant Hitcham to move other matter.

233

Adeline Smith's Case

(C.P. Mich. 6 Car. I, 1630)

The ecclesiastical courts have jurisdiction over defamation of married women who were called whores.

A suit was begun in the spiritual court for calling a married woman a whore. And it was moved to have [a writ of] prohibition.

But Chief Justice RICHARDSON and justices HUTTON and DAVENPORT [held that] no prohibition will be granted, because it is properly for this court.

234

Countess of Shrewsbury v. Earl of Pembroke

(C.P. Mich. 6 Car. I, 1630)

A tenant in common has a common law cause of action against a co-tenant to prevent waste.

In a writ *de partitione faciundo* between the Countess of Shrewsbury and the Earl of Pembroke, Serjeant *Bramston* moved that the land of which the partition could be made is a great part of it divers woods and now great waste was made in cutting down of the trees and selling of timber trees. He prayed to have a [writ of] estrepment. And he proffered to show a precedent where, in another case, an estrepment was granted.

Justices HUTTON and HARVEY, being only there [in court]: It is reasonable that you should have [a writ of] estrepment.

235

Lord Brook's Case
(Part 1)

(C.P. Mich. 6 Car. I, 1630)

Where a lessee is bound by covenants in the lease, the lessee must seal and deliver the written lease.

A tenant in tail made a lease for twenty-one years, reserving the ancient rent etc. And there was a covenant between them that the lessee will not enter during the lifetime of the tenant in tail, but the tenant will enjoy it during his life [. . .] tenant in tail continued the possession, and he died, having issue.

Serjeant *Crewe*: This is a good lease to bind the issue, though the lessee did not enter in the lifetime of the tenant in tail, which was not denied.

The case was of a lease made by the Lord Brooke, now deceased.¹

236

Anonymous

(C.P. Mich. 6 Car. I, 1630)

In this case, the plaintiff did not plead a good cause of action.

An information was [brought] upon the Statute of Usury² for taking above £8 in the hundred, and, [upon an] issue taken, it was found for the plaintiff. And, now, it was moved in arrest of judgment that the plaintiff in the information had laid that he did borrow of the defendant on the seventh day of May, the fourth year of the reign of our lord the King Charles [1628] etc. And the Statute says that none shall take above £8 in the hundred etc. from a day set down in the Statute and the plaintiff has not laid in the information that the lending was since that day after which and was to be brought by the Statute, but he said at the seventh day of May, 4 Car. [1628], by which it does not appear but that the lending could have been before the Statute.

Justices HUTTON and DAVENPORT, being only there [in court], allowed the exception, because [it was held] by them, where he said [. . .] the seventh day of May and where it is at the seventh day of May, because saying at the seventh day is exclusive and leaves the day indefinite.

237

Bales's Case

(C.P. Mich. 6 Car. I, 1630)

If a person, to whose use a copyhold is surrendered, demands admittance and dies without an heir, the land will not escheat, but will revert to him who made the surrender.

As estates of land descend by the custom of the manor, in the same manner, any part of the estate, such as a remainder or a reversion, will descend.

Bales's Case was tried in this court by the order of the Chancery.

RICHARDSON, Chief Justice of the Common Bench asked Serjeant *Hitcham*, if a copyholder surrender into the hands of the lord to the use of a stranger and his heirs, before admittance, in whom is the estate?

Hitcham: It is in him who surrendered until the admittance.

Quod tota curia negavit.

And RICHARDSON said that it is true that, until the admittance for any purposes, the estate will have a retrospect to him, as where a man surrenders into the hands of the lord to the use of a stranger and his heirs and the stranger to whose use the surrender was refused, now, the estate will go back to the person who surrendered and, by this way [?], the estate will revert to him who made the surrender.

¹ For later proceedings in this case, see below, Case No. 241.

² Stat. 21 Jac. I, c. 17 (SR, IV, 1223-1224).

And [it was held] by RICHARDSON and HUTTON, if the person, to whose use a copyhold is surrendered, demands admittance [and] dies without an heir, the land will not escheat, but will revert to him who made the surrender.

Hitcham, to the same intent: A person, to whose use a surrender of a copyhold is made, has an estate in the land and could enter without a trespass, and, after his entry, he could punish any other [person] who made a trespass upon the land, but he is only a tenant at will, as where a man made a deed of feoffment in fee to one and his heirs, now, before livery and seisin, the person, to whom the feoffment was made, will be a tenant at will by force of the deed of feoffment and he can enter legally in the land, and, after his entry, he can maintain [an action of] trespass against a stranger.

Finch, Recorder of London, cited a case that was the Case of Lord Montagu and Sir Sidney Montagu. The custom of a manor was that the copyhold land should descend to the younger son; a copyholder surrendered to the use of A. for life, the remainder to B. and his heirs; B. died, A. being tenant for life. And [it was] adjudged that the younger son of B. will have the reversion, as he would have the land if the estate had been in possession.

RICHARDSON: It was resolved by all the justices of England in one Egerton's Case, that, as estates of land descend by the custom of the manor, in the same manner, any parcel of the estate, as a remainder or a reversion, will descend.

238

Sylliard v. Kecke

(C.P. Mich. 6 Car. I, 1630)

The question in this case was whether there can be an information in the Court of Star Chamber where any conspire to indict another, though they never indict him.

Chief Justice RICHARDSON: There can well be an information in the Star Chamber where any conspire to indict another, though they never indict him. And, also, the information will be good though he declared of some confederacy or conspiracy but only that, by a corrupt and bad agreement [of] another of them, they will have made or that they had indicted him etc.

But, [it was held] by Justice DAVENPORT, upon an indictment by a conspiracy put against a man and *ignoramus* found, no action of conspiracy or action upon the case in the nature of conspiracy would lie at common law.

239

The College of Physicians, *qui tam* v. Butler

(C.P. Mich. 6 Car. I, 1630)

The College of Physicians had the power to regulate physicians to practice medicine in the City of London and its environs.

The President of the College of Physicians *qui sequitur tam pro domino rege quam seipso* brought an action of debt against George Butler. And he declared upon the charter and the statute of Physicians made 10 Hen. VIII and confirmed afterwards by the Act of Parliament made 14 Hen. VIII, 'that none within the City of London or within seven miles of it should practice physic without a license from the President and College of Physicians and, if any did

so contrary, that he should forfeit £5 a month whereof one moiety to the king and the other' etc.¹

Butler pleaded in bar the Statute of 34 Hen. VIII, in which it is purviewed² 'that it should be lawful for any subject born within the realm having knowledge' etc. And he averred that he was a subject born and that he had science etc. To which the President and College pleaded in replication the Statute of 1 Mar., which took notice of the statute of 10 Hen. VIII and of 14 Hen. VIII, confirmed the charter of the Physicians with these words *non obstante aliqua lege, statuto, vel consuetudine usitata in contraria* [. . .].³

Chief Justice RICHARDSON, in the presence of the other judges, gave a judgment for the plaintiff. And he declared the reasons of this judgment in which they were [. . .] agreed.

And, first, as to an objection that had been made by the counsel of the defendant that was to the jurisdiction of this court, they resolved that they had jurisdiction.

And as to the other objection that was made, it being brought in the name of the President alone where it should have been in the name of the President and College, because they are incorporated by the name of the President and College etc., they resolved that the action is well brought in his name alone, because the king incorporated them by one name and gave them power to plead and to be impleaded by another name; an action brought by this name will be good, though it not be according to the name of the corporation. And he cited the book of 11 Hen. VII, 27, 28, directly in the point.⁴

Also, the plea of Butler is insufficient for this cause, *eo quod* he pleaded that, by the Statute, any being a subject born and having science in the nature and operation of herbs, roots, stones, etc. by speculation or practice etc. could apply salves, plasters, poultices etc. to outward sores, wounds, ulcers, etc. and give potions for agues, the stone, and the strangury and that accordingly he had administered plasters, poultices, etc. to wounds, sores, ulcers, and other infirmities, and, also, he had administered potions for agues, the stone, strangury and other maladies and diseases of a similar nature, where, by the Statute, the plasters and poultices are restrained to three cases, wounds, sores, and ulcers and outward diseases, which word 'outward' is twice repeated in this clause, and the potions are to be administered to diseases there limited and not to others. But the defendant has justified of more than the Statute speaks, because he justifies for other maladies and diseases of a similar nature, by which way he could administer physic for diseases and maladies that is against the intention of the Statute.

Also, they resolved and are all of the opinion that no man is enabled by the Statute of 34 Hen. VIII to practice physic for lucre or gain or to make a profession and profit of it but only good and honest persons (as the Statute calls them) are licensed in certain diseases and infirmities there limited and the sorts of medicines there mentioned for to administer physic and this must be done for neighborhood, piety, and charity and not for lucre or to make profession and profit of it, because then they are punishable.

Also, they resolved that, if the charter of the physicians etc. are impeached by the Statute of 14 [Hen. VIII] or another Statute, now, by the Statute of 1 Mar., which confirms their charter and take notices of the other statutes made concerning the physicians and the practice of physic, restores to them their liberties and privileges and confirms to them their charter, by the opinion of all of the justices.

¹ Stat. 14 & 15 Hen. VIII, c. 5 (SR, III, 213-214).

² Sic in MS.

³ Stat. 34 & 35 Hen. VIII, c. 8 (SR, III, 906); Stat. 1 Mar. I, stat. 2, c. 9 (SR, IV, 207-208).

⁴ YB Trin. 11 Hen. VII, f. 27, pl. 12 (1496).

Lastly, he cited a case that was in the King's Bench, 3 Jac., where Doctor Langton, President of the College of Physicians, brought [an action of] debt in a similar case, and a similar judgment was given there for Doctor Langton, the plaintiff, as they gave now for the now President of the College etc. And this Case of Doctor Langton was adjudged upon debate, because it pended from 3 Jac. until 6 Jac.¹

[Other reports of this case: Littleton 168, 212, 246, 349, 124 E.R. 190, 212, 229, 280, Croke Car. 256, 79 E.R. 823, W. Jones 261, 82 E.R. 136.]

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Beck's Case

(C.P. Mich. 6 Car. I, 1630)

Where a fine is levied, any contingent estate tail is destroyed and also any remainder upon it. If a contingency never happens, the remainder cannot be executed.

Becke's Case, the report of which was given to me by Mr. Winn. The plea began Trinity term 4 Car., rot. 770.

The case was thus. James Becke, the father, seised of land in fee, made a feoffment in fee of it to the use of himself [. . .] remainder [. . .] and the son, having issue two sons, Jobe, the elder, and James, the younger, and this feoffment was to the use of James, the father, for life, the remainder to James, the son, for life, the remainder to the first son of James who will have issue male of his body and to his heirs, and, for default of such issue, the remainder to the first daughter of James, the son, who will have issue male of her body and to his heirs, and, for default of such issue, the remainder to the right heirs of James, the father, forever. Afterwards, James, the father died. And James, the son, before he had any sons who had issue male, levied a fine etc., for which Henry Beck entered for the forfeiture, as son and heir of Jobe, the son and heir of James, the father.

And Chief Justice RICHARDSON, who gave the judgment in the case, declared the reasons upon which the judges grounded this judgment. It was resolved that James, the son, had an estate tail in contingency so that, by the fine levied, the contingency was destroyed and also the remainder upon it, so that the entry for a forfeiture was not good. But, if James, the son, had had a son who had issue male, then, the remainder would have been settled in the son of whatever son he was of James, the elder, [. . .] or other issue, that, then, James, the son, will have had but only an estate for life, and, then, the fine could not have barred his issue. But, now, this being an estate tail, the fine destroyed the whole, as it was in Archer's Case.²

The first reason [was] because it will be where an estate tail is upon the exposition of the deed, because, in exposition of deeds, *scio [?] observanda sunt*, first, such an exposition must be that all the parts of the deed could stand together; second, that it be according to the intention of the parties; third, that it must be according to the rules of law, as is said by Anderson in Shellie's Case, in which case, it is also said that, if a man make a feoffment in fee to the use of himself and his heirs, it is [. . .] a fee simple, but, if he will limit a remainder over, then, it is only an estate tail, which is according to the intention of the parties. Thus, the

¹ *Atkins v. Gardener* (1610), 8 Coke Rep. 107, 77 E.R. 638, Noy 121, 74 E.R. 1085.

² *Baldwin v. Smith* (1597), 1 Coke Rep. 63, 76 E.R. 139, 139 Selden Soc. 818, Croke Eliz. 453, 78 E.R. 692, 2 Anderson 37, 123 E.R. 533.

case is put in the *New Institutes*, sec. 16.¹ If a man make a feoffment in fee to the use of one and his heirs and if he die without heirs of his body, then it will remain to another, it is only an estate tail within the intention of the parties, because, in these cases, the limitation of the remainder does not take away any part of that which was granted before, but it is a *modus donationis* and not a repugnancy, because, as is said in Archer's Case, such an exposition must be of a deed if it be possible so that all parts of the deed will be significant.

Thus it is in our case, that it must be an estate tail in James *ratione* of the limitation of the remainder. And he cited 7 Edw. III, 10. But, if lands be given in tail in the premises by express words, 'habendum for life', this *habendum* is void according to the rule in Prince's Case, 8 Report.² *Clausula generalis non porrigitur ad ea quae [ante] specialiter sunt comprehensa*.

The second reason was that, in every estate tail, there must be restrictive words and 'the body' [. . .] or words equivalent to the body so that the expression of 'heirs of the body' or that which as much as amounts to it must be in every estate tail. And, in our case or the estate of James, the son, there is the word 'heirs', because, without heirs, there cannot be an estate tail. And, at common law, all were conditional fees, which, by the Statute of Westminster II,³ be translated into estates tail, because, as, at common law, there could not be a conditional fee without the word 'heirs'; thus, by the Statute, it could not be an estate tail without the word 'heirs'. And *salva opinione* My Lord Coke, that the Statute of Westminster is as well a mother of estates tail as a nurse, because, before the Statute of Westminster, there was not any notice of such a thing as an estate tail. And for [this], he cited a notable case, as he said, 12 Edw. III, *Variance*, 77, which case is not in the printed book;⁴ a man gave land to a husband and wife and to the heirs of the body of the husband and that, if the husband and wife die without heirs engendered upon the body of the wife, that, then, it will remain to the right heirs of husband, in [which] case, the wife will have only an estate for life, because the word 'heirs' was only applied to the estate of the husband, which makes the fee conditional at common law and translates by the Statute into an estate tail.

38 Ass., pl. 14; lands were given to a man and to his heirs *si haeredes de carne habuerit*; this is a good estate tail, because it was a conditional fee at common law. 5 Hen. VIII, 6; lands [were] given to a husband and wife and to their heirs and, if *contingerit* that they die without heirs of their bodies, that, then, it will remain to another; this is an estate tail upon the exposition of the grant, according to the intention of the parties. 8 Edw. III, *Tayle*, 33; land [was] given to a man *et haeredibus*, saving the reversion to the donor, there, upon the reason aforesaid, it was adjudged an estate tail. And so in Shellie's Case, land [was] given to a man *et pueris* or *semini suae* or *proli*; this did not make an estate tail for default of the word 'heirs', so that the party will take only an estate for life jointly with his children for default of

¹ *Wolfe v. Shelley* (1581), 1 Coke Rep. 88, 76 E.R. 199, 3 Dyer 373, 73 E.R. 838, 1 Anderson 69, 123 E.R. 358, Moore K.B. 136, 72 E.R. 490, Jenkins 249, 145 E.R. 176; E. Coke, *First Institute* (1628), f. 20.

² *Anonymous v. Mortimer* (1333), YB Hil. 7 Edw. III, ff. 9, 10, pl. 20; *The Prince's Case* (1606), 8 Coke Rep. 1, 77 E.R. 481.

³ Stat. 13 Edw. I (Westminster II), c. 1, s. 1 (SR, I, 71-72).

⁴ YB Pas. 12 Edw. III, Rolls Ser. 31b, vol. 1, p. 512, 2 Fitzherbert, Abr., *Variaunce*, pl. 77 (1338).

the word 'heirs'. Thus, 2 Edw. III, *Bre.*, 743; land [was] given to a man *et haeredibus de uxore suae*; this is an estate tail.¹

The third reason was that all uses will have as favorable a construction in law according to the intent of the party as it could by way of devise, as is agreed by all the judges in Shellie's Case. And, on account of this, in wills, a construction will be made according to the intention of the parties, as Wilde's Case, 6 rep. A man devised lands to one and to his issues; there, if he had issue at the time of the devise, he will take jointly with him, but, if he did not have any issue at the time, then, he will have an estate tail according to the intent of the devisor.²

Thus is Benlowe's Case, 4 Eliz., 122, because, where a devise is made to one that, if the sons of the devisor did not have any issue of their bodies, then, the devisee will have it. This is a remainder to the devisee, notwithstanding that the sons do have any estate conveyed to them, but only upon an inference that will be expounded according to the intention. Thus, in Sundaye's Case, 9 rep.; a devise to one for life, the remainder to his son, William, and, if his son William die without issue male of his body, that, then, the land will remain over to another, a stranger; this is an estate tail in William. Thus, in Beresforde's Case, 7 rep.; a devise to one and *certis haeredibus corporis Adeni*, which is good Latin and yet, by exposition, it will be taken as strongly as it were *de corpore Adeni*. Also, it was adjudged in Abrams and Twigg's Case, 38 Eliz., where a feoffment was made to one and his heirs male, it was held to be an estate in fee, because it was not expressed of what body, which, always, must be in estates tail or other equivalent and definitive words.³ And he said that he had a report of the case delivered to him by Justice Hutton that he himself argued. And it was 13 Jac., King's Bench, rot. 606; Saye, seised of lands, having issue, a son called Francis and three daughters, devised by a will this land and house to his wife for life, the remainder to his son Francis and that, if *contingerit* that his daughters survive his wife and Francis and his heirs, that, then, the land will remain to his daughters. Francis died without issue, the daughters being his heir. The question was, though it could be that the daughters will survive Francis and his heirs, the daughters being the heirs of Francis, and they could not survive themselves. But, in this case, the exposition was made according to the intention of the devisor, that, if the daughters will survive Francis and the heirs of his body, and so it was adjudged for the daughters, so that estates tail will have a construction according to the intent, as in the cases put before.

And, in our case, the estate of James Pecke, the son, all those things requisite to make an estate tail are inserted: first, the heirs; second, the body, which is the body of James, the son ('and to the first son who will have issue male of his body and to his heirs'), which also expresses the intention, similarly to the case 39 Ass., pl. 10. Land given to one *et haeredi et sui haeredi ipsius haeredis* [is] a good estate tail.⁴

Other things have been moved in the case by the counsel, as a feoffment in fee is made to the use of one for life, the remainder in contingency in waste or forfeiture made by a tenant for life, whether the feoffor could enter for the forfeiture or will have an action of waste,

¹ YB 37 Edw. III, Lib. Ass., f. 219, pl. 15 (1363); 2 Fitzherbert, Abr., *Taile*, pl. 21, 33; *Wolfe v. Shelley* (1581), *ut supra*; 3 Edw. III, 1 Fitzherbert, Abr., *Briefe*, pl. 743 (1329).

² *Wolfe v. Shelley* (1581), *ut supra*; *Wild's Case* (1599), 6 Coke Rep. 16, 77 E.R. 277, also 1 Eq. Cas. Abr. 181, 21 E.R. 973, Gouldsborough 139, 75 E.R. 1050, *sub nom. Richardson v. Yardley*, Moore K.B. 397, 72 E.R. 652.

³ *Digg's Case* (1562), Benloe 122, 123 E.R. 93; *Sunday's Case* (1611), 9 Coke Rep. 127, 77 E.R. 915; *Beresford's Case* (1607), 7 Coke Rep. 41, 77 E.R. 471; *Abraham v. Twigg* (1596), Moore K.B. 424, 72 E.R. 671, Croke Eliz. 478, 78 E.R. 729.

⁴ Perhaps YB 35 Edw. III, Lib. Ass., f. 213, pl. 14 (1361).

because the use arises out of the estate of the feoffee and, being executed by the Statute of Uses,¹ the feoffee has nothing to do with it. Query.

Another objection has been made, that several fee simples could be by way of a use upon contingent remainders, because, when one ends, the other will begin, though it could not be by way of a conveyance, upon which they also were not agreed [. . .]. Query.

Fourth, another objection was, whether the remainder to the heirs of James, the father, could be executed before the contingency happened *in esse*, which is the remainder to James, the son, for life, the remainder to the first son that will have issue male of his body.

And RICHARDSON said that his opinion was that a remainder in contingency could be executed before the contingency happened *in esse*.

But justices HUTTON and DAVENPORT [held] to the *contra* that, if the contingency never happens, the remainder will never be executed, because, by no way, could it begin, inasmuch as, by this way, the foundation fails.

[Other reports of this case: Littleton 253, 285, 315, 344, 124 E.R. 233, 249, 264, 277.]

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Lord Brook's Case
(Part 2)

(C.P. Mich. 6 Car. I, 1630)

The tenant in tail made a lease for twenty-one years etc. If the lessee not seal and deliver the counterpart of the lease, it is not a good lease.² [This was said] by Serjeant *Bramston*, *quod curia concessit*.

Also, if a tenant in tail makes a lease for twenty-one years, according to the Statute,³ and it is covenanted that the lessee will not enter during the lifetime of the lessor, but only the lessor will enjoy it during his life, this is a good lease.

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Anonymous

(C.P. Mich. 6 Car. I, 1630)

If a person falsely and maliciously indicts another of felony and the jury acquits, an action of case lies for this defamation.

If a man falsely and maliciously indicts another of felony and the jury finds *ignoramus*, an action upon the case will be maintainable for it, as was resolved 31 Eliz., in Jerom's Case,

¹ Stat. 27 Hen. VIII, c. 10 (SR, III, 539-542).

² For earlier proceedings in this case, see above, Case No. 235.

³ Stat. 32 Hen. VIII, c. 28 (SR, III, 784-786).

King's Bench,¹ and, in this court in Blacke's Case, in the time of Chief Justice Hobart,² as Chief Justice RICHARDSON said.

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Wilson v. Peck
(Part 2)

(C.P. Mich. 6 Car. I, 1630)

An action upon the case was brought by Wilson, an attorney of the Common Bench, against William Pecke for fees due to the plaintiff as a solicitor.³ And [it was held] that the action is not maintainable.

The Lord Hedman [?] against Salkins; More against Topham; Handeborough and Jones; Bouch and Collens; Ingram and Butler; Mouse and Postone; all these [were] fined in the Star Chamber for soliciting.

Hilary 4 Car. [1629], upon a verdict given for the plaintiff Wilson, the court was moved in arrest of judgment, because it was urged by the counsel of the defendant that an attorney could not solicit out of his own court.

Justice HUTTON and YELVERTON were strongly of the opinion that an attorney could not be a solicitor and that the law did not take notice of any such minister as a solicitor.

Chief Justice RICHARDSON argued for the plaintiff upon the convenience of soliciting by an attorney, and he granted that none but an attorney could solicit, with which Justice HARVEY seemed to agree in opinion.

It was replied by the counsel of the defendant that, admitting that an attorney could solicit, yet the plaintiff has not alleged in his declaration that, at the time of his retainer for soliciting, that he was an attorney.

And that an attorney could not solicit, *vide sequentiae*:

Michaelmas 37 & 38 Eliz., King's Bench, Jeremy and Rowell's Case; in an action upon the case for soliciting, the soliciting was adjudged [to be] maintenance. 36 & 37 Eliz., rot. 365, King's Bench, between Jeremy and Rowell.⁴

19 Eliz., Ousley's Case, by Manwood and Mounson; an action upon the case [was] brought by a general solicitor for fees for soliciting. In this [case], the justices said that, if, for the appeasing of the debates between me and J. St., I assume to pay all the charges that he will disburse for me, if he does not agree to it at the time that the offer is made, but labors afterwards for a satisfaction, not regarding the first assumption, the assumption will not bind me, because it is not reasonable that he will take advantage of my promise if he be not also bound by an acceptance of it to pursue any other action against me. And, on account of that, if he does not agree to this promise, I am at liberty; so that, if I be not a general solicitor if I do not agree to a certain sum at the time of the promise made to him, the plaintiff is not bound by the promise.

Easter 13 Jac., rot. 750, Common Bench; Solomon Leach, an attorney of the Common Pleas, declared in an action upon the case against Richard Panton for fees due to him for

¹ *Knight v. Jermin* (1589), Croke Eliz. 78 E.R. 391.

² *I.e.* 1613 to 1625.

³ For earlier proceedings in this case, see above, Case No. 178.

⁴ *Rolls v. Germin* (1595), Moore K.B. 366, 72 E.R. 633.

soliciting divers suits in the King's Bench and the Chancery for the said Panton, who promised him for his labor £6 13s. 4d., upon which declaration, the defendant demurred, but the demurrer was never argued.

Michaelmas 44 & 45 Eliz., in the Star Chamber; John Earle against George Watkins and [. . .] Bathurst. The solicitor was fined £20 for soliciting. Common solicitors were disallowed by the court, and admonished that they will not intermeddle with causes but for themselves, it being repugnant to divers good laws. And the difference also was there taken by the judges that to be a general solicitor was illegal and tended to maintenance. But, if he was the servant of any man or one employed in special and in certain, it was good, and it could be allowable.

Also, no one can have a solicitor general but the king *neque ullus potest* challenge any fees due as a solicitor for soliciting causes unless he did it as a servant to the party and by his command and, in this regard, he can have a special promise of reward for his pains and repayment of such sums of money as he will disburse. But the law does not take any notice of a solicitor or of any fee due to him, as it does of any attorney, who has his fee certainly known.

Hilary 4 Car. [1629], King's Bench, entered Trinity 4 Car., rot. 217, Thursby against Warner; in a writ of error to reverse a judgment given in the Common Bench in an action upon the case upon a promise, the case was thus. Warner, the testator, being an attorney, had disbursed for Thursby divers sums of money in several courts as an attorney (where he was an attorney) and in the Chancery and at other courts at Westminster and in the country as a solicitor for him, he delivered his bill to him, who said, if one such being an attorney will allow it to be reasonable, then he promised to pay it, which bill was accordingly seen and allowed by him. And, upon this, an action upon the case was brought against Warner, his executor. It was assigned for error that, for fees disbursed as a solicitor, no action will lie for the soliciting of causes in courts where he was not an attorney and that no action will lie for it, but that it is maintenance in him. And, there, Justice Whitelock seemed of the opinion that the promise was bad in regard that the consideration was bad, it being in the judgment of the law maintenance for an attorney to solicit causes in other courts but in the same court where he is an attorney unless it was as a servant to the party. And to this purpose to prove it to be maintenance, these books were cited: 21 Hen. VI, 16; 22 Hen. VI, 35; 19 Edw. IV, 30; 32 Hen. VI, 24 and 25.¹

In this case, [it was] questioned whether a bailiff or a pledge could disburse money. The consideration of disbursing money as a solicitor implies in itself maintenance and, on account of that, it is void.

19 Eliz., Dy. 355, Onley's Case, by Mounson and Manwood, against Dier, [was] that this consideration implied maintenance.²

Hilary 16 Jac., King's Bench, entered Easter 16 Jac., rot. 416, Bradford against Woodhouse, [an action of] debt by an attorney against a defendant, who was a solicitor to Sir Thomas Jervis, and he retained Bradford to be an attorney and to pay to him 3s. 4d. each term; he brought [an action of] debt against the solicitor for this retainer, [and] he had a judgment in the Common Bench. [A writ of] error was brought in the King's Bench, and the judgment was affirmed, because the action [was] brought upon the contract between them for the retainer. And the case held, if such a solicitor for himself and without a command will retain an attorney

¹ *Thursby v. Warren* (1629), Croke Car. 159, 79 E.R. 738, W. Jones 208, 82 E.R. 110; *Pomeroy v. Abbot of Buckfast* (1442), YB Mich. 21 Hen. VI, f. 15, pl. 30; YB Mich. 22 Hen. VI, f. 35, pl. 54 (1443); YB Mich. 19 Edw. IV, f. 3, pl. 9 (1479); *Docket v. J.P.* (1454), YB Hil. 32 Hen. VI, f. 24, pl. 11.

² *Onley v. Earl of Kent* (1577), 3 Dyer 355, 73 E.R. 797, also Benloe 297, 123 E.R. 208, 136 Selden Soc. 20, 124.

for another for whom he solicits and without the express command of him for whom he solicits, it will be maintenance in the law, but, otherwise, if he be made by his commandment and as a servant to him.¹

Hilary 4 Car., King's Bench, Kellaway against Meere, in an action upon the case upon an *assumpsit*, because, being a clerk of one of the Six Clerks in the Chancery, for fees due to him that came to £6 *pro feodo et labore suo*, [there was a] verdict *pro querente*, upon which it was moved in arrest of judgment, because the consideration was bad because he [was a] clerk of Tottle, one of the Six Clerks, who was clerk to Meere, testator, at whose request, money was disbursed upon it.

He relied upon the Case of 19 Eliz., Dy. 355, Onely's Case, and 7 Hen. IV, 10, Marscham, in the end of the case, [. . .] it is maintenance in the clerk for laying out fees upon it. He cited 21 Hen. VI, 15; 13 Hen. IV, 16, 17; 32 Hen. VI, 27; 21 Hen. VI, F., *Corone*, pl. 455; 11 Ric. II, F., *Duresse*, pl. 13; 20 Hen. VII, 2; 21 Hen. VII, 13; 15 Edw. IV, 26, Browne, for fees that are due.²

Note that these two last cases mentioned before pend still in the King's Bench undetermined and to be argued next term.

[Other reports of this case: Hetley 129, 124 E.R. 397.]

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Anonymous

(C.P. Hil. 6 Car. I, 1631)

In pleading a modus decimandi, it must be alleged and proved to exist by an ancient prescription.

The parson sued in the spiritual court for tithes of hay growing in marsh grounds where they of the country used to depasture the land and, then, at the end of the summer, to cut the tufts of the grass that grow after the depasturing and, from this, they make hay. And, now, it was moved to have [a writ of] prohibition. And it was alleged that one etc., predecessor of the parson, had made a composition with the parishioners for their tithes of their marsh and it had allotted to him and his successors a certain parcel of land in lieu of those tithes, which land he accepted for all his time and also a Doctor Mawe accepted it and continued it for all his time and also the parson, who now sues, at first, accepted it, but, now, he refused and designed to [. . .], and he sued for his tithes in specie, for which, they prayed [a writ of] prohibition *ratione* of the composition, because, by his acceptance of the land and the agreement, he has affirmed the composition.

But, *per curiam*, no prohibition [lies], because, by the death of the predecessor, the composition is void, because a parson cannot prejudice his successor and, thus, the acceptance and agreement of the successor does not make it good what was void. But, if you have alleged such a composition made by the predecessor and continues from the time of which memory

¹ *Bradford v. Woodhouse* (1619), Croke Jac. 520, 79 E.R. 445.

² *Onely v. Earl of Kent* (1577), *ut supra*; *Pomeroy v. Abbot of Buckfast* (1442), *ut supra*; *Becket v. Anonymous* (1412), YB Hil. 13 Hen. IV, f. 16, pl. 12; *St. Nicholas v. Pigherd* (1387), Ames Found., vol. 5, p. 12, pl. 5, 1 Fitzherbert, Abr., *Dures*, pl. 13; YB Mich. 20 Hen. VII, f. 2, pl. 4 (1504); *Browne's Case* (1475), YB Trin. 15 Edw. IV, f. 26, pl. 2.

does not run, *ideo*, this composition binds the parson and, if he has sued for the tithes in such a case, you will have a prohibition.

Then, it was moved to have a prohibition upon this advice, and it was alleged that the custom by all the country used from the time of which memory does not run and it is that of such tufts of grass thus mowed and made into hay, no tithes have used to be paid.

And, upon this matter, a prohibition was granted.

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Anonymous

(C.P. Hil. 6 Car. I, 1631)

When an outlawry is reversed, goods seized thereupon will be restored to their owner.

Where a man is outlawed in any suit, by [which] his goods are forfeited, and the king has granted to one all the goods and forfeitures of outlaws, if the goods are taken *ratione* of the forfeiture by the sheriff and the goods being in the hands of the sheriff, the outlawry is reversed for error, now, the party will have a writ of restitution for the goods, [as held] by Chief Justice RICHARDSON and not denied by anyone.

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Jennings v. Cousins

(C.P. Hil. 6 Car. I, 1631)

Damages for animals that have damaged another person's land must be tendered before the animals were seized in order to avoid litigation thereupon.

Cattle [were] taken damage feasant or impounded etc. The owner brought [an action of] replevin, and the avowery was for damage feasant. And it was pleaded in bar *quod, post captionem*, he offered sufficient amends. But he did not allege that it was before the impounding.

And it was adjudged that [it was] no plea, because he must have said that, before the taking of the cattle and the impounding of them, he offered sufficient amends, because the amends must be offered before the impounding.

[Other reports of this case: Hetley 165, 124 E.R. 424, Littleton 355, 124 E.R. 282.]

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Rex, ex rel. v. Anonymous

(C.P. Hil. 6 Car. I, 1631)

Where a case has been discontinued upon a non prosequi, it cannot be revived.

Where a parson who was in possession of his church through simony or who held a plurality has vacated the church, the king's right to present ceases.

[An action of] *quare impedit* was brought by the king upon a title of a presentation given to the king by the Statute for simony.¹ And it was of the church of Bushley in Herefordshire. The party who prosecuted for the king, after the declaration, took money from the incumbent, who was in by simony, to surcease the suit, and so a *non prosequi* was entered upon the roll.

And, now, the King's Attorney [Heath], at the prosecution of a Doctor Seaton, will have proceeded upon this former *quare impedit*, the party that was proceeded in *simoniace* having resigned and another incumbent being in the church. And he would have a special *scire facias* against the patron and the ordinary and the incumbent, because the entry of the *non prosequendo* was *quod non vult ulterius prosequi* with a *salvo semper jure regis*.

Chief Justice RICHARDSON and HUTTON being only there [in court] advised [him] to bring a new [action of] *quare impedit*, because the entry is *quod non vult ulterius prosequi etc. salvo semper jure regis* and the judgment is *ideo partes eant sine die*, thus, the suit by this judgment was thus discontinued, which no way can be revived.

[It was held] by RICHARDSON and HUTTON and *non dedictum*, where a presentation is given to the king in another right, as for simony or plurality, and the party who is in by simony or has a plurality dies or resigns and another incumbent is elected, who also dies before the [action of] *quare impedit* be brought by the king, now, the title of the king is gone, and he will never have a [writ of] prohibition, because it is in another right. But [it is] otherwise where the title of the king is in his own right, because, there, *nullum tempus occurrit regi*.

248

Williams' Case

(C.P. Hil. 6 Car. I, 1631)

Incest is an issue that is within the jurisdiction of the ecclesiastical courts.

Williams, having married his brother's son's widow, was questioned for it in the High Commission Court. And, there, he was by them judged and sentenced for incest, and he was committed by them to prison for refusing to obey their order and sentence, upon which, he had [a writ of] *habeas corpus* returnable in the Common Bench at a certain day. At which day, the said Williams came into the court. And the return was that, the said Williams being questioned in this court for incest with the widow of the son of his brother and he confessed that he married her, that the judges of the High Commission Court, upon consideration among them[selves] and upon a view of the Statute of 32 Hen. VIII,² found the said marriage to be declared by the canons of the Church are by the clergy of England and confirmed by the Queen Elizabeth and King James which canons reduced the degrees of marriage to a certain table, published and enjoined to be set up in every parish church of England, by which table, this marriage is declared to be against the law of God. And, thus, this marriage being within the degrees prohibited by this table and against the law of God, they judged it to be incest and condemned the said Williams in a £300 fine to the king and £100 costs to the prosecutor, and that Williams will give a bond to appear personally (when he will be required) and by a proctor etc. in the Court of Arches to a suit to be there for the confirming or disannulling of his marriage and also he will give a bond with sufficient sureties that he will not cohabit with the said wife or come into the same place where she is, unless it be a church or market or common assembly.

¹ Stat. 31 Eliz. I, c. 6 (SR, IV, 802-804).

² Stat. 32 Hen. VIII, c. 38 (SR, III, 792).

Serjeant *Henden* moved the court that, inasmuch as, by their return, it appeared to the court they took [?] upon them[selves] to expound and declare the meaning of a Statute that appertains to the judges of the common law to do, the court will bail him and will prohibit the Court of High Commission to do this, because, by the Statute, no marriages will be impeached unless they be within the Levitical degrees or against the law of God,¹ and this marriage is not.

RICHARDSON: Be you advised in this case that you will be, because clearly, if the return were generally that, for incest committed by him, they have sentenced him in such sums to the king and, for disobeying their sentence, they committed him. Without [. . .] they have done where, clearly, the matter does not belong to the judges of the common [law].

Also, to that which is said that they take upon them[selves] to expound the Statute, it is not so. And to that which is said that they, in their sentence, allege it to be incest by the canons of the Church, where the Statute is only against marriages within the Levitical degrees or contrary to the law of God; as to this, he agreed that, if this sentence had been that, inasmuch as it was against the canons of the Church, they adjudged it incest, he will not allow it, but, as they have by the return and the sentence, it is well, because they allege that, by the canons of the Church and the tables of marriage made by the Church, this marriage is declared to be against the law of God and so all is well. *Ideo*, such a course you see taken, you may well advise your client, because, as the matter is moved, we do not see how we could aid you by the taking of bail. And, for his opinion, he said that he will not bail him.

HUTTON thought that this sentence is not harsh and intolerable, because they have not solely sentenced the incest, but also, by this sentence, they will have the party to enter a bond to appear in the [Court of] Arches and to answer the suit there for the trial of the marriage. And, by this way, they took away from the party his liberty to bring an appeal, which the law gives to him, because the marriage is properly to be tried before the inferior ordinary where the place is, and, so, the party may have his appeal from this court to the Arches. And, by this sentence, they will take away from him his appeal, and by [. . .] force the party to try it in another court than it should be originally tried, and this against the will of the party and the liberty that the law gives to the party. And, on account of this, you may advise of this matter, because it seems to me that it will well aid you.

[See] below.²

[Other reports of this case: Littleton 355, 124 E.R. 282.]

249

Saunders' Case

(C.P. Hil. 6 Car. I, 1631)

A remainder is not defeated by a prior intervening contingency that never happened.

Chief Justice RICHARDSON [held] and it was not denied by anyone, if a feoffment be made and it is to the use of A. for life, the remainder to the first son of B. that he will have, B. not having then any son or limited it to any other particular contingent use, the remainder to C. and his heirs, B. dies without issue, A. living, this is a good remainder to C., because,

¹ Leviticus, chap. 27, verses 30-33.

² *Anonymous* (C.P. 1632), see below, Case No. 255.

the intervening contingency being a particular contingency, the remainder continues good, though the contingency not be shielded.

And [it was said] by Serjeant *Hetley*, if a feoffment in fee be to the use of A. for years, the remainder to B. and his heirs, this estate for years would not support this remainder in fee.

250

General Order of Court

(C.P. Hil. 7 Car. I, 1632)

Only a judge can order the entry of a judgment by default.

[It was held] by Chief Justice HEATH and justices HARVEY and VERNON there will be no peremptory order for a judgment by *nihil dicit* but with the consent of one of the judges of the court. And it will not be entered by any clerk or attorney of the court who divers times are parties to the suit and could be partial. But all such entries will be made by the prothonotaries or their secondaries or, otherwise, such an order will be void. And this will be observed [as a] constant order.

251

Anonymous

(C.P. Hil. 7 Car. I, 1632)

A will can be proved in common form for chattels, but it must be proved in solemn form for land.

[It was held] by Chief Justice HEATH and not denied. A will proved *in communi forma* though it not be *per testes* is good enough for all goods. But, for lands, the probate must be *per testes*. And it was agreed by all. And, also, he said that the civilians say that, in their law, a probate of a will *per testes* can be made within the time of thirty years.

252

Anonymous

(C.P. Hil. 7 Car. I, 1632)

The ecclesiastical courts have jurisdiction over simony that is alleged to be contrary to the canon law.

A suit was commenced before the Commissioners at York for ecclesiastical matters. And the libel was because the defendant, who was the incumbent of the church of West Kerby, was *simoniace promotus* to the said church *contra canones ecclesiae et statuta regni*.

Serjeant *Henden* prayed a [writ of] prohibition, because he libeled for an offense against the Statute,¹ the exposition of which Statute whether it was an offense *contra* the Statute or not, belongs not to them of the ecclesiastical court, but to the judges of the courts of the king.

¹ Stat. 31 Eliz. I, c. 6 (SR, IV, 802-804).

Serjeant *Ashley*: Our libel is laid for an offense against the canons and statutes, and the ecclesiastical judges do not meddle with the offense *quatenus* against the Statute but *quatenus* against the canon. And their sentence is only for a deprivation etc. And it is well known to you that simony is punishable by the canons and the ecclesiastical court.

Chief Justice HEATH: They have only proceeded to the deprivation according to the canons and not according to the Statute. But they only make a recital of the offense to be against the Statute. And we should not prohibit them when they proceed according to their law. And it is usual in informations in the King's Bench to lay the offense to be committed *contra legem et statuta regni*, as, divers times, there is no statute in the case and yet the information is good.

And [it was held] by all of the justices present there no prohibition will be granted upon this matter.

253

Rex v. Archbishop of Canterbury
(Prust's Case)
(Part 3)

(C.P. Hil. 7 Car. I, 1632)

This term [Hilary 7 Car. I], the court having been before divided in opinion,¹ because justices RICHARDSON and HARVEY were in opinion against YELVERTON and HUTTON, the judges now argued the case again. And HUTTON and VERNON were in opinion against the title of the king, and HARVEY and Chief Justice HEATH were for the title of the king [. . .] which case the ancient justices, HUTTON and HARVEY, recited only the former reason of their arguments.

And VERNON argued much in effect as YELVERTON and HUTTON.

And HEATH argued to this effect, and he held that, though a statute be ancient and has not been put in operation for a long time, yet, by this, the Statute is not obsolete and of no use, but, upon occasion, it can be revived and put in operation. Thus, the Statute of 25 Edw. III is not obsolete, because the book of 11 Hen. IV shows it to be taken to be in use at this time and this book greatly confirms our case and [it is] not against us.² And, though it not be adjudged, yet it is good law, because, there, the title of the king was of the ancient lapse incurred in the time of the predecessors of the king, *scil.* 100 years before, which was an ancient title of long time. And, thus, clearly, [it is] barred by the Statute of 25 Edw. III, because this Statute does not extend to all titles before in the time of the predecessor of the king, but only to the ancient title accrued in the time of the predecessor of the king and to such ancient tithes that are in another right.

And he held that, as the king had the title to present by the lapse, it is not a title in another right, *scil.* in the right of the patron, but [. . .] a title under the title of the patron.

And, also, he agreed with the case that has been put before that, where the king has a title to present in another right, yet, by a lapse or upon simony etc. and the patron or another presents and his incumbent be in the church and die, there the [. . .] does not hold *quod nullum tempus occurrit regi*, because this title of the king is not gone and the king has lost his

¹ For earlier proceedings in this case, see above, Case Nos. 206, 227.

² Stat. 25 Edw. III, stat. 6, cc. 1, 3 (SR, I, 325); YB Mich. 11 Hen. IV, f. 37, pl. 67 (1409).

turn to present. And, if such a title descended to the king, it is an ancient title within the Statute of 25 Edw. III, and the king is barred by the Statute.

Then, for the second point, he held that the Pardon does not extend to our case, because the Statute of 21 Hen. VIII¹ has made the first benefice void, and not voidable. Thus, it being void, it cannot be aided by the Pardon, as the confirmation of a void estate does not help it. And he said that, if, in the Pardon, there had been words of grant, it could have aided the incumbent, but, otherwise, not, as, if a man be outlawed, by which his goods are forfeited, [and] the king pardons the outlawry, yet it restores him well enough unless there are words of grant of the goods in the pardon. Thus, if a man be attainted of felony and the king pardon the felony, yet, by this pardon, he is not restored to his blood, but it must be by an act of Parliament. And, also, for a reason that appears by the pleading, Pruste will not take a benefit of the Pardon, because he was not a party who had offended by an acceptance of the second benefice, but Shilton. *Ideo*, the Pardon of 21 Jac. does not extend to Pruste, who had not committed any offense.

[Other reports of this case: Littleton 238, 302, 124 E.R. 226, 257, Hetley 124, 124 E.R. 394.]

254

Wyndham's Case

(C.P. Hil. 7 Car. I, 1632)

Where several sisters inherit an advowson, the eldest can unilaterally make the first presentment or they can all agree on the presentment.

A manor with an advowson descended to three coparceners. The middle coparcener died, having issue, four daughters. Sir John Strongwich married the elder of the [. . .] coparceners, and he purchased the part of one of the four sisters, and, then, he granted *proximam praesentationem*.

And it was resolved by Chief Justice HEATH with the unanimous consent of all the other justices that Sir John Strangwich had a part, *scil.* the part of the elder coparcener in coparcenary, so that the coparcenary remained, and that he had another part that he purchased from one of the four daughters of the middle coparcener as tenant in common, so that, as to this part that he had in coparcenary, he [can] present without the consent of the others, but, as to this part that he had by purchase from one of the four daughters of the middle coparcener, which part he had as tenant in common, there, he must present with the consent of the other tenants in common with him, because joint tenants and tenants in common must consent and agree to present or, otherwise, the ordinary can present. But it is otherwise among coparceners. And, as to this conceit that was in the argument of this case at the bar, *scil.* that, if there not be an agreement among coparceners to present when the church is void, then, upon such disagreement, the elder will have the turn to present first so that, there, there must be a disagreement among them before the elder will have *initiam partem* to present first.

But they all agreed that it is not necessary, but that, without any disagreement, the elder will have *initiam partem*. And, also, if they will, they can all agree to present.

Also, *per curiam*, this privilege of the elder sister among coparceners to have the *initiam partem* is a real privilege and yet *ratione personae* also. Thus, our books are that a tenant by curtesy will have the privilege of the elder sister.

¹ Stat. 21 Jac. I, c. 35 (SR, IV, 1269-1275); Stat. 21 Hen. VIII, c. 13 (SR, III, 292-296).

Also, it was resolved that, as Sir John Strangwich had one part from the elder coparcener, to which the privilege is annexed, and he had another by purchase from one of the four daughters of the middle coparcener, of which part, he is a tenant in common and he granted the *proximam praesentationem* generally, the grantee will have the *proximam praesentationem* at the next avoidance of the church, as in the turn of the elder coparcener, because the grant will be taken most strongly against the grantor and most beneficially for the grantee so that the grantee will present in the turn of the grantor as coparcener and not as tenant in common. And, also, the grantee will have the same privilege that the grantor had.

255

Anonymous

(C.P. Trin. 8 Car. I, 1632)

Incest is an issue that is within the jurisdiction of the ecclesiastical courts.

A similar case to Williams' Case,¹ reported above, was now moved in the Common Bench, and it was thus. One, having married the daughter of the sister of his former wife, was sued for it in the ecclesiastical court. And it was moved that, inasmuch as they of the spiritual court will take in this matter of marriage against the Statute² to intermeddle with the Statute, the exposition of which Statute belonging to the judges of the common law and not to the spiritual judges, *ideo* he prayed a [writ of] prohibition to the spiritual court.

Chief Justice HEATH: This Statute of 32 Hen. VIII has reference to marriages that are within the Levitical degrees and contrary to the law of God.³ Now, those are more properly judges of marriages and also of such marriages and to expound the law of God and to declare what marriages are against the law of God but only the spiritual judges.

And [it was held] by the residue of the justices, being all there present, this [. . .] case is similar in this point to Williams' Case now recently argued in this court where the opinion of the court was concordant with the opinion of Lord [Chief Justice] HEATH. And [it was held] so by all of them no prohibition will issue in this court.

And note that this case was against Pierson's Case in the new *Institutes* of Lord Cooke, and Pierson being remembered was disallowed for [good] law by the justices.⁴

256

Anonymous

(C.P. Trin. 8 Car. I, 1632)

Treble damages can be awarded for acts of waste.

¹ *Williams' Case* (C.P. 1632), see above, Case No. 248.

² Stat. 32 Hen. VIII, c. 38 (SR, III, 792).

³ Leviticus, chap. 27, verses 30-33.

⁴ E. Coke, *First Institute* (1628), p. 235.

Upon a writ to enquire of waste, the sheriff returned that the waste was done *sparsim* in the three acres (the close containing three acres), where the sheriff was mistaken, as appears to the court, and it did not know what was waste *sparsim*.

Chief Justice HEATH, with whom the other justices all agreed, [held] it appears to us that the close is triangular in manner and has a great ditch and a great bank surrounding it and the waste was committed *sparsim* in the ditch and the bank by two sides of it and no waste was done in the close. *Ideo*, you should recover for the ditch and the bank in which the waste was done, and you will have treble damages, but no costs. And the close will not be recovered, because, upon *rei usitate*, the waste was not done throughout the hedge and ditch or [?] the bank, but *sparsim* by one side or by two sides of the close in the bank and the ditch; *ideo*, the ditch and the bank by one side or two sides in which the waste was done will be recovered and not all the close.

257

Lamb v. West

(C.P. Mich. 8 Car. I, 1632)

No demand for a rent charge in arrear is necessary before a distraint is made, because the distress itself is a sufficient demand.

Sir John Lambe's Case in [an action of] replevin against Thomas West.

The case was [thus]. A rent [was] reserved upon a lease of land payable at a place outside the land and, if it be arrear and not payable, a *nomine poenae*. And, if the rent and a *nomine [poenae]* be arrear and not paid, being legally demanded at the place of payment, that, then, he will distrain. The question was whether the distress taken without a demand for the arrearage be good.

And, [it was held] by the opinion of Chief Justice HEATH and justices HUTTON and CRAWLEY the demand is not requisite, but the distress is a sufficient demand in itself.

Justice CRAWLEY: The demand is not requisite, but the distress is a sufficient demand. And he cited Littleton, *Institutes*, 453. The neglect of the formality will not destroy the duty. *Ideo*, if a single bill be made to pay such a sum upon demand, though an actual demand not be made, yet the duty will not be lost by the neglect of the demand. *Vide* Reade and Stanly's Case. And, where the rent in our case, as he said, is really a rent charge and, *ideo*, he will have all the remedy that the law gives to the rent charge. *Vide* Maund's Case, cited by him.¹

Justice VERNON agreed with him and said *quod prima facie* seemed to him upon the authority of the printed book that a demand was requisite before the distress, but, now, upon the manuscript books seen by him and the records also examined agreeing with them, he is clearly in opinion that a demand before is not requisite. And he said that the reservation of the parties in this case is not but in affirmance of the law. And he cited 33 Hen. VIII [. . .]; if a man had a thing by prescription and took a grant of it, the grant, being only affirmative of the same thing, does not destroy the prescription, as an action brought is a sufficient demand; thus, a distress also will be a sufficient demand.

Justice HUTTON agreed in opinion, because, he said, that the rent remains a rent charge and thus distress is incident to it. *Vide* 21 Edw. IV, fol. 17, where the diversity is of a thing of another nature, as of homage, fealty, etc. And *vide* 22 Hen. VI, 54. If you distrain for the penalty, a demand is requisite, but, where the distress is for the rent, the demand is not

¹ E. Coke, *First Institute* (1628), f. 153; *Maund v. Gregory* (1601), 7 Coke Rep. 28, 77 E.R. 454.

requisite, but the distress is sufficiently demanded. *Vide* 1 Jac., rot. 1818; and another cause, Trinity 16 Jac., Skinner etc., rot. 974.¹

Also [it was held] by HUTTON, if I, being seised of the manor of D., covenant and grant that, if you not be paid by me at two feasts of the year, *scil.* at the feast of St. Michael etc. and at the feast of the Annunciation etc. 20s. during your lifetime and that, if you not be paid, you, upon a demand of it, will distrain in the manor of D. for it, because it is a rent charge and a demand is not requisite in this case, but the distress is a sufficient demand.

Which Chief Justice HEATH *et omnes alii* agreed.

Chief Justice HEATH agreed with them in opinion. And he said that this is a rent charge by creation and he will have all the incidents to a rent charge, as distress. And what is objected, *scil.* that the rent is payable at a place outside of the land and, thus, it will not be intended a rent charge, he said that this restraint or this appointment of the payment does not make any alteration as to the duty, but only as to damages, that, if there be no demand, there will be no damages.

Thus, it was resolved *per curiam*, that distress is a sufficient demand.

The case began [?] Trinity 4 Car., rot. 3336, in the Common Bench.

[Other reports of this case: Hutton 114, 123 E.R. 1139.]

258

Herbert v. Anonymous

(C.P. Mich. 8 Car. I, 1632)

In actions for defamation, the words complained of will be taken in mitiori sensu.

Herbert brought an action upon the case for these words, 'you are a thief and have robbed me and cozened me of my land.'

It was resolved *per curiam*, that the words are not actionable. And they agreed that, for the first part of the words, *scil.* 'you are a thief', an action would lie, but, because there are further words and [they are] in the copulative and declaratory and in exposition of the first words, they are clearly not actionable, because he cannot be a thief upon this matter. It is similar to the case for these words, 'you are a thief for you have stolen my corn'; these words are not actionable for uncertainty, because it could be that it was growing and standing corn, and, so, it is not any felony. And words will be taken in the most benign sense.

259

Gwin's Case

(C.P. Mich. 8 Car. I, 1632)

An ecclesiastical court can grant a divorce from bed and board, alimony, and reasonable attorney fees to a wife.

It seemed to the court in Gwin's Case, that, where the wife sued in the ecclesiastical court and articulated there against the husband *propter saevitiam* and for infecting the wife with

¹ YB Hil. 21 Edw. IV, f. 16, pl. 12 (1482); YB Pas. 22 Hen. VI, f. 54, pl. 30 (1444); *Nich v. Langford* (1613 x 1614).

a foul disease, not to be named, and for incontinency with his maidservants so that the wife sued for alimony and to be separated from him, it was now moved to have [a writ of] prohibition.

Et dies datus ultra.

And it seemed to the court in this case, that the ecclesiastical judges could enjoin the husband to allow maintenance to the wife pending the suit there.

And [it was held] by Chief Justice HEATH they ordinarily in the ecclesiastical courts used to compel the husband to pay for the libels and articles and books in their courts and also to allow money for maintenance and support of the wife and to defray her charges during the suit.

260

Saunders v. Wood

(C.P. Mich. 8 Car. I, 1632)

The Court of Exchequer can hear cases between two common persons only where one of them is an accountant or debtor of the crown.

Sanders and Richardson in *audita querela* against Wood's wife.

Serjeant *Hetley*: The jurisdiction of the Exchequer is declared and restrained by divers statutes and by the Statute of Magna Charta.¹ But there is no restraint on the Exchequer to hold common pleas if they have used to. And, in Sir Christopher Hatton's Case,² it was resolved by the judges, and divers precedents were shown out of the Exchequer that, where a *cestui que use* is indebted to the king, the land will be liable to the debt of the king by the common law, though, before the Statute,³ this land will not be forfeited to the king by treason. And no statute restrains the Exchequer to hold a plea of common pleas.

Another point he moved in the case [was] whether the [writ of] *supersedeas* lies to the barons of the Exchequer. *Vide Fitzherbert, Natura Brevium*, 'supersedeas'. The barons of the Exchequer are of the coif and serjeants of the law and judges of the law and of the matters of the law, and there will not be a *supersedeas* against them anymore than against the judges of the King's Bench, and, if they disobey the *supersedeas*, no [writ of] attachment lies against them. And he said that the [writ of] *supersedeas* is grounded upon a suggestion that he is not a minister of the Exchequer where he sued there as a minister, which is not well grounded, because he could be a debtor *domini regis*.

Also, [it was said] by Serjeant *Hetley* the *supersedeas* was not well served, because it was [not] delivered in court or at the court, but to the Chief Baron out of court.

Justices HUTTON and CRAWLEY, being only in court: The barons of the Exchequer will not hold a plea of the common pleas but where one party is a minister or a debtor *domini regis*, and, if they hold a plea otherwise, the party can traverse *quod non est minister curiae* or a debtor *domini regis* and it always was allowed. Also, they said you should have pleaded the

¹ Stat. 12 Edw. I (Rhuddlan) (*SR*, I, 69-70); Stat. 28 Edw. I (*Articuli super Cartas*), c. 4 (*SR*, I, 138); Stat. 5 Edw. II, c. 25 (*SR*, I, 163); Stat. 25 Edw. I (*Magna Carta*), c. 11 (*SR*, I, 115).

² *Rex v. Coke* (Wards 1623), 2 Rolle Rep. 295, 81 E.R. 809, Godbolt 289, 78 E.R. 169, Benloe 117, 73 E.R. 983.

³ Stat. 33 Hen. VIII, c. 39, s. 37 (*SR*, III, 886-887).

delivery of the *supersedeas* to the court and given in evidence the delivery of it to the Chief Baron.

The case was this. One sued for a debt by an [action of] *quo minus* in the Exchequer, and a *supersedeas* was prayed out of the Common Bench and delivered to the Chief Baron, and the ground of the *supersedeas* was that the suit in the Exchequer was by one who sued in the Exchequer upon a false surmise etc. where, in truth, he was no a *minister curiae* etc. And, notwithstanding this *supersedeas*, they proceeded and gave judgment in the Exchequer, upon which an *audita querela* was brought in the Common Bench.

261

Anonymous

(C.P. Hil. 8 Car. I, 1633)

A common recovery can be suffered by an infant with the consent of his guardian and of the court.

In a recovery suffered by Sir James Howard, an infant of the age of fourteen years, with the earl of Suffolk and baron Weston, his guardians, and by another of his friends there present at the bar before which a recovery was suffered to be passed, Chief Justice HEATH, as for the court, said that their intent was that all the persons there present in the court of the reason that this recovery was suffered by an infant, that, in the time to come, it will be a precedent, but, in a similar case accompanied with similar circumstances, because this recovery was suffered for the settling of the estate to the avail and benefit of the infant with the consent of all the friends of the infant, being present there, the earl of Suffolk and the countess of Suffolk and others. And, also, the king was acquainted with it, and he sent to them, the judges, a [writ of] privy seal to do it, which was shown to the court and there ordered to be recorded in this court. And, thus the recovery was suffered by the aforesaid infant.

262

The City of London's Case

(C.P. Hil. 8 Car. I, 1633)

The question in this case was whether the City of London can regulate porters within its boundaries.

By an ancient custom of the City of London that has the conservation of the Thames and the ports etc. And, by the custom of the said City, all of the corn and grain and salt etc. brought by water and the River of Thames to the City of London will be brought to such a haven or wharf and, there, it will be unloaded into the carts or gurneys by the porters of the City of London, who have the charge and care of it. And the said City maintains 400 persons for this service. And, if any besides these porters unload etc., they will forfeit by an act of the Common Council of the said City 20s. for the offense.

Serjeant *Bramston* argued that the custom is good and, also, the act of the Common Council and the said penalty is good. And he cited Davies' Report 56, that the City of London has the conservation of the River of Thames; Dy. 352; *New Book of Entries* 536 and 537; the

custom of the City to have care to measure corn etc.¹ It is reasonable and also for the avail and benefit of all people. Thus, it is necessary that the City will appoint officers to attend the service, the number of which is 400 porters sworn to this office and a reward is allowed to them for their labor by the custom and none besides them should meddle with the loading or unloading. And if they do, they will forfeit 20s., which penalty is enjoined by an act of the Common Council and is not unreasonable. *Vide* 2 Hen. VI, 19; 8 Rep., City of London's Case.²

263

Strilley's Case

(C.P. Trin. 9 Car. I, 1633)

A conveyance by a fine that is erroneous can be corrected by an amendment.

Serjeant *Henden*: The proclamations upon a fine must remain with the Chirographer, and a transcript of it is sent by him to the Custos Brevium. And, thus, if there be an error in the transcript with the Custos Brevium, it will not avoid the fine.

Chief Justice HEATH: The Chirographer is the proper officer of this court for the fines and, also, for the proclamations. And he cited the Statute of 5 Hen. IV, of Fines,³ by which Statute, the Chirographer is the proper officer for the preservation of the fines. And the proclamations are part of the fines. And the proclamations must be made by the Chirographer, and the proclamations must remain with him, and he makes a transcript of it that remains with the Custos Brevium.

Justice HUTTON agreed that the Chirographer was originally the officer to conserve the fines and also the proclamations that are added and annexed to the fines. And, by the Statute, the proclamations must be entered in the foot of the fine. Thus, if the Chirographer is the officer to conserve the fines, he is also the officer to conserve the proclamations. Thus, the proclamations remained originally with him, and he sent the transcript of the proclamations to the Custos Brevium.

Justices VERNON and CRAWLEY agreed in opinion.

And [it was held] by *totam curiam*, if the proclamation and the transcript of the proclamations that are with the Custos Brevium are erroneous, if the originals that remain with the Chirographer are good, and not erroneous, they will be amended according to the originals that remain with the Chirographer.

And [it was held] by *totam curiam* the fine will not be avoided by a writ of error for falsity or error in the transcript that remains with the Custos Brevium, but it will be amended by the original that remains with the Chirographer.

[Other reports of this case: Hutton 122, 123 E.R. 1145.]

¹ *Case of the Royal Piscary of the Banne* (1610), Davis 55, 56, 80 E.R. 540, 542; *Anonymous* (1576), 3 Dyer 353, 73 E.R. 791; *Rex v. City of London* (Ex. 1605), E. Coke, *Booke of Entries* (1614), 'Quo Warranto', pl. 4, f. 535.

² *Waggoner v. Fish* (1610), 8 Coke Rep. 121, 77 E.R. 658, also 2 Brownlow & Goldesborough 278, 284, 123 E.R. 941, 944.

³ Stat. 5 Hen. IV, c. 14 (SR, II, 147).

Scovell v. Bradstock

(C.P. Trin. 9 Car. I, 1633)

A fine levied by an heir in tail, who died without issue in the lifetime of the tenant in tail, does not bar the right of his younger brother after the death of the tenant in tail.

[An action] in *ejectione firmæ* was entered 7 Car., rot. 1459. The case was [thus]. A husband and wife, tenants in special tail for the jointure of the wife, had issue, two sons, Philip, the elder, and Thomas, the younger. The husband died, and the wife took another husband. The husband and wife, by a bargain and sale, granted *totum statum suum* to the elder son and his heirs, who levied a fine with proclamations, and he died without issue.

Justice CRAWLEY: Judgment will be given for the defendant. And he greatly relied upon the Statute of 4 Hen. VII, of Fines, which bars all parties and privies. And [as to] who are privies, he cited Whittingham's Case, 8 Rep. One can be privy to an estate tail three ways: First, privy in estate when one is [. . .] or actually seised, *vide* Fitzherbert, *Natura Brevium*, 112; second, privy in right, *vide* Fitzherbert, *Natura Brevium*, 112, and these two privies will be barred by the fine; third, privy in possibility, who have only a possibility, and a fine levied by him will be a bar. And he cited 29 Eliz., vouched in Lampet's Case; 9 Rep. 50; [. . .] Rept. 99. And he held that this privy by possibility, if he levy a fine, though he had only a nude possibility, yet he will be barred by this fine and also all claimants by him. He said that Mackwilliams' Case, Michaelmas 15 Jac., rot. 785, in the Common Bench, seemed to be against the Statute of 4 Hen. VII, of Fines, to bar privies by the fine levied, but not to limit and declare who are privies.¹ *Ideo*, in these cases, recourse is to be had at common law to expound statutes and declare who are privies. And, thus, if the younger [son] be privy by the common law in fee simple and fee tail also, he also will be barred by this Statute. In our case, *ideo*, if there be a father and two sons, the elder son disseises the father and makes a feoffment in fee with a warranty, the elder son dies, the father also dies, there, the younger son will be barred by this lineal warranty if the estate be not interrupted in the lifetime of the father. And the law is similar also in the case of a fee tail. And thus is Littleton [*Tenures*]. And, in the case of the father and two sons and the elder disseises the father, as the case was before, if the father had entered before the warranty attached, there, the privy had been destroyed and [be] no bar to the younger son. And similar to this is the Case of Mackwilliams, Michaelmas 18 Jac., Common Bench, rot. 125, which seems against our case, but this diversity unites both cases, *scil.* where the privy is disturbed and where it is settled and continues, because, where it is disturbed, [there is] no bar, but, where it is not disturbed, it is a bar. He also cited 29 Ass., pl. 34, and 3 Rep. 67.²

¹ Stat. 4 Hen. VII, c. 24 (SR, II, 547-548); *Whittingham's Case* (1603), 8 Coke Rep. 42, 77 E.R. 537; A. Fitzherbert, *Natura Brevium*; *Johnson v. Carlile* (1587), 10 Coke Rep. 50, 77 E.R. 1001, Goulesborough 107, 75 E.R. 1027; *Lampet's Case* (1612), 10 Coke Rep. 46, 77 E.R. 994, also *sub nom.* *Lampit v. Starkey*, 2 Brownlow & Goldesborough 172, 123 E.R. 880; *Godfrey v. Wade* (1621-1623), W. Jones 31, 82 E.R. 17, Hobart 332, 80 E.R. 473, Winch 41, 124 E.R. 35.

² *Godfrey v. Wade* (1621-1623), *ut supra*; YB 29 Edw. III, Lib. Ass., f. 164, pl. 34 (1355); *Westby v. Skinner* (1595), 3 Coke Rep. 67, 76 E.R. 783, also 139 Selden Soc. 822, Croke Eliz. 365, 78 E.R. 613, Popham 85, 79 E.R. 1197, Moore K.B. 688, 72 E.R. 841.

And he said that, in construction of the Statute of 4 Hen. VII, the benign interpretation will be made to destroy the ancient estate and bar it and to settle the new estate.

Justice VERNON: An issue in tail, in the lifetime of his father, levies a fine with proclamations, and dies; the father dies; the question is whether this fine will be a bar to the younger son, issue in tail. And he held yes, because the Statute of 4 Hen. VII was that fines with proclamations levied by the tenant in tail bar all parties and privies. The issue in tail has such a right, as he will be by the law received to defend this right in default of the father. *Ideo*, by the same law, he can pass and convey this right. 36 Eliz., Browne's Case, resolved that a fine levied with proclamations, the issue in tail in the lifetime of the father bars issues in tail and all claimants under him or by him.¹ Also, [it was said] by him, if land be given to the father and to the heirs male of his body, the remainder to the heirs female of his body, the remainder to the heirs of the body of the father, there, the fine levied with proclamations by the father bars all the issues and remainders.

Justice HUTTON: Judgment will be given for the plaintiff, against the opinions of CRAWLEY and VERNON. And, that the fine did not bar, because, if the tenant in tail had issue, a son, who levied a fine in the lifetime of the father, tenant in tail, he clearly held that it did not bar by the Statute of 4 Hen. VII. If a tenant in tail have issue, three sons, and the younger levy a fine, it does not bar the elder son and yet the younger son is an issue of the tenant in tail and could be the heir to the estate tail. *Vide* Lincoln College Case, 3 Rep. The Statute of 32 [Hen. VIII], of Fines, that is an explanation of the Statute of 4 Hen. VII, must be explained and taken in equity, because, otherwise, [an] absurdity will ensue.² He agreed that, if the elder son of the tenant in tail, in the lifetime of his father, levy a fine and, afterwards, survived his father, now, this fine bars him and all his issue. And, also, he said that it can be agreed that it bars all of the estate tail. *Vide* Archer's Case.³ Thus, he agreed that, where a tenant in tail is disseised and levies a fine, this fine bars. Thus, also, where the issue in tail, heir in tail in the lifetime of the ancestor, tenant in tail, levies a fine, if the estate tail descends to him, the fine thus bars.

The first reason that the fine in our case does not bar is that the second son, in any issue or action, will never name his older brother, that, as he is dead, he is as no person, 43 Edw. III, 7; 40 Edw. III, 9, because, in all cases where the elder son, in the lifetime of the father, dies, not having issue, the second son is now the heir to the father, and will never name the elder brother who is dead.⁴

The second reason is that, if the elder son is attainted in the lifetime of the father and dies, the land will not escheat, because the second son will never claim or will make a descent by him, but, otherwise, if he survive the father after the attainder. He held Mackwilliams' Case to be directly in the point.

Another point that he argued was of the warranty. He held that the warranty in this case did not bar, because, though the jury has found the warranty, yet it was not pleaded. And the

¹ *Lynch, ex dem. Brown v. Spencer* (1594-1596), 3 Coke Rep. 45, 76 E.R. 742, also Moore K.B. 455, 72 E.R. 691, Croke Eliz. 513, 78 E.R. 762, 139 Selden Soc. 701, 831, *sub nom. Winch v. Spencer*, 2 Anderson 44, 123 E.R. 537.

² *Chamberlain v. Lincoln College* (1595), 3 Coke Rep. 53, 76 E.R. 757, also 2 Anderson 31, 123 E.R. 530, Moore K.B. 255, 72 E.R. 564, 2 Leonard 56, 74 E.R. 354, 139 Selden Soc. 834; Stat. 32 Hen. VIII, c. 36 (SR, III, 789-790).

³ *Baldwin v. Smith* (1597), 1 Coke Rep. 63, 76 E.R. 139, Croke Eliz. 453, 78 E.R. 692, 2 Anderson 37, 123 E.R. 533, 139 Selden Soc. 818.

⁴ YB Hil. 43 Edw. III, f. 7, pl. 21 (1369); YB Hil. 40 Edw. III, f. 9, pl. 18 (1366).

finding of the warranty generally is not any bar because it was not found that it is descended upon him. *Vide* 40 Edw. III, 15, and 30 Edw. III, 23.

Chief Justice HEATH agreed with HUTTON. And he spoke, firstly, to this point that Judge HUTTON had made the second point, *scil.* the warranty. And he said that a warranty does not give any estate, but it only binds and bars an estate. The finding of the warranty was not perfectly found, because the jury found that Philip, who made the warranty, *obiit sine haerede masculino*, which includes that he had a female heir and, thus, she is an heir to the warranty. And the judges of the common law must ground their judgment upon things certain.

As to the second point, he judged that the fine levied by the elder son in the lifetime of his mother, tenant in tail, who died in the lifetime of the tenant in tail, did not bar the younger son, because he had only a possibility to an estate tail, and no estate in himself. And, if he did not have any estate, he could not give any estate. Also, the younger son and all the issue had a possibility as well as the elder son, but none of them had any estate that he could give.

The principal part of the government is to settle estates of men quietly. And these laws that are to quiet and settle estates of men are to be maintained. And among these laws are the statutes of fines that concern the quiet of the estates of all men. And, as it seemed to him, fines were before the Conquest [1066], though some ignorant [people] hold that the common law was introduced by the Conqueror [King William I]. But he has seen an ancient writ that was sent by Harold, king of England, to Sir John Ashburnham, knight, in Sussex commanding him that he will take with him the *posse comitatus* to resist the landing and arrival of William, the bastard.

And [it was held] by him, though, in Scovel's Case, there be a doubt that, where a tenant in tail levy a fine and die before the proclamations pass, if the issue could sue the proclamations and avoid the proclamations, he held that, if the Statute of 32 [Hen. VIII] had not been made, yet this fine bars, because, though it has not been levied according to the Statute, yet it is a fine at common law, and, in respect of the continuance of the estate tail, the heir cannot enter, and, if he cannot enter, no claim made by him will avail. But such proclamations must be by him in the lifetime of the tenant in tail. And, for authority in this case, he cited Dallison's Reports.

And he argued much in effect as HUTTON. He agreed with the difference where the elder son of the tenant in tail, in the lifetime of the father, tenant in tail, levied a fine with proclamations, if the son die in the lifetime [of his father] without issue, *ideo*, the fine does not bar the other issues. But, if, after such a fine levied, the father, tenant in tail, die in the lifetime of the son who levied the fine, then, this will bar all of the estate tail.

And he held Mackwilliams' Case to be a direct authority in the case. An estate was limited to the husband and wife and to their heirs male of their two bodies, the remainder to the heirs male of the body of the husband, the remainder to the heirs of the body of the husband and wife, the remainder to the right heirs of the husband; the husband died. The elder son, in the lifetime of the mother, made a lease for years and, for the confirmation of it, levied a fine, and he died without issue in the lifetime of his mother, and, then, the mother and all of the daughters, heirs in tail, suffered a recovery; there, this fine levied by the son is not a bar to the daughters.

[Affirmed by *Bradstock v. Scovell* (K.B. 1636), *Croke Car.* 434, 79 E.R. 977.]

265

Anonymous

(C.P. Trin. 9 Car. I, 1633)

In this case, the modus decimandi of tithing wool that was in issue was held to be void.

Judge HUTTON said that, in this court, it was alleged, where a custom for the tithing of wool that, when the wool is clipped and put out in a room, that the owner will go into the room and will take such a number of the fleeces of wool as he, in his conscience, will judge to be the tithe and tenth of it. And this custom, he said, was adjudged unreasonable and void.

Serjeant *Hitcham* said that, of the rakings of corn, no tithes will be paid. Yet, if any man allows or makes much corn to be scattered and left for rakings, so that he makes rakings, there, tithes will be paid for it, and the parson will not lose his tithe of these rakings.

To which judges HUTTON and VERNON seemed to agree, not contradicting it.

266

Dean v. Keene

(C.P. Trin. 9 Car. I, 1633)

A devise of the residue of the testator's good is a good and valid devise.

A devise of movable goods passes bonds and bills of exchange.

Thomas Den against Keene and his wife.

John Den made his last will, and devised by it divers legacies, and he made Elizabeth, his wife, his executor. And he devised to her the residue of all of his movable goods, his debts and legacies being first discharged. John Den died. And, afterwards, the wife, before the probate of the will or any notice, died within three days intestate. Thomas Den took letters of administration of the goods of John Den, his brother, which were granted to him *cum testamento annexo*. Afterwards, the sisters of the wife of John Den prayed administration of the goods of the wife of John Den, [and], being her administrators, libelled in the spiritual court against Thomas Den for the residue of the goods given to Elizabeth, the wife of John Den, by the will of John Den, her husband. And, upon [a writ of] prohibition being granted, a [writ of] consultation was prayed. And it was adjudged that it will be granted.

Justice CRAWLEY: The first point was whether the residue of the goods, being uncertain things, be well given. And he held yes. The other point was whether the obligations and bills of debt were devised by these words '*bona mobilia*', the will being a devise of [. . .] movable goods, the bonds and bills being choses in action. And he held yes, if that they pass by the devise of the [*blank*].¹

¹ The remainder of this report is on the next page of this manuscript, but it has been lost.

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