

2016

## Reports of Cases in the Court of Exchequer From 1604 to 1648

William Hamilton Bryson

*University of Richmond - School of Law*, [hbryson@richmond.edu](mailto:hbryson@richmond.edu)

Follow this and additional works at: <https://scholarship.richmond.edu/law-faculty-publications>



Part of the [Courts Commons](#), [Jurisprudence Commons](#), and the [Legal History Commons](#)

---

### Recommended Citation

Reports of Cases in the Court of Exchequer From 1604 to 1648 (W.H. Bryson ed., 2016).

This Book is brought to you for free and open access by the School of Law at UR Scholarship Repository. It has been accepted for inclusion in Law Faculty Publications by an authorized administrator of UR Scholarship Repository. For more information, please contact [scholarshiprepository@richmond.edu](mailto:scholarshiprepository@richmond.edu).

**REPORTS OF CASES  
IN THE COURT OF EXCHEQUER  
From 1604 to 1648**

**Center for Law Reporting**

*General Editor:*

W. Hamilton Bryson

*Advisory Board:*

Paul A. Brand  
A. Mark Godfrey  
Richard H. Helmholz  
Janet S. Loengard  
Andrew Lyall  
James C. Oldham  
C. H. van Rhee  
David E. C. Yale

**REPORTS OF CASES  
IN THE COURT OF EXCHEQUER  
From 1604 to 1648**

EDITED BY  
W. H. BRYSON

Richmond, Virginia

2016

© 2016 W. H. Bryson  
All Rights Reserved.

No part of this publication may be reproduced, stored in a retrieval system, or transmitted, in any form or by any means, electronic, mechanical, photocopying, recording, or otherwise, without the written permission of the author.

ISBN: 9798572292640

Independently Published.

Printed in the United States of America.

# INTRODUCTION

Before the year 2000, there were in print only two modest collections of reports of cases in the Court of Exchequer dating before the accession of King George I in 1714. These are the reports of Sir Richard Lane (d. 1650) and those of Thomas Hardres (d. 1681). Combined, they cover only 28 years, and the number of cases is quite minuscule compared to the other high courts of justice at Westminster. This extreme paucity of printed materials has given a false impression of unimportance of the Court of Exchequer. While it is certainly true that this court did not have the large case load of the courts of King's Bench and Chancery in the seventeenth and eighteenth centuries, it, nevertheless, was a significant venue for the development and exposition of the law of England at that time.

Although the jurisdiction of the Court of Exchequer was originally limited to disputes involving the royal revenue and this limitation was still enforced up to 1649, litigants who were debtors or accountants of the crown could bring to this court actions against private persons in order to recover money which could then be used to pay off their debts to the crown. This was the medieval *quo minus* jurisdiction in the Office of Pleas and, later, the equity jurisdiction in the Office of the King's Remembrancer. Also the many officers of the Exchequer had the privilege of suing and being sued in the Court of Exchequer so that they would not be interrupted in the performance

of their official duties. Thus, in practice, many issues involving the general civil law were decided in the Exchequer during this time, as is demonstrated by the reports printed herein.

In the seventeenth century, the collections of law reports were not made with a view to publication, with a few notable exceptions, such as the reports of Sir Edward Coke (d. 1634). For the most part, the reports of the seventeenth century that found their way into print were chosen through a random and unscientific selection process, and many of the better law reports of this period remain in manuscript today. It has been a challenge to put into print the manuscript reports from the Court of Exchequer, and this book is a part of that effort.

Even though the modern convention of printing law reports grouped by court or jurisdiction has been forced on the seventeenth century reports by modern bibliographers, in fact, many of the seventeenth-century reports in print include cases from many different courts though they may concentrate on a single court. The result is that some Exchequer cases from 1604 to 1648 have been in print for centuries, but have been lost in the large mass of cases reported from the other courts. This book collects those Exchequer cases and presents them here newly edited in modern English. This will give to the reader a better sense of the history of the Court of Exchequer at this period of time. On the other hand, this collection of reports does not include the Exchequer cases printed in Lane's reports, Robert Paynell's Exchequer reports, nor Selden Society volumes 117 and 118.

Here also are numerous cases collected from the manuscript reports of Arthur Turnour (d. 1651), British Library MS. Hargrave 30. Other Exchequer cases reported by Turnour are printed in volume 118 of the Selden Society publications. However, Turnour's King's Bench and Common Pleas reports await publication.

Another collection of Exchequer cases from this period is an anonymous set entitled 'Cases experimental in the Exchequer and also matters in law'. There are three manuscripts containing this collection:

Lincoln's Inn MS. Maynard 21, ff. 119-170;

Lincoln's Inn MS. Maynard 31, ff. 1-42;

British Library MS. Add. 25207, ff. 3v-27v.

The equity cases from this collection have been printed in volumes 117 and 118 of the Selden Society publications, and the rest of them are printed here. There are a few cases from the appellate court of Exchequer Chamber and one from the Court of Star Chamber; these are not included.

The Exchequer reports of Sir Richard Lane (1584-1650) were first printed in 1657. There are, however, many manuscript copies of Lane's reports:

- British Library MS. Add. 25208, ff. 14-39
- British Library MS. Add. 25223
- British Library MS. Add. 35955, ff. 99v-147
- British Library MS. Hargrave 16, ff. 3-111
- British Library MS. Hargrave 33, ff. 5-76v
- British Library MS. Harley 4814, ff. 218-264
- British Library MS. Lansdowne 1098, ff. 30-107
- British Library MS. Lansdowne 1172, ff. 201-295
- Cambridge University Library MS. Gg.2.23, ff. 17-24v, 158-219v
- Cambridge University Library MS. Gg.4.9, ff. 1-72v
- Folger Shakespeare Library MS. V.b.48, ff. 215-220
- Gloucester Cathedral Library MS. 10
- Harvard Law School Library MS. 118, part 1
- Harvard Law School Library MS. 1156 [formerly 1207], part 1, ff. 1-84
- Lincoln's Inn MS. Maynard 2, ff. 1-57v
- Lincoln's Inn MS. Maynard 73, part 2, ff. 41-100
- Longleat MS. 244
- Middle Temple MS. 13, ff. 83-163
- Philadelphia Free Library MS. LC 14.62, part 1
- Yale Law School MSSG R72, no. 1

*Reports in the Court of Exchequer, Beginning in the third, and ending in the ninth year of the Raign of the late King James by the Honourable Richard Lane Late of the Middle Temple, an eminent Professor of the Law, sometime Attorney General to the late Prince Charles. Being the first Collections in that Court hitherto extant. Containing severall Cases of Informations upon Intrusion, touching the King's Prerogative, Revenue and Government, with divers Incident Resolutions of Publique Concernment in Points of Law: With two exact Alphabeticall Tables,*



*the one of the Names of the Cases, the other of the Principall Matters contained in this Book. London, Printed for W. Lee, D. Pakeman, and G. Bedell, and are to be sold at their Shops in Fleetstreet, 1657.*

2 p. l., 119, [4] p. 28 cm.; signatures A<sup>2</sup>, B-Q\*,R<sup>2</sup>; Wing L340.

*Lane's Exchequer reports, being a reprint of Reports of cases in the Court of Exchequer from 1605 to 1612, by the Hon. Richard Lane. With notes and a life of the reporter by Charles Francis Morrell. London: H. Sweet, 1884.*

xvii, 200 p. 25 cm.

*The English Reports* (Edinburgh 1914), vol. 145, pp. 249-348.

This edition is based upon the 1657 edition, the 1884 edition still being in copyright.

For a discussion of Lane's reports, see G. D. G. Hall, 'Bate's Case and "Lane's" Reports: The Authenticity of a Seventeenth-Century Legal Text', *Bulletin of the John Rylands Library*, vol. 35, pp. 405-427 (1952). Hall is convincing that it is unlikely that Lane composed or compiled these reports, since he was a student at the time of the cases that were reported and students usually attended the Court of King's Bench and took notes of the cases there. Also in the case of *Anonymous* (Ex. 1668), British Library MS. Hargrave 62, f. 10, pl. 1, one of the counsel doubted the attribution of these reports to Lane and he also questioned their authority. However, until the name of the true reporter is known, we might as well continue the tradition of citing these cases as Lane's. The printed edition is very poor, and a new edition and translation of Lane's reports would be very welcome.

Thanks and appreciation are due to the William S. Hein & Co., Inc., for their kind permission to reprint the reports from the time of King Charles I.

# TABLE OF CASES REPORTED

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

Acton ads. Attorney General (1637)	201
Allen v. Morgan (1611)	62
Alpe ads. Davie (1639)	211
Alport v. Wainwright (1612)	84
Amcotts v. Catherich (1621)	149
Appleton's Case (1638)	207
Appleton ads. Attorney General (1636)	197
Arden ads. Darcy (1613)	102
Attorney General v. Acton (1637)	201
Attorney General v. Anonymous (1611)	63
Attorney General v. Anonymous (1634)	196
Attorney General v. Appleton (1636)	197
Attorney General v. Carr (1618)	144
Attorney General v. Clerkenwell Churchwardens (1631)	187
Attorney General v. Collins (1633)	194
Attorney General v. Curriton (1630)	180
Attorney General v. Fletcher (1609)	20
Attorney General v. Ford (1606)	5

Attorney General v. Gray (1610)	55
Attorney General v. Hide (1625 x 1630)	178
Attorney General v. Hussey (1604)	2
Attorney General v. King (1634)	195
Attorney General v. Middleton (1631 x 1645)	208
Attorney General v. Pembroke, Earl of (1630)	179
Attorney General v. Powell (1611)	76
Attorney General v. Raleigh (1609)	29
Attorney General v. St. Saviour (1613)	98
Attorney General v. Tredwell (1611)	72
Attorney General v. Trollope (1609)	32
Attorney General v. Trollop (1610)	50
Attorney General v. Vandecount (1642)	218
Audley v. Clarke (1615)	137
Babington v. Regem (1614)	132
Bancroft v. Heron (1631)	189
Barham ads. Ward (1613)	113
Barker's Case (1609)	38
Barron v. Boell (1608)	19
Basset ads. Powell (1612)	87
Bateman ads. Elborowe (1631)	184
Bates' Case (1609)	23
Bayley v. Harvey (1609)	33
Beckett ads. Regis (1610-1612)	56
Beddoe v. Anonymous (1612)	85
Beddoe, <i>qui tam</i> v. Cutts (1623)	153
Beddoe, <i>qui tam</i> v. Fishborne (1613)	116
Beddoe, <i>qui tam</i> v. Oliver (1612)	93
Beddoe, <i>qui tam</i> v. Sanderson (1617)	143
Beddoe, <i>qui tam</i> v. Vanlore (1623)	152
Beddoe, <i>qui tam</i> v. Winchcombe (1619)	147
Bellingham ads. Willson (1610)	59
Bennet v. Lewknor (1616-1619)	138
Bere v. Trolloppe (1609)	32
Bland ads. Higgins, <i>qui tam</i> (1611)	73
Bluet ads. Muschamp (1617-1619)	142

Boell ads. Barron (1608)	19
Borrowe ads. Camden (1613)	101
Boyes ads. Wainwright, <i>qui tam</i> (1613)	119
Braughton's Case (1640)	214
Brochas's Case (1613)	105
Broughton ads. Carew (1610)	58
Buett ads. Ratcliffe (1631)	185
Burt's Executor v. Jenner (1640)	215
Buttolph v. Cole (1637-1641)	206
Camden v. Borrowe (1613)	101
Carew v. Broughton (1610)	58
Carew ads. Newsham (1617-1619)	141
Carr ads. Attorney General (1618)	144
Casse ads. Mollins (1613)	107
Catherich ads. Amcotts (1621)	149
Chambers v. Jarvis (1626)	161
Chelshire ads. Tilston, <i>qui tam</i> (1626)	160
Cheney ads. Smart (1645)	221
Clarke ads. Audley (1615)	137
Claxton v. Stubbe (1613)	100
Clerkenwell Churchwardens ads. Attorney General (1631)	187
Close's Case (1605)	3
Coheite's Case (1614)	128
Cohite, <i>qui tam</i> v. Hoblyn (1614)	129
Cole ads. Buttolph (1637-1641)	206
Collins ads. Attorney General (1633)	194
Collins v. Moone (1631)	183
Colton's Case (1613)	118
Crisp and Powell's Case (temp. Car. I)	200
Curriton ads. Attorney General (1630)	180
Customs Farmers v. Jolles (1612)	97
Cutts ads. Beddoe, <i>qui tam</i> (1623)	153
Dacombe's Executors ads. Regis (1618)	144
Dale ads. Parry (1609)	25
Darcy v. Arden (1613)	102
Davenport's Case (1608)	17

Davie v. Alpe (1639)	211
Dawkins v. Yardley (1608)	16
Deacon's Case (1614)	130
Death ads. Regis (1618)	145
Delaware, Dame ads. Mawdit (1611)	80
Derecap ads. Wilson, <i>qui tam</i> (1612-1613)	95
Doilie v. Joiliffe (1611)	66
Dorrell ads. Longe (1629)	171
Duckett's Case (1613)	103
Duckett and Bird's Case (1632)	193
Eaton's Case (1637)	199
Egglesfield v. Fabian (1632)	192
Elborowe v. Bateman (1631)	184
Fabian ads. Egglesfield (1632)	192
Faliell's Case (1623)	151
Farmers of the Customs v. Jolles (1612)	97
Farren, <i>qui tam</i> v. Stonehouse (1642-1645)	219
Fawne v. Pescodd (1611)	71
Fayne's Case (1609)	36
Fishborne ads. Beddoe, <i>qui tam</i> (1613)	116
Fitzwilliam's Case (1613)	117
Fletcher ads. Attorney General (1609)	20
Fludd's Case (1631)	188
Ford ads. Attorney General (1606)	5
Fowey, Town of, Case of (1608)	14
Frome Selwood Forest Case (1630)	179
Fryer v. Pollard (1613)	114
Gage's Case (1609)	21
Gargrave's Case (1609)	37
Garnett ads. Odor (1637)	203
Garraway v. Malapert (1616)	139
Gillingham Forest, Case of (1625 x 1630)	178
Gillingham, Vicar of ads. Raleigh (1609)	19a
Giver ads. Moncke (1610)	49
Glover's Case (1614)	121
Goldsmith's Company v. Maddox (1611)	82

Gower ads. Monke (1611)	65
Gowre and Winter's Case (1611)	64
Gray ads. Attorney General (1610)	55
Griffith v. Smith (1604)	1
Grobham v. Stone (1612-1613)	91
Haines v. Anonymous (1610)	60
Hall v. Marsh (1611)	75
Halsey ads. Regis (1608)	13
Harris ads. Pynchyn (1615)	136
Harvey ads. Bayly (1609)	33
Hawkins v. Anonymous (1609)	22
Hawkins ads. Moore (1610)	61
Hayward's Case (1613)	115
Henry's Case (1636)	198
Herbert v. Smith (1614)	123
Heron ads. Bancroft (1631)	189
Hide ads. Attorney General (1625 x 1630)	178
Higgins, <i>qui tam</i> v. Bland (1611)	73
Hobbs v. Prichard (1641-1642)	216
Hoblyn ads. Cohite, <i>qui tam</i> (1614)	129
Hodgson ads. Taylor (1609)	35
Holden and Duncombe's Case (1630)	181
Holt ads. Rich (1610)	43
Hope v. Roberts (1648)	225
Howe ads. May (1610)	52
Hussey ads. Attorney General (1604)	2
Ivatt v. Warren (1618)	144a
Jacob ads. Singleton (1646)	222
Jarvis ads. Chambers (1626)	161
Jenner ads. Burt's Executor (1640)	215
Johnson v. Lane (1611)	70
Joiliffe ads. Doilie (1611)	66
Jolles ads. Customs Farmers (1612)	97
Jones's Case (1609)	39
Jones v. Oxford, Countess of (1629)	172
Jones v. Skidmore (1609)	40

Kelley ads. Lunsdale (1609-1610)	41
King ads. Attorney General (1634)	195
Kingston, Town of, Case of (1646)	223
Kinnerseley's Case (1613)	109
Kirk ads. Levison (1610)	44
Knightly ads. Smith (1637)	204
Kynaston v. Lloyd (1621)	150
Lake, Lady ads. Tidd (1639 x 1644)	213
Lane ads. Johnson (1611)	70
Lawrence v. Mowlins (1613)	99
Lennox, Duke of, Case of (1609)	30
Lenthal ads. Syvedale, <i>qui tam</i> (1615)	134
Levison v. Kirk (1610)	44
Lewknor ads. Bennett (1616-1619)	138
Lisle, Viscount ads. Regis (1624)	157
Litler ads. Spiller (1631)	186
Lloyd ads. Kynaston (1621)	150
Longe v. Dorrell (1629)	171
Lunsdale v. Kelley (1609-1610)	41
Machill v. Oxford (1613)	111
Maddox ads. Goldsmith's Company (1611)	82
Malapert ads. Salter (1616)	139
Marsh ads. Hall (1611)	75
Mascall's Case (1613)	112
Mawdit v. Dame Delaware (1611)	80
May v. Howe (1610)	52
Melletyne ads. Town of Southampton (1613)	120
Middleton ads. Attorney General (1631 x 1645)	208
Miller's Case (1629)	170
Mollins v. Casse (1613)	107
Moncke v. Giver (1610)	49
Monke v. Gower (1611)	65
Moone ads. Collins (1631)	183
Moore v. Hawkins (1610)	61
Moore v. Musgrave (1614)	124
Mordant ads. Nicholls (1610)	54

Morgan ads. Allen (1611)	62
Mott v. Semayne (1609)	24
Mountjoy, Lord, Case of (1609)	42
Mowlins ads. Lawrence (1613)	99
Murray's Case (1608)	10
Muschamp v. Bluet (1617-1619)	142
Musgrave ads. Moore (1614)	124
Needham v. Williams (1614)	125
Newsham v. Carew (1617-1619)	141
Nichol's Case (1624)	156
Nicholls v. Mordant (1610)	54
Nichols ads. Porter (1631)	182
Odor v. Garnett (1637)	203
Oliver ads. Beddoe, <i>qui tam</i> (1612)	93
Oxford ads. Machill (1613)	111
Oxford, Countess of ads. Jones (1629)	172
Parkenson's Case (1623)	154
Parry v. Dale (1609)	25
Pembroke, Earl of ads. Attorney General (1630)	179
Penrin ads. Rich (1609)	28
Perrott ads. Regis (1613)	108
Pescodd ads. Fawne (1611)	71
Pescott ads. Uvedall (1639-1640)	212
Pollard ads. Fryer (1613)	114
Porter v. Nichols (1631)	182
Potter's Case (1611)	79
Powell ads. Attorney General (1611)	76
Powell v. Basset (1612)	87
Poynes' Case (1614)	122
Prichard ads. Hobbs (1641-1642)	216
Prichard ads. Puliston (1638)	209
Prunner's Case (1614)	126
Puliston v. Prichard (1638)	209
Pynchyn v. Harris (1615)	136
Quarles ads. Topley (1608)	12
Raleigh ads. Attorney General (1609)	29



Raleigh v. Vicar of Gillingham (1609)	19a
Ratcliffe v. Buett (1631)	185
Reade ads. Regis (1609)	27
Redishe's Case (1626)	163
Remington and Barnes' Case (1611)	74
Rex v. Anonymous (1612)	94
Rex ads. Babington (1614)	132
Rex v. Beckett (1610-1612)	56
Rex v. Dacombe's Executors (1618)	144
Rex v. Death (1618)	145
Rex v. Halsey (1608)	13
Rex v. Lisle, Viscount (1624)	157
Rex v. Perrott (1613)	108
Rex v. Reade (1609)	27
Rex v. Shaftesbury, Mayor of (1612)	88
Rex v. Twine (1607)	8
Rex v. Vandenbrook (1628)	167
Rex v. Vermuyden (1637)	202
Rex v. Wendman (1605)	4
Rich v. Holt (1610)	43
Rich v. Penrin (1609)	28
Roberts ads. Hope (1648)	225
Rookes v. Slared (1644)	220
Roswell v. Vaughan (1607)	9
St. David's, Bishop of, Case of (1623)	155
St. Saviour Wardens ads. Attorney General (1613)	98
Salter v. Malapert (1616)	139
Salter v. Stoddard (1611)	83
Salters' Company's Case (1610)	47
Sanderson ads. Beddoe, <i>qui tam</i> (1617)	143
Sandhurst, Tenant of, Case of (1647)	224
Sands' Case (1642)	217
Savoy, Master of v. Worcester (1609)	26
Semayne ads. Mott (1609)	24
Shaftesbury, Mayor of ads. Regis (1612)	88
Sheldon ads. Attorney General (1606)	5

Short ads. Standish (1616-1618)	140
Shoyle, <i>qui tam</i> v. Taylor (1607)	7
Sidley's Case (1614)	127
Singleton v. Jacob (1646)	222
Skidmore ads. Jones (1609)	40
Slared ads. Rookes (1644)	220
Smart v. Cheney (1645)	221
Smith's Case (1613)	104
Smith ads. Griffith (1604)	1
Smith ads. Herbert (1614)	123
Smith v. Knightly (1637)	204
Smith ads. Worcester, Earl of (1615)	135
Southampton, Town of v. Melletyne (1613)	120
Spiller v. Litler (1631)	186
Standish v. Short (1616-1618)	140
Standish and Tryon's Case (1620)	148
Stocker's Case (1609)	31
Stoddard ads. Salter (1611)	83
Stone ads. Grobham (1612-1613)	91
Stonehouse ads. Farren, <i>qui tam</i> (1642-1645)	219
Stubbe ads. Claxton (1613)	100
Sutton Marsh Case (1637)	202
Syvedale, <i>qui tam</i> v. Lenthal (1615)	134
Taylor v. Hodgson (1609)	35
Taylor ads. Shoyle, <i>qui tam</i> (1607)	7
Throckmorton's Case (1613)	106
Tidd v. Lady Lake (1639 x 1644)	213
Tilston, <i>qui tam</i> v. Chelshire (1626)	160
Topley v. Quarles (1608)	12
Tredwell ads. Attorney General (1611)	72
Trinity College, Case of (1611)	78
Trollope ads. Attorney General (1610)	50
Trollope ads. Attorney General (1609)	32
Trollope ads. Bere (1609)	32
Twine ads. Regis (1607)	8
Uvedall v. Pescott (1639-1640)	212

Vandecount ads. Attorney General (1642)	218
Vandenbrook ads. Regis (1628)	167
Vanlore ads. Beddoe, <i>qui tam</i> (1623)	152
Vaughan ads. Roswell (1607)	9
Vermuyden ads. Regis (1637)	202
Wade v. Vandecount (1642)	218
Wainwright ads. Alport (1612)	84
Wainwright, <i>qui tam</i> v. Boyes (1613)	119
Ward v. Barham (1613)	113
Warren ads. Ivatt (1618)	144a
Weavers of London, Case of (1629)	169
Wendman ads. Regis (1605)	4
Weston and Bowes' Case (1611)	67
Williams ads. Needham (1614)	125
Willson v. Bellingham (1610)	59
Wilson, <i>qui tam</i> v. Derecap (1612-1613)	95
Winchcombe ads. Beddoe, <i>qui tam</i> (1619)	147
Woodcock's Case (temp. Car. I)	227
Worcester ads. Master of the Savoy (1609)	26
Worcester, Earl of v. Smith (1615)	135
Yardley ads. Dawkins (1608)	16
York and Allen's Case (1613)	99a
Young's Case (1612)	89

# REPORTS OF CASES IN THE COURT OF EXCHEQUER

1

## **Griffith v. Smith** (Ex. 1604)

*A devise of the profits of land to a trustee does not give the ownership of the land to the beneficiaries of the trust.*

*The beneficiaries of a trust of land cannot make a lease of that land.*

Moore K.B. 753, 72 E.R. 884

In the common pleas of the Exchequer, in [an action of] *ejectione firmæ*, it was found by a special verdict that one Hunt, possessed of a term for years of the rectory of Shaborne in the County of Wiltshire of the demise of the Dean and Canons of Windsor, devised the profits of his wife for so many years as she should live and afterwards he devised also the profits to twenty of the poorest of his kin 'being his brothers' and sisters' children'. And he devised that, after the death of his wife, the rectory shall be demised for so

much rent that can conveniently be obtained by the advice of his overseers etc. and that the rent shall be distributed to the said twenty 'of the poorest of his kin', and he makes his wife executrix and dies. The wife makes Erasmus Web, who as one of the overseers, her executor and dies. But she, before her death, had surrendered the term, being nineteen years to come, and took a new lease for twenty-one years. Web, with the advice of the other overseers, made a lease to Smith, the defendant, rendering rent. And the twenty poor of the kin of Hunt entered upon Smith and made a lease for years to Griffith, who, being ousted by Smith, brings [an action of] *ejectione firmæ*. And the case was often times argued in the Exchequer.

And by the opinion of CLARKE and SAVILE, Barons, against the opinion of PERYAM, Chief Baron, judgment was given for the defendant, upon which the plaintiff brought [a writ of] error in the Exchequer Chamber. And there, by the assistance of POPHAM and ANDERSON, [chief justices], who heard the case argued at Serjeants' Inn and reported their opinions to the Lord Chancellor [LORD ELLESMERE] and the Lord Treasurer [LORD BUCKHURST], now Michaelmas [term] 2 *Jacobi Regis* [1604], the judgment was affirmed upon this reason shown by Popham, to wit that, even though a devise of the profits be in all cases a devise of the land itself if the will had not other circumstances, yet in the principal case, the deviser had expressly declared that the twenty poor would not have the property of the term because he appointed the lease to be made by the advice of the overseers for the rent and the rent to be distributed to the twenty poor, by which he intended that those who make the lease, to wit the executor, shall have the property of the term and yet upon confidence to make the lease and distribute the rent, and, thus, the twenty poor have the confidence and not the interest, by which they did not have the power to make the lease to the plaintiff. And, thus, the judgment is good that the barons have given against the plaintiff, and it should be affirmed.

## 2

### **Attorney General v. Hussey** (Ex. 1604)

*The beneficiary of a trust can be indicated by reference to a prior revoked will.*

Moore K.B. 789, 72 E.R. 908

The case of one Hussey in the Exchequer, who purchased a manor from Queen Elizabeth, was that he, being a bastard, made his will, by which he devised the manor. And afterwards, he made a feoffment of the same manor to the use of such persons and for such estates that he had declared by his will bearing date etc.

And it was adjudged that the feoffment was a countermand of the will and yet that the countermanded will was sufficient to declare the use of the feoffment. And thus, there was no escheat to the crown.

3

**Close's Case**  
(Ex. 1605)

*The question in this case was whether an ecclesiastical court can exercise jurisdiction of a case of simony.*

Moore K.B. 777, 72 E.R. 900

In Michaelmas term, 3 Jac. [1605], in the Exchequer, a prohibition was argued which there was brought against the parson, Close, because he came to his benefice by simony for which the presentation belonged to the king *hac vice* by the Statute of 31 Eliz.<sup>1</sup> and yet he sued by a libel in the court Christian for tithes in which the title of the king, for simony, would come in debate.

And *Dodderidge*, Solicitor [General], prayed a [writ of] consultation. And he argued that the simony is aptly triable in the ecclesiastical court by the common law, and it is not taken away from them by the Statute of 32 Eliz.<sup>2</sup> And he said simony *sic definitur, viz., simonia est studiosa voluntas emendi vel vendendi spiritualia vel spiritualibus annexa. Et dividitur in men-*

---

<sup>1</sup> Stat. 31 Eliz. I, c. 6 (SR, IV, 802-804).

<sup>2</sup> Sic for 31 Eliz.

*tualis et conventualis*. The ecclesiastical law can both judge and proceed by examination upon the oath of the party or witnesses, but the temporal law upon the conventual only. And on account of this, where simony is in an allegation first in the ecclesiastical court, the temporal court cannot prohibit the proceeding.

Coke, Attorney General, [argued] to the contrary because the title of the king by the simony is examinable in the temporal courts.

*Et sic pendet.*

4

**Rex v. Wendman**  
(Ex. 1605)

*A chose in action is forfeited to the crown when the obligee commits the act of forfeiture, not when execution is made upon it.*

Croke Jac. 82, 79 E.R. 69

It was held by all the barons, and so they delivered the law to the jury, first, that, where Anthony Bowen had a statute made to him by Sir Richard Wendman of £1000 and afterwards was a fugitive beyond the seas in 27 Eliz. [1584 x 1585] and after, but before an office, he returned and released this statute, and an office is after found, that this release shall not bar the king, for he was entitled by the flight, and the office is but an informing of him, and the statute was in him before the office. Secondly, it was resolved that the queen's granting the said statute *inter alia* to Conway and liberty to him to sue it in the name of the queen and her successors, it is a good warrant and all process shall be made in the king's name as if there had not been any grant thereof. Whereupon the jury gave their verdict accordingly.

**Attorney General v. Ford and Sheldon**  
(Ex. 1606)

*Where a debtor to the Crown lent money to a third person, the Crown can recover the debt directly from the third person.*

*In this case, a fraudulent conveyance was set aside and the creditor, the Crown in this case, recovered directly from the transferees.*

12 Coke Rep. 1, 77 E.R. 1283

In an information in the Exchequer Chamber for the king against Thomas Ford, Esq., Ralph Sheldon, Esq., and divers others, the case was thus. Thomas Ford was before the Statute of 23 Eliz.<sup>1</sup> a recusant. And for money lent to Sheldon, some before 23 Eliz. and some after, he took a recognizance in the names of the other defendants. And he took also a grant of a rent charge to them in fee with a condition of redemption by deed indented. And the recognizance was conditioned for performance of covenants in the said indenture. And afterward, the Statute of the 29 Eliz.<sup>2</sup> was made, by which it was enacted that, if a default of payment was made in any part of the payment, *viz.* of £20 for every month etc., ‘that then and so often, the Queen’s Majesty . . . by process out of the Exchequer, may take, seize, and enjoy all the goods and two parts’ etc. And after the said Act and before the 34th year of the reign of the late queen [1591 x 1592], Ford lent divers other great sums of money to Sheldon, and, for the assurance of it, he took a rent charge by a deed indented with a condition of redemption. And he took also several recognizances in the names of some of the other defendants for the performance of covenants etc., as is aforesaid, which recognizances did amount in all to the sum of £21,000, all which were to the use of the said Ford and to be at his disposition, and they were forfeited. And afterwards, *viz.* 41 Eliz. [1598 x 1599], Ford was convicted of recusancy and did not pay £20 *per mensem*

---

<sup>1</sup> Stat. 23 Eliz. I, c. 1 (SR, IV, 657-658).

<sup>2</sup> Stat. 29 Eliz. I, c. 6, s. 4 (SR, IV, 771).



according to the Statute. And, if upon all this case, the king should have the benefit of these recognizances was the question.

And this case was debated by counsel learned on both sides in court. And it was objected by the counsel of Ford that, if the recognizances had been acknowledged to Ford himself, they should not be forfeited to the king, for the Statute speaks only of goods. And debts are not included within the word 'goods'. And, therefore, if the king grant all the goods which came to him by the attainder of J.S., the patentee shall not have debts due to him, for that the grant only extends to goods in possession, and not to things in action. And this Act is a penal law and shall not be extended by equity.

Second, it was objected that these recognizances were acknowledged to perform covenants in an indenture concerning a rent charge. And, therefore, they savor of the realty and are not within the intention of the said Act, which speaks only of goods.

Third, no fraud or covin appears in the case. And then, forasmuch as no Act of Parliament extends to this case, it was said that the common law does not give any benefit to the king, for, at the common law, in a far stronger case, if a *cestui que use* had been attainted of treason, this use, forasmuch as it was but a trust and confidence, of which the law did not take notice, it was not forfeited to the king and could not be granted. And if an use shall not be forfeited, of which there shall be a *possessio fratris etc.* and which shall descend to the heir, *a multo fortiori*, a mere trust and confidence shall not be forfeited.

Fourth, it was objected that, if the forfeiture in this case at the bar accrues to the king by the Statute of 29 Eliz., it ought to be by force of this word 'goods'. But that shall not be without question in this case, for Ford has not any goods, but only a mere trust and confidence, which is nothing in the consideration of the law.

And the court cannot adjudge that these recognizances belong to the king by the equity of the said Statute because it is penal. Also, one recognizance was taken in the names of some of the other defendants before the Statute of the 29 Eliz., which gave the forfeiture. And for that reason, it cannot be imagined that it was to defeat the king of a forfeiture, which then was not *in esse*, but given afterwards.

As to the first objection, it was answered and resolved by all the barons and by POPHAM, Chief Justice of England, and divers others of the justices, with whom they conferred, that, if the recognizances had been acknowledged

to the party himself, that they were given to the king without question, for personal actions are as well included within this word 'goods' in an Act of Parliament as goods in possession. But inasmuch as, by the law, things in action cannot be granted over, for that cause by his general grant, things in action, which only he may grant by his prerogative, without special words pass not, for what he can grant only by his prerogative can never pass by general words. And it was affirmed that so it had been resolved before, that is to say, that debts were forfeited to the king by the said Act of the 29 Eliz. And where the Statute says 'shall take, seize, and enjoy all the goods and two parts' etc., although a debt due to a recusant cannot be taken and seized, yet inasmuch as there is another word, *viz.* 'enjoy', the king may well enjoy the debt and, by process out of the Exchequer, levy it. And so 'take and seize' refers to two parts of the lands in possession and 'enjoy' relates to goods.

As to the second objection, they answer that it was originally for the loan and forbearance of money. And as well the recognizance as the annuity were made for the security of the payment of the said money. Also, when the recognizances are forfeited, they are but chattels personal.

As to the third objection, they answer there was covin apparent, for, when he was a recusant continually after that Statute of the 23 Eliz. and, for that, chargeable to the king for the forfeiture given by the same Act, it shall be intended that he took these recognizances in the name of others with an intent to prevent the king of levying of the forfeiture. And all the recognizances, which were taken in other men's names after the said Act, shall be presumed in law to be so taken to the intent to defeat the king of his forfeiture. True it is that an use or trust shall not be forfeited for treason or other offence by the common law because it is not a thing of which the common law takes any notice, for that the *cestui que use* has neither *ius in re* nor *ius ad rem*, but, by the common law, when any act is done with an intent and purpose to defraud the king of his lawful duty or forfeiture by the common law or Act of Parliament, the king shall not be barred of his lawful duty and forfeiture *per obliquum*, which belongs to him by the law, if the act was done *de directo*.

And, therefore, if a man outlawed buy goods in the names of others, the king shall have the goods in the same manner as if he had taken them directly in his own name. So, if any accountant to the king purchase lands in the names of others, the king shall seize those lands for money due unto him. And this appears by the Case of Walter Chirton, Trinity 24 Edw. III, rot. 4,

*in Scaccario*, where the case was that Walter de Chirton was indebted to the king for £1800 which he had received of the king's treasure and did purchase certain lands with the king's money and, by covin, had caused the vendor to enfeoff his friends in fee to defraud the king and, notwithstanding, took the profits himself, and, afterwards, Walter Chirton was committed to the Fleet [Prison] for the said debt. And all the matter was found by inquisition, and, by judgment, the land was seized into the king's hands *quousque*, for, in the case of the king, an act done by covin, *per obliquum*, shall be equal to an act done *de directo* to the party himself, for *rex fallere non vult, falli autem non potest*.

See another precedent, Trinity 24 Edw. III, rot 11, *extractum regis*, where one Thomas Favell was a collector of tithes and fifteenths and was seised of certain lands in fee simple, and, having divers goods and chattels, *die intromissionis de collectione et levatione* of tenths and fifteenths, *languidus in extremis alienavit tenementa sua et bona et catalla diversis personis* and died without an heir or executor. In this case, by the prerogative of the king, process was made as well against the terre tenants as against the possessors of the goods and chattels, although they were not executors etc. *ad computandum pro collectione praedicta et ad respondendum et satisfaciendum inde regni etc. et hoc per Cancellarium Angliae et Capitales Justiciarios Angliae et aliorum justiciariorum utriusque banci, quod nota bene*.

As to the fourth objection, *non refert* whether the duty is to accrue to the king by the common law or by statute. But be it the one way or the other, no subterfuge that the party can use can defeat or defraud the king. And although one of the recognizances was taken before the Statute of 29 Eliz., yet that was to his use, and, for that, it is in the nature of a chattel in him and was taken in the names of others to prevent the queen of her forfeiture, which she might have by the Act of 23 Eliz. And, although Ford was not convicted until 41 Eliz. [1598 x 1599], that is not material, for, at all times before that, he was subject to a forfeiture for his recusancy.

### 117 Selden Soc. 345

One Ford, being a convicted recusant for many years and being possessed of great sums of money, in order to defraud the queen, lent his money to divers persons upon usury and took the obligations and assurances in the names of his friends. And he curried favor with Ralph Sheldon and sojourned

in his house and lent to him great sums for usury as in kindness upon statutes, obligations, and mortgages of land so long that he became his debtor in principal and usury almost £21,000. Ralph Sheldon agreed to give to him and his heirs land of the value of £600 *per annum* and also certain money for the redemption of these bonds and land. And afterwards Ford renounced the agreement<sup>1</sup> and held him to the forfeitures, upon which Sheldon complained in the Chancery.

And upon the bill and the answer there, the King's Attorney [General], perceiving that, by those subtle conveyances, the king was defrauded, exhibited an English information in the Exchequer Chamber against Ford and Sheldon containing all these matters and the great debt of Ford to the king.

And upon the whole matter examined there, it was decreed that all of the deeds of the mortgages, statutes, and bonds should be brought in into the court to the use of the king. And Sheldon had his debt of £21,000 stalled to be paid to the king by £3000 [payments] annually. And Ford, upon this, languished and died.

Public Record Office E.126/1, f. 50  
2 June 1606.

Whereas Sir Edward Coke, Knight, the King's Majesty's Attorney General, has exhibited an English bill into this court against Thomas Hoorde, Raph Sheldon, Edward Sheldon, and other, defendants, informing thereby that, whereas by a Statute made in the first year of the reign of the late Queen Elizabeth, it was enacted that, from and after the feast of the Nativity of St. John the Baptist then next following, all and every person and/or persons inhabiting within this realm or any other of Her Majesty's dominions should diligently and faithfully, having no reasonable excuse to be absent, endeavor themselves to resort every Sunday and other days ordained and used to be kept as holidays to their parish church or chapel accustomed or upon reasonable let thereof to some usual place where common prayer should be used and then and there to abide orderly and soberly during the time of the common prayer, preaching, or other service of God there to be used and ministered upon pain of punishment by the censure of

---

<sup>1</sup> swarne del agreement *MS*.

the church and, whereas afterward, in the 23rd year of Her Majesty's said reign, it was enacted by another act or statute made that every person above the age of sixteen years which should not repair to some church, chapel, or usual place of common prayer but forbear the same contrary to the tenor of the said Statute made in the said first year of Her Majesty's reign and being thereof lawfully convicted should forfeit to Her Majesty for every month after the end of that session of Parliament which he or she should so forbear £20 of lawful English money and showing further that, whereas Thomas Hoorde, late of Hornsey in the County of Middlesex, esquire, being of the age of sixteen years and above and refusing and forbearing to repair or come to any church, chapel, or usual place of common prayer contrary to the said laws and statutes and being a man of great wealth and substance in money intending to defraud Her Majesty of the said penalty and payment of £20 a month and such forfeiture as was or might be made for non-payment thereof and to raise and make unto himself a great yearly revenue by way of loan and interest and to live privately thereupon and keep his said estate private and unknown did at sundry times lend unto the said Raph Sheldon divers great sums of money and, for the security of payment thereof and of the sum of £9 yearly to be paid for the use and forbearance of every £100 so lent, he the said Raph Sheldon did make and pass unto the said Thomas Hoorde or to some friends of his in trust to his use divers and sundry grants of annuities or rents charge issuing out of divers manors, lands, tenements, and hereditament of him the said Raph Sheldon with several conditions of redemption by and upon the payment of the principal sum and the consideration that should grow due for the forbearance thereof until the same should be repaid and further that the said Raph Sheldon, for the better security of the said Thomas Hoorde in that behalf for payment of the said sums of money and performance of the covenants contained in the said several deeds or grants of annuities, became bound and did acknowledge eight several recognizances in His Majesty's Court of Chancery to the person hereunder named in trust to the use of the said Hoorde, that is to say the first of the said eight recognizances on the 22nd day of May in the 25th year of the reign of our late sovereign lady Queen Elizabeth [1583] whereby the said Raph Sheldon and Edward Sheldon, his son and heir apparent, did acknowledge to owe to John Brooke of Madley in the County of Salop, esquire, and Richard Brooke of Lapley in the County of Stafford, esquire, a sum of £3000 with condition

for the performance of all the covenants, grants, articles, payments, and agreements on the part of the said Raph Sheldon to be paid and performed contained in one paper of indentures bearing date the 10th day of March then last past made between the said Raph Sheldon of the one part and the said John Brooke and Richard Brooke of the other part, the second of the said recognizances on the 9th day of November in the 26th year of her said late Majesty's reign [1584] whereby the said Raph Sheldon and Edward Sheldon and one William Childe, the elder, of Pensax in the County of Worcester, esquire, did acknowledge to owe to Robert Chamberlayne of Sherborne in the County of Oxford, esquire, and Philip Scudamore of Bourneham in the County of Buckingham, esquire, £2000 with the like condition for performance of covenants, the third of the said recognizances on the 26th day of November in the 29th year of the said late queen [1586] whereby the said Raph Sheldon and Edward Sheldon have acknowledged to Allen Hoorde, gentleman, the sum of £1200 with like condition for performance of covenants, the fourth of the said recognizances on the 26th day of November in the said 29th year of her said Majesty's reign [1586] whereby the said Raph Sheldon and Edward Sheldon did acknowledge themselves to owe Roger Gifford and the said Philip Scudamore, esquire, the sum of £3000 with the condition for performance of covenants, the fifth of the said recognizances bearing *teste* the 25th day of November in the thirtieth year of her Majesty's said reign [1587] whereby the said Raph Sheldon and Edward Sheldon did acknowledge to owe to Francis Boodulph of Boodulph in the County of Stafford, esquire, and Humfry Gifford of Brude in the said county, esquire, the sum of £2200 with like condition for performance of covenants, the sixth of the said recognizances on the 22nd day of November in the 31st year of her Majesty's said reign [1588] whereby the said Raph Sheldon and Edward Sheldon did acknowledge to owe to Robert Dormer of Wynges and John Dormer of Durton in the County of Buckingham, esquire, the sum of £3000 with like condition for performance of covenants, the seventh of the said recognizances on the 24th day of November in the 32nd year of her said late Majesty's reign [1589] whereby the said Raph Sheldon and Edward Sheldon did acknowledge to owe to Thomas Astley of Patteshill in the County of Stafford, esquire, and Edward Brooke of London, gentleman, the sum of £1800 with like condition for performance of covenants, and the eighth and last of the said recognizances on the 30th day of May in

the 37th year of her Majesty's said reign [1595] whereby the said Raph Sheldon did acknowledge to owe to Walter Gifford of Hyon in the County of Stafford, esquire, and Edward Brooke of London, gentleman, the sum of £6000 with like condition for performance of covenants as by the said eight recognizances remaining of record in the said Court of Chancery more at large do and may appear and showing further that the said several indentures mentioned in the said conditions of the said recognizances were the said grants and assurances made for payment of the said several annuities and principal money to or for the use of the said Thomas Hoorde in manner and form aforesaid and also that whereas at a session of Parliament held and begun at Westminster the 29th day of October in the 28th year of the reign of our said late sovereign lady Queen Elizabeth [1586] and continued until the dissolution thereof the 23rd day of March then next following [1587], it was among other things enacted that every such offender as aforesaid on not repairing to divine service but forbearing the same contrary to the said Statute made in the said 23rd year as then afterwards should fortune to be thereof once convicted should in such of the terms of Easter or Michaelmas as should be next after such conviction pay into the Receipt of the Exchequer after the rate of £20 for every month which should be contained in the indictment whereupon such conviction should be and should also for every month after such conviction without any other indictment or conviction pay into the Receipt of the Exchequer aforesaid at two times in the year, that is to say in every Easter and Michaelmas term as much as then should remain unpaid after the rate of £20 for every month and, if default should be made in any part of any payment aforesaid contrary to the form thereinbefore limited that then and so often the Queen's Majesty should and might by process out of the said Exchequer take, seize, and enjoy all the goods and two parts as well of all the lands, tenements, and hereditaments, leases, and forms of such offender as of all other the lands, tenements, and hereditaments liable to such seizure or to the penalties aforesaid by the true meaning of the said Act leaving the third part only of the same lands, tenements, hereditaments, leases, and forms to and for the maintenance and relief of the same offender, his wife, children, and family, and further informing that whereas the said eight several recognizances made and acknowledged by the said Raphe Sheldon, Edward Sheldon, and William Childe to the said John

Brooke, Richard Brooke, Robert Chamberlayne, Philip Scudamore, Allan Hoorde, Roger Gifford, Francis Boodulph, Humfrey Gifford, Robert Dormer, John Dormer, Thomas Asteley, Edward Brooke, and Walter Gifford as aforesaid and the said several penalties and sums of money on the said recognizances and every of them mentioned are become forfeited for the not performance of the said several conditions thereupon made as aforesaid and whereas at a general delivery of her said late Majesty's Gaol of Newgate made in and for the County of Middlesex at the Justice Hall in the Old Bailey in the City of London the first day of December in the 42nd year of her said late Majesty's reign [1599] before Nicholas Moseley, mayor of the said city, Edward Fenner, one of the justices of her said late Majesty of pleas before Her Highness to be held assigned, Robert Wroth, knight, John Crooke, esquire, recorder of the said City of London, and others, their fellows justices of our said late sovereign lady the Queen, at the Gaol aforesaid of the prisoners in the same being in the and for the said County of Middlesex to be delivered assigned, the said Thomas Hoorde was indicted for that he the 10th day of June in the 41st year of her said Majesty's reign [1599], being of the age of sixteen years and above did not repair to his parish church of Hornsey aforesaid nor to any other chapel or usual place of common prayer at any time within six months next following the said tenth day of June in the said 41st year [1599] but had forborne the same from the said tenth day of June in the said 41st year by the space of the said six months then next following contrary to the tenor of the said several statutes whereupon, at the same gaol delivery, a proclamation was made by which it was commanded that the said Thomas Hoorde should yield his body to the Sheriff of the said County of Middlesex before the next general gaol delivery to be held for the said county according to the form of the Statute in that case provided, and whereas the said Thomas Hoorde, at the same next general gaol delivery held for the said County of Middlesex the 17th day of January in the 42nd year of Her Majesty's said reign [1600], did not appear upon record and thereupon the default of the said Thomas Hoorde at the same general gaol delivery was record and, by reason thereof, the said Thomas Hoorde was in due form at law convicted of the premisses in the indictment aforesaid specified and the sum of £120 for the said six months became forfeited and due and payable to Her Majesty by the said Thomas



Hoorde, and further that the said Thomas Hoorde made default of payment of the said sum of £120 contrary to the form of the said Act or Statute of the 28th year of Her Majesty's said reign and that by means thereof found by force of the said Statute all the said penalties and several sums of £3000, £2000, £1200, £3000, £2200, £3000, £1800, and £6000 in the said several recognizances mentioned and contained became forfeited unto Her Highness and the same, by and after her decrease, being yet unlevied do belong to our said sovereign lord, the King's Majesty that now is, and in consideration thereof desired process against the said Thomas Hoorde, Allan Hoorde, Raphe Sheldon, Edward Sheldon, William Childe, John Brooke, Richard Brooke, and all the rest of the said recognisees to appear in this court to answer the premisses and to declare upon their oaths to whose use the said recognizances were taken, unto which bill, the said Thomas Hoorde, Raphe Sheldon, and Edward Sheldon and other of the defendants appeared and answered and the said Raphe Sheldon and Edward Sheldon in their answers upon their oaths confessed the said acts and statutes to be made in manner and form as in the said bill is alleged and the said Raphe Sheldon for himself said that, between some part of the 19th year of the reign of the late Queen Elizabeth and the 37th year of Her Majesty's said reign, he the said Raph Sheldon had and received of the said Thomas Hoorde divers several sums of money amounting in the whole to £5600 or near thereabouts and that, for repayment thereof and for the several interests by way of use for the forbearing of the same, he did by divers indentures grant several annuities and rents charged out of his lands with several conditions of redemption, and the said Raphe Sheldon and Edward Sheldon further said that they and one William Childe, deceased, respectively became bound to the persons in the information named, Robert Chamberleyne therein named only excepted, by the said several recognizances in the said several sums of money in them contained with several defeasances or conditions for the performance of the covenants and payments in the indentures mentioned, as the said information is alleged, as they take it, and further that, as they think the said recognizances were acknowledged for the benefit and behoof of the said Thomas Hoorde and not meant for the benefit or behoof of the recognisees, except the recognizance of the said Allen Hoorde, which the said Thomas Hoorde affirmed to be for the money of the said Allen Hoorde,

and further the said Raphe Sheldon said that whatsoever has incurred and is grown due to the said cognisees over and above the said principal money of £5600 received by him has grown by use and use upon use, and further said that, by the rigor of the law, he cannot deny but that the said recognizances have been forfeited and the several sums of money thereby due are in extremity of the law due to the said cognisees, and both the said defendants do likewise say they verily think that the money disbursed by the said Thomas Hoorde to the said Raphe Sheldon, in respect whereof the said recognizances were taken, was the proper money of the said Thomas Hoorde, except the money for which he became bound to the said Allen Hoorde, and the said Thomas Hoorde, by his answer upon his oath, confessed the making of the said acts and statutes and the disbursing of divers sums of money to the said Raphe Sheldon and the granting of the said annuities and rents charges and the taking of the said recognizances to the several cognisees to the use and behoof of the said Thomas Hoorde and confessed further that all the said grants, rents charges, and recognizances, except the said grant and recognizance made to the said Allen Hoorde, were made in trust and confidence to and for the behoof of the said defendant Thomas Hoorde and to be disposed of at his pleasure and the money disbursed for the said rents charges, except the said rents charges granted to the said Allen Hoorde, was the proper money of him the said Thomas Hoorde, and further said that the said recognizances are all become forfeited for not performing of the several covenants thereof and also that he thought himself to stand indicted and convicted of recusancy and acknowledged that he has not paid the penalty and forfeiture of the said statutes otherwise then that two parts of his lands were seized into her said late Majesty's hands according to the statutes for the levying of the said penalties as in and by the said several answers amongst these things more at large may appear,

And whereas upon opening and debating of the same cause upon the said bill and answer by the counsel of all side, the said recognizances being acknowledged to be forfeited, the question then was whether His Majesty, by reason of the recusancy of the said Thomas Hoorde, ought to have the benefit and forfeitures of the said recognizances or the said Thomas Hoorde, to whose use they were acknowledged and for that the said matter was held to be of great weight and consequence as well for the King's Majesty as for

such subjects as are or hereafter may be in the like case, the Lord Treasurer of England and the barons thought fit to take some reasonable time to consider of the matter and see precedents and to have the opinion of some of the judges in the case,

It was, therefore, the last day of May this term ordered that the bill and answer and the matter in question for His Majesty should be considered of and that, thereupon, the barons of this court should have conference with such other of the judges of this land as they should think fit who were required with all convenient speed they could to deliver their resolutions in that case unto the said Lord Treasurer to the end that thereupon a decree might be made in this matter by the said Lord Treasurer and barons in regard of the weakness and age of the said Thomas Hoorde with all convenient speed as by the said order also appeared,

Now, forasmuch as the court was moved and desired to declare and deliver their opinions touching the said matter in question and that a decree might be thereupon made, therefore they having advisedly considered of all the defendants' answers and other premisses as well amongst themselves as with such other judges of this land as to them has seemed fit and finding by the confession of the said Thomas Hoorde and other of the defendants in their answers upon their oaths that all the said several recognizances abovementioned, except the recognizance acknowledged by the said Raph Sheldon and Edward Sheldon to the said Allen Hoorde the 26th day of November in the 29th year of the said late Queen's Majesty's reign [1586], were taken in trust and confidence to the use and behoof of the said Thomas Hoorde and to be disposed of at his pleasure and also that the said sums of money contained in the said recognizances, except the said sum of £1200 last abovementioned, are forfeited and for that also they conceive that the said recognizances were acknowledged to the said other persons of purpose to defraud His Majesty of the said forfeitures which would be very prejudicial to His Majesty's profit and a very dangerous example to other like obstinant recusants to attempt and practice the like cunning and fraudulent conveyances if this so crafty and subtle practice should not be suppressed,

Therefore, the Lord Treasurer and barons of the court upon due consideration of all the matter contained in the said bill and answer of the defendants to the same do this day declare their opinions and do order, adjudge, and decree that the said sum of £3000 contained in the first recognizance acknowledged by

the said Raphe Sheldon and Edward Sheldon unto the said John Brooke and Richard Brooke as aforesaid and also the said sum of £2000 mentioned in the said second recognizance acknowledged by the said Raphe Sheldon, Edward Sheldon, and William Childe to the said Robert Chamberlayne and Philip Scudamore as aforesaid and likewise the said sum of £3000 contained in the said fourth recognizance acknowledged as aforesaid by the said Raphe Sheldon and Edward Sheldon to the said Roger Gifford and Philip Scudamore and also the said sum of £2200 contained in the said fifth recognizance acknowledged by the said Raphe Sheldon and Edward Sheldon to the said Francis Boodulph and Humfry Gifford as aforesaid and the said sum of £3000 contained also in the said sixth recognizance acknowledged by the said Raphe Sheldon and Edward Sheldon unto the said Robert Dormer and John Dormer as aforesaid and also the said sum of £1800 contained in the said seventh recognizance acknowledged as aforesaid by the said Raphe Sheldon and Edward Sheldon unto the said Thomas Asteley and Edward Brooke and also the said sum of £6000 contained in the said eighth recognizance acknowledged by the said Raphe Sheldon to the said Walter Gifford and Edward Brooke as aforesaid and every part and parcel of them ought in all equity and conscience to remain and be forfeited upon our said sovereign lord the king, his heirs, and successors by reason of the recusancy of the said Thomas Hoorde and the non-payment of the said monthly payments of £20 due as aforesaid in the like manner and form as if the said recognizances and every of them had been taken in the name of the said Thomas Hoorde the money disbursed being the goods of the said Thomas Hoorde and the recognizances acknowledged being taken for the only use and behoof of him the said Thomas Hoorde and to defraud the said late queen of the same as aforesaid and that our said sovereign lord the king, his heirs, and successors shall and may in equity recover against the said Raphe Sheldon, Edward Sheldon, and William Childe the said several sums of money by them acknowledged and forfeited as aforesaid in such like manner and form as he might have done if the said recognizances had been taken in the proper name of the said Thomas Hoorde and that the said Raphe Sheldon, Edward Sheldon, and William Childe shall be from henceforth chargeable of and for the said several sums of money to the king's majesty only and discharged of them as well against the said cognisees, their heirs, executors, and administrators and assigns and every of them as against the said Thomas Hoorde, his heirs, executors, administrators, and assigns and every of them by virtue of this decree.

**Anonymous**  
(Ex. 1607)

*A lease of a copyhold is not a forfeiture of the copyhold.*

Godbolt 269, 78 E.R. 157

It was adjudged in the Exchequer that, where the king was lord of a manor and a copyholder within the said manor made a lease for three lives and made livery and, afterwards, the survivor of the three continued in possession forty years and, in that case, because that no livery did appear to be made upon the endorsement of the deed, although in truth there was livery made, that the same was no forfeiture of which the king should take an advantage. And in that case, it was cited to be adjudged in London's Case that, if a copy tenant does bargain and sell his copy tenement by a deed indented and enrolled, that the same is no forfeiture of the copyhold of which the lord can take any advantage. And so was it held in this case.

**Shoyle, *qui tam* v. Taylor**  
(Ex. 1607)

*Brewers are included in the Statute that requires apprenticeships.*

*The Court of Exchequer has jurisdiction over offenses against the Statute that requires apprenticeships.*

Croke Jac. 178, 79 E.R. 155

An information [was exhibited] in the Exchequer on the [Stat.] 5 Eliz., c. 4,<sup>1</sup> by Shoyle for the king and himself, for that the defendant at St.

---

<sup>1</sup> Stat. 5 Eliz. I, c. 4 (SR, IV, 414-422).

Clement's, near Temple Bar, London, on the first of December 3 Jac. I [1605] and continued *postea usque* 12 November 4 Jac. I [1606], which was until the day of the information, for the space of eleven months and more, exercised and occupied the art and occupation of a brewer, being an occupation used within the realm, 12 January, 5 Eliz., *ubi revera* he did not exercise the said trade the 12 January, 5 Eliz., nor was ever brought up for seven years as an apprentice in the said art *contra formam statuti*.

The defendant pleaded not guilty, and it was found against him. And, after the verdict, [it was] moved in arrest of judgment:

First, that the art of a brewer is not such a trade the using whereof is prohibited by the Statute.

*Sed non allocatur* for, by the express words of the Statute, it is reckoned as a trade or occupation, and the words in the Statute whereupon this information is founded refer to the trade aforesaid.

Secondly, that by the Statute of 31 Eliz., c. 5,<sup>1</sup> it is enacted that offenses against the Statute of 5 Eliz., c. 4, shall be enquired of only in the sessions of peace, assizes, or leets within the county where the offenses are committed, *et non alibi extra comitatum*, so as this information upon this Statute in this court is not maintainable.

And of this point, the barons were in doubt. But it was afterward resolved upon consideration of the Statute that the information well lay, for the intent of the Statute was that, for such offenses, men should not be drawn out of the county where the offence was committed. And although the Statute mentions that the suit shall be for them in such courts there named, yet it is not in the negative, 'and not in any other court', but 'not in any other county'. And this being a suit for the king and in this court proper for him, this information is well maintainable. And so it was adjudged.

And a precedent was shown, Easter term, 3 Jac. I, roll 150, in the King's Bench, between Ken v. Drake,<sup>2</sup> for using the art of a spurrier within the said parish of St. Clement's against the said Statute, and it was adjudged that it well lay. But it was said that there was not any question in that case because, the offence being in Middlesex and the King's Bench sitting in Middlesex, they had the power of the sessions intended within the Statute.

---

<sup>1</sup> Stat. 31 Eliz. I, c. 5, s. 2 (SR, IV, 801).

<sup>2</sup> *Ken v. Drake* (1605), Croke Jac. 85, 79 E.R. 72.

But the court held it to be all one. Wherefore, it was adjudged accordingly.

Note: The principal case was afterward affirmed in a writ of error.

This was the first case wherein Sir Lawrence Tanfield, being before a Justice of the King's Bench and the same day made the Chief Baron of the Exchequer, being the last day of the term, spoke. And it was adjudged by the opinion of all the court.

Lincoln's Inn MS. Maynard 21, f. 124v, pl. 2

In the case of Stowell and Taylor, it seemed that a brewer is a trade within the Statute 5 Eliz.,<sup>1</sup> that none can exercise it without being apprenticed to it notwithstanding that it be out of the corporation. And thus it was adjudged in the Exchequer [for the] plaintiff and affirmed in error.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 7.]

8

**Rex v. Twine**  
(Ex. 1607)

*The Crown can assign a chose in action, but a common person cannot.*

Croke Jac. 179, 79 E.R. 156

Upon a demurrer, the case was that one George York recovered against John Allen £4000 damages in an action on the case. Afterwards, George York, being outlawed in a personal action, died. And Queen Elizabeth, in the 34th year of her reign [1591 x 1592], reciting that he was outlawed and dead, granted all his goods, chattels, and debts to Francis Anger to the use of Mary York. Afterwards, Francis Anger, by deed, assigned that debt and judgment to Christopher Twine. And, notwithstanding, a [writ of] extent issued in the king's name to extend all the lands which the said John Allen had at the time

---

<sup>1</sup> Stat. 5 Eliz. I, c. 4 (SR, IV, 414-422).

of the judgment. And the lands in the possession of Thomas Twine, which he purchased after the judgment, were extended. Thereupon, he, as terre tenant, pleaded against this extent to be discharged thereof, it being upon an assignment made 34 Eliz. by the queen, whereas, by the assignment made by Anger to Twine, he is chargeable to him only, and not to the king. It was thereupon demurred and argued divers times in the Exchequer.

The principal question was whether, after the assignment of this debt by Queen Elizabeth, the king may extend in his own name for the benefit of the patentee and the patentee thereby have the suit in the king's name.

And all the barons, after the argument at the bar, resolved that, as the king's grant of a thing in action is good enough, so this debt, which is forfeited to the king by the outlawry of York, is well granted. And the grantee may have the benefit to levy this debt by an action in his own name or by an extent in the king's name, although he has not any words in his grant to sue it in the name of the king, as is usual in such cases. But the assignment over of this debt by Francis Anger, the king's patentee, to Christopher Twine is merely void, for there cannot by law be any assignment made by a common person of this debt.

It was, therefore, adjudged that the plea was ill and no cause of discharge and that the land should remain in extent for the king.

*Vide* 4 Hen. VIII, Dyer, fol. 1 and fol. 30, Breton's Case; 39 Hen. VI, pl. 26.<sup>1</sup>

[Related cases: York and Allen's Case (1607), Lane 20, 145 E.R. 265.]

9

**Roswell v. Vaughan**

(Ex. 1607)

*An action for deceit does not lie against a seller who did not own the thing sold unless he expressly warranted that he was the owner. Caveat emptor.*

---

<sup>1</sup> *Note* (1512), 1 Dyer 1, 73 E.R. 2; *Brevertton's Case* (1537), 1 Dyer 30, 73 E.R. 67; *Walwin v. Brown* (1460), YB Mich. 39 Hen. VI, f. 26, pl. 36.



Action on the case in the nature of deceit [was brought] whereas, on the ninth of June 35 Eliz. [1593], Queen Elizabeth was seised in fee of the advowson of the vicarage of Southstoke, whereto the tithes in Southstoke appertained, to which vicarage, the defendant, on the ninth of June 35 Eliz., affirmed that he was the lawful incumbent and had the right to the tithes from the death of Thomas Vaughan, the incumbent, whereupon the plaintiff, 16th June 35 Eliz., having communication with the defendant about his buying of the defendant the tithes appertaining to the said vicarage after the death of the said Thomas Vaughan, who died 16th April, 35 Eliz. [1593], until Michaelmas following, that the defendant *adtunc sciens* that he had not any right or interest to the tithes, whereas he never was instituted and inducted, but that they appertained to Evan Thomas, sold them to the plaintiff for £30 *false et deceptiva*. And he alleges *in facto* that Evan Thomas was presented, admitted, instituted, and inducted to that vicarage on the last day of August 35 Eliz. [1593] and took the tithes and so the plaintiff lost them.

The defendant pleads not guilty. And [it was] found against him. And it was now moved in arrest of judgment that the action lay not, for an action in the nature of deceit lies not where one sells a thing which he has not any property in and although he took upon him in discourse that he was the owner and had a right to sell, unless he warrants that the other should enjoy it accordingly, which warranty ought to be at the time of the sale, it is not good. But here is not any warranty nor affirmance at the time of the sale that he had any right or title to sell, for his affirmance that he was vicar and had a right to sell was upon the ninth of June and the sale was the 16th of June after. And in proof hereof, he relied upon 5 Hen. VII, pl. 41; 9 Hen. VII, pl. 21; and *Chandler v. Lopus*, *ante*, 4.<sup>1</sup>

TANFIELD, Chief Baron, and ALTHAM, were of that opinion.

But, if a man sell victuals which is corrupt without a warranty, an action lies because it is against the commonwealth, as 9 Hen. VI, pl. 53; 7 Hen. IV,

---

<sup>1</sup> YB Trin. 5 Hen. VII, f. 41, pl. 6 (1490); YB Hil. 9 Hen. VII, f. 21, pl. 21 (1494); *Chandolor v. Lopus* (1603), Croke Jac. 4, 79 E.R. 3.

pl. 15; and 11 Edw. IV, pl. 6.<sup>1</sup> And although the Book of Assise, 42 Ass., pl. 8,<sup>2</sup> was objected, where one took goods from another and sold them and the owner retook them, that an action upon the case was brought in the nature of deceit for this falsity in sale without any warranty, TANFIELD thereto answered that the said book is not adjudged, but the party admits it and takes issue. Yet, if it were allowed to be law, it is because he there had possession by tort and so had color in show to be owner, and he was deceived by buying of him who had only gained a tortious possession. And, although he had not any right, yet everyone took cognizance of him as owner, and he himself knew that he was not the right owner, which is the reason that the action was maintainable. But here, he had not any possession, and it is no more than if one should sell lands wherein another is in possession or a horse whereof another is possessed without a covenant or warranty for the enjoyment; it is at the peril of him who buys, and [it is] not reason [that] he should have an action by the law, where he did not provide for himself, wherefore, it was adjudged for the defendant.

10

**Murray's Case**  
(Ex. 1608)

*The court will not take judicial notice of a criminal conviction, but it must be proved by the record of the court.*

Lincoln's Inn MS. Maynard 21, f. 119, pl. 1

In the case of Sir Patrick Murrey, a Scot, it was held by the barons where it was found by an inquisition taken 5 Jac. that one Gooden was indicted and attainted of treason because he was reconciled to the Pope against the

---

<sup>1</sup> YB Mich. 9 Hen. VI, f. 53, pl. 37 (1430); YB Pas. 7 Hen. IV, ff. 14, 15, pl. 19 (1406); YB Trin. 11 Edw. IV, f. 6, pl. 10 (1471).

<sup>2</sup> YB 42 Edw. III, Lib. Ass., f. 259, pl. 8 (1368).

[Statute] 13 Eliz.<sup>1</sup> And this offense was supposed to be done 15 Eliz. And it was prayed to be to have the possession for the king because the king is here entitled by double matter of record. But it was denied by the whole court because the king will not be said to be entitled by a double matter of record except that they have the record of the attainder before them and here there is nothing except a single record of the inquisition that can be found unknown to the party and yet, in such a case, he will not be ever put out of possession of land or goods but process will be awarded against him to make a defense.

And it was held that the indictment here being taken before justices of the peace in the County of Surrey was void and *coram non iudice* because it was not within the year after the offense done and thus the ensuing outlawry upon it will be avoided by a plea.

And TANFIELD said that, if there was such an attainder, they should make the record to be sent to them out of the King's Bench or they will not ever put the party out of possession.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 1.]

## 11

### **Anonymous** (Ex. 1608)

*The provisoes in a patent of denization are not conditions, but they are only explanations of the intentions of the king, and, therefore, any offense against them does not revoke his denization nor his power to make a will.*

*A merchant of London who marries an alien forfeits his freedom of the City.*

Lincoln's Inn MS. Maynard 21, f. 119, pl. 3

Upon a trial in an information of intrusion of lands in Kent that belonged to one Verselyne, a Venetian, who was made a denizen in 19 Eliz. and afterwards had purchased lands and, by his will, devised it to his daughters and the son pretended that, by reason of the proviso that was always

---

<sup>1</sup> Stat. 13 Eliz. I, c. 2 (SR, IV, 528-531).

in the patent of denization, *viz. quod faciat homagium, ligeum nobis et quod teneatur* and he will be obedient to all statutes made and to be made and that he will pay scot and lott and custom etc., that Versilyne had forfeited his denization because he kept journeymen foreigners contrary to the Statute 14 Hen. VIII<sup>1</sup> and this was found by an office.

But it was held clearly *per totam curiam* that the provisoes in such a patent are not conditions but they are only explanations of the intentions of the king, for which the jury gave a verdict against the king. And there it was certified by a clerk of the Chancery that a man cannot have a patent of denization before he takes an oath to be a liege man to the king because, *quando* the suit is granted, then a docket is made and it is sworn before a master of the Chancery and then it is signed by the Lord Chancellor and then he has his patent, but no record is made of his oath but only the master writes upon the docket *jurat*. And it was said that, if a merchant of London marries with an alien, he forfeits his freedom [of the City].

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 1; British Library MS. Add. 25207, f. 3v, pl. 2.]

12

**Topley v. Quarles**  
(Ex. 1608)

*The Crown can be an assignee of a chose in action.*

Lincoln's Inn MS. Maynard 21, f. 122 bis, pl. 1

In the case of Topley and Quarles upon an assignment, it was held that, by the course of the court, one, who is not a debtor to the king nor have any privilege, can assign a debt to the king in satisfaction of a debt of any other who is in debt to the king and, judgment be once given upon an assignment, the assignment cannot ever be revoked after if it not be by the assent of the parties notwithstanding that, at first, sufficient matter can be shown to have

---

<sup>1</sup> Stat. 14 & 15 Hen. VIII, c. 2 (SR, III, 208-209).

rejected the assignment because, being a chose in action at first, now *transit in rem judicatum*.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 5; British Library MS. Add. 25207, f. 4, pl. 3.]

13

**Rex v. Halsey**  
(Ex. 1608)

*Where a recusant conveys his land in trust in order to defraud the Crown of the statutory penalties, the remedy for the Crown lies in equity not in common law.*

Lincoln's Inn MS. Maynard 21, f. 122 bis, pl. 2

Michaelmas term 6 Jac. 1608.

In the Case of Halsey, a recusant, the case was that one Cockes and Grove, who was clerk to Seabright of London, purchased land of J.S. and it was found by an inquisition and that it was with the money of Halsey and to his use and that it was by fraud to defraud the king. And an order was made that Cocke and Grove should bring in the evidences into court.

And [it was] moved by *Walter* that the matter found by the jury cannot entitle the king because it is not any fraud that is remediable by common law or statute law and whether the king is not entitled to the inheritance but only to have a [writ of] extent.

And TANFIELD thought that this matter cannot avail for the king upon the inquisition according to the common law, but it must be by an English bill.

Upon this Mr. Attorney [General *Hobart*] said that he would have a bill tomorrow. *Sed interim*, an order was made that the evidences should be brought into court, which no one said they had seen<sup>1</sup> without a special order of court.

---

<sup>1</sup> eux veyer *MS*.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 5.]

[Other reports of this case: Lane 104, 145 E.R. 335.]

14

**Case of the Town of Fowey**

(Ex. 1608)

*One cannot prescribe in the non-paying of prisage or any other royal revenue that is an inheritance in the Crown.*

Lincoln's Inn MS. Maynard 21, f. 122v, pl. 1

Upon the motion of *Prideaux*, for the Town of Foy in Cornwall, upon which a charge was imposed for prisage wines, and he said that they never pay prisage.

But TANFIELD said that they cannot prescribe in non-paying of prisage because it is an inheritance in the crown and due as well as any other revenue. And he said that he had seen a record of 17 Ric. II, where one prescribed to pay only one tun of thirty for prisage and it was adjudged against him upon a demurrer because, by the law of prisage, it is of the tenth tun one and two of twenty tuns.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 5; British Library MS. Add. 25207, f. 7v, pl. 3.]

15

**Note**

(Ex. 1608)

*Upon writs of error to the Court of Exchequer, the appellate judges tax greater costs for assignments of error that were asserted purely in order to delay the proceedings.*

Lincoln's Inn MS. Maynard 21, f. 122v, pl. 2

Note the order is upon a writ of error [to the Court of Exchequer] brought in the [Court of] Exchequer Chamber, first, to lay the writ of error engrossed in parchment and that it is read in court upon the motion of counsel and then errors are assigned and delivered in in parchment, which being read, the counsellor should move for [a writ of] *scire facias ad audiendum errores* and, after the defendant has pleaded to the errors, then to move the Lord [Chancellor] to refer it to the judges, who are assistants, *viz.* the two chief justices and, at this day, the Lord Chancellor moves the chief justices that they will certify which errors are colorable, which not and only for delay to the intent that they can tax the greater costs upon them.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 5v.]

16

**Dawkins v. Yardley**  
(Ex. 1608)

*Where a jury gives court costs for part of the case, the court will tax costs for the entire case.*

Lincoln's Inn MS. Maynard 21, f. 122v, pl. 3

In the case of Dawkins against Yardeley, in which I was of counsel, Dawkins brought an action of trover against Yardley for divers haircloths and sackcloths. The defendant pleaded that he bought them in London, being a market [overt], upon which issue was joined that he did not buy the goods aforesaid. And [it was] found that he bought some of them and not the others, *et si super totam materiam* it is not by law such a purchase for them only as the defendant had pleaded, then they found for the plaintiff for all and assess damages and costs, and, if it be such a bargain for them, then they found for the plaintiff for the residue and assessed damages. And there in the note of the verdict there was no mention of the costs, upon which I attended here the Chief Baron [TANFIELD] because Haines would not allow it to be entered with costs.

And the Chief Baron overruled it. But if no costs at all had been taxed by the jurors, he said that he would not insert [them], but inasmuch as they have taxed costs upon the first part of the verdict, it sufficed for all.

And at first, I moved the court that the defendant could be forced to plead the general issue because, by the purchase in a market overt, he had ownership of them.

And thus was the opinion of TANFIELD, but the other [barons] overruled it against him.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 5v.]

17

**Davenport's Case**  
(Ex. 1608)

*Upon a conviction of recusancy, all of the recusant's goods which he had at the time of conviction are forfeited to the king absolutely except those which are employed upon the third part of the recusant's land that are saved to him by the Statute.*

*Where there is a dispute over a seizure of recusant's goods and lands, the court alone will appoint the commissioners to hear the evidence.*

Lincoln's Inn MS. Maynard 21, ff. 123v, 124

In the Case of Davenport, to whom the king had granted £1200 of the goods of recusants, it was said that the course of the court is that, where the two parts of the lands of the recusants are seized and the third part is allowed to him, that he does not forfeit his goods [ . . . ] his stock employed upon the said third part because it will be in vain that he will have the third part of his land for maintenance if he cannot have goods and stock to occupy it. But it was said that all the goods which he had at the time of conviction are forfeited to the king absolutely but those which are employed upon the said third part, which are forfeited by the intent of the Statute.<sup>1</sup> (Note.)

---

<sup>1</sup> Stat. 3 Jac. I, c. 4 (SR, IV, 1071-1077).



In the Case of Davenport, *supra*, the Chief Baron [TANFIELD] said that the Lord Treasurer and all the barons have taken an order that, upon all such suits obtained of the king of the other nature whatever, the patentees will not have a commission but that the commissioners will be named by the court, who will be the justices of the peace or such sufficient men of the Chancery because they used to name those who are interested in the cause for the commissioners.

And the court took order in this case that, inasmuch as it appeared that the agents of Davenport have seized the goods of those who were not recusants and also sold them at under values, that they were [to make] restitution before any other tally of reward be struck for him and that he will be examined upon oath and as well of moneys he had levied.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, ff. 6, 6v; British Library MS. Add. 25207, f. 5, pl. 1.]

## 18

### **Anonymous** (Ex. 1608)

*Upon an information for the king for custom, the informer cannot have a commission to examine witnesses without a special order of the court for it.*

Lincoln's Inn MS. Maynard 21, f. 124, pl. 1

Upon an information for the king for custom, the informer can examine witnesses in court at his pleasure, but he cannot have a commission to examine witnesses without a special order of the court for it. And in such a commission, the defendant cannot join to examine witnesses against the king.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 6v; British Library MS. Add. 25207, f. 5, pl. 2.]

19

**Barron v. Boell**

(Ex. 1608)

*Selling apples and plums is not covered by the Statute against engrossing.*

Lincoln's Inn MS. Maynard 21, f. 124v, pl. 3

In an information for Barron against Boell for the engrossing of apples contrary to the Statute of 5 Edw. VI,<sup>1</sup> it seemed that apples and plums are not victuals within the Statute because they are things more of pleasure than of necessity.

And COKE said that, inasmuch as it cannot appear that any such information had been brought upon this Statute, that is a good argument that it is not within the Statute, and however the Statute of 2 Edw. VI<sup>2</sup> names costermongers and fruiterers and speaks of selling of their victuals and thus this was adjudged in the Exchequer and affirmed in [a writ of] error.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 7; British Library MS. Add. 25207, f. 5, pl. 3.]

19a

**Raleigh v. Vicar of Gillingham**

(Ex. 1609)

*The king does not pay tithes of his demesne lands unless there is a custom for them.*

*Lessees of the king for years or for life, but not tenants at will, pay tithes.*

2 Gwillim 491, 1 Eagle & Younge 393, 117 Selden Soc. 362

Easter 7 Jac., in the Exchequer, Sir Carew Rawleigh against the vicar of Gillingham.

---

<sup>1</sup> Stat. 5 & 6 Edw. VI, c. 14 (SR, IV, 148-150).

<sup>2</sup> Stat. 2 & 3 Edw. VI, c. 15 (SR, IV, 58-59).

The case was thus. The vicar libeled against the keeper of the forest of Gillingham for tithes of beasts agisted within the forest of Gillingham. And, upon a surmise made of the special matter and of the payment of 8s. by the year in satisfaction of all manner of tithes, a [writ of] prohibition was granted.

And it was resolved that the king was not to pay tithes for any part of his demesnes, except they have used to pay tithes of the same land. And a judgment in 31 Eliz. was cited to be accordingly. And the beasts being agisted whilst the forest was in the hands of the king, no tithes are to be paid of it. But, of beasts commoning in the chase of the king, tithes shall be paid, and farmers of the king for life or for years shall pay tithes, but not tenants at will of the demesnes of the king.

## 20

### **Attorney General v. Fletcher** (Ex. 1609)

*An error in a writ of venire facias is cured by a verdict in the case.*

Lincoln's Inn MS. Maynard 21, f. 120, pl. 3

An information [was filed] for prisage wines against one Fletcher, and, upon a [plea of] not guilty, it was found against the defendant. And [it was] moved in arrest of judgment by *Walter* that, in the [writ of] *venire facias*, these words '*et habeas tunc ibi nominas juratorum*' were omitted and thus the *venire facias* [was] returned without a warrant.

But it was not allowed after the verdict because [it was] only [a matter of] form because the writ of *venire facias* is a warrant to the sheriff to return the jury.

Another matter was that the information supposes that the ship came into the Port of London, *viz. in parochia de St. D. et warda de C.* so that the parish and the ward are alleged as two distinct places and the *venire* was only of the parish. But [it was] thought that it was good enough because it will be intended that the parish is within the ward.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 2.]

**Gage's Case**  
(Ex. 1609)

*A judgment upon an information of intrusion against several defendants is several and not joint.*

Lincoln's Inn MS. Maynard 21, f. 120v, pl. 1

In the case of Gage, it was ruled that, where, upon an information of intrusion against A. and B., A. is found guilty and B. not guilty and judgment was given against A., it was held that no injunction will issue against B. to put him out of possession, but the injunction will be granted to put the king in possession, as a writ of extent is at common law. And if any other [person] interrupt the possession of the king afterwards, then he will proceed against him. And it is not similar to an injunction upon an English bill, which is against the defendants and all claims under them, but, upon an information, it is otherwise.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 2v.]

**Hawkins v. Anonymous**  
(Ex. 1609)

*A condemnation and judgment of goods forfeited as wrongfully imported is res judicata as to the ownership of the goods.*

Lincoln's Inn MS. Maynard 21, f. 120v, pl. 2

Upon a seizure made of Venice glass brought in by one Faukener, which were seized as goods prohibited and thus forfeited, the course of the court is that, if, upon an information made and [on] the day given no one comes in to claim the goods, they will be condemned and judgment will be for the

king. And after such judgment, Hawkins brought an action upon trover and conversion in the Office of Pleas against them that seized.

But the court would not allow him to proceed by such means to call in question the judgment of the court.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 2v.]

## 23

### **Bates' Case** (Ex. 1609)

*A protection against suit does not protect against a suit on behalf of the Crown without a special provision.*

Lincoln's Inn MS. Maynard 21, f. 121, pl. 1

In the case of one Bates, process was awarded against him for a debt of the king. And he pleaded the protection of the king that the king had granted to him for a year that he will not be molested nor attached nor sued etc. for any debt.

But the barons held that those general words do not serve to privilege him against the king himself because it did not have the words *licet nos tangat*.

And TANFIELD cited the Case of 33 Eliz., that one who lived in the Cinque Ports was elected Sheriff of Somerset and he refused to take the office upon himself by reason of the privileges of the Cinque Ports, which charter is with very large words that they will not be drawn out of the Cinque Ports because their attendance is necessary there, but it was refused by all of the justices that, inasmuch as there were not the words *licet nos tangat*, he will not be discharged from this office which concerned the king in so high a degree.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 2v.]

[Earlier proceedings of this case are reported at Lane 22, 145 E.R. 267.]

**Mott v. Semayne**  
(Ex. 1609)

*Bills of exchange cannot be assigned to the Crown.*

*Bills of exchange can be enforced by actions of case but not by actions of debt.*

Lincoln's Inn MS. Maynard 21, f. 121, pl. 2

In the case there between Mott and Semayne, the court held that bills of exchange which are made between merchants cannot be assigned to the king because they are not specialties because they are not used to be under seal but only subscribed, as Baron ALTHAM said. And he said that [an action of] debt does not lie upon such bills, but an action upon the case only.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 3; British Library MS. Add. 25207, f. 6v.]

**Parry v. Dale**  
(Ex. 1609)

*A court will not hear evidence that should be presented at the trial at an assize.*

Lincoln's Inn MS. Maynard 21, f. 121v, pl. 1

Between Parry and Dale in an action upon the case for words, it was moved for Mr. Parry that the matter was to be tried at the Assizes and Sir Thomas Smith, who was the principal witness for the plaintiff, was ill and also one of the clerks of the counsel and inasmuch as he could not be at the Assizes, thus to have him examined before one of the barons.

But it was absolutely denied and [held] that it was not ever seen but for the king.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 3; British Library MS. Add. 25207, f. 7, pl. 1.]

26

**Master of the Savoy v. Worcester**  
(Ex. 1609)

*The Court of Exchequer will not enjoin a suit in the Court of Chancery, but the remedy against such a suit lies in the Court of Chancery itself.*

Lincoln's Inn MS. Maynard 21, f. 121v, pl. 2

In the case between the Master of the Savoy and Worcester, [it was] moved that, for the same land that was decreed in this court against Worcester, he had now exhibited a bill in Chancery, and, on account of this, an injunction was prayed.

But it would not be granted because it has not been seen that they have enjoined the Chancellor.

And then it was prayed to have it against the party only.

But it was denied, but he must move it in [the Court of] Chancery, and the Lord Chancellor will dismiss it.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 3; British Library MS. Add. 25207, f. 7v, pl. 2.]

27

**Rex v. Reade**  
(Ex. 1609)

*Where a juror is withdrawn and a mistrial is declared, the new trial must be before the same jury.*

Lincoln's Inn MS. Maynard 21, ff. 121v, 127v

Between the king and Sir William Reade, when the jury came to the bar to give their verdict, Mr. Attorney [General *Hobart*] for the king caused a juror to be withdrawn.

And now, I moved to examine witnesses for the king, and it was granted, but so that we deliver in their names and examine before one of the court.

And SNIGGE [ordered] that we not pray to try the same issue again, but to plead *de novo*.

In the case between the king and Sir William Read, where the Attorney [General] of the king withdrew a juror and now, would he try it, it must be by the first jury because the jury is not discharged unless it be that a new action could be brought and thus a new pleading, but it was upon a charge that could not be made *de novo* and some of the jurors who have made default before now appeared, and they were sworn.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, ff. 3, 9.]

28

### **Rich v. Penrin**

(Ex. 1609)

*In an action for defamation for being called a bankrupt, the plaintiff must prove that he was a merchant in his case in chief.*

Lincoln's Inn MS. Maynard 21, f. 122

Between Rich and Penrin in an action upon the case for calling [him a] bankrupt, not guilty was pleaded.

Inasmuch as the plaintiff cannot prove at the time of the speaking of the words that he was a merchant or used the trade of buying and selling, by the direction of the Chief Baron [TANFIELD], the jury found against the plaintiff, notwithstanding that the defendant made no defense, but the matter was moved only by *Bayly*, the attorney.



[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 3v; British Library MS. Add. 25207, f. 7, pl. 3.]

29

**Attorney General v. Raleigh**  
(Ex. 1609)

*After an attainder for treason, any devise by the person attainted is a fraudulent conveyance and can be set aside.*

*An infant defendant does not put in his answer under oath.*

Hardres 498, 145 E.R. 566

Queen Elizabeth purchased a lease for years and gave it to Sir Walter Rawleigh [1554-1618],<sup>1</sup> and, afterwards, she purchased the fee and intended to give it to Sir Walter likewise, who, to prevent a merger, assigned over the term to his son, then a child of six years of age. Afterwards, the queen conveyed the fee to Sir Walter, who settled it upon his son. But the conveyance was void in law. Afterwards, in 1 Jac. [1603], Sir Walter was attainted of treason,<sup>2</sup> and then he granted over all his goods and chattels in trust for himself and then made a lease of his lands for 99 years, if he should so long live, in trust for himself.

And it was adjudged that the lease *supra* was forfeited, though assigned to his son, because there was fraud apparent and he himself took the profits and had surrendered and taken a new lease of the bishop, of whom it was held, and that the king's inheritance was discharged of it, or at least that it should be attendant upon the inheritance that was forfeited.

117 Selden Soc. 364

An English information was exhibited by Mr. Attorney [General] for the king against Sir Walter Raleigh and his son, who was an infant of fifteen

---

<sup>1</sup> M. Nicholls and P. Williams, 'Raleigh, Sir Walter', *Oxford Dictionary of National Biography*, vol. 45, pp. 842-859.

<sup>2</sup> 1 State Trials 211 (F. Hargrave, ed., 1776).

years, and John Shelbury of Lincoln's Inn supposing that they divulged that Sir Walter Raleigh before his attainder had made divers leases of his land *bona fide*, where if any such leases were made, they were made upon trust.

The defendants demurred and showed that the king had granted the lands and all his estate, title, and interest to Sir Robert Carr [d. 1645].

But it was held by the court that this trust, if there was any, was not conveyed nor [is it] extinct, but it is examinable in equity by the king to have his benefit from it. And it was ordered that they should answer to the bill, but the infant should not answer upon his oath, but the court assigned his tutor, who was then present, to be his guardian and so to answer for him without oath.

Eq. Cases Exch., p. 17

Queen Elizabeth, having a lease, assigned it to Sir Walter Raleigh; afterwards, the queen had the inheritance of the same land given to her by an Act of Parliament; after this, Sir Walter Raleigh assigned over this lease in trust for his son, who was seven years of age, and took the profits himself and renewed it with the queen. After this, the queen conveyed the inheritance of the same premisses to Sir Walter Raleigh, and Sir Walter Raleigh conveyed this over to another in trust (but [there] was a defect in the conveyance). And afterwards, Sir Walter Raleigh was attainted for treason. And [it] was adjudged in this court that the inheritance was forfeited to the king and that the assignment of this lease was fraudulent and, in truth, in trust for Sir Walter Raleigh himself and, on account of that, was decreed to be cancelled.

But it is to be observed that it was in a case of treason, and, in such a case, if it was a term in gross, it pertained to the king as a chattel, and, if it attended the inheritance, it pertained to the king, to whom the inheritance was forfeited.

Lane 48, 145 E.R. 289

Sir Walter Raughlie being possessed of a term of 100 years of [ *blank* ], he, having a determination to purchase the reversion in fee of the same land, conveyed his term to his eldest son to the intent it should not be drowned. And, therefore, about 40 Eliz., he purchased the fee, and after[wards] in the year etc. of our king that now is, he committed treason and was attainted.

And it was decreed here that the king should have the land discharged of this lease, *viz.* in possession, and, although no fraud be found in the case, but only it appears by circumstances of witnesses here examined that Sir Walter Raughley took the profits of the land and held courts in his own name until the attainder, yet the said assignment was conceived to be in trust. And, therefore, [it was] decreed to be void against the king as for fraud, although he was convicted of treason a long time after and so the king's title [was] subsequent to the said assignment.

M. Hale, *Pleas of the Crown*, vol. 1, p. 251

Sir Walter Raleigh, being possessed of a long term for years of the manor of Sherburn, intending to obtain the inheritance, assigned this term to his son, an infant, upon pretense for a trust for his son, but really in trust for himself. Sir Walter Raleigh then purchased the inheritance and made a settlement upon his son, but the same was defective, whereby the fee simple remained in Sir Walter. 1 Jac., Sir Walter was attainted of treason, and, afterwards, the king granted all the goods and chattels, real and personal, of Sir Walter to Shelbury and Smith in trust for Sir Walter's wife and children. Sir Walter Raleigh was executed.

And, upon an information in the Exchequer Michaelmas 7 Jac. [1609], it is declared and decreed that the lease was in trust for Sir Walter and, therefore, forfeited by his attainder, as well as if it had continued in him and that it should be cancelled and not incumber the reversion in fee simple, so that, according to this resolution, this trust for Sir Walter was not a chattel, for then it had passed to Shelbury and Smith, but it was a kind of appurtenance to the inheritance and together with it was forfeited by the attainder, the conveyance of the inheritance being defective. And accordingly, at this day, it is held by those that derived under the patent of King James.

[Orders of 13 and 29 May and 1 June 1609: Public Record Office E.124/8, f. 16v, E.124/10, ff. 13, 15.]

**Duke of Lennox's Case**  
(Ex. 1609)

*The questions in this case were whether the crown is entitled to alnage payments and whether an alnager is entitled to any fees.*

2 Brownlow & Goldesborough 301, 123 E.R. 954

In [an action of] trespass, the case was this. The king, by his letters patents, created the duke of Lennox alnager, and he made his deputy. And the duke, by his said letters patents of the king, was to measure all clothes and to have so much for every piece and to search and to view that if it be well and sufficiently made or not. And he made his deputy, who offered to measure, search, and view certain parcels of worsted and demanded the duty due to the alnager for that. And for that, that the owner refused to pay it, he seized certain pieces of worsted and kept them, upon which this action was brought.

And *Haughton*, Serjeant, for the defendant, conceived that the sole question rests upon these letters patent of the king. And for that, he would first consider:

First, if these duties of subsidies and aulnage are due by the common law, and, if they are not due by the common law, then, if they are due by statute law, and, if they be due neither by the common law nor statute law, then, if the king by his letters patents may grant it.

And, to the first, he said that the subsidy is an aid or help. And there are two manners of aid, one which is an inheritance in the king, as an aid to make his son a knight or to marry his daughter, and others which are given by the grant of others, and these are not inheritances in the king and these duties were not demandable by the common law nor by custom. And this appears by the 25 Edw. III, 6,<sup>1</sup> where any prises were demanded which were due by the common law and some which were not due, and a subsidy for wools was not due by the common law, but it was granted to the king and is now due. But this is by a grant and not by the common law. And, in 14 Edw. III, a

---

<sup>1</sup> Stat. 25 Edw. III, stat. 2, c. 6 (SR, I, 313).

Statute<sup>1</sup> was made for the king for his subsidy for wools, what part he should have, which part was given to him in quantity. And in the time of Hen. VI, a Statute was made, by which a subsidy was given to him during his life. And 36 Edw. III,<sup>2</sup> a subsidy was granted for three years, and after[wards, there] should not be any subsidy paid, as appears by 45 Edw. III.<sup>3</sup> And if a subsidy were not due by the common law for wools, then may it be concluded that it was not due for cloths, for wools grow without man's labor. And the 11 Hen. IV and 13 Hen. IV, the king makes a grant of alnage of clothes, and a writ is awarded to the Mayor and sheriffs of London to give possession to the patentee, who return the writ that the office was not granted before his time. And the Statute of 24 Edw. III<sup>4</sup> was the first Statute that gave a profit to the king for clothes.

But he granted that the office of alnager was of ancient times and an ancient office, but it was no office of profit, but an office of justice and right, and no fee was due for the exercising of it, and that of 1 Edw. II was a grant of the office of the alnager; and 11 Hen. IV was a grant of the office of alnager for canvas, but it does not appear by any account that the king had any profit of the alnage itself or upon the said grants, either before or after. And allowing that there were accounts for cloth, yet it does not appear that there were any accounts for worsted. The Statute of 27 Eliz.<sup>5</sup> gives a subsidy of 4d. for every broadcloth, so that the Statute made express mention of broadcloth. But there was not any mention of worsted. And this Statute shall not be taken by equity, though that the Statute of 1 Ric. II, 12,<sup>6</sup> for escapes by the Warden of the Fleet [Prison], being a penal statute, yet for that, that it was for a general mischief, shall be taken by equity, as it appears by Platt's Case in

---

<sup>1</sup> Stat. 14 Edw. III, stat. 2, c. 4 (*SR*, I, 291-292).

<sup>2</sup> Stat. 36 Edw. III, stat. 1, c. 11 (*SR*, I, 374).

<sup>3</sup> Stat. 45 Edw. III, c. 4 (*SR*, I, 393).

<sup>4</sup> Stat. 27 Edw. III, stat. 1, c. 4 (*SR*, I, 330-331).

<sup>5</sup> Stat. 27 Eliz. I, c. 17 (*SR*, IV, 724-725).

<sup>6</sup> Stat. 1 Ric. II, c. 12 (*SR*, II, 4).

the *Commentaries*.<sup>1</sup> So the Statute of 9 Edw. III, cha. 3,<sup>2</sup> provides that, where [an action of] debt is brought against divers executors, that they shall have but one essoin. And the Statute mentions executors only, yet administrators are taken to be within the equity of this Statute, as it appears by 3 Hen. VI. Yet in this case at the bar, the Statute of 27 Eliz. was not for the remedy of a mischief, but is a grant to the king, and a grant of one thing cannot be a grant of another thing, as if the king pardoned an offence, another offence cannot be pardoned by this, as it appears by *The Archbishop of Canterbury's Case*, 2 Coke,<sup>3</sup> where the Statute of 1 Edw. VI,<sup>4</sup> by which divers chantries were granted to the king, it shall be intended a grant within the Statute of 31 Hen. VIII,<sup>5</sup> of monasteries, which was before.

But further, he said that the matter is insufficient to raise a duty to the king, for in vain is the property of anything in one man, if another man may charge it. And, in this case, the king cannot grant these clothes, and for that he cannot charge them. And the letters patents of the king are not sufficient only to charge the goods of any man. See the case of 11 Hen. IV. But he agreed that, if the king grant a ferry and that every passenger shall pay for his passage 4d., this is good, for every man may chose whether he will pass by that or not, and none shall be constrained to pass by that. But a grant of the king to one that none shall bring in any cards into England but the patentee only is void. And it was adjudged in *Nichol's Case*, in 18 Eliz., that, if any man offend in the not repairing of a bridge, the king cannot pardon it, for the subjects of the king have an interest in that.

And further he says that the grant was against an express Statute made in 7 Edw. IV, 1,<sup>6</sup> for this appoints that the alnager shall not take any fee, by which the grant of the said office shall be without a fee. And this grant is with a fee, that is so much for every cloth. He agreed that this is an affirma-

---

<sup>1</sup> *Platt v. Lock* (1550), 1 Plowden 35, 36, 75 E.R. 57, 59.

<sup>2</sup> Stat. 9 Edw. III, stat. 1, c. 3 (*SR*, I, 271).

<sup>3</sup> *Green v. Balseer* (1596), 2 Coke Rep. 46, 76 E.R. 519.

<sup>4</sup> Stat. 1 Edw. VI, c. 14 (*SR*, IV, 24-33).

<sup>5</sup> Stat. 31 Hen. VIII, c. 13 (*SR*, III, 733-739).

<sup>6</sup> Stat. 7 Edw. IV, c. 1 (*SR*, II, 418-421).

tive law, and, for that, it shall not bind the king generally, but when it is for a determination of right or wrong, the king shall be bound by that.

And the patent is grounded upon the Statute of 27 Eliz. or 47 Edw. III, 1,<sup>1</sup> which are made for the breadth of clothes. And here, the patent has not any respect to it, for, if the piece be but of the breadth of a foot, if it be in length according to the Statute, so much shall be paid for that, as if it were a broadcloth, and for that there is not any equity in it that the Statute seems to intend, for the charge ought to be correspondent to the quantity of the cloth, as 41 Edw. III, 16,<sup>2</sup> avowry for distress of sixteen oxen for 9d. rent, and it was adjudged that it was found outrageous, and, therefore, he was amerced for taking of an excessive distress.

And so he demanded judgment for the plaintiff.

*Dodderidge*, the King's Serjeant, [said] that the question is if the alnager may meddle with this new kind of drapery and shall take a fee for that. And it seems to him that he may meddle with all things which consist in measure, weighing, and searching. And he may exercise his office in this for the necessity of merchandise, for the commonwealth cannot consist without commerce and *pecunia est rerum mensura* and provides to make recompense in value for everything, as it is said by Keble, 12 Hen. VII, 24b,<sup>3</sup> and then to reduce all other things in certain, for it is the certain value of money, is known to be a direct means to know the quantity of all other things, and that is by weight and measure, etc. And for this for the necessity of commerce, there ought to be a public officer, who shall have the care and charge that such shall be well and duly made for the profit and benefit of the commonwealth. And this officer is as ancient as there has been any commerce within this realm. And he made illustration thereof by divers rolls of the Exchequer in the time of 2 Hen. IV, by which it appears that then there were marts for cloth and that then there was an officer to measure and see the said clothes opened, for then there was an officer made of the purpose to measure and search the clothes which were sold in a fair at Worcester, by which rolls also it appears that there was an assize of breadth and length of clothes before any statute for that purpose. By the Statute of Magna Charta, made 9 Hen. III, chap.

---

<sup>1</sup> Stat. 27 Eliz. I, c. 17 (*SR*, IV, 724-725); Stat. 47 Edw. III, c. 1 (*SR*, I, 395).

<sup>2</sup> YB Mich. 41 Edw. III, f. 26, pl. 23 (1367).

<sup>3</sup> YB Trin. 12 Hen. VII, ff. 22, 23, pl. 2 (1497).

25,<sup>1</sup> it is provided that *una mensura . . . et una latitudo pannorum tinctorum, russatorum, et haubergettorum*, that is *due ulne infra listas, per totam regnum Angliae*. And in 1 Edw. I, amongst the rolls of the patents, in the Tower [of London], it appears that the office of alnager was granted *de omnibus pannis tam ultra mare quam infra mare*. And [in] 1 Ric. II was another grant of the office of alnager. And in 14 Ric. II, the king granted the office of alnager in Ireland. And by the Statute of 5 Edw. II,<sup>2</sup> it is provided that the estreats by the warden of the alnage should be delivered into the Exchequer to the Treasurer of the Exchequer. And in 17 Edw. II, the office of alnager was granted to one J. Griffin of all the clothes made beyond the sea, until the 1st of Edw. III, by which the use appears in the time of the reign of King Edward III, upon which records he observed that the office of an alnager is an ancient office and that he has the power to see, search, and measure *omnes pannos tam ultra marinos quam infra marinos*, without any exception. And for that, it cannot be denied but that he ought to meddle with woollen clothes and he ought to meddle with all for one self same end and purpose, that is to fasten a seal to them.

Secondly, that, if the law depends upon the art and invention of artists, then no law shall prevent more mischiefs, for there is no end of art and invention.

And thirdly, and that in this *individuo*, for there is not any invention made of worsteds until the time of Edward II, for it was a new commodity and then first invented, and, after it was first invented, there was immediately an officer made for that. And for this, it appears that, [in] 1 Edw. III, Nicholas Shoverler was made general alnager for that and, after that, came wadlowes and sayes, and also an alnager was immediately made for them, by which it appears that, so soon as new stuff was invented by the artist, that there was a new officer to search and see that and prevent that deceit should not be used in it.

And then for the fee of the alnager, that is grounded upon a just law, which is the law of retribution, for *dignus est operarius mercede*. And though it does not appear by their patents that they had taken any fee for the exercising of their said office, yet it appears by their accounts that they have had a fee

---

<sup>1</sup> Stat. 25 Edw. I, Magna Carta, c. 25 (SR, I, 117).

<sup>2</sup> Stat. 5 Edw. II, cc. 4, 8 (SR, I, 158, 159).



for it. And if they have no fee of the king, then it follows that they ought to have a fee of the subject by the common law, the officer being for the public good. And the patent is, upon which the duke shall have the said office, as hitherto they have had it, and it appears by the 11 of Hen. IV, 58, and the 12 of Hen. IV, that the king may grant and annex a fee to a necessary office to be taken of the subjects. But it was objected that the alnager had no fee and, if he had, that he was abridged of that by the Statute of 2 Edw. III, 14,<sup>1</sup> where it is said that they shall be ready to make proof when they should be required to measure without taking anything of the merchant, but this refers only to the mayors and bailiffs of towns, where such clothes shall come, and not to the alnager.

And that the Statute of 11 Edw. III, chapter 3,<sup>2</sup> consists of two parts: first, that clothiers may make cloth of what length and breadth that they will; the second, that no cloth shall be brought into England, Wales, or Scotland, but that which is made in them, and then, if the clothiers have such liberty to make cloth of what length and liberty they will, then there is no need of an alnager. As to that, it was answered that there was need of him to see and search the goodness of that, as well as the length and breadth. And also the Statute of 25 Edw. III, chap. 4,<sup>3</sup> provides that all clothes vendible, which shall be sold whole clothes in England, in whose hands soever they are, shall be measured by the alnager of the king, and the Statute of 27 Edw. III, chap. 4, statute the first,<sup>4</sup> provides that no clothes shall be forfeit, though they be not of the same size, but the alnager of the king shall measure the cloth and mark it with such a mark that a man may know how much that contains. So for these statutes, and for the reasons aforesaid, it appears that it belongs to the office of an alnager to survey, measure, and mark clothes, as well by the common law, as by the statute law.

It was objected, first, that the Statute of 27 Edw. III limits and appoints that the alnager should measure broadcloth and does not make mention of any other clothes but broadclothes, and, for that, it seems that he shall not

---

<sup>1</sup> Stat. 2 Edw. III, c. 14 (*SR*, I, 260).

<sup>2</sup> Stat. 11 Edw. III, cc. 2, 3 (*SR*, I, 280).

<sup>3</sup> Stat. 25 Edw. III, stat. 3, c. 1 (*SR*, I, 314).

<sup>4</sup> Stat. 27 Edw. III, stat. 1, c. 4 (*SR*, I, 330-331).

meddle with any other clothes. But it appears by divers accounts that he should meddle with wadlowes and sayes. And the Statute of 17 Ric. II, chapt. 2,<sup>1</sup> provides that none shall sell any cloth before that it be measured by the alnager of the king and that none shall make any deceit in kerseys.

The second objection that [for] clothes of a lesser size than half broadcloth, the alnager shall take nothing by the Statute of 27 Edw. III. This is intended of broadcloth, which has used to be sold, and these be in length above the broadcloth and in breadth, as kerseys and others were. But as remnants which have not been used to be sold, no subsidy was due by the common law, for that is granted by the Statute of 27 Eliz. And in this grant, two things are to be considered.

First, the Statute of 2 Edw. III and the Statute made at Northampton,<sup>2</sup> where it was petitioned to the Parliament that the king would remit the penalties and the king should have recompense for the loss, and, for this, the Statute gives a subsidy, this was no private gift, but a public gift, and the reason of this was the retribution of his loss, and the king paid for it, and that for this he should have a subsidy.

Secondly, wools are the continual treasure of the realm, and let them be of what nature they will, they are called *panni*. And for that, when the king has a settled inheritance, it is no reason that the flight of an artist should prejudice the king. And it appears by the Statute of 11 Hen. IV, 7,<sup>3</sup> that was made to prevent the barrelling of clothes and the making of them into garments and the transporting of them beyond the sea.

And also the third reason is usage, for all other clothes pay a subsidy, and there is no other law to charge them but the Statute of 27 Edw. III, that this subsidy is settled in the king. And no device of man may divest it. The statutes of 27 Edw. III and 47 Edw. III set down and alter the length and breadth of clothes, and yet the custom remains.

The fifth objection [is] that the Statute does not extend in equity to a thing which is not *in rerum natura* at the time of the making of the Statute, which is a false position. For how can makers of statutes prevent all mischiefs?

---

<sup>1</sup> Stat. 17 Ric. II, c. 2 (*SR*, II, 88).

<sup>2</sup> Stat. 2 Edw. III, c. 14 (*SR*, I, 260).

<sup>3</sup> Stat. 11 Hen. IV, c. 7 (*SR*, II, 165).

Eaton and Studde's Case, Com.;<sup>1</sup> Aristotle in *Ethicks*, liber 5, chap. 10, says that *aequitas est correctio legis generatim late, qua parte deficit*. And Bracton, in his first book of the new division, ch. 3,<sup>2</sup> says that *aequitas est rerum convenientia quae in paribus causis paria desiderat jura et omnia bene coaequiparet et dicitur aequitas quasi aequalitas*. And, for that, it is enacted by the Statute of 11 Edw. I, Acton Burnell,<sup>3</sup> for the understanding of the Statute, that, if prisers of goods prise them at too high a value, that they themselves shall have them at the same price at which they were prised. And after[wards], another Statute is made, which provides that lands shall be extended upon a statute, which is taken to be within the Statute of Acton Burnell, which was made before. And so it appears by Littleton that the Statute of Gloucester<sup>4</sup> provides that a warranty by a tenant by the curtesy shall not bind the heir without assets and an estate tail was not then created, but it was afterwards created by the Statute of Westminster II, which was made the 13 of Edw. II.<sup>5</sup> Yet this warranty shall not bind the heir in tail.

And also two objections have been made against the patent, first, that it was against an express statute; secondly, that it did not observe any rate or proportion proportionable to the quantity of the piece.

To that he answered that it is not against any statute. See 7 Edw. IV, 2; 27 Hen. VII; 5 Hen. VIII, 2; 1 & 2 Phil. & Mary.<sup>6</sup> It is not against any of those, for those provide and ordain that there shall be wardens for the better performance of all things which are to be done by the alnager and do not deprive the king of anything given to him by any former statute, but add further care and diligence. And, when there is a law which adds care and manner and form to a former law, that does not abridge and deprive the former law of anything given by that. And, if the wardens do not do their office, yet that cannot prevent but that the alnager may do that which

---

<sup>1</sup> *Eyston v. Studd* (1574), 2 Plowden 459, 75 E.R. 688.

<sup>2</sup> *Bracton on the Laws and Customs of England* (S. E. Thorne, ed., 1968), vol. 2, p. 25.

<sup>3</sup> Stat. 11 Edw. I (*SR*, I, 53-54).

<sup>4</sup> Stat. 6 Edw. I, c. 3 (*SR*, I, 47).

<sup>5</sup> Stat. 13 Edw. I, Westminster II, c. 1 (*SR*, I, 71-72).

<sup>6</sup> Stat. 7 Edw. IV, c. 2 (*SR*, II, 421-422); Stat. 5 Hen. VIII, c. 2 (*SR*, III, 93); Stat. 1 & 2 Phil. & Mar., c. 14 (*SR*, IV, 260-261).

to him belongs, as in 1 Edw. IV, 2, for indentures taken in sheriffs' tourns, which should be delivered by indenture to the justices, yet the justices may proceed, though they be not delivered by indenture. And so it is in 43 Edw. III, 11, the sheriff ought to array his panel four days before the taking of that, and it was adjudged that, if he does not, it shall be no error, in 43 Edw. III, Assize, 22.<sup>1</sup> And so the Statute of 5 & 6 of Edw. VI<sup>2</sup> provides that the mayor appoints two viewers and searchers; this does not abridge the power of the alnager, for this is but an addition of greater care and diligence. And, by the Statutes of 39 and 43 Eliz.,<sup>3</sup> if, upon a search, they find any forfeiture, they shall have it, but, if they do not find, the alnager may find it, and then the king shall have it.

And, to the second, he answered, that true it is for every 64 of clothes, the alnager ought to have 4d. for his fee and, though that some pieces of cloth are more broad than others, yet the labor of the alnager to measure them is all one.

So he concluded and demanded judgment for the plaintiff.

## 31

### **Stocker's Case** (Ex. 1609)

*A judgment upon an information of intrusion is res judicata as to the title to the land in issue.*

Lincoln's Inn MS. Maynard 21, f. 126, pl. 1

Upon an information of intrusion *ex relatione* Clerke against Stocker for lands in Hertfordshire where the verdict passed for the king upon a misstating in pleading and judgment [was] given and, afterwards, Stocker entered and made a lease in order to try the title, it was held by the Lord Chief Baron

---

<sup>1</sup> YB 43 Edw. III, Lib. Ass., f. 273, pl. 22 (1369).

<sup>2</sup> Stat. 5 & 6 Edw. VI, c. 6, s. 14 (SR, IV, 139).

<sup>3</sup> Stat. 39 Eliz. I, c. 20 (SR, IV, 920-923); Stat. 43 Eliz. I, c. 10 (SR, IV, 975-977).

[TANFIELD] and the court, Altham absent, that, in such a case, he should have a petition to the king and *ex gratia* to be allowed to sue or otherwise he could not because the information is as well in the nature of real action as of a personal estate.

And TANFIELD cited the Case of Sir John Parrott, where, upon an information, judgment was given for the fault in pleading because it was [ . . . ] feoffment but he said *inde et tamen* was not sufficient to try the matter again.

*Hitchcock* [was] of counsel.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 8.]

32

**Attorney General, *ex rel.* Bere v. Trollope**  
(Ex. 1609)

*Upon an information of intrusion, where the defendant is in default, the court alone names the commissioners who are to find the amount of the damages.*

Lincoln's Inn MS. Maynard 21, f. 126, pl. 2

In the case of an information of intrusion *ex relatione* Mr. Bere against Trollope and Troppelope, judgment was given against them upon *nihil dicit*, upon which a commission issued

to inquire of the value, which was returned etc., that, in such commission, the party, by the course of the court, as it seemed, cannot join but the court names the commissioners solely for the king. But, if the value be found in too high [a value], it seems that they can award a new commission *ad informandum conscientiam* so that a reasonable value be answered for the mesne profits.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 8.]

**Bayly v. Harvey**  
(Ex. 1609)

*Where a debt is assigned but not recovered, a later execution of the same debt by a person without notice of the assignment is valid.*

Lincoln's Inn MS. Maynard 21, f. 126, pl. 3

In the case of Bayly and Thomas Harvey moved by *Boone* that, if one of the farmers assigns a debt that J.S. owes to him and afterwards J.D. recovers the debt against J.S. *bona fide* and has execution, that this [is] good and will not be avoided by the assignment. But, because an English information was exhibited by Mr. Attorney [General] that supposing it to be by fraud, he moved, inasmuch as no relator is named, the person who in fact prosecutes it can be bound to pay costs if he loses.

But the court said that they will take an order for it upon the hearing.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 8.]

**Note**  
(Ex. 1609)

*Debts due to the Crown have priority over debts of the same debtor due to private persons.*

Lincoln's Inn MS. Maynard 21, f. 126v, pl. 1

It is the usual course of the court if one be in debt to the subject *licet* [?] be by a judgment and he is also in debt to the king to award a writ of prerogative in the nature of an injunction, but it should not be so [and] command him that he not sue for his debt until the king be satisfied.

And it was said by *Babbe* that, by the course of the court, if the defendant in an information pleads a deed and, of the part of the king, it is prayed that it be entered, that this will be entered at the costs of the defendant, which is contrary to the course in other courts.

But query, if a relator, if he will not pay the charge, it seems he can.

The Chief Baron [TANFIELD] said that it will be always at the cost of him who pleads it because it is part of his plea.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 8.]

## 35

### **Taylor v. Hodgson**

(Ex. 1609)

*A person who buys corn to sell without a license is an engrosser.*

Lincoln's Inn MS. Maynard 21, f. 127, pl. 2

Upon a trial before the Chief Baron [TANFIELD] between Taylor and Hodgson upon an information of engrossing of corn, it was held by him that a man cannot sell corn to transport without a license notwithstanding that it be of such a price by which the Statute<sup>1</sup> gives liberty, and, if he purchases without a license, he will be an engrosser.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 8v; British Library MS. Add. 25207, f. 9, pl. 1.]

---

<sup>1</sup> Stat. 5 & 6 Edw. VI, c. 14 (SR, IV, 148-150).

**Fayne's Case**  
(Ex. 1609)

*A power given to the barons of the Exchequer to take assignments cannot be deputed to others.*

Lincoln's Inn MS. Maynard 21, f. 127, pl. 3

It was said that, the barons [of the Exchequer] having a commission to take assignments of debts to the king, they cannot grant a commission to another to take because they have only the power by the commission which they cannot depute to another. So, however, Baron HERNE said that such a commission can be awarded. And this was in the case of Mr. Faynes of the Custom House.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 8v; British Library MS. Add. 25207, f. 9, pl. 2.]

**Gargrave's Case**  
(Ex. 1609)

*A sheriff is not liable for the misdemeanors of his under sheriff.*

Lincoln's Inn MS. Maynard 21, f. 127v, pl. 1

It was moved in the case of Sir Richard Gargrave that his under sheriff had forged divers [writs of] process of this court, and, by color of it, he had levied divers sums of money and, now, he cannot be found, for which he prayed [a writ of] process against Sir Richard Gargrave.

But the court denied it because he will not be charged to answer for the misdemeanors of his servant.



[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 9; British Library MS. Add. 25207, f. 9, pl. 3.]

38

**Barker's Case**  
(Ex. 1609)

*A recusant who pays the monetary penalties will not have his land distrained.*

Lincoln's Inn MS. Maynard 21, f. 127v, pl. 2

In the Case of Barker, it was moved by *Knaplocke*, who also moved in the last case,<sup>1</sup> that Barker being a recusant convict and a lease made of his lands, they were distrained for the 12d. for each Sunday upon the Statute of 1 El.<sup>2</sup>

But it was held that he will not be charged with it by the intent of the Statute because it is intended only of negligent recusants and not of those who paid great penalties.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 9.]

39

**Jones's Case**  
(Ex. 1609)

*Lands that are forfeited to the Crown for treason are no longer liable for prior debts.*

Lincoln's Inn MS. Maynard 21, f. 127v, pl. 3

Edward Jones [was] in debt to the king, and, afterwards, he was attainted of treason, by which the land came to the queen, who granted it

---

<sup>1</sup> *Gargrave's Case* (Ex. 1609), see above, Case No. 37.

<sup>2</sup> Stat. 1 Eliz. I, c. 2, s. 3 (SR, IV, 356-357).

over to the Lord Treasurer who now is [Robert Cecil] and Sir Henry Bestow, who granted it.

[It was] held by Baron HERNE clearly that this will not be liable to the debt of the king extended for it against his grant, but the debt remains to be levied of the debtor and his heirs.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 9; British Library MS. Add. 25207, f. 9, f. 4.]

40

**Jones v. Skidmore**

(Ex. 1609)

*Trial by wager of law is not available upon writs of quo minus where the Crown is concerned.*

*A person cannot sue a defendant as present in the Court of Exchequer unless there is a cause of privilege.*

Lincoln's Inn MS. Maynard 21, f. 128, pl. 1

In the case of Jones, a tailor of London, who brought [an action of] debt by *quo minus* against Sir John Skidmore for apparel of Queen Elizabeth, it was held that no wager of law lies in a *quo minus* because the king is a party.

And they agreed that a man cannot declare against another as present in court without cause of privilege. And though *Thomas Trevor* said that he had divers precedents of such declarations, see *post* Hilary 9 Jac.<sup>1</sup> [it was] held *contra* and that a man can declare against another present in court.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 9.]

---

<sup>1</sup> *Powell v. Basset* (Ex. 1612), see below, Case No. 87.

**Lunsdale v. Kelley**  
(Ex. 1609-1610)

*Under the Statute of Recusants, the Crown does not gain any title to land or goods before a seizure.*

Lincoln's Inn MS. Maynard 21, ff. 128, 129

In the case between Lunsdale, a Scot, and Kelley, if a lease be made to a recusant convict and, before seizure, he grants it over *bona fide*, it seems the law is clear that the king will not have it because the Statute<sup>1</sup> is that the king can take up and seize. But the court delivered no opinion.

Upon the Statute of Recusants, it was resolved that, where the Statute in which, if the recusant does not pay etc., that then the king can seize all his goods by process out of the Exchequer, that, upon non-payment, the king does not have ownership of the goods of those granted before seizure.

[Other copies of this report: Lincoln's Inn MS. Maynard 21, f. 134, pl. 3, Lincoln's Inn MS. Maynard 31, ff. 9v, 13, 18; British Library MS. Add. 25207, f. 9v, pl. 1.]

**Lord Mountjoy's Case**  
(Ex. 1609)

*The question in this case was whether the issue in tail is liable to pay a subsidy.*

Lincoln's Inn MS. Maynard 21, f. 128, pl. 3

---

<sup>1</sup> Stat. 3 Jac. I, cc. 4, 5 (SR, IV, 1071-1082).

In the case of the Lord Mountjoy for a subsidy, the doubt was whether it was against the Statute of 33 Hen. VIII that the issue in tail is charged with it. It seemed not. *Sed curia vult advisare.*

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 9v; British Library MS. Add. 25207, f. 9v, pl. 2.]

43

**Rich v. Holt**  
(Ex. 1610)

*It is defamation of a lawyer to say that he is a maintainer and protector of felons. Where the issue is joined upon a bad plea, the correct venue of the trial is the place where the justification arose.*

Croke Jac. 267, 79 E.R. 230

[In an] action for words, whereas he being *peritus in lege* and had been a counsellor at the common law for ten years, that the defendant, 16th December, 6 Jac. I [1608], at Withington in the County of Gloucester in the presence and hearing of divers, of the said Thomas [Rich] spoke these words 'you are a paltry lawyer and use to play on both hands.' And of his further malice etc. the 18th September, 7 Jac. I [1609], at Tewksbury in the County of Gloucester, before Doctor Seaman, Chancellor of the Bishop of Gloucester, and others, the commissioners of the Archbishop of Canterbury, in his visitation, the said plaintiff, giving them information of certain misdemeanors of one Thomas Knowles, parson of Withington, spoke to the chancellor *de eodem Thoma* these words: 'Mr. Chancellor, I hope you will not believe Mr. Rich (*ipsum Thomam modo querentem innuendo*), for he is a furtherer and maintainer of felonies.'

The defendant pleaded not guilty to all the words except these, 'you play on both hands', and, as to those, he justifies for that the plaintiff, at Withington aforesaid, devised certain articles against one Thomas Knowles, parson of Withington, concerning divers misdemeanors supposed to be done by him, and that the plaintiff afterward, *viz.* 11th September 6 Jac. I [1608],

at Cirencester in the County of Gloucester, concerning the said articles, then and there promised the said Thomas Knowles that he should not any further be molested by the said articles. And further he said that, afterward, *viz.* 16th September, Jac. I, he, speaking with the plaintiff concerning the said articles, told him he had promised the said Thomas Knowles that he should not be molested by reason of the said articles, and yet notwithstanding, endeavoured by the solicitation and procurement of Richard Lawrence and D.L. to prosecute him upon the said articles before the Chancellor and commissioners of the Archbishop of Canterbury in his visitation, whereupon, he said to the plaintiff 'you play on both hands' as well pleases him.

The plaintiff thereunto replies *de son tort demesne, sans tiel cause.*

The parties were at issue upon both issues. And a [writ of] *venire facias* was awarded from Withington and Tewksbury.

The jury found as to these words, 'you are a paltry lawyer and use' etc. and also as to the other words, 'Mr. Chancellor, I hope you will not believe Mr. Rich, for he is a smotherer and maintainer of felonies', mentioned in the first issue, that the defendant is guilty and assess damages to £6 13s. 4d. The other issue they found also for the plaintiff and assess damages to £6 13s. 4d.

It was, thereupon, moved in arrest of judgment that, for the words in the first issue, they are not actionable, for the words, 'you are a paltry lawyer', by themselves, will not maintain an action, and the words, 'he is a smotherer and maintainer of felonies', do not touch him in his profession, and he being but a private person, and no justice of the peace nor public officer, an action lies not for them. Also, the words found are not the same words which are in the declaration.

*Sed non allocatur.* All the barons held that the words are all one with the declaration, although they be otherwise coupled, by reason of the defendant's plea, also, that the first words are not actionable, but the last words, 'he is a smotherer and maintainer of felonies', are of great discredit to any man, though he be not a magistrate, and are actionable.

And, therefore, TANFIELD, Chief Baron, said it was adjudged in the Case of Sir Henry Lea for saying he was 'a maintainer of felons', although it were not alleged that he knew them to be felons, or that he was a justice of the peace, that the words were actionable; *a multo fortiori*, when he says that one is 'a smotherer and maintainer of felonies' which cannot be without cognizance of them.

An exception was also taken to the trial of the second issue because the *venire facias* was not as well from Cirencester as from the other vills, there being matter of justification in the issue; therefore, it was a mistrial. And as to that, the barons doubted, for they held that the plea was ill, so as the plaintiff might have demurred upon it.

Yet the issue being joined upon an ill plea, the trial shall be from that place where the justification arises. And, therefore, they advised the plaintiff, in regard there were several issues severally found and several damages assessed, that he should take his judgment upon that which was clear and duly tried and relinquish the other which was doubtful for a doubt of error, which he did accordingly.

44

**Levison v. Kirk**  
(Ex. 1610)

*A person can sue an action of trespass or an action of case against an agent for malfeasance.*

*Where a jury is summoned from a wrong venue, the court will grant a new trial. In this case, the second jury found greater damages than the first.*

Croke Jac. 265, 79 E.R. 228

An action upon the case [was brought that] whereas the plaintiff [William Lewson] is, and for twenty years last past was, a citizen and merchant of London using traffic into parts beyond the sea and the 20th May 32 Eliz. [1590], took his journey from London *in partes transmarinas* to merchandise and, the same 20th April 32 Eliz. [1590], at London in the parish of Aldermanbury in the ward of Cripplegate did trust and appoint the defendant, as his servant, to receive in his absence and when he should be in his journey all merchandises of the plaintiff to the plaintiff's own use or what by way of merchandise should be brought from beyond the seas or consigned to him and to pay the customs and subsidies for them due or payable and to dispose and convert them to the use of the plaintiff and that, the same day,

he took his journey accordingly and that, the 9th April 32 Eliz. [1590], in his absence, twenty pieces of velvet of the value of £800 were consigned by one Martin Billingsley, his factor, being in Stoad beyond the sea, to be delivered in England, which by way of merchandise were brought into England to the port of London in the parish of Saint Peter's near Paul's Wharf in the parish of Queenhithe in a ship called the *Dolphin*, that the defendant having notice thereof and knowing that a subsidy was due to the queen for them and, if they were landed, the subsidy not paid or agreed for, that they thereby were forfeited and might be seized, the defendant intending to deceive the queen of her subsidy and, notwithstanding, to deduct the allowance from the plaintiff of so much as should be due for the subsidy, as if it had been paid, the said 9th April 32 Eliz. [1590], in the said parish of St. Peter's and ward of Queenhithe, caused the said goods to be unloaded and put to land, the subsidy for them due being not paid nor the collector agreed with etc., whereby the said goods were forfeited to the queen and, then and there, seized by one Thomas Gardiner, and an information was brought in the Exchequer for that cause and it was there adjudged that they should remain forfeited to the queen, whereupon he lost all the profits of them, for which etc.

The defendant pleaded not guilty. And it was found against him to his damage of £250.

It was, thereupon, moved in arrest of judgment that an action upon the case lies not by reason of the confidence or trust reposed in him as his servant because it is not alleged that he had any money left with him to pay the subsidy and then he is not bound to pay it.

But it was thereto answered that, in regard he was trusted with all the goods to merchandise and dispose of to his master's profit, therefore, by intendment, he had means sufficient to satisfy the custom etc., for he might agree for the custom and, afterward, take and sell the said goods and then pay the custom.

For a second reason also the action well lies, for he is chargeable because he caused the goods to be taken out of the ship not customed, whereupon they became forfeited. And, if he had not wherewithal to pay for the custom, he might have let them alone within the ship and not have meddled with them, wherefore, although he had been a stranger, he had for this cause been chargeable, *a multo fortiori*, being a servant and doing it by color of authority.

But it was said that then this being a mere tort, the action lies not, but trespass *vi et armis*.

The barons, at the first, inclined to that opinion, but, having considered thereof afterward, all the barons, except Snigge, conceived that the action well lay for the special loss which the plaintiff had by this malfeasance, although the defendant had been now taken as a stranger. Also, although it is alleged that he did that in his absence, the plaintiff being beyond the sea, yet the plaintiff may well have a general writ of trespass or his special action upon the case, as here. 43 Edw. III, pl. 3;<sup>1</sup> *Natura Brevium*, 93, 94.

But then, it was moved that here was a mistrial, for this action being now maintained against him for his malfeasance in taking the goods out of the ship, which is in the parish of St. Peter's in the ward of Queenhithe, the *venire facias* ought to be from that venue and parish only and it was awarded as well from that parish and ward as from the parish of Aldermanbury and ward of Cripplegate and, being made of two parishes and wards where it ought to have been of one only, it is as well a mistrial as when it is of one vill where it ought to be of two.

The barons were all of opinion that, for this cause, it was a mistrial, wherefore a *venire facias de novo* was awarded. And this issue was tried again, and damages were found to £400. And judgment was for the plaintiff.

[Other reports of this case: Lane 65, 145 E.R. 303.]

## 45

### **Anonymous** (Ex. 1610)

*In order to vacate an estreat of a criminal fine, the party must remove the record into the Chancery and have it sent from there to the Exchequer.*

Lincoln's Inn MS. Maynard 21, f. 129, pl. 1

Trinity term 8 Jac., 1610.

A man was indicted at the Sessions and fined and the fine was estreated into the Exchequer. And afterwards, the indictment was removed into the

---

<sup>1</sup> YB Hil. 43 Edw. III, f. 1, pl. 3 (1369).



[Court of] King's Bench, and, there, overthrown for insufficiency. The party must procure [a writ of] *certiorari* to remove the record in the Chancery and have it in the Exchequer by [a writ of] *mittimus*.

[Other copies of this report: Lincoln's Inn MS. Maynard 21, f. 134, pl. 1, Lincoln's Inn MS. Maynard 31, ff. 13, 18.]

46

### **Anonymous**

(Ex. 1610)

*A writ of extent to enforce a statute will not be issued unless there is a certificate from the Clerk of Statutes or the statute itself is produced.*

Lincoln's Inn MS. Maynard 21, f. 129, pl. 4

It was held upon a motion of Mr. Attorney [General *Hobart*] that, without a certificate of the Clerk of Statutes that such a statute was acknowledged, they will not award a process of extent for the king without a showing of the statute itself.

[Other copies of this report: Lincoln's Inn MS. Maynard 21, f. 134, pl. 4, Lincoln's Inn MS. Maynard 31, f. 13, 18.]

47

### **Salters' Company's Case**

(Ex. 1610)

*Persons who live outside the City of London but who own freeholds in London can sit on juries in London.*

Lincoln's Inn MS. Maynard 21, f. 129v

The title of a house came in question to be tried, which house was in London and belonged to the Company of Salters. And, for the disinterest of the trial, it was ordered that a jury will be returned of men who have a freehold in London and dwell out of the City and are not citizens in livery.

And the Recorder [of London] moved that it was against their custom [and] charter, that, in that trial, it should be by men of the City.

But it was held by the court that men in the country that have houses in London are of the City and will be accounted as citizens when in such trials.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 14.]

48

**Anonymous**  
(Ex. 1610)

*A plaintiff cannot amend his declaration where the defendant has pleaded the general issue and refuses to consent to the amendment.*

Lincoln's Inn MS. Maynard 21, f. 130, pl. 3

Upon a motion in the Office of Pleas, it was ruled that, if the plaintiff declared and the defendant pleads the general issue, the plaintiff cannot amend his declaration without the consent of the defendant, notwithstanding that the plea not be entered nor any rule given to the defendant to plead.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 14.]

**Moncke v. Giver**  
(Ex. 1610)

*A lessee of lands, of which part of the rent is paid to the Crown, is not a debtor to the Crown and thus privileged to sue in the Exchequer unless the rent is in arrear.*

Lincoln's Inn MS. Maynard 21, f. 130v, pl. 2

Between Moncke and Giver, Moncke brought an action in the Office of Pleas against Giver, and the defendant pleaded that the plaintiff did not have a privilege [to sue in the Court of Exchequer]. And the truth was that the plaintiff was a farmer to Lord Mounteagle upon which a tenth is paid to the king.

But it was held that this was not a cause of privilege, but, if the tenth was in arrear at the time the bill [was] exhibited, then he had privilege because then he is a debtor.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 14v; British Library MS. Add. 25207, f. 10v, pl. 3.]

**Attorney General v. Trollopp**  
(Ex. 1610)

*In informations of intrusion, both parties may join in the commission to find the amount of damages.*

Lincoln's Inn MS. Maynard 21, f. 130v, pl. 3

In the case of Trollopp and Bee, an information of intrusion, it was said by *Staunton* and another of the attorneys that there are divers precedents that, in commissions which are awarded for the king to enquire of [ . . . ] rates that

are to answered to the king, the party joins in the commission and it will not be sued [out] by the king alone because too great a value could be found in prejudice of the party.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 14v.]

[Connected cases: Trallop's Case, Lane 51, 145 E.R. 291.]

51

**Anonymous**  
(Ex. 1610)

*The Court of Admiralty has jurisdiction over cases arising on the high seas up to the first bridges over rivers.*

Lincoln's Inn MS. Maynard 21, f. 132, pl. 1

Serjeant *Harris* moved that the Searcher of Gravesend had made a seizure of goods for the king, and, upon this, the other libeled against him in the Admiralty Court. And he prayed to have [a writ of] prohibition.

But it was denied because no matter of record was pending before them. And the barons said that he must go to [the Court of] King's Bench. And where the Admiral has his patent of all things done *super altum mare et usque ad primum pontam*, by which he claims a privilege up to London Bridge, it was said that the Statute of Ric. II, in French,<sup>1</sup> is that he will have jurisdiction to the first bridges and not to the great bridges.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 16; British Library MS. Add. 25207, f. 11, pl. 2.]

---

<sup>1</sup> Stat. 15 Ric. II, c. 3 (SR, II, 78-79).

**May v. Howe**  
(Ex. 1610)

*The question in this case was whether certain cloth was required to be of a certain size by the Statute of 39 Eliz. I, c. 20.*

Lincoln's Inn MS. Maynard 21, f. 132, pl. 2

Upon an information by May, the Deputy Aulnager of London, against Howe, a clothier, because the content seal was not put to certain sayes and the doubt was upon the Statute of 39 Eliz.<sup>1</sup> whether such clothes which by no statute are bound to any length are within the Statute of 39 Eliz. or not. The words are that all kerseys, penistones, or other cloths will be made of such length as by the statutes of the realm provide and before which are sold or offered to be sold, the party put his seal [ . . . ]. And it was said that, in the Case of Tay and also in the Case of Langley, it has been adjudged upon argument [ . . . ] barons in the time of Chief Baron Fleming that such cloths are within the Statute because the intent of the Statute is that all cloths should have the content seal to the intent that the king will not be deceived in his custom nor the party who buys them of his measure.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 16.]

**Anonymous**  
(Ex. 1610)

*Where a person has a decree for a sum certain in the Court of Requests, a debt assigned to the king afterwards does not hinder the execution of this decree.*

---

<sup>1</sup> Stat. 39 Eliz. I, c. 20 (SR, IV, 920-923).

Lincoln's Inn MS. Maynard 21, f. 132v, pl. 2

If a man has a judgment to recover a debt by an assignment of another debt to the king and thus in another case, upon a motion of Mr. *Caesar*, where a man has a decree for a sum of money in the Court of Requests, a debt assigned to the king afterwards does not hinder the execution of this decree.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 16; British Library MS. Add. 25207, f. 11, pl. 4.]

54

**Nicholls v. Mordant**  
(Ex. 1610)

*In a dispute over an induction to a church, a perfected appeal to the Court of Delegates suspends any further action in the matter.*

*Where a person is inducted into a church and compounds for the payment of first fruits, if another person asserts a title to it, the court will grant a writ of sequestration to the friends of him who is inducted.*

Lincoln's Inn MS. Maynard 21, f. 135

Between Samuel Nicholls and Mordant [as to] the church of Fulmerston in the County of Cambridge, the case was that, upon the avoidance of the church by the death of the incumbent, Mr. Aldred, who was the patron, presented J.S. And the bishop of Ely, inasmuch as there was notorious fame of simony, refused to admit him, upon which he sued a *duplex querela* to remove the matter before the archbishop. And Nicholls having obtained a presentation of the king upon a supposal of a lapse, the archbishop admitted and instituted him and made a mandate for his induction. But, before he was inducted, J.S. appealed to the [Court of] Delegates. And, after he was inducted, it was said that, if Nicholls had been inducted before the appeal to the [Court of] Delegates, that then there was no means to avoid [it] except by [an action of] *quare impedit*. And the commissioners of the [Court of]

Delegates have nothing to do with it, but the appeal suspended the induction, and then the induction was not good.

And, by the course of the court, a man is inducted and compounds for the first fruits. If another pretends a title to it, the court grants a [writ of] sequestration to the friends of him who is inducted. But if a person has been in possession and another supposes this to be a lapse for simony or another cause and procures himself to be presented and admitted, instituted, and inducted, the court will not grant a sequestration for him against the ancient incumbent.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 19.]

55

**Attorney General v. Gray**  
(Ex. 1610)

*A steward of a royal manor and a copyholder on the manor who cut timber without a warrant will be both fined.*

Lincoln's Inn MS. Maynard 21, f. 135v, p. 1

Upon an information in the Exchequer Chamber, [against] one Gray, who was the steward of a manor of the king in the County of Norfolk, and Edgar, a copyholder of the manor, for the cutting of timber trees upon his copyhold by color of a license given to him by Gray, which was without a warrant, it was decreed that the copyholder should pay to the king the value of the trees. And also a fine of £10 was imposed upon him and another fine upon Gray. And they will be imprisoned until they have paid it. And thus is the course of the court.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 19.]

**Rex v. Beckett**  
(Ex. 1610-1612)

*The king can seize the land of convicted recusants in their lifetime, but not after their death.*

Lincoln's Inn MS. Maynard 21, ff. 136, 153

Michaelmas, 8 Jac. [1610].

In the case of Mr. Beckett, upon the seizure of his goods [and] lands for the recusancy of Robert Beckett, his uncle, two points were argued by *Stephens* and *Coventry*: first, if a man be indicted of recusancy after the Statute of 23 Eliz. and before the Statute of 28 Eliz.<sup>1</sup> and he continues a recusant divers years afterwards the Statute of 28 [Eliz.] without a new conviction that he not forfeit more than is contained in the indictment and not £20 the month and he dies before the king had seized his lands, it seems that then the land cannot be seized by the Statute. And it seems also that the Statute has not made it a debt by which the lands will be seized by the common law because the Statute of 28 [Eliz.] has reference to the Statute of 23 [Eliz.] which gives it as a penalty by which the king can seize the land in the lifetime of the recusant, but not after his death.

Michaelmas term 10 Jac. [1612].

In the case of Beckett, [it was] found that Beckett, the recusant, was seised of divers lands and messuages and manors by particular names. And upon the return of it, H. Beckett came in as the *tenantas omnium praemissorum praeterquam de terrae vocatae S. et terrae vocatae G.* and he did not show where these lands lie and also no such land by such name was found in the inquisition. And he pleaded a plea in bar, upon which the Attorney [General] of the king [*Hobart*] demurred in law.

And the barons resolved the law against the king.

---

<sup>1</sup> Stat. 23 Eliz. I, c. 1 (SR, IV, 657-658); Stat. 29 Eliz. I, c. 6 (SR, IV, 771-772).



But it was moved that no judgment could be given inasmuch as it did not appear which lands those were in the *praeterquam*. And it was urged by *Davenport* that the *praeterquam* will be void and [ *blank* ].

But the court thought not and that this made all uncertain because it could be that those lands in the *praeterquam* are part of those lands which are found generally in the inquisition because, *prima facie*, it will be intended that the lands in the *praeterquam* were contained in the inquisition. And if it could be so, it will not be otherwise taken. But if all the lands in the inquisition have been found by a special name and he pleads with a *praeterquam* of such lands and names them and there are not any such in the inquisition, then the *praeterquam* is void.

And [Justice] DODDERIDGE cited, *tempore* Edw. I, Fitz., tit. *Bre.*, 866,<sup>1</sup> that a *praecipe* was brought for a quantity of land except one selion; the exception was not void, but it made the writ bad and all abated.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, ff. 19v, 31; British Library MS. Add. 25207, f. 12v, pl. 1.]

[Other reports of this case: Lane 91, 118, 145 E.R. 325, 347, Georgetown Univ. Law Sch. MS. B88-1, ff. 219v, 317, Cambridge Univ. Lib. MS. Ii.5.14, ff. 94v, 133v.]

## 57

### **Anonymous** (Ex. 1610)

*The question in this case was whether a scire facias can be awarded where there is no record of the warrant.*

Lincoln's Inn MS. Maynard 21, f. 136, pl. 2

[In an action of] debt, *Nicholls* moved that a *scire facias* was awarded against [ *blank* ] where there was not any record of this warrant, and he moved that the record not be filed.

---

<sup>1</sup> Fitzherbert, Abr., *Briefe*, pl. 866.

But the Chief Baron [TANFIELD] [was] against this vehemently and [said] that it was not ever seen because the party had not any prejudice because he can either demur in law or plead to it against commissions or a writ of inquiry of damages in which there are undue proceedings these will be stayed because the party does not have a remedy for pleading.

But Baron ALTHAM inclined to the contrary for saving of the damages.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 19v; British Library MS. Add. 25207, f. 12v, pl. 2.]

58

### Carew v. Broughton

(Ex. 1610)

*Nil debet is a void defensive pleading in an action sounding in detinue.*

*An action of debt against a sheriff for an escape is in the nature of the original debt of the prisoner.*

Lincoln's Inn MS. Maynard 21, f. 136v, pl. 1

In the case between Carew and Broughton, the Chief Baron [TANFIELD] said that, if an executor brought an action in the *debet et detinuit* where it should be in the *detinet tantum* and, upon [a plea of] *nihil debet*, it is found for the plaintiff, he cannot have judgment because, if it will be said that the word *debet* will be only surplusage and void, then *nihil debet* is a void issue because it does not respond to the *detinet*. *Vide* for the first, the case of Mr. Gefferies, who was of counsel.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 20.]

1 Rolle, Abr., *Dett*, pl. P, 1, p. 602

If A. be in execution upon a judgment for B. and, afterwards, B. dies and then A. brings an *audita querela* against C., the executor of B., and has a *scire facias* and, upon this, he puts in bail by a recognizance in Chancery

according to the Statute of 11 Hen. VI, cap. [ *blank* ],<sup>1</sup> and afterwards, upon this *audita querela*, judgment is given against A. and then a *scire facias* issues against the bail and, after judgment, the bail is taken in execution upon the recognizance and the sheriff allows him to escape, upon which escape, the executor brought an action of debt, this action must be brought in the *detinet tantum* and not in the *debet et detinet* because this recognizance is in the nature of the first debt, it being in a legal course.

[Other reports of this case: Lane 79, 145 E.R. 315.]

59

**Willson v. Bellingham**  
(Ex. 1610)

*The issue in an action of trover is the ownership of the goods in question.*

Lincoln's Inn MS. Maynard 21, f. 136v, pl. 2

In an action upon the case of trover and conversion of a load of corn by Willson against Bellingham, the Chief Baron [TANFIELD] took this diversity, that the action [was] only brought for goods and nothing came in question except the title of the goods. If the defendant pleaded that he was possessed of them as of his own goods and that he lost them and J.S. found them and gave them to the plaintiff and the plaintiff lost them and the defendant found them and though this plea amounts only to the general issue and the plaintiff can demur specially for this cause, but, if the action for the goods be to try the title of the land, it is otherwise.

And *Davenport* said that it was thus found in the [Court of] King's Bench.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 20.]

---

<sup>1</sup> Stat. 11 Hen. VI, c. 10 (SR, II, 285-286).

**Haines v. Anonymous**  
(Ex. 1610)

*When a corporation is erected, the place of it must be specified.*

Lincoln's Inn MS. Maynard 21, f. 137, pl. 1

In the argument of the case between Haines and [ *blank* ] for the lease of the school lands of Brentwood [ . . . ] the rector of Daynam, *Davenport* said that it was adjudged in the [Court of] Common Bench that, where the king makes a corporation of the master and assistants of the minerals without appointing any place of their foundation, it was adjudged to be void.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 20.]

**Moore v. Hawkins**  
(Ex. 1610)

*In an action of ejectment, any allegation concerning land must show where the land lies so that a proper jury can be empaneled.*

Lincoln's Inn MS. Maynard 21, ff. 137, 137v

In the argument of the case of Moore and Hawkins, Mr. *Stephens* said that it was adjudged in Trinity [term] 40 or 41 Eliz. [1598 x 1599] in the case of *Matravers and Westwood*<sup>1</sup> that, where a man pleads an assignment of a lease without showing where it was made and the plaintiff demurs generally, judgment was given for him.

---

<sup>1</sup> *Matures v. Westwood* (1598-1601), Croke Eliz. 599, 617, 78 E.R. 842, 858, Gouldsborough 175, 75 E.R. 1075.

In [an action of] *ejectione firmæ* by Moore against Hawkins of three manors and lands in three separate villis in the County of Oxford and upon [a plea of] *non culpabilis*, [a writ of] *venire facias* was awarded of the manors and villis. And before the justices of *nisi prius*, the defendant pleaded that, *puis darrein continuance*, the plaintiff had entered into two closes *parcella tenementæ prædictæ* and the plea was recorded and certified in this court with the king. And the defendant demurred in law generally. And judgment was given for the plaintiff because the defendant did not show in what vill the closes lie so that, if the plaintiff traverses the entry, there is no certain place of which the venue will come.

Another exception was taken because the defendant concluded his plea *unde per judicium etc.* without concluding in abatement or in bar. But this was held only a matter of form.

And the Chief Baron [TANFIELD] said that this plea must be pleaded certainly because it is in delay of the trial.

Then it was objected for the defendant that the justices of *nisi prius* should have discharged the jury and given a day to the parties, and, inasmuch as no day was given, the plea was discontinued. But it was found that they do not have the power to give a day because they are not judges of the cause but only of the record of the matter.

In the day in the [Court of Common] Bench which is given upon the [writ of] *distringas*, it suffices for the parties and, notwithstanding that there is no record that the jury was discharged, this is not material because, in law, they are discharged by the plea.

And the Chief Baron [TANFIELD] cited divers records, Hilary 36 Eliz., rot. 448, King's Bench, at *nisi prius*, the defendant challenged the array, and the plaintiff demurred, and they recorded it but gave no day; and Hilary 45 Eliz., rot. 331, where the justices of assize sealed a bill of exceptions; and Hilary 4 Hen. VIII, rot. 806, in the Common Bench, *accord*; and Hilary 33 Hen. VI, rot. 118, *ibidem*; and Hilary 14 Hen. VIII, rot. 406; but in Michaelmas 10 Hen. VIII, rot. 835, Common Bench, where the parties demurred upon the evidence before the justices of assize, then they gave a day, but it must be the same day that was given in the [Common] Bench but

upon [ . . . ]<sup>1</sup> vouched in Durham that the voucher is ended,<sup>2</sup> and the parol remand gave them [?] a day to the parties in the [Common] Bench because the [writ of] *mittimus* commanded them to so do.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 20v; British Library MS. Add. 25207, f. 12v, pl. 3.]

62

**Allen v. Morgan**  
(Ex. 1611)

*An information on a penal statute cannot be brought against one partner only without joining all of the other partners.*

Lincoln's Inn MS. Maynard 21, f. 139v, pl. 3

Upon an information by Allen against Morgan, a brewer of Surrey, upon the Statute of 23 Hen. VIII,<sup>3</sup> for the selling of beer beyond the rates assessed by the justices at the sessions, the information being against Morgan solely, it was shown in evidence on the part of the defendant that one Kenton, a merchant of London, was the partner with Morgan in the brew house, and, for proof of this, indentures were shown and, therefore, the verdict passed against the informer. And though, in the common opinion, Morgan was reputed the sole owner and the sole dealer, but his sale was in law the sale of both.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 22v; British Library MS. Add. 25207, f. 14, pl. 1.]

---

<sup>1</sup> scire facias [?] *MS.*

<sup>2</sup> dettor mine *MS.*

<sup>3</sup> Stat. 23 Hen. VIII, c. 4, s. 3 (*SR*, III, 367).

**Attorney General v. Anonymous**  
(Ex. 1611)

*A verdict that finds liability but is silent as to damages will be set aside, and, in such a case, a new trial will be granted.*

Lincoln's Inn MS. Maynard 21, f. 140, pl. 1

Upon an information for the king against [ *blank* ] for the taking of corn and other goods, upon [a plea of] *non culpabilis*, the jury found, as to such corn to the value of 10s., that the defendant was guilty but did not tax any damages, upon which it was found that the verdict was insufficient. And [a writ of] *venire facias de novo* was awarded.

*Prideaux* [was] of counsel.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 22v; British Library MS. Add. 25207, f. 14v, pl. 2.]

**Gowre and Winter's Case**  
(Ex. 1611)

*Where a lessee later receives the fee from a grantor who forfeited his land for treason, the merger of the estates is vacated and the lease is revived.*

Lane 113, 145 E.R. 343

Upon a motion made by *Prideaux* that Robert Winter<sup>1</sup> one of the powder traitors made a lease for years 1 Jac. to one Gower and that, after 3 Jac.,

---

<sup>1</sup> M. Nicholls, 'Winter [Wintour], Thomas', *Oxford Dictionary of National Biography*, vol. 59, pp. 786-789.

the lessor was attainted of treason by Parliament,<sup>1</sup> which attainder related to a time before the conveyance of the fee, and if, in this case, the term be saved or lost, it was the question.

Lincoln's Inn MS. Maynard 21, f. 141, pl. 2  
Easter term 9 Jac. [1611].

In the case of an information for certain bulleries<sup>2</sup> of salt in Worcester, which belonged to Richard<sup>3</sup> Winter, who was attainted of treason, it was agreed by the Chief Baron [TANFIELD] and SNIGGE and BROMLEY, Altham absent, that, where Richard Winter made a lease for years to one Gowre and, afterwards, he committed treason and afterwards he made a feoffment of certain land to Gowre, by which the term was merged, and, afterwards, he was attainted and an office [was] found, now, in respect that the reversioner was evicted *ab initio*, the term is revived.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 23v; British Library MS. Add. 25207, f. 15, pl. 2.]

65

**Monke v. Gower**  
(Ex. 1611)

*The lord of a manor cannot have a fine from his copyholder unless he shows a custom for it.*

Lincoln's Inn MS. Maynard 21, f. 141, pl. 3

Between Monke and Gower, lord of the [ *blank* ], the Chief Baron [TANFIELD] held that the lord of the manor will not have a fine of his copy-

---

<sup>1</sup> Stat. 3 Jac. I, c. 2 (*SR*, IV, 1068-1070).

<sup>2</sup> bulleyes *MS*.

<sup>3</sup> Sic in *MS*. for Robert.



holder by the law unless he shows a custom for it. And the other barons, Altham being absent, assented to this.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 23v; British Library MS. Add. 25207, f. 15, pl. 3.]

66

**Doilie v. Joiliffe**  
(Ex. 1611)

*A husband cannot sue alone for the false imprisonment of his wife without alleging his loss of consortium.*

*A writ of capias ad satisfaciendum cannot be executed upon a married woman unless special matter appears of record.*

Lincoln's Inn MS. Maynard 21, f. 141, pl. 4

Mr. Robert Doyley of Lincoln's Inn brought [an action of] trespass for the imprisonment of his wife, and he did not declare *per quod consortium amisset*.

And the Chief Baron [TANFIELD] and Baron ALTHAM were clear that the action was not well brought in his sole name unless he had declared *quod consortium amisset*, by which he discontinued this action, and he and his wife can [bring] a new action.

And the case was that Leonard Lewis brought [an action of] trespass in [the Court of] Common Bench [against] one Julian Goddard, widow, and, pending the writ, she took a husband, Robert Doyley, and, afterwards, the judgment was given against the plaintiff and he brought a writ of error in the [Court of] King's Bench against Julian Goddard, widow, and, upon this, he had a *scire facias* against him *ad audiendum errores*. And she appeared by an attorney, and the judgment [was] reversed and £30 [was] taxed to Leonard Lewis for costs and damages. And he, upon this, sued a [writ of] *capias ad satisfaciendum* directed to the Sheriff of Cornwall to take Julian Goddard, widow, upon which he took Julian Doyley, the wife of Robert Doyley, upon which they brought the action. And all the matter *supra* appeared in the plea in bar, upon which the plaintiffs demurred.

And the court resolved that the action lies because the sheriff cannot by this writ take the wife of the plaintiff. But special matter must have been surmised and entered of record and upon it to have had<sup>1</sup> a writ to take Julian Doyley, the wife of Robert Doyley.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 23v; British Library MS. Add. 25207, f. 15, pl. 4.]

[Other reports of this case: Lane 48, 52, 145 E.R. 289, 292.]

67

**Weston and Bowes' Case**  
(Ex. 1611)

*When a recusant is convicted, then he forfeits all his goods in his possession at the time of each conviction.*

Lincoln's Inn MS. Maynard 21, f. 142, pl. 1

In the case of Mr. Weston and Mr. Bowes, to both of whom the king had granted goods of recusants, it was said by Chief Baron [TANFIELD] that, upon the Statute 28 Eliz.,<sup>2</sup> if a man be convict of recusancy because he, being indicted, did not come in upon a proclamation made, then, by the Statute, if he does not pay the £240 into the Exchequer as the Statute limits, he forfeits all of his goods, which is intended all that he had at the time that he failed of payment. And if, afterwards, he, [at] other times, fails of another payment, he forfeits all his goods that he then had, *et sic toties quoties* upon the first conviction.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 24; British Library MS. Add. 25207, f. 15v, pl. 1.]

---

<sup>1</sup> error *MS.*

<sup>2</sup> Stat. 29 Eliz. I, c. 6 (*SR*, IV, 771-772).

**Note**  
(Ex. 1611)

*The Marshall of the Court of Exchequer has the custody of prisoners of the court only until the next sealing day.*

Lincoln's Inn MS. Maynard 21, f. 142, pl. 2

The marshall of the court should not guard the prisoners but until the sealing day, and then he should deliver them to the Warden of the Fleet [Prison].

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 24; British Library MS. Add. 25207, f. 15v, pl. 2.]

**Anonymous**  
(Ex. 1611)

*The wardship of an heir goes to the lord of whom the deceased tenant holds by priority.*

Lincoln's Inn MS. Maynard 21, f. 142, pl. 3

*Vide* that, if the tenant, who holds land of J.S. by priority and of J.D. by posterity, makes a feoffment of the land held of J.S. for the preferment of his wife or children and dies, his heir under age, J.S. will have the wardship because the priority is saved by the Statute of 32 Hen. VIII.<sup>1</sup>

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 24; British Library MS. Add. 25207, f. 15v, pl. 3.]

---

<sup>1</sup> Stat. 32 Hen. VIII, c. 1 (SR, III, 744-746).

**Johnson v. Lane**  
(Ex. 1611)

*Once a vicarage is merged into the rectory, it cannot be later separated from it.*

Lincoln's Inn MS. Maynard 21, f. 142, pl. 4

Between Johnson and Lane for the vicarage of Londham in Suffolk, the case was that, in another time, there was an endowed vicarage, as appeared by the record 200 years past, but no record of recent times could be shown that there was any vicar there until now when the plaintiff was presented to the vicarage by the king.

The case was dismissed because the Chief Baron [TANFIELD] said that, if the parsonage and vicarage were confounded or united before the dissolution, because this rectory belonged to the monastery of Cawsey Ashe, thus the king had them as one entire thing and the vicarage will not be now revived. And so, he said that it had been ruled in divers cases.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 24.]

**Fawne v. Pescodd**  
(Ex. 1611)

*A rectory will pass by a general grant of all lands, tenements, and hereditaments.*

Lincoln's Inn MS. Maynard 21, f. 143, pl. 2

Upon the evidence [in an action] between Fawne and Pescodd for the title of the rectory of Newton Valence in the County of Northampton, which concerned Knaplock of Gray's Inn and Hill, it was held for the plaintiff by the Lord Chief Baron [TANFIELD] that the king, having the rectory of Newton Valence, granted all his tithes and lands in the parish of Newton Valence,

that the rectory passed notwithstanding that he did not grant the rectory by a special and proper name and thus, by grants of all lands, tenements, and hereditaments in D., a manor passes from the king.

It was also held by them all that, where the rectory being in truth the rectory of Newton Valence and, upon the endowment of the vicar a long time past, all of the tithes of Newton Valence were allotted to the vicar and the tithes of Hawkley, which was a hamlet of Newton Valence allotted to the parson and, in 26 Hen. VIII, the rector of Edington in Wiltshire, to which it was appropriated, in 26 Hen. VIII made a lease of it by the name of the rectory of Hawkley rendering rent and, after the dissolution, it was named in charge by the name of the rectory of Hawkley in Newton Valence and the rent paid to the king accordingly. And afterward, King Henry VIII, *anno* 35 [1543 x 1544], granted it to Crymarke by the name of the rectory of Hawkley, that this grant was good because, having gained this name first by reputation *in pais* before the dissolution and after[wards] for the rectory, the king did not know another name of it granted, and it is no misnomer.

And they held also that this cannot be concealed because the plaintiff claims by a patent of concealment made *anno* 30 Eliz. because the thing was put in charge, *licet non* by the true ancient name.

And the Chief Baron [TANFIELD] said that *si injuste detentus est* where the abbey before the dissolution, it was dissolved so that only a right came to the king, because, if the king was once seised of the land, it could be concealed afterwards, but it cannot be detained. And if the abbot was seised at the time of the dissolution, then the king was also seised by the Statute, *licet* the profits were not ever answered for to the king.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 25.]

**Attorney General v. Tredwell**  
(Ex. 1611)

*Information found by a commission during the pendency of an action is not admissible evidence in that action.*

Lincoln's Inn MS. Maynard 21, f. 143v, pl. 1

Upon an information of intrusion against Tredwell and others for entering into divers houses in D., which were supposed to be come to the king by the Statute of Chantries,<sup>1</sup> pending the information, they had by a commission found matter to enforce the title of the king.

But it was ordered by the court that this matter, upon the trial, will not be given in evidence and that it was after the information was exhibited. But, if the Attorney [General] discontinues this information and exhibits a new [one], then it is otherwise.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 25v.]

73

**Higgins, *qui tam* v. Bland**  
(Ex. 1611)

*If an information is filed for the non-payment of customs duties and the owner of the goods seized is alleged to be unknown, the owner of the goods is not entitled to notice of the action and cannot file a pleading to defend his goods.*

Lincoln's Inn MS. Maynard 21, f. 143v, pl. 2

Between Higgins and Blande, upon the seizure of tobacco, it was held that, if an information be exhibited for landing goods without paying custom or upon another penal law, the party must be served with a subpoena and must appear or otherwise no judgment should be given against him, but if the information be upon a seizure supposing that the goods *cuiusdam ignoti* were landed without paying custom and that he seized them and they came into the hands of J.S., there a *scire facias* will be awarded against J.S. and upon *nihil* returned, judgment will be given against him. And this was the case of Blande. And therefore, he could not be aided without that the informer by assent would allow him to plead.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 25v.]

---

<sup>1</sup> Stat. 37 Hen. VIII, c. 4 (SR, III, 988-993).

Serjeant *Hutton* moved that a customer seized tobacco uncustomed and demised it in the hands of the owner, who was one Bland, upon which issued two *scire faciases*, yet, in truth, Bland was not one who was served with them nor had notice. And judgment was given upon *nihil dicit* for £45. And Bland, upon this, was in execution. And now the Serjeant said that this is a mischievous case for the subject. And he prayed a remedy that Bland could plead to the information.

But *tota curia contra* that it could not be because it is the advice of the court.

And there is another course, *viz.* to seize such goods in the hands of J.S. and suppose that he demised them to a stranger and inform against him, and thus he will have a judgment upon *nihil dicit*. But the barons said that this is not a conscionable course.

But [it was said] by Chief Baron TANFIELD, if he had seized the tobacco in his hands, *viz.* of the informer, so that he is not the proprietor, there, the informer will have a subpoena.

[Other reports of this case: Cambridge Univ. Lib. MS. li.5.14, f. 93v, pl. 1.]

## Remington and Barnes' Case (Ex. 1611)

*The executor of a tenant of the king is liable for active waste but not for permissive waste.*

Lincoln's Inn MS. Maynard 21, f. 144, pl. 2

In a case that concerned Sir Thomas Remington and Barnes, who was an infant, and Sir Thomas, his guardian, the doubt was, if the tenant of the king by a lease made waste in the houses and died, whether the king will have a remedy against his executor.

And ALTHAM said that, if he cuts down trees or makes a voluntary destruction of the houses, the king will have a remedy against him and he will account to the king for it, but it is not in the nature of an action of waste and that there are precedents of it. But, of permissive waste, no remedy lies against the executor.

The others seemed to doubt and would see the precedents.

*Noy* was of counsel for the king.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 26; British Library MS. Add. 25207, f. 16, pl. 2.]

75

**Hall v. Marsh**  
(Ex. 1611)

*The lands of an executor are not subject to pay the debts of the decedent owed to the Crown.*

Lincoln's Inn MS. Maynard 21, f. 144v, pl. 1

In the case of Hall, servant of the king, to whom he had granted divers debts, and Marsh, it was held that, if a man be indebted to the king and makes his executor and dies, there, the own land of the executor will not be seized for this debt.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 26; British Library MS. Add. 25207, f. 16, pl. 3.]

76

**Attorney General v. Powell**  
(Ex. 1611)

*The tenant of a person cannot sit on a jury in an action in which that person is concerned.*



Lincoln's Inn MS. Maynard 21, f. 144v, pl. 3

Upon the evidence, in an information of intrusion against Powell and others for lands in Shropshire which were part of the manor of eternal time, the cause concerning the earl of Northampton, the manor in the time of Henry VIII belonged to the earl of Arundel and the ancestor of the defendant had encroached a part of the waste which was the land in question and he died seised of it. And afterwards, the right of this land came to Philip, earl of Arundel,<sup>1</sup> who, [in] 31 Eliz. [1589], was attainted of high treason, and this right [was] forfeited to the queen, which came to the now king. And he, by a commission under the great seal, gave authority to Holland of Lincoln's Inn and others to enter into this land in his name because, otherwise, the king cannot have an information of entry.

And the defendant challenged a juror because he was a tenant of the earl of Northampton. And he was found not indifferent and treated. And afterwards, he challenged another because he passed<sup>2</sup> for the king in a former trial. And this was held for [ . . . ] challenge. And another, who was a tenant of the earl was challenged. And he [was found] indifferent and sworn, and thus others, so that twelve were sworn. And inasmuch as there were two or three jurors more than had appeared, those that were of counsel for the king were content that he will be treated.

But it [was] held that they could not by the law, notwithstanding that he will assent, because a full jury was sworn.

But the Chief Baron [TANFIELD] said that, if only ten or eleven had been sworn, they could by assent withdraw one of them and swear another in his place.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 26; British Library MS. Add. 25207, f. 16v, pl. 2.]

---

<sup>1</sup> J. G. Elzinga, 'Howard, Philip, thirteenth earl of Arundel', *Oxford Dictionary of National Biography*, vol. 28, pp. 406-409.

<sup>2</sup> I.e. found a verdict.

**Anonymous**  
(Ex. 1611)

*A later statute cannot give a power to justices of the peace to license violations of an earlier statute.*

Lincoln's Inn MS. Maynard 21, f. 145, pl. 1

Upon a trial before the Chief Baron [TANFIELD], he showed the reason upon which, upon an information of engrossing, if a man pleads *non culpabilis*, he cannot give [in evidence] a license made by the justices of the peace because this is given by another statute made of a later time, *viz.* by the Statute of 13 Eliz.<sup>1</sup> But if such a proviso had been in the Statute of 5 Edw. VI,<sup>2</sup> it is otherwise.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 26v; British Library MS. Add. 25207, f. 16v, pl. 3.]

**Case of Trinity College, Cambridge**  
(Ex. 1611)

*Upon an inquisition, a finding that a rectory was concealed from the Crown is sufficient without also finding that there was a title in the Crown.*

Lincoln's Inn MS. Maynard 21, f. 145v, pl. 1

Upon the motion of *Wincoll* for Trinity College in Cambridge [. . .] the rectory of Thundridge near Ware in the County of Hertford in a commission issued out of the Exchequer to enquire of all concealed lands within the county

---

<sup>1</sup> Stat. 13 Eliz. I, c. 25, s. 1 (SR, IV, 560).

<sup>2</sup> Stat. 5 & 6 Edw. VI, c. 14 (SR, IV, 148-150).

and, upon this, it was found that the rectory of Thundridge was *concelatus et injuste detentus* from Queen Elizabeth *et sic in suo* had been for thirty years past and that it was of the annual value of £5, upon the receipt of which inquisition, the rent was put in charge and process was now<sup>1</sup> awarded to levy the arrears.

It was held that, notwithstanding that the inquisition did not find any title for the king but generally that it was concealed, in this it is good enough to make a charge of it and to make the other to answer to it.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 26v.]

79

## Potter's Case

(Ex. 1611)

*An annuity is real property and can be granted, distrained upon, and extended.*

Lincoln's Inn MS. Maynard 21, f. 145v, pl. 2

The case of Potter [was] moved by *Knaplocke* that, Simon Potter being a recusant convict, it was found by inquisition that he had an annuity for his life of £40 payable by Robert Potter, his son. And for this annuity, distress was taken for the king in the land of Robert Potter. And he moved to have the land discharged because the annuity was only personal.

But the Chief Baron [TANFIELD] said that in *York's Case*, in the Court of Wards,<sup>2</sup> when he was a serjeant, it was resolved that an annuity could be extended for the king.

And they grounded their resolution upon a case adjudged in 3 Edw. VI, that such an annuity could be granted over and thus, if the king has the annuity, he can distrain for the arrearages of it in the lands of him who must pay it.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 27; British Library MS. Add. 25207, f. 17, pl. 2.]

---

<sup>1</sup> ne MS.

<sup>2</sup> *York v. Twine* (1605), Croke Jac. 78, 79 E.R. 67.

**Mawdit v. Dame Delaware**  
(Ex. 1611)

*A lessee is an assignee.*

*A writ of extent can be levied upon some but not all of the debtor's lands.*

Lincoln's Inn MS. Maynard 21, f. 146, pl. 1

Between Mawdit and Dame Delaware, where Mawdit had a lease made to him by the Lord Delaware, which land was afterwards extended for the king upon a debt due by an obligation made before the extent, it was moved by Serjeant *Hutton* that the Statute of 33 Hen. VIII made an obligation of the king of the force of a statute against the obligor, his heirs, executors, and assigns. But Mawdit here, who was only a lessee for years, was not an assignee.

But this was overruled, and [it was held] that a lessee is an assignee. And thus it is the common experience of the court.

Then he [*Hutton*] moved that the Statute willed that all of the lands will be equally subject and not a part solely. And here the Lord Delaware had divers other lands that were not extended.

But it was held that the court will not take notice of more lands than were found in the inquisition and whether all those are extended suffice. And if there are more, then a new inquisition must be found, and thus those lands will be liable with the others, but the first extent will not be avoided.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 27; British Library MS. Add. 25207, f. 17, pl. 3.]

**Anonymous**  
(Ex. 1611)

*Imprests for the repair of castles are enforced by writs of distress to account.*

Lincoln's Inn MS. Maynard 21, f. 146, pl. 2

In a case moved by *Sir Philip Jackson* that money was imprested to divers knights of Yorkshire for the reparation of a castle, the course is that a note must be made of it out of the Receipt [of the Exchequer] and sent to Sir Henry Fanshawe's office<sup>1</sup> and then [a writ of] distress will be awarded against them *ad computandum* or against their executors if they are dead and they must account upon their oaths.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 27.]

82

### **Goldsmiths' Company v. Maddox** (Ex. 1611)

*A conveyance by description is valid although the metes and bounds be incorrect, but a conveyance by metes and bounds is void where they are incorrect in any way.*

Lincoln's Inn MS. Maynard 21, f. 146v, pl. 1

Upon a trial at the Guildhall that concerned the Company of Goldsmiths and Maddox for the title of his lease, it was said by the Chief Baron [TANFIELD] that, if there be a lease of a house called The Angel and it adds boundings to it that are false, in this the lease is good by the certainty of the name. But if there be a lease of a house and it abuts it of the east, west, etc., if any of the boundaries be false, the lease is void because all of the boundaries are as one certainty, that the house does not have a name given to it.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 27v; British Library MS. Add. 25207, f. 17v, pl. 1.]

---

<sup>1</sup> The King's Remembrancer's Office.

**Salter v. Stoddard**

(Ex. 1611)

*Where a person intends to avoid a royal lease for non-payment of the rent, the lessee must be given notice, but the patent need not be shown.*

Lincoln's Inn MS. Maynard 21, f. 146v, pl. 2

Upon a trial at the bar between Mr. Saulter and Sir Nicholas Stoddard for the title of a lease made to Sir Nicholas with a rent reserved and a condition to re-enter by Queen Elizabeth and the king granted a reversion to Saulter, who intended to avoid the lease for non-payment of the rent, it was held that notice must be given, but it is not necessary that the patent must be shown to the lessee. And also it is not necessary to demand<sup>1</sup> the person of the lessee for him to have notice, but, if he publish it at the house that was demised, this suffices.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 27v; British Library MS. Add. 25207, f. 17, pl. 2.]

**Alport v. Wainwright**

(Ex. 1612)

*Where an importer of goods does not pay the import duties but settles out of court with the informer, the fine to the Crown is still due and payable.*

Lincoln's Inn MS. Maynard 21, f. 148, pl. 2

In the case of Alport against Wainwright, who informed for the landing of Venice gold uncustomed, Alport compounded with Wainwright and gave him £100.

---

<sup>1</sup> querer *MS.*

It was held that *ex consequente* he must submit himself to his fine for the king.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 28; British Library MS. Add. 25207, f. 18, pl. 2.]

85

**Beddoe v. Anonymous**  
(Ex. 1612)

*In this case, it was held that the defendant had a fee simple in the copyhold lands in issue.*

Lincoln's Inn MS. Maynard 21, f. 148, pl. 3

Upon a trial of a title in [an action of] *ejectione firmæ* between Bydeawell and another for lands in Wales, where the custom of the manor was that *sibi et suis* made an estate in fee simple of copyhold land and the title of the defendant was under a surrender made by the ancestor of the lessor, which was that he surrender into the hands of the tenants *ad opus et usum Thomae Bydeau cui dominus concessit etc. habendum et tenendum sibi et suis*.

And it was urged by the counsel for the plaintiff that this carried only an estate for life to Thomas Bydeaw.

But the Chief Baron [TANFIELD] said that it is to be presumed that all the farms of the lord within the said manor are such that he cannot say *ad opus Thomae Bydeaw et heredum suorum* because they did not use such words.

And upon this verdict, judgment passed against the plaintiff.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 28; British Library MS. Add. 25207, f. 18, pl. 3.]

**Anonymous**  
(Ex. 1612)

*Where land conveyed by a fine lies partly within the duchy of Lancaster and partly outside, the post fine goes entirely to the Crown.*

Lincoln's Inn MS. Maynard 21, f. 148, pl. 4

A fine was levied of land, part of which was within the duchy [of Lancaster] and part outside. And the question was for the post fine for the patentee who had the post fines within the duchy. But being a thing entire that could not be divided, the court thought that the king should have all.

And in another case moved by *Anson* of Lincoln's Inn that the justices of assize imposed an amercement upon two villis of 40s. for the non-repairing of a bridge and one vill was within the duchy [of Lancaster] and the other of Lancashire, and they thought *ut supra*.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 28; British Library MS. Add. 25207, f. 18, pl. 4.]

**Powell v. Basset**  
(Ex. 1612)

*Where a person is in the jurisdiction of the court, anyone can file an action against him.*

*A sheriff is an accountant to the Crown, but an under sheriff is not.*

Lincoln's Inn MS. Maynard 21, f. 148v

In an action upon the case by Powell against Basset, the Sheriff of Glamorgan, for a false return upon a *scire facias*, which had garnished him etc., the plaintiff declared against the defendant *nuper vicecomitis praesente in*



*curia* without saying *super compotum*. And the plaintiff did not enable himself to sue here as *debitor domini regis* or otherwise. And this was moved in arrest of judgment by *Sir John Jackson*.

*Sed non allocatur* because it appeared by divers precedents that a stranger can declare there against another *praesente in curia* and there is sufficient jurisdiction to the court because, if a man be in the court, anyone can file a declaration against him. But where a man declares against an under sheriff *praesente in curia super compotum*, this is not good because he is not accountable, but only the sheriff.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 28; British Library MS. Add. 25207, f. 18v.]

## 88

### **Rex v. Mayor of Shaftesbury** (Ex. 1612)

*A principal challenge to a juror must be proved by evidence; a challenge to the favor of a juror will be examined upon a voir dire.*

Lincoln's Inn MS. Maynard 21, f. 149, pl. 1

Upon a trial at the bar in [an action of] *quo warranto* by the king against the Mayor and Burgesses of Shaftesbury, a juror was challenged by the defendants, which being a principal challenge, the court would not examine him upon *voir dire*, but the defendants must prove it. And afterwards, another of the jurors was challenged for the king because he was one of the burgesses. The court asked of Mr. *Diggs*, who made the challenge, if he took it for favor or as a principal challenge, and he said that [it was] for favor. And then the juror was examined upon *voir dire* if he was a burgess or not.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 29.]

**Young's Case**  
(Ex. 1612)

*A judgment lien attaches when the execution is made, not when the writ of execution is issued.*

Lincoln's Inn MS. Maynard 21, f. 149, pl. 2

In the case of one Young, who was upon an assignment of a debt to the king, which was endeavored to be prevented by a former judgment in giving where it was part that the goods are bound, which the party had at the time of the *teste* of the writ of execution, upon the book of 2 Hen. IV,<sup>1</sup> which says that his goods are bound which the party had at the time of the execution sued.

The Chief Baron [TANFIELD] said that, in the time of Sir James Dyer, it was resolved by the justices of the Common Bench by good advice that the said book is to be intended at the time of the execution pursued and that the goods are only bound which the party had at the time of the execution made, and not those that he had at the *teste* of the writ of execution.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 29; British Library MS. Add. 25207, f. 19, pl. 1.]

**Anonymous**  
(Ex. 1612)

*An action of debt does not lie on an indenture unless the counterpart signed by the defendant-obligor is produced.*

---

<sup>1</sup> YB Hil. 2 Hen. IV, f. 14, pl. 5 (1401).

It was moved by *Sir John Harris* that, in the time of Henry VIII, one Heron had by an enrolled indenture bargained and sold land to Lord Williams of Thame, by which indenture, the Lord Williams covenanted to pay money to Herne at divers days and, afterwards, before the days of payment, Herne was attainted of treason. And he moved to have a *scire facias* against the heir of Lord Williams to answer for this money to the king.

But the court denied this because, by the law, no action of debt lies upon this indenture without showing the counterpart which was sealed by the Lord Williams. And they held that [where] a note remained with the Clerk of Statutes that J.S. was bound in a statute of £10,000 to J.N., who was attainted, they do not go upon this note to make any process without seeing the statute itself.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 29; British Library MS. Add. 25207, f. 19, pl. 2.]

### **Grobham v. Stone**

(Ex. 1612-1613)

*A lessee cannot sue actions of ejectment or of trespass against a person who ousts the lessee's sub-tenant who is a tenant at will.*

Lincoln's Inn MS. Maynard 21, ff. 151, 161v

Upon a trial in [an action of] *ejectione firmæ* between Sir Richard Grobham and Mr. Stone, the case appeared that the lessee for years made a lease at will and a stranger ousted the tenant at will. And the lessee brought [an action of] *ejectione firmæ*.

And the opinion of the court, except ALTHAM, was that it did not lie and that he could not have *ejectione firmæ* any more than [an action of] trespass because the tenant at will had the possession, and a special verdict was found upon the point.

Michaelmas term 11 Jac. [1613].

The case between Sir Richard Grobham and Stone, one of the attorneys, was that the lessee for years made a lease at will and, he being ousted by a stranger, the lessee brought [an action] of *ejectione firmæ*.

And [it was] resolved that it did not lie any more than trespass.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, ff. 30, 36v; British Library MS. Add. 25207, ff. 23v, 19v.]

[Connected cases: Grobham v. Stone (Ch. 1612), 118 Selden Soc. 397.]

92

**Note**  
(Ex. 1612)

*A tenant in tail cannot be restrained to suffer a common recovery.*

Lincoln's Inn MS. Maynard 21, f. 151, pl. 2

Note that *Walter* [said] that the advise that the Lord Coke used to give to cut off an estate tail with a perpetuity was that the tenant in tail should make a lease for years and the lessee will make a feoffment and the feoffee being impleaded will vouch the tenant in tail and he vouch further the common vouchee and this is [ . . . ] of the danger of the restraint because the tenant in tail cannot be restrained to suffer a common recovery.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 30.]

93

**Beddoe, *qui tam* v. Oliver**  
(Ex. 1612)

*A contract that was not originally usurious can be made usurious by a later agreement.*

Trinity term 10 Jac. [1612].

Upon a trial between Bedoe and Walrum Oliver, a Dutchman of Sandwich, upon an information for the taking of usury and it was surmised that, upon a corrupt agreement, he took £3 for the loan and forbearing of £132 19s. 6d. from 8 January until 26 March. And Curling, who had borrowed the money, deposed that he agreed with Oliver that the money would be forborne from 8 January until 9 April for the rate of £10 in the hundred, but Oliver took the money 26 March before.

The Chief Baron [TANFIELD] said that, notwithstanding that it was not a corrupt agreement at first it, it is not material because the receipt is punishable unless he receive only ten in the hundred, but where a man is to avoid an obligation for usury, then the informer must show that the obligation was made upon such a corrupt agreement as he declared, and, if an obligation be forfeited and the obligee agrees to forbear it for a longer time at greater than ten in the hundred, if it be not agreed that he should have the surplus of the penalty, this is usury notwithstanding that the obligation was forfeited.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 30.]

### **Rex v. Anonymous**

(Ex. 1612)

*The question in this case was whether the Crown has remedy for the profits of the land of a convicted felon before a judgment has been given.*

Lincoln's Inn MS. Maynard 21, f. 151v

In a Yorkshire case moved by *Blunden* that a man being convicted of felony but no judgment [was] given, process was made for the king for the profits of the land, and whether the king will have the profits of the lands of a man convicted of felony was the doubt.

And Baron ALTHAM said that, upon an outlawry in a personal [action], the king will have the profits and [ . . . ] in this case.

To which it was answered that there is a judgment for the Crown.

And the court gave a day to have this matter argued.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 30v; British Library MS. Add. 25207, f. 20, pl. 1.]

95

**Wilson, *qui tam* v. Derecap**  
(Ex. 1612-1613)

*Where a person has a right to a jury de medietate lingue, if the jury cannot be fully seated, talesmen who are not foreigners can fill up the jury.*

Lincoln's Inn MS. Maynard 21, ff. 152, 159

Upon the trial of an information against an alien for landing of goods in the night against the Statute of 10 Eliz.,<sup>1</sup> the *venire facias* was *de medietate lingue*. And the jury did not appear. And the question was made whether a *tales de circumstantibus* will be awarded generally.

And it was granted thus because it suffices that the *venire facias* be *de medietate lingue*. And if he cannot procure the aliens to appear, it [the verdict] will be taken of others.

*Infra*, judgment [was] arrested.

Trinity term 11 Jac. [1613].

An information [was filed] by Wilson against Deerecop, an alien, for the landing of goods in the night. The [writ of] *venire facias* was awarded *de medietate lingue*. And at *nisi prius* at the Guildhall, the jury did not appear full and a *tales de circumstantibus* was awarded generally. And [it was] found for the king. And [it was] moved in arrest of judgment that the *tales* should be *de medietate lingue* as the *venire facias* was.

---

<sup>1</sup> Stat. 1 Eliz. I, c. 11 (SR, IV, 372-374).

And the court advised upon it.

And the Lord Chief Baron [TANFIELD] asked that question of Mr. Man, the [ . . . ] of the King's Bench, and he said that the precedents there are that the *tales* is general because it is upon the Statute of Hen. VIII, cap. 6.<sup>1</sup>

And the last day of this term, I moved for judgment, and it was given *per totam curiam*.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, ff. 30v, 35; British Library MS. Add. 25207, ff. 20, 22v.]

**Anonymous**  
(Ex. 1612)

*The arrearage of a rent is not a personal debt, but it is a real right.*

Lincoln's Inn MS. Maynard 21, f. 152v, pl. 2

Sir Thomas Campbell, who paid a fee farm of 33s. to the king, assigned an obligation of £300, in which one Hamden and Jones were bound to him. And upon a motion of Mr. *Walter*, it was ordered that the assignment will be revoked because one who is in arrear of his fee farm is not a debtor because this savors of the land and the king has recourse to the land for his fee farm.

And the Chief Baron [TANFIELD] cited a case, which was the case of Dr. Nicholas Saunders now recently in this, if a man [be] seised of a rent who was in arrear divers years, these arrearages could not be assigned to the king as a debt because it was a thing real.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 31; British Library MS. Add. 25207, f. 20v.]

---

<sup>1</sup> Stat. 35 Hen. VIII, c. 6 (SR, III, 962-963).

**Farmers of the Customs v. Jolles**  
(Ex. 1612)

*The question in this case was whether importing fish to sell that were caught by the seller is merchandizing.*

Lincoln's Inn MS. Maynard 21, f. 153v, pl. 1

Upon a controversy between the farmers of the customs and Sir John Jolles, who is the farmer at the City of London, of one fishing in Saffoye in Ireland and there he took salmons in the river which he farmed of the City and salted them in barrels and imported them to London to sell, whether customs will be paid for them or not was the question.

And it was said by Mr. *Weston* that custom will not be paid inasmuch as Sir John Jolles did not buy these salmons but took them in the river as his own. And thus they were not brought in by way of merchandise.

But it seems to me that, here upon the matter, he bought them because he paid rent for the fishing and, if it would not be so taken, yet it seems that, if a man brings in his own goods to sell, it is merchandise because, if a man transport commodities out of the realm that he had of [ . . . ] and not bought them, there is no doubt but that they are transported by way of merchandise and will pay custom. See the Stat. 5 Eliz., cap. 10.<sup>1</sup>

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 31v; British Library MS. Add. 25207, f. 22, pl. 3.]

---

<sup>1</sup> Note Stat. 1 Jac. I, c. 33, s. 2 (SR, IV, 1063).



**Attorney General v. Churchwardens  
of St. Saviour, Southwark**  
(Ex. 1613)

*A patent of the king will be construed so as to make the grant effective.*

10 Coke Rep. 66, 77 E.R. 1025

In an information of intrusion preferred in the Court of Exchequer by the King's Attorney General, which is entered Hilary 5 *Jac. regis*, rot. 121, against Thomas Harvey, John Marshall, Abraham Grene, and others for intruding into the rectory of the parish church of St. Saviour in the County of Surrey, 9 October *anno 3 regni regis Jac.* [1605] etc., upon not guilty pleaded, the jury gave a special verdict to this effect, that Queen Elizabeth was seised of the said rectory in her demesne as of fee in the right of her crown, and, by her letters patent bearing date 22 February *anno regni sui 27* [1585], demised to the churchwardens of the parish of St. Saviour in Southwark, who by such name were incorporated by Act of Parliament in *anno 32 Hen. VIII*, and so found the said rectory from the Feast of St. Michael then last past for twenty-one years, by force whereof, they entered and were thereof possessed. And, afterwards, the said queen by her other letters patent bearing date the 28 November *anno regni sui 33* [1590], reciting the said lease, *per praedictas literas patentes port' dat' 22 Februarii anno dictae nuper reginae 27 confect' quas quidem literas patentes, et totum statum, titulum, interesse terminum annorum adhuc futur' de et in praemissis dilecti subditori nostri Thomas Norton etc. gardiani dictae ecclesiae parochialis modo habentes, et ad praesens possidentes nobis sursumreddiderunt et restituerunt cancelland', quam quidem, sursumredditionem acceptamus per praesentes; sciatis igitur quod nos ad humilem petitionem gardianorum et parochianorum dictae ecclesiae Sancti Salvatoris de Southwark, tam in consideratione sursumredditionis praedictis quam in consideratione quod praedict' nuper gardiani ecclesiae parochialis praedictis post datum dictarum nostrarum literarum patentium superius mentionat', unam sufficientem domum aptam et convenientem pro schola grammaticali ibidem tenend' infra paroch' Sancti Salvatoris praedict' pro eruditione puerorum ejusdem paroch' sumptibus*

*eorum et expensis erexerunt et aedificaverunt, necnon pro fine £20 legalis monetae Angliae ad Receptum Scaccarii nostri ad usum nostri per praefatos modo gardianos solut*, demised the said rectory to the said Thomas Norton etc., now wardens of the said church, from the Feast of the Annunciation of our Lady [25 March] then last past for the term of fifty years. And [they] further found that the said wardens, at the time of the making of the said lease for fifty years, surrendered and yielded up the said letters patent of 27 Eliz. to be cancelled and then paid to the officers of the Court of Chancery the fees due for cancelling them and making a *vacat* of the enrolment of them and that they then were possessed of the residue of the said term of twenty-one years, but no *vacat* was made of the said enrolment of the said letters patent and that the defendants and others, being wardens, had entered into the said rectory by force of this later lease *praedicti tempore quo*. And if the entry of the said defendants as wardens was lawful or not was the question.

And this case was often argued at the bar in sundry several terms. And, now, this term, it was argued by SIR EDWARD BROMLEY, SIR JAMES ALTHAM, and SIR GEORGE SNIGGE, barons of the Exchequer, and SIR LAWRENCE TANFIELD, Chief Baron. And, in this case, three points were resolved:

First, that an actual surrender was not necessary in this case because these words '*modo habentes et ad praesens possidentes*' etc. prove that, at the time of the making of the said letters patent, the said churchwardens had the said term for years in them, and, therefore, it expressly appears that the king's intention was not that they should make any surrender before the patent, but that, by acceptance of the letters patent, they having the term then in them, their estate for years should be surrendered. And where the words are '*sursumreddiderunt et restituerunt*' etc. in the preterperfect tense, it is to be observed that the words are '*modo habentes et ad praesens possidentes sursumreddiderunt et restituerunt*' etc., which is true in construction of law, for, in the judgment of the law, the surrender precedes the new lease, and, in many cases, the preterperfect tense is put for the present tense, as *dedimus et concessimus* for *damus et concedimus* etc., to which surrender in law, the king expressly agrees by these words *quam quidem sursumrestitutionem acceptamus*. And the king is not deceived thereby nor prejudiced in estate, interest, value, or remedy. And, although the lessees were a corporation aggregate of many and could not make an express surrender without a deed in writing under their seal, yet they might, by an act in law, surrender

their term without a writing, for *fortior et potentior est dispositio legis quam hominis*, as, in 37 Hen. VI, 16, if a man has an *interesse termini pro termino annorum* to begin at Michaelmas, he cannot expressly surrender this interest, but, if he takes a new lease for years, this acceptance is a surrender in law of the first lease. So, if a prior with the consent of his convent makes a lease for years rendering rent, if the prior, by deed, expressly releases the rent and dies, the successor shall recover the arrearages, but, if the prior had ousted the lessee and died, this discharge in law should discharge the rent which incurred during the ouster against the successor, as it appears in 34 Hen. VI, 21.<sup>1</sup>

And this construction and no other stands with the words and intention of the said letters patent. But if two constructions may be made of the king's grant, then the rule is, when it may receive two constructions and, by force of one construction, the grant may, according to the rule of law, be adjudged good and, by another, it shall by law be adjudged void, then, for the king's honor and for the benefit of the subject, such construction shall be made that the king's charter shall take effect, for it was not the king's intent to make a void grant. And therewith agrees Sir J. Molins's Case, in the Sixth Part of my Reports.<sup>2</sup>

Second, it was resolved that the delivery made by the wardens of the said letters patent in Chancery to be cancelled etc., which was part of the consideration, by their hands without a writing was sufficient and as much as they ought to do. And it belongs to the Lord Chancellor or his officers to have cancelled them, and everyone ought to do what belongs to him to do.

Third, it was resolved that it was not necessary to find the payment of the said £20, which was one of the considerations of the lease, for that is but a sum of money in the personalty and affirmed by the king to be paid and satisfied in time before the patent and so a personal consideration executed. And therewith expressly agrees 37 Hen. VIII, Br., *Patents*, 4.<sup>3</sup>

---

<sup>1</sup> YB Mich. 34 Hen. VI, f. 21, pl. 40 (1455).

<sup>2</sup> *Molyn's Case* (1598), 6 Coke Rep. 5, 77 E.R. 261.

<sup>3</sup> Brooke, Abr., *Patents & graunts le Roy*, pl. 4.

(Note, reader, I have seen divers other letters patent made upon like consideration and having such words [as] ‘*modo habens et possidens*’ and no actual surrender was ever made in any of them. *Vide* Berwick’s Case in the Fifth Part of my Reports, fol. 93, 94. *Vide* the Case of Alton Woods in the First Part of my Reports, between which and the case at bar, the difference appears.<sup>1</sup>)

[Other reports of this case: Lane 21, 145 E.R. 266.]

[Record and argument of counsel: Georgetown Univ. Law Sch. MS. B88-1, f. 208v, Cambridge Univ. Lib. MS. Ii.5.124, f. 90v.]

99a

## **York and Allen’s Case** (Ex. 1613)

*A pardon does not pardon debts due to a private person.*

*Where the crown is a joint creditor, it can execute its judgment in all of the judgment debtor’s lands.*

Paynell Exch. 223

The case was [that] York recovered against Allen [in] 24 Eliz.; [in] 26 Eliz., York was outlawed. After this outlawry, Allen and his son were jointly seised of the land in fee and made a feoffment, and, afterwards, a [writ of] extent [was] sued. And there, the question was, as the case by direction was drawn and argued, whether the king will extend here the moiety of the moiety of the moiety or the whole.

---

<sup>1</sup> *Attorney General v. Barwick* (1597), 5 Coke Rep. 93, 77 E.R. 199, also Moore K.B. 393, 72 E.R. 649; *Attorney General v. Bushopp* (1600), 1 Coke Rep. 26, 76 E.R. 64, also 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.

And there, it was resolved upon solemn debate, first, that the Pardon of 26 Eliz.<sup>1</sup> did not pardon this debt of York; secondly, that the king will have in execution here all of the land.

Paynell Exch. 435

It was resolved by BROMLEY and ALTHAM, barons, and Chief Baron TANFIELD, *una voce*, that a person who was outlawed after judgment will not have the benefit of the pardon until he has satisfied the party.

[Other reports of this case, Lane 20, 145 E.R. 265.]

99

**Lawrence v. Mowlines**

(Ex. 1613)

*Upon an assignment of a debt to the Crown upon a writ of extent, the debtor is not in execution for the debt but the extent can be pleaded in discharge of the debt.*

Lincoln's Inn MS. Maynard 21, f. 155, pl. 1

In a case between Sir Jo. Lawrence and Mowlines touching the goods of Bromley, who was outlawed, it was held by Baron SNIGGE and Baron ALTHAM that, where a debt is assigned to the king and, upon a second *scire facias* returned *nihil*, judgment is given and, upon this, a writ of extent, by which the party is taken in it, he is not in execution for the debt any more than where he is taken by a writ of extent upon the assignment without suing any *scire facias* as he can be because the awarding of the *scire facias* is only in discretion, but it can be pleaded in discharge of the debt in the one case as well as in the other.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 32v.]

---

<sup>1</sup> Stat. 27 Eliz. I, c. 30 (SR, IV, 758-762).

**Claxton v. Stubbe**  
(Ex. 1613)

*Perjury consists only of false matter of record that is material to the case.*

Lincoln's Inn MS. Maynard 21, f. 155v

An action upon the case [was brought] by Claxton against Stubbe for calling him a perjured knave. The defendant justified that, upon a bill in the [Court of] Star Chamber by Stubbe against another, the plaintiff to delay the defendant in the said suit, swore before Minot, the clerk of the court, who was lawfully authorized to take an affidavit, that J.S and J.D, who were defendants in the said suit were, as he believed in his conscience and as they seemed to be, seventy years of age, *ubi revera* they were only forty years of age, as the plaintiff well knew, and did not seem to be of the age of seventy years and *ubi revera* J.S. and J.D. were not defendants in the said suit, for which plea the plaintiff demurred in law.

And *per totam curiam*, judgment was given for the plaintiff principally because he said that the oath was before Minot and he did not show that it was recorded in court because it is not of record if he keep [it] in his pocket and does not file it of record and then it is not perjury. And if it was recorded, then he must plead that he was deposed in court. Also, it did not appear that the defendant had any prejudice because he did not show that, by it, he was delayed by having a commission to take their answer, not being defendants in the suit, so that the supposed perjury was in a thing not material. And if a man commits perjury that is not punishable by the Statute of 5 Eliz.<sup>1</sup> but is punishable in the [Court of] Star Chamber as a misdemeanor. A man could justify to call him perjured. But, if he could be punishable one way nor the other, it seems it is other[wise].

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 32v; British Library MS. Add. 25207, f. 21v.]

---

<sup>1</sup> Stat. 5 Eliz. I, c. 9 (SR, IV, 436-438).

**Camden v. Borrowe**  
(Ex. 1613)

*For the purposes of assigning a debt to the Crown, the creditor-assignor will be considered a debtor of the Crown where he has entered into a conditional debt to the Crown even though the condition of the debt has not occurred.*

Lincoln's Inn MS. Maynard 21, f. 156, pl. 1

In Camden and Borrowe's Case, it was that, Borrowe being in debt to Camden by a bill, Camden was bound to the king in a recognizance of £150 upon a condition that, where an information was exhibited against one Tyrr for the landing of goods without paying custom, if the goods will be adjudged forfeited, that he must answer to the king the value.

And I moved that, by this recognizance, he was not a debtor to the king to make an assignment because the recognizance was not forfeited.

And *tamen* the court allowed it and would not revoke the assignment.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 33; British Library MS. Add. 25207, f. 22, pl. 1.]

**Darcy v. Arden**  
(Ex. 1613)

*The question in this case was whether an entry after a judgment awarding the pernancy of profits is a disseisin.*

Lincoln's Inn MS. Maynard 21, f. 156, pl. 2

Hilary term 10 Jac.

In the case between Sir Robert Darcy and Arden, it was said by the Solicitor [General *Bacon*] that, if J.S. be seised of land and this land is decreed

to J.D. by which he enters, that notwithstanding that the decree did not give to him any estate but only a peryancy of the profits of them to J.D., it is not a disseisin.

But the Chief Baron [TANFIELD] seemed to doubt this.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 33; British Library MS. Add. 25207, f. 22, pl. 2.]

[Connected cases: Arden v. Darcy, Lane 68, 145 E.R. 305, 1 Anderson 281, 123 E.R. 473, 2 Anderson 93, 123 E.R. 563, 118 Selden Soc. 431, Darcy v. Arden, 117 Selden Soc. 365.]

103

**Duckett's Case**

(Ex. 1613)

*A grant of the king of goods and chattels does not pass debts or obligations.*

Lincoln's Inn MS. Maynard 21, f. 157

In the case of Duckett who claimed felons' goods by a grant of the king within a hundred in Wiltshire, the Chief Baron [TANFIELD] said that, if the king grants to J.S. *omnia bona et catalla felonum* within the hundred of D., if a debt be due to the felon by the obligation, J.S. will not have the money nor the obligation because notwithstanding that, in the case of a common person, by a grant of *omnia bona et catalla felonum*, it passes notwithstanding that the debt itself does not pass in it, in the case of the king, it is otherwise and the obligation will not be severed from the debt and, by a grant of *bona et catalla* by the king, the debt does not pass *ideo* nor the obligation that is for the payment of it.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 34; British Library MS. Add. 25207, f. 23, pl. 1.]



**Smith's Case**  
(Ex. 1613)

*One co-obligee can assign the debt to the Crown.*

Lincoln's Inn MS. Maynard 21, f. 158, pl. 2

In the case of Smith, upon the motion of Mr. *Crewe*, it was resolved that, if there are two obligees, one of them can assign it to the king.

*Sed vide* that, before this time, the contrary had been held.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 34v; British Library MS. Add. 25207, f. 23, pl. 2.]

**Brochas's Case**  
(Ex. 1613)

*A writ of execution to enforce a fine estreated out of the Court of High Commission need not show the reason for the fine.*

Lincoln's Inn MS. Maynard 21, ff. 158, 158v

Sir Pexall Brochas was fined by the High Commissioners £1000 for adultery, and this was estreated into the Exchequer, upon which process was made. And he demurred in law. And it was argued by *Goldsmith* for Sir Pexall Brochas. And he took two exceptions, first, because the style of the court was *Curia Commissionariorum Domini Regis virtute litterarum patentum* and not the Court of Commissioners of the King, but that it did not certify the cause so that it could appear to the court if it was within their commission, and the estreat is like a declaration of the king which must show the cause of the debt.

*Sed tamen* without argument, judgment was given for the king and that they need not certify the cause any more than upon the estreats out of the [Court of] Star Chamber or of the justices of assize. And for the other, inasmuch as it appears what authority they have, it is good enough.

In the case of Sir Pexall Brochas, *supra*, two precedents were shown, one in the case of one Gouilding where [there was] a demurrer upon such a certificate of a fine because it was only *quia non fecit penitentiam* without showing for what matter. And this plea was confessed by Lord Coke, being then Attorney [General], and the other precedent now recently in the Case of Sir Harry Crispe, where it appeared that the court had stayed process against him because the certificate did not show for what cause the fine was imposed.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, ff. 4v, 35.]

106

**Throckmorton's Case**

(Ex. 1613)

*The estreat of a fine out of the Court of High Commission need not show the reason therefor.*

*In order to attack an estreat out of a court, the party must show that the court lacked jurisdiction to make the fine.*

Lincoln's Inn MS. Maynard 21, f. 160, pl. 1

In the case of Dame Throckmorton upon a fine imposed upon her by the ecclesiastical commissioners, the court held that, in the estreat of their fines, there is no need to show any cause for which the fine was imposed because the general estreat is sufficient to possess the court of it. And then, the party, for her discharge, must show the cause and make it to appear to the court by showing the Statute of 1 Eliz.<sup>1</sup> and of their commission and that do

---

<sup>1</sup> Stat. 1 Eliz. I, c. 1 (SR, IV, 350-355).

not have jurisdiction of the cause for them, and, inasmuch as it was not so done in this case, the court held it bad.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 35v; British Library MS. Add. 25207, f. 23, pl. 3.]

107

**Mollins v. Casse**  
(Ex. 1613)

*The debts of convicted recusants can be levied after their death, but penalties cannot be levied post mortem.*

Lincoln's Inn MS. Maynard 21, ff. 160, 162

Michaelmas term 11 Jac. [1613].

Upon a motion made by Mr. *Warder* of the Exchequer concerning a lease of one Mollins, a recusant, the Chief Baron [TANFIELD] said that it was resolved now lately in a case concerning the Queen Anne that, if a recusant convict be possessed of a lease for years that is found by an inquisition, if the recusant die before a seizure, the term cannot be seized after his death, but the king has lost the benefit of it.

Michaelmas term 11 Jac. [1613].

In the case of Mollins, a recusant, and Casse, one of the pages of the Prince's Chamber, the Chief Baron [TANFIELD] showed the difference upon the Statutes of 23 Eliz. and 28 [Eliz.],<sup>1</sup> that, if a man be indicted of recusancy and convicted, that the £20 per month for each month that is contained in the indictment is a debt and it will be levied after the death of the recusant as well as any other debt at common law, but the £20 the month is payable for each month afterwards without a new conviction to be his is not a debt, but a penalty for which a seizure is given, and there, if the recusant dies before the seizure, all is gone and lost.

---

<sup>1</sup> Stat. 23 Eliz. I, c. 1 (SR, IV, 657-658); Stat. 29 Eliz. I, c. 6 (SR, IV, 771-772).

[Other copies of this report: Lincoln's Inn MS. Maynard 31, ff. 35v, 36v; British Library MS. Add. 25207, ff. 23v, 24.]

108

**Rex v. Perrott**  
(Ex. 1613)

*A leasehold begins as of the date agreed upon; the date of the delivery of a deed of lease is not material to the substance of the lease.*

Lincoln's Inn MS. Maynard 21, f. 160, pl. 3

Upon a special verdict between the king and Perrott upon an assignment made by Havers, Perrott, being garnished upon a *scire facias* as terre tenant, pleaded a lease made to him by J.S. before the assignment and pleaded that J.S., the last [day of] December 9 Jac. [1611], demised the land to him for twenty-one years to begin after the death of J.S. The Attorney [General] of the king [*Bacon*] joined issue *non demisit modo et forma*. And the jury found that the indenture of lease bore the date of the last of December but it was not delivered until 1 February afterwards.

And the opinion of the court was clear against the king because the day is not material inasmuch as the demise in substance was found for the same term.

But the Chief Baron [TANFIELD] said that, if, in [an action of] *ejectione firmæ*, the plaintiff declares that a lease made 1 April for twenty-one years to begin from the Michaelmas [29 September] before, upon *non dimisit*, if the lease was made the 2d of April, it is against the defendant because it is not the same term because, by his plea, the first day of April will be part of his term. But if it was to commence at Michaelmas following, then it is otherwise because it is the same estate.

And Mr. *Crewe* cited a case to be adjudged in 33 Eliz. [1590 x 1591] that, in [an action of] *ejectione firmæ*, the plaintiff declared of a lease made by Sir William Vaughan, and, upon [a plea of] *non demisit*, it was found that William Vaughan, Esq., demised and that he was not a knight, in this it was

good, *contra* the opinion in 13 Eliz. Dyer 300a,<sup>1</sup> of a lease supposed to be made by J.W. to Dame Delaware where she was not a dame.

But it [was] thought by the Chief Baron [TANFIELD] that, if a man pleads a demise by an indenture bearing a date of such a day, upon a *non demisit*, if the indenture bears a date which [is] another day, it is bad.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 35v.]

109

### **Kinnerseley's Case** (Ex. 1613)

*Absolute ownership of property is presumed, and, therefore, an allegation of the mere occupation of a lessee of goods must be specially pleaded.*

Lincoln's Inn MS. Maynard 21, f. 160v

Upon an assignment made by Kinnerseley of an obligation of Harrison and process awarded, it was found by an inquisition that Harrison was possessed of divers goods contained in a schedule as of his own goods. And they were seized into the hands of the king. And one Beston came and pleaded to this inquisition that Thomas Harrison was possessed and before the assignment gave the goods to him, and he, being possessed, demised the goods to Harrison for a year, by virtue of which demise, he was possessed at the time of the inquisition. And he did not take a traverse that Harrison was not possessed *ut de bonis suis propriis*.

And the court thought that it was bad and that this is not any [plea of] confession and avoidance because it will be intended by the inquisition an absolute property, and a person who has goods demised to him has only the occupation.

I was of counsel for Kynnersely and demurred upon the plea.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 36.]

---

<sup>1</sup> *West's Case* (1571), 3 Dyer 299, 73 E.R. 673.

**Anonymous**  
(Ex. 1613)

*Notice of a trial must be given to the party himself or to his attorney of record.*

Lincoln's Inn MS. Maynard 21, f. 161

Upon a trial before the Chief Baron [TANFIELD] at *nisi prius* for [ *blank* ], a motion was made to stay the trial for want of notice. And an affidavit was made that notice was given to Walter Hilary, the clerk, before Babbe, who was the attorney for the defendant.

But the Chief Baron [TANFIELD] held that it was not sufficient because he delivered it for a rule that notice must be given to the party himself or the person who is attorney of record. And it was deposed here that notice was given to the solicitor of the defendant. But this notwithstanding, the trial was stayed.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 36; British Library MS. Add. 25207, f. 23v, pl. 2.]

**Machill v. Oxford**  
(Ex. 1613)

*The husband of an executrix cannot assign a debt due to the decedent's estate.*

Lincoln's Inn MS. Maynard 21, f. 161v, pl. 3

Between Machill and Oxford upon an assignment of a debt to the king, the case was that Machill was indebted to J.S. by an obligation and J.S. died and his wife took administration and [she] married Oxford, who, being a debtor to the king, assigned this obligation to the king.

And Baron ALTHAM thought that it was good and that it will bind the wife because the husband could have released it.

But the Chief Baron [TANFIELD] and SNIGGE thought *contra*. And he said that [there is a] diversity between a grant and the release that [makes] extinct the duty.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 36v; British Library MS. Add. 25207, f. 23v, pl. 4.]

112

### **Mascall's Case**

(Ex. 1613)

*Where an advowson is held of the Crown, the rector of the church is not liable where the advowson is improperly alienated.*

Lincoln's Inn MS. Maynard 21, f. 162, pl. 2

In the case of Mascall, parson of Mundylees in Essex, he was presented by Cant. And the advowson being held of the king *in capite*, Cant alienated it without a license, upon which money was levied upon Mascall. But by a motion made, it was discharged. And it will be levied of the others held by Cant.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 36v; British Library MS. Add. 25207, f. 24, pl. 2.]

113

### **Ward v. Barham**

(Ex. 1613)

*Upon an action against a sheriff for causing a debtor to go at large without putting up bail in the amount of the debt owed to the plaintiff, the plaintiff-creditor must plead specially in his complaint the amount of the debt.*

Lincoln's Inn MS. Maynard 21, f. 163

An action upon the case [was brought] by Ward against Barham and Smithes, sheriffs of London, and it showed that one Waight was imprisoned in the Counter at the suit of the plaintiff upon a plaint of £60 and afterwards [a writ of] *habeas corpus* was awarded out of this court to have his body before Baron Southerton with the causes and, upon this, the sheriffs intending to defraud him of his debt returned that Waight was in prison at the suit of the plaintiff in a plea of debt of £20 *ubi revera* he was in prison for £60 and not for £20, by reason of which Baron Southerton took bail of him of trespass to the plaintiff in an action of £20 and not of £60. And upon this, he was allowed to go at large. And upon [a plea of] *non culpabilis*, it was found for the plaintiff.

And I moved in arrest of judgment because it did not say that the sheriffs did not return the plaintiff for £60.

And [it was the] opinion of the court that it was bad.

And the plaintiff began *de novo*.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 37v.]

114

**Fryer v. Pollard**  
(Ex. 1613)

*The question in this case was whether, upon an information upon a penal statute for a joint offense, the defendants can plead separately.*

Lincoln's Inn MS. Maynard 21, f. 163v, pl. 1

An information [was filed] by Fryer against Pollard and Ray upon the Statute of 5 Edw. VI, for the buying of cattle.<sup>1</sup> And Pollard appeared alone and pleaded *non culpabilis* and was found guilty. And at another term afterwards, Ray appeared and pleaded *non culpabilis* and was also found guilty.

---

<sup>1</sup> Stat. 3 & 4 Edw. VI, c. 19 (SR, IV, 119); Stat. 7 Edw. VI, c. 11 (SR, IV, 175-176).



And it was moved in arrest of judgment by *Edwards* that it was a joint offense; therefore, they must have pleaded jointly and it should have been tried by an apt *venire facias*.

But, however, by the consent of all in court, judgment was given.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 37v.]

115

### **Hayward's Case**

(Ex. 1613)

*A person in debt to the Crown upon a fine for abuse can be removed out of the Gatehouse Prison into the Fleet Prison.*

Lincoln's Inn MS. Maynard 21, f. 163v, pl. 2

Hayward, a Welshman, was in execution for debt in the Gatehouse [Prison], and he was brought into court to answer to divers misdemeanors in vexing men with false process. And the court would have committed him to the Fleet [Prison], but they could not in respect of the contempt and those misdemeanors because they could not commit him for the execution, by which, at another day, they fined him £100 to the king for his abuse. And this being a debt to the king, they committed him to the Fleet in execution upon this and for the other execution also that he was in the Gatehouse.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 38; British Library MS. Add. 25207, f. 24, pl. 3.]

116

### **Beddoe, *qui tam* v. Fishborne**

(Ex. 1613)

*Foreign depositions are admissible in evidence.*

Lincoln's Inn MS. Maynard 21, f. 164, pl. 1

In the case of an information by Bedoe against Mr. Fishborne and Browne for the landing of silk grograins uncustomed, the question was upon the nature of the stuff if they were tobnies or grograins. And depositions that they were taken in Venice, where the silks were made, and certified here upon the seal of the duke were allowed to be given in evidence.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 38; British Library MS. Add. 25207, f. 24v, pl. 1.]

117

### **Fitzwilliam's Case** (Ex. 1613)

*Where lands have been seized into the king's hands, a later seizure on behalf of a private person is void.*

Lincoln's Inn MS. Maynard 21, f. 164, pl. 2

In the case of one Fitzwilliam, in which Mr. *Reynell* and Mr. *Jermye* were of counsel, it was that, Morrison of the Pipe [Office] being in debt to the king, his land was seized into the hands of the king and, afterwards, Fitzwilliam, having a statute of Morrison, sued execution, and he had an inquisition found for him and a seizure. After this, a debt of Morrison was assigned to the king by J.S., and, afterwards, a composition was made with the king and his hands [were] removed as to the seizure for Morrison's debt and, after this, Fitzwilliam swore a [writ of] *liberate* upon the statute. And afterwards, his land was extended for the said assignee.

And [it was] held that it well can because the seizure upon the statute during the time that the land was in the hands of the king was void.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 38; British Library MS. Add. 25207, f. 24v, pl. 2.]

**Cotton's Case**  
(Ex. 1613)

*No fees are payable upon a fine levied by the king himself.*

Lincoln's Inn MS. Maynard 21, f. 164v, pl. 1

In the case of Cotton, which was moved by *Repington*, that Cotton having a defective title, the king levied a fine to him for the confirmation of his estate. And process was made against Cotton to make a fine to the king for this alienation, *viz.* a fine *pro licentia educandi*. But he was discharged because nothing will be paid upon a fine levied by the king himself.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 38; British Library MS. Add. 25207, f. 24v, pl. 3.]

**Wainwright, *qui tam* v. Boyes**  
(Ex. 1613)

*An information qui tam cannot be taken for confessed by the Attorney General.*

Lincoln's Inn MS. Maynard 21, f. 164v, pl. 2

Upon an information by Wainwright against Boyes, a stranger, upon a seizure of lawnes as forfeited for the not paying of custom, the Attorney [General] of the king [*Bacon*] *non vult ulterius prosequi*. And upon this, a judgment was given that the defendant [ *blank* ].

Upon my motion, it was ordered by the court that a *vacat* will be made of it.

And they gave a rule that no such confessing will be received upon an information *tam quam*.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 38; British Library MS. Add. 25207, f. 25, pl. 1.]

120

**Town of Southampton v. Melletyne**  
(Ex. 1613)

*The question in this case was whether seven Englishmen and five foreigners can constitute a jury de medietate linguae.*

Lincoln's Inn MS. Maynard 21, f. 164v, pl. 3

In a case between the vill of Southampton and Melletyne in an action of debt upon the Statutes of 5 and 13 Eliz.,<sup>1</sup> that would that [if] any sweet wines of the parts of the Levant be brought into this realm in any port at Southampton [there is an] impost 20s. for each butt and that the king will have bailiffs [who] will sue an action of debt. And in [an action of] debt brought against Melletyne, he pleaded *nihil debet*. And a *venire facias* [was] awarded *de medietate linguae*. And at *nisi prius* before the Chief Baron [TANFIELD] in London, seven Englishmen appeared and six foreigners and one of the foreigners was challenged out. And it was tried by seven Englishmen and five foreigners. And it was moved in arrest of judgment.

And the court was divided. And the Chief Baron [TANFIELD] said that all of the judges of their house [Serjeants' Inn Chancery Lane] were of opinion the trial was good.

And Baron ALTHAM said that all of their house [Serjeants' Inn Fleet Street] were of the contrary opinion and that the trial must be by a moiety of foreigners unless it be that there are not as many within the place of which the venue is.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 38v.]

---

<sup>1</sup> Stat. 1 Eliz. I, c. 11, s. 8 (SR, IV, 373-374).

**Glover's Case**  
(Ex. 1614)

*There can be no abatement of a rent where part of the leasehold is lost to the sea by erosion.*

Lincoln's Inn MS. Maynard 21, f. 166, pl. 1

In the case of Glover in an action of debt for rent, the defendant pleaded that part of the lands was surrounded by the sea and thus could have an apportionment, upon which there was a demurrer. And judgment was given against the defendant upon the insufficiency of the pleading.

But the Chief Baron [TANFIELD] and ALTHAM seemed to incline that there will be no apportionment in such a case and thought it reasonable that the lessee must bear the loss of it because, if the land became of a greater value, the lessor will not have more rent and, on account of this, this case differs from the case of an extent because, if land be delivered in execution upon a statute at such a value and, afterwards, part of the land is surrounded, the conusee will not carry the loss of it because it is to satisfy the precedent debt, and, if the land becomes of a greater value, the conusor will have the benefit of it. And notwithstanding that the sea had surrounded part, yet it could be that it will be restored again and relinquished by the sea.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 39; British Library MS. Add. 25207, f. 25, pl. 3.]

**Poynes' Case**  
(Ex. 1614)

*Lands held by wards of the Crown are not subject to execution for debts during the minority of the ward.*

Lincoln's Inn MS. Maynard 21, f. 166, pl. 3

Sir John Poynes, being seised of the manor of Benerston in the County of Gloucester, was bound in a statute of £400 to Serle, the proctor of the king. Afterwards, he alienated the manor to Sir Gilbert Hicks, who died, his heir under age, and the land was seized into the hands of the king and the king granted the wardship of the body and the land to Dame Hicks. And then Searle assigned the statute to the king.

The court held that the land will not be extended during the minority.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 39; British Library MS. Add. 25207, f. 25v.]

123

### **Herbert v. Smith**

(Ex. 1614)

*Where a sheriff executes a writ of extent for a common person, this takes priority over a later execution of a writ of extent for the Crown.*

Lincoln's Inn MS. Maynard 21, f. 166v

In the case of Sir William Herbert and Smyth, which was that Smyth was bound to Sir William Herbert in a recognizance in the nature of a statute staple in the Chancery upon which a present extent will be awarded without a *scire facias*. And four years afterwards, a customer had a judgment to recover a debt against Smyth and before any process [was] awarded upon the statute, he assigned this judgment to the king. And afterwards, Sir William Herbert sued execution upon the recognizance, and he had the land delivered.

[It was] held clearly that he will not be ousted by the king. But the case here was more hard because the first process of extent was delivered to the sheriff for the king and then, afterwards, process upon the recognizance, and the sheriff having both of the processes in his hands, he executed this which was for Sir William Herbert, and then, upon the process for the king, he returned that he could not extend this because it was extended before upon

the recognizance, and, notwithstanding that the sheriff had not to bar himself as he should, as was said in this, inasmuch as execution was made upon the recognizance, they will not adjudge this for the king.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 39; British Library MS. Add. 25207, f. 26, pl. 1.]

124

**Moore v. Musgrave**  
(Ex. 1614)

*A lease will be construed according to the intent of the parties thereto.*

Lincoln's Inn MS. Maynard 21, f. 167, pl. 1

Between Moore and Musgrave of the County of Cumberland [in an action of] *ejectione firmæ*, the plaintiff declared of a lease made 5 May 10 Jac. [1612] to have from the Feast of the Annunciation [25 March] before for twenty-one years. Upon *non culpabilis* pleaded, the jury found that the lease was made 5 May *habendum a festo Annunciationi* before for twenty-one years next ensuing the date hereof. And upon this verdict, the case was that a man held a lease dated 6 May to hold from the Annunciation last past for and during the term of twenty-one years next ensuing the date hereof, whether the lessee will have twenty-one years from the date according to the last words or from the Annunciation according to the first words, because this is a repugnancy and both cannot stand.

And the Chief Baron [TANFIELD] thought that he will have twenty-one years from the making of the lease because it will be taken more strongly against the lessor and thus it is not the same lease of which the plaintiff has declared.

But the other three barons [held] *contra* because the intent appears that the lease will begin and will end at the Annunciation. And they gave judgment for the plaintiff.

And the Chief Baron [TANFIELD] seemed to hold that, if a man make a lease of a house and twenty acres of land *habendum* the house for twenty years and nothing [be] said of the land, that, in this, he will have the land for twenty years because the office of the *habendum* is only to limit the estate and not the thing that is granted.

But Baron ALTHAM expressly denied it.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 40.]

125

**Needham v. Williams**

(Ex. 1614)

*Where some of the jury appear after others have been sworn, they will all be sworn again after the jury is full.*

Lincoln's Inn MS. Maynard 21, f. 167, pl. 2

Upon a trial at the bar between Needham and Williams for the title of land in Carnarvon, it was tried by a jury of Shropshire, being the next English county. The jury were called upon the Tuesday, which was the day of the return, and thirteen or fourteen appeared. And they were adjourned to the next day, and then it was alleged by the plaintiff that others of the jury who did not appear the first day were now come. And the doubt was whether all of the panel will be called over *de novo* or that the jury will be taken only of those who were adjourned.

And it was much doubted by the barons. And they sent for Mr. *Brownlow* and conferred with him. And at last, it was resolved that all of the panel will be called over. And so it was, and some then appeared who did not appear the first day. And they were sworn before any of the others who were adjourned because, in law, it was an adjournment of all of the panel.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 40; British Library MS. Add. 25207, f. 26, pl. 2.]



**Prunner's Case**

(Ex. 1614)

*An inquisition post mortem must find in which county the manor, in which the lands are held, lies.*

Lincoln's Inn MS. Maynard 21, f. 168, pl. 2

By an inquisition found in Monmouth in Wales, it was found that one Prunner died without an heir and that he was seised of certain land in S. in the County of Monmouth which was held of the king as of his manor of D., and [it was] not found in which county the manor of D is.

And *prima facie*, Baron ALTHAM thought that it was good enough.

But the Chief Baron [TANFIELD] [held] *contra* because, if the tenure be traversed, it must be tried where the land lies and where the manor is and *non constat* where the venue will be for the manor.

And so all agreed.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 41; British Library MS. Add. 25207, f. 27, pl. 2.]

**Sidley's Case**

(Ex. 1614)

*An action of covenant lies upon an agreement in a deed of indenture though technical words of covenant are lacking.*

Lincoln's Inn MS. Maynard 21, f. 168, pl. 3

In the case of Sir Isaac Sidley, it was agreed clearly, that, upon a word of agreement in an indenture, an action of covenant lies notwithstanding that it is not a word of covenant.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 41.]

128

### **Coheite's Case**

(Ex. 1614)

*A writ of habeas corpus does not lie to remove a case out of the Cinque Ports.*

Lincoln's Inn MS Maynard 21, f. 168, pl. 4

[A writ of] *habeas corpus* [was sent] to the Mayor and Jurats of Sandwich to remove one Coheite, who had seized goods there for the king.

But [it was] held that the writ cannot be awarded in the Cinque Ports.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 41.]

129

### **Cohite, *qui tam* v. Hoblyn**

(Ex. 1614)

*Upon an information upon a penal statute, the employees of the defendant can give evidence against him.*

Lincoln's Inn MS. Maynard 21, f. 168, pl. 5

An information [was filed] by Cohite against Hoblyn, a dyer of Southwark, upon the Statute 23 & 34 Eliz., for the using of logwood.<sup>1</sup>

I moved to have one Harwood, who was a servant of the defendant, to be examined in this case because it is a thing that rests in the discretion of the court and the Statute of 39 [Eliz.]<sup>2</sup> that appoints, if any be suspected of using

---

<sup>1</sup> Stat. 23 Eliz. I, c. 9 (SR, IV, 671-672).

<sup>2</sup> Stat. 39 Eliz. I, c. 11 (SR, IV, 911-912).

it, a justice of the peace can examine his servants or workmen upon oath and this is good. I inclined to move the court in its discretion to examine in this case notwithstanding that, in other cases, as for the landing of goods uncustomed, they will not.

And it was ordered accordingly that he will be examined, by the Chief Baron [TANFIELD], Baron ALTHAM, and Baron BROMLEY, but SNIGGE thought that an information does not lie for the penalty of £20 upon the Statute 39 Eliz. before he had [been] examined and convicted upon the first part of the Statute which gives the corporal punishment.

But all of the others [were] *contra* to him. And the Chief Baron [TANFIELD] said that inasmuch as the Statute appoints that the servants will be examined in the case where the master will have corporal punishment at the pillory, *a fortiori* in its good discretion, they will be examined in the case of a forfeiture of the £20.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 41.]

130

## Deacon's Case (Ex. 1614)

*The Warden of the Fleet Prison can be found in contempt of court for the disobedience of his deputy.*

Lincoln's Inn MS. Maynard 21, f. 168v

Upon the examination of contempt in the Warden of the Fleet [Prison] and Deacon, his deputy, in the disobeying of [a writ of] *habeas corpus* which was sent for Charles Ormshow, notwithstanding that the contempt was committed by Deacon in it, they fined the Warden £100.

And Chief Baron [TANFIELD] said that he had seen divers precedents that the Court of Exchequer, for a great abuse or contempt, had committed offenders to the Tower [of London], and this they can now do.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 41v.]

131

**Anonymous**

(Ex. 1614)

*A case can be adjourned to a later term even though the jury has been seated.*

Lincoln's Inn MS. Maynard 21, f. 169, pl. 1

Upon an information of intrusion concerning lands in Lewisham in Kent, the jury appeared full. And the Chief Baron [TANFIELD] [ . . . ] if they can be adjourned to another term and [ . . . ] it was resolved that they can. And they were adjourned until a day in Michaelmas term.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 41v.]

132

**Babington v. Regem**

(Ex. 1614)

*An incomplete verdict will be set aside.*

Lincoln's Inn MS. Maynard 21, f. 170, pl. 2

In the case between Mr. Babington and the king in the Exchequer, issue was joined that one Babington was in debt to Robert Bromley at the time of his outlawry in £7010. And the jury found that he was indebted to him in £6400 upon divers accounts and *quoad* £610, the residue of the said £7010, that he was not indebted. But they did not find expressly that the £6400 was part of the £7010. And on account of this, judgment was stayed because the implication of the residuum does not aid it because, upon such a matter, attaint will not lie against them.

This case was in Michaelmas term 12 Jac. [1614].

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 42v.]

**Anonymous**  
(Ex. 1614)

*Calling a person a perjurer is defamation.*

Hobart 126, 80 E.R. 275

In the Exchequer, an action of the case was brought by [ *blank* ] against [ *blank* ] for calling him *idonor* in the Welsh tongue, and he did aver that it was in the presence of divers that understood the Welsh tongue, but he did not aver what the word did import.

And yet judgment was given for the plaintiff, and the court took information by Welshmen what the word meant in English, wherein they were satisfied that it was as much as 'perjured' in English.

And the like judgment in the Common Pleas, and upon the like form of declaration was found upon search in the Common Pleas, between Gillam verch Howell against Evan George, for a slander in Welsh words, Trinity 43 Eliz., [rot.] 3024, and another Easter 44 Eliz., rot. 834.

And at this time, Serjeant *John More* informed the court that judgment had been given in the King's Bench, 6 Jac., in the case of one Tuck<sup>1</sup> upon these words, 'Thou art an healer of felons' without any averment how the words were taken, because the court was informed and took knowledge that in some countries<sup>2</sup> it was taken for a smotherer or coverer of felons.

Lincoln's Inn MS. Maynard 21, f. 169, pl. 2

In a Welsh case, in an action upon the case for words spoken in Welsh and declared that '*Anglice* thou art a perjured fellow', upon [a plea of] *non culpabilis*, it was found for the plaintiff. And it was moved in arrest of judgment by Mr. *Floyd* that the words in Welsh signify a forsworn fellow and not

---

<sup>1</sup> *Pridham v. Tucker* (1609), Yelverton 153, 80 E.R. 103, Noy 133, 74 E.R. 1096.

<sup>2</sup> I.e. counties.

perjured, and this was granted by Mr. *Jones*, who was of counsel with the plaintiff.

And Sir William Morris being in court, the court asked of him the true interpretation of the words. And he said that they do not have but one word not several words for forsworn and perjured.

And upon this, Baron ALTHAM and Baron BROMLEY were of opinion against the plaintiff.

But the Chief Baron [TANFIELD] and SNIGGE seemed to incline for the plaintiff.

And it was stayed, and Baron ALTHAM said that the plaintiff must have shown further circumstances to prove that the defendant intended matter of perjury and the *Anglice* does not aid anything, but if the plaintiff had declared *innuendo* that he was perjured, it would make the case better.

And in this case, the Chief Baron [TANFIELD] cited the Case of the Earl of Arundel, who brought [an action of] *scandalum magnatum* for saying that he did send his officer into the country to spoil the country, and, upon [a plea of] *non culpabilis*, it appeared upon the evidence that the words were spoken in Welsh and yet the plaintiff had judgment.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 41v.]

134

**Syvedale, *qui tam* v. Lenthal**  
(Ex. 1615)

*The insufficiency of a plaintiff's declaration can be raised by a demurrer, but, if the defendant pleads in bar, such an objection is waived.*

Croke Jac. 365, 79 E.R. 313

An information [was brought] for the king and himself, supposing that the defendant, after the end of the second sessions of Parliament held 5th November 3 Jac. I [1605] and before the 31st October 9 Jac. I [1611] was a recusant Papist, convicted in due form of law according to the Statute 3 Jac. I,

c. 4,<sup>1</sup> and after his conviction and for two years before the 31st October, 9 Jac. I, at the parish of Saint Dunstan's in the West in the County of Middlesex, *seipsum conformavit* and came to church and there continued during the time of divine service, according to the Statute, notwithstanding the defendant for three years next after the 31st October 9 Jac. had not received the Sacrament of the Lord's Supper etc. in the said church, where he usually inhabited during the said time nor in any other place, but had made default *contra formam statuti*, wherefore, he demanded against him £60 for every year, *in toto* £180. The defendant pleaded not guilty. And it was found against him.

And, after the verdict, it was moved in arrest of judgment:

First, that the information was uncertain because no certain time of the conviction is shown nor how nor in what court nor before whom, so as the party cannot have an answer thereto.

*Sed non allocatur*, for TANFIELD, Chief Baron, said that it might, peradventure, have been a good exception if he had demurred upon the information, but, now that he has pleaded not guilty, all this is admitted, and it is only to be given in evidence. And the matter in fact is only triable, whether he has received the Sacrament, as, in [an action of] debt upon an obligation, if no place be shown, that is not good, but, if the other plead a release, the exception to the declaration is saved.

A second exception was taken, because it is not shown when or before whom he conformed himself.

*Sed non allocatur*, for being for two years before 31st October 9 Jac. I, it is sufficient to entitle the king to the penalty, and the conformity by coming and continuing at church in the time of divine service is sufficient, without being before the ordinary.

Thirdly, for that the informer demands the penalty for three years, whereas, by the Statute of 31 Eliz., c. 5, s. 5,<sup>2</sup> no informer can demand a penalty on a penal statute but by an information exhibited within a year after the offence.

But the court held it to be well enough for the king, although it was not good as to the informer.

---

<sup>1</sup> Stat. 3 Jac. I, c. 4 (*SR*, IV, 1071-1077).

<sup>2</sup> Stat. 31 Eliz. I, c. 5, s. 5 (*SR*, IV, 802).

**Earl of Worcester v. Smith**  
(Ex. 1615)

*The right of wreck is a different and distinct right from the ownership of the shore.*

S. Moore, *Foreshore* (1888), p. 247

The earl [of Worcester], afterwards, brought another suit against John Smith and others to establish his right to a wrecked ship as against the Admiral. And it was decreed in the Exchequer on 5 February, 13 James I, A.D. 1615, that, as lord of the lordship of Strugoil *alias* Chepstow, he was entitled to all wreck within the bounds above set out [within the boundaries of his lordship, from King's Road near Bristol to Welsh Road, a long extent over the Severn River]. This case shows the right to wreck as distinct from the ownership of the shore, for the lord of Hembury clearly had the shore, while the earl was entitled to the wreck. But whether Hembury was a subinfeudation of the lordship of Chepstow has not been ascertained.

**Pynchyn v. Harris**  
(Ex. 1615)

*A person can devise a chose in action, such as the next avoidance of an advowson.*

Croke Jac. 371, 79 E.R. 317

Note: Upon evidence in an information by Sir Edward Pynchyn against Doctor Harris upon the Statute of 32 Hen. VIII, c. 9,<sup>1</sup> for buying an advowson of Thomas de Banck, who had not been in possession etc., a question was made, if the incumbent of a church purchase the advowson thereof in fee, the

---

<sup>1</sup> Stat. 32 Hen. VIII, c. 9 (SR, III, 753-754).



advowson being held in socage, and he devises that his executor shall present after his decease and he devises the inheritance to another in fee, whether this be a good devise of the next avoidance, because that, instantly by his death, when his will should take effect, the church is void; so [it is] a thing in action, and not devisable.

But it was held to be good enough, for the law is so, that all shall be good, according to the intent of the party expressed in the will.

137

**Audley v. Clarke**  
(Ex. 1615)

*Where a judgment defendant in execution surrenders himself, the judgment creditor cannot refuse it and go after the judgment debtor's bail bond.*

Lincoln's Inn MS. Maynard 21, f. 169v, pl. 2

In the Exchequer, in the case of Mr. Clarke of Lincoln's Inn and Audley, Easter term 13 Jac. [1615], Audley had three judgments against him, and he sued [a writ of] *capias* [*ad satisfaciendum*] against Clarke, upon which was returned *non est inventus*. And then he had a *scire facias* against his bail. And at the return of this warrant, Clarke came and rendered his body for the satisfaction of his bail. And the attorney of the plaintiff said that he would not take him in execution.

But the court said that he will be committed notwithstanding. And so he was. And the bail [was] discharged, but he was not committed in execution but only entered *quod committitur*.

And the court said to the plaintiff that he could advise what to do.

[Other copies of this report: Lincoln's Inn MS. Maynard 31, f. 42; British Library MS. Add. 25207, f. 27, pl. 2.]

**Bennet v. Lewknor**  
(Ex. 1616-1619)

*When a term is devised to one and his heirs male, it is only a limitation, and his executor will have the term and not his heirs male.*

1 Rolle Rep. 356, 81 E.R. 531

In the Exchequer upon a special verdict, the case was thus between Bennet and Sir Robert Lewknor. Hamond had issue, four sons, and, being possessed of a term yet continuing, he devised it to his eldest son and to his heirs male, and, for default of such heir male, to Rafe, the second [son], and to his heirs male and, for default of such heirs male, to William, the third, and to his heirs male and, for default of such heirs male, to Thomas, the fourth, and to the heirs male of his body and, for default of heirs male of his said sons, to the right heirs of the devisor. The devisor died, and Alexander, the eldest, entered by the assent of the executor, as legatee. And afterwards, he granted the term to Boies, under whom the defendant claims. And Rafe, the second son, died in the lifetime of Alexander, having issue. And afterwards, Alexander died without issue. And the executor of Rafe entered upon the defendant, being the assignee of Alexander. And upon a re-entry, he brought [an action of] *ejectione firmæ*.

The case was argued by *Davenport*, for the plaintiff, upon the devise, *supra*. When a term is devised to another and his heirs male, it is only a limitation, and his executor will have the term and not his heirs male. And thus it is in Love's Case, Coke 10, cited to be adjudged.<sup>1</sup>

And Serjeant *Finch*, who argued to the contrary, conceded it.

And TANFIELD, Chief Baron, also.

And *Davenport* said that [in] Michaelmas 30 Eliz. [1587], between Kinman and Reynolds, in the King's Bench, a lease was made to two, *habendum* to them and two others for their lives, and, because the two strangers

---

<sup>1</sup> *Prowt v. Worthen* (1613), 10 Coke Rep. 78, 77 E.R. 1043, also 2 Brownlow & Goldesborough 103, 123 E.R. 839.

were not named in the premises, it was void in interest as to them, and, because it will be taken to be good to the other two by way of limitation for their four lives, because it appeared that the intent was that all should have it.

The first point upon the devise, *supra*, [is] whether the remainder be good to Rafe by way of an executory devise or not.

*Davenport* thought yes. Hilary 9 Jac. [1612], rot. 895, in the King's Bench, *Reticke and Chappel*, it was adjudged in point a good remainder.<sup>1</sup>

But it was said on the other side that this point was not moved. See the case in my reports [ *blank* ] where there is no mention of this point.

Serjeant *Finch* thought to the contrary for these reasons.

The first response [was] upon the limitation of the estate that is *tam diu* that he has heirs male, if a man give land to one and his heirs male, it is a fee, but if he devise to one and his heirs male, it is a tail, as 27 Hen. VIII is. But in our case, it cannot be a tail, but only a limitation of the estate. And on account of this, he thought inasmuch as the word 'body' was not mentioned, it will not be implied, but it will be taken for a limitation in fee upon a determination of heirs male.

It has been objected that the last remainder, which is limited to Thomas and to the heirs male of his body and because this will explain all of the other remainders before to be thus also, but he thought to the contrary because he thought that, because the remainders are limited in several manners, that it will be taken that the deviser diversely intended.

But is has been objected that it appears by this devise that the intent was that the limitation will be upon death without issue male because the remainders are limited to several brothers and then, if it will be taken to be a limitation in fee, and not to the issues, the other brothers will never have the term because they will be the heirs male of the elder brother, and thus the limitation to the elder brother will continue to him and his executors during the time that the younger brothers or their issue male will be *in esse*, and thus all of the remainders will be void. But he thought to the contrary because, if it should be a fee simple limited, yet the remainders could well stand also because the limitation is to him and his heirs male so that, by the limitation, there should be an heir and male. And peradventure, the eldest should die without issue male and with issue female and then the second brother is

---

<sup>1</sup> *Retherick v. Chappel* (1612), 2 Bulstrode 28, 80 E.R. 932.

not the heir male to the elder. And on account of this, then the limitation is finite, and the second brother will have it. Thus, if it be a limitation in the nature of a fee, he thought no remainder could be limited over because it is an infinite limitation and, by intendment, it is to continue perpetually. But admitting that the word 'body' is supplied by implication, yet and thus it will be a limitation in the nature of a tail, yet it is not any entail because within the Statute but a fee conditional, as 4 Edw. VI, *Commentaries* [ *blank* ].<sup>1</sup> If a gift be to one and his heirs during the time that J.S. has issue of his body, it is a fee, and not an entail. And thus, in our case, no remainder can be dependent upon it. But, if it is a limitation, it will be taken as a fee tail at this day, yet, by implication, it is to continue perpetually because of Coke 4, Lambert.<sup>2</sup> The Statute of Chantries<sup>3</sup> speaks of such estates that will have a perpetual continuance, yet an estate tail is within it. Terling and Trafford, Coke 6, Mildmay.<sup>4</sup> A reversion dependent upon an estate tail is not assets. Coke 10, Jennings.<sup>5</sup> Such a reversion will not be received. 3 Jac., Bevin, being a tenant in tail, the remainder to his right heirs, had issue, a son, and he leased for twenty-one years to begin after the death of the son without issue, and he died, and the son died without issue, and [it was] ruled that it was not a good lease to issue out of the remainder to his right heirs because of the intent at the time of the grant of the perpetual continuance of the estate tail. But, if a term be devised to one for life, a remainder can well be limited over because, by the common and necessary intent, the lessee must die, as was resolved in Matthew Man, Coke 8, and Lampett, Coke 10.<sup>6</sup>

---

<sup>1</sup> *Colthirst v. Bejushin* (1550), 1 Plowden 21, 35, 75 E.R. 33, 57.

<sup>2</sup> *Adams v. Lambert* (1602), 4 Coke Rep. 96, 76 E.R. 1079, also Moore K.B. 648, 72 E.R. 815.

<sup>3</sup> Stat. 1 Edw. VI, c. 14 (SR, IV, 24-33).

<sup>4</sup> *Terling v. Trafford* (Q.B. 1570), in *Hethersall v. Mildmay* (1605), 6 Coke Rep. 40, 42, 77 E.R. 311, 316, also Moore K.B. 632, 72 E.R. 805.

<sup>5</sup> *Wiseman v. Crowe* (1596), 10 Coke Rep. 43, 77 E.R. 990, also 1 Anderson 275, 123 E.R. 470, Moore K.B. 692, 72 E.R. 842, Croke Eliz. 562, 570, 78 E.R. 806, 815.

<sup>6</sup> *Clark v. Manning* (1609), 8 Coke Rep. 94, 77 E.R. 618; *Lampet v. Starkey* (1612), 10 Coke Rep. 46, 77 E.R. 994, also 2 Brownlow & Goldesborough 172, 123 E.R. 880.

The second response [was] if it will be a good remainder, then it will be a possibility upon a possibility, which will not be allowed, as is shown [in] Coke 10, Lampett.

The third response [was] if it will be a good remainder, then it will be a perpetuity of a chattel where there could not be a freehold. And there will not be any means to dock it. The Case of Retoricke, which has been cited, was not argued as to this point in question here. D. 28 Hen. VIII [is] in point; two against one which is not a good remainder. But I do not rely upon it because it seems that they there intended the same question that was made upon a devise for life etc.

The second point [is], when the second brother died in the lifetime of the eldest brother having issue male and, afterwards, the eldest died without issue, whether the executor of the second brother will have the term or not inasmuch as the testator died before the contingency happened.

*Davenport* thought yes. And it was adjudged in point by admittance in Com., *Welden's Case*.<sup>1</sup>

Serjeant *Finch* thought to the contrary because it was a mere possibility. And it is not an argument that, because it could be a release, as is Coke 10, Lampett, that, on account of this, it is an interest because Coke 1, Albanie, a power of revocation is a possibility yet it could not be released.<sup>2</sup> Coke 1, Rect. Chid., the administrator should not have the term because it was only a possibility.<sup>3</sup> 29 & 30 Eliz., in the [Common] Bench,<sup>4</sup> Fenner moved to the court, if a man devise a term for life to his wife and if she die within the term, then he devises it to his son when he comes to the age of twenty-four and if they both die before twenty-four years of age of the son, that J.S. should have the term and, afterwards, the devisor dies and, afterwards J.S. dies and afterwards the wife and the son dies before twenty-three, and, *per curiam*, the executor of J.S. will not have the term. In *Welden's Case*, Com., there was no

---

<sup>1</sup> *Welcden v. Elkington* (1578), 2 Plowden 516, 75 E.R. 763, also 3 Dyer 358, 73 E.R. 804, Benloe 308, 123 E.R. 216.

<sup>2</sup> *Grendon v. Albany* (1585-1586), 1 Coke Rep. 107, 76 E.R. 246, also 4 Leonard 133, 219, 74 E.R. 778, 833.

<sup>3</sup> *Lloyd, ex dem. Roberts v. Wilkinson* (1596-1598), 1 Coke Rep. 148, 76 E.R. 337, also Moore K.B. 478, 72 E.R. 707.

<sup>4</sup> *Anonymous* (1587), 3 Leonard 195, 74 E.R. 628.

speaking to this point, *quod fuit concessum per* TANFIELD. Trinity 9 Jac. [1611] and adjudged 10 Jac. [1612 x 1613], in the King's Bench, between Price and Marten, it was adjudged in point that the executor will not have it.

Note that *Yelverton*, Solicitor [General], said that he argued this case and there was no speaking to this point.

The second response is the diversity between a remainder limited upon an estate for life in a devise of a term and where there is a limit upon an entail because, upon an estate for life, it is a common and necessary possibility of the termination of the particular estate, as Coke 10, Lampet, and, on account of that, there, peradventure, the executor will have the remainder dependent upon it. But [it is] otherwise of a remainder dependent upon an entail.

*Adjornatur.*

British Library MS. Hargrave 30, f. 4v  
(Turnour's reports)

Henry Johnson, plaintiff, in [an action of] *ejectio firmæ* against Sir Robert Lewknor. The case was thus. William Hammon being possessed of a lease for ninety-nine years of land in Elam, part of the manor of Elam in the County of [ *blank* ], by a lease made by the deans and canons of Westminster in the time of Edward VI had issue four sons, Alexander, Rafe, William, and Thomas. And he made his will, and, by it, he devised all his estate, right, interest, and term in Elam to Alexander and the heirs male of his body and, for default of such issue, to Rafe and the heirs male of his body and so to William and, by default of such issue, to Thomas and his heirs male (without mention of the body of Thomas, but it is not material) etc. William Hammon died. Alexander entered. And, taking upon himself to be the absolute owner of the whole term, he assigned all of the term to the defendant. Rafe had issue male and made B., his wife, the executrix to Rafe, supposing that now she should have this term so long as the issue male of Rafe continued, she entered and made a lease to the plaintiff who, upon an ouster by the defendant, brought this action. The doubt was whether the assignee of Alexander or the executrix of Rafe now will have this term.

DENHAM, baron, [held] for the plaintiff that the executrix of Rafe will have this term. In this case, there are two points, first, a lessee for years devised his term to Alexander and the heir make of his body and, for default of such issue, to Rafe and his heirs male; Alexander assigns all of this term and estate

to Lewknor, and Alexander died without issue male; whether the assignee of Alexander or Rafe will have the residue of this term. And [it was held] by him that Rafe will have it by the ancient rule of the common law that, if a termor for years devise his term or land to A. for life, the remainder to B., this remainder to B. was void and A. has the entire term. And this construction was held in the time of Henry VIII because then there was a strict construction was made of such a demise according to the rule of the common law and, by the rule of the common law, such a remainder could not be good by any act executed in his lifetime, any more by a devise. But now of recent times, it has been often adjudged that this will be good to B., not as a remainder, but as an executory devise. And the construction of such a will will be that A. will have as many of the years as he shall live and that, if he die within the term, that B. will have it for the residue of them. Coke, li. 8, 95.<sup>1</sup> And thus this remainder is good to B., not by the name of the remainder, but by the name of the executory devise. And this construction, with which he will agree by reason of the current recent authorities, he conceived is grounded more strongly upon an equitable construction made by the judges of late times to support the intent of the party than upon the rule of the ancient common law.

And it is to see that this estate devised to Alexander was not an estate tail because the estate of the devisor, which was but for a term of years, will not support or bear such an estate. And Coke, li. 10, fo. 87,<sup>2</sup> agrees. If a term is devised to one and the heirs of his body, his heir will not have it, but his executor, because a term which is only a chattel cannot be entailed, but yet, in a will, it will be construed as a limitation determinable upon a default of issue of his body and it is completely reasonable as the devisor has said that Alexander will have the land to himself, his executors, and assigns until the issue male of Alexander fail or for so many of the years as shall happen to expire during the contingency of the issue male of Alexander and, if the issue male of Alexander fail during the term, Rafe will have the residue of the years so long etc. And upon a reasonable construction, as well as in the cases aforesaid, where a termor devises his term to A. for life, the remainder to B., that A. will have for so many of the years as he lives and B. the residue of the

---

<sup>1</sup> *Clark v. Manning* (1609), *ut supra*.

<sup>2</sup> *Prowt v. Worthen* (1613), *ut supra*.

years and A., by no assignment, can defeat B. of this possibility if he die during the years.

And he cited a case in point in 9 Jac., in the Bench, Hilary 9 Jac., rot. 35, a western case. Upon a special verdict, the case was thus. The dean and chapter of Exeter in the time of Edward VI made a lease for divers years to Robert Carie, who had issue, four sons, as here. And he made his will and, by it, devised his term to his oldest son and the heirs male of his body and, for default of such issue, to the second son and the heirs male of his body and, for default of such issue, that the third brother will have a moiety and the fourth brother the other moiety. And he made his oldest his executor and died. The oldest son entered, and he and the second brother granted all of this term to J.S. And the oldest brother and the second brother died without issue male, and the years continued. And the two other brothers claimed the residue of the term. And the question was adjudged for the two younger brothers because it will be construed to be a limitation determinable upon the default of the heirs male, the which agrees with our case in point.

The second point is a termor for years devised his term to A. and the heirs male of his body and for default of such issue to B. etc.; B. was made his executor and he had issue male and died; A. died without issue male; the years continued, whether the executor of B. will have the residue of the years inasmuch as it was but a mere possibility in B. and was not in the possession of B. And [it was held] by him without doubt that this possibility goes to the executor of B. And for this he relied upon a judgment given in the King's Bench, in another case, which see in Book W, fo. 704.

BROMLEY, baron, to the contrary: He held that the defendant, as assignee to Alexander had a good right to hold this land during all of the years and that Alexander had the power, as absolute owner, to dispose of all of this term. I will not endeavor to hold paradoxes, but, if it had not been so current of new authorities in the case where a termor devises his term to A. for life, the remainder to B., that this remainder will be good by the name of an executory devise, as it is now called, I should have doubted of that remainder and incline to the opinion of Walmesley in Coke, li. 8, fo. 95.<sup>1</sup> But now, I will not question it. But I also conceive that the judgment given in Welden's

---

<sup>1</sup> *Clark v. Manning* (1609), *ut supra*.



Case, *Plowden*,<sup>1</sup> is not this point so much grounded on the ancient rule of the common law as upon a strained construction made by the judges to support the intent of the parties.

[It was] objected that now, after an estate for life limited of a term for years, a remainder can be limited, as in the Case of *Weldon, Plowden, Commentaries*, and *Coke*, li. 8, 95, and that the remainder will be good as an executory devise, and, on account of this, as well in this case, it will be good where the remainder is limited after a limitation in tail or determinable upon an estate tail. It is true, and it has been agreed that an estate tail cannot be limited of a term for the estate of the devisor, being but a termor, will not support and bear such an estate. And [it was held] by him such an estate that will not bear an estate tail to be devised out of it will not bear a limitation of an estate tail to be limited upon it and, on account of this, no more than the termor cannot devise an estate tail of his term no more can he devise an estate that will be limited to be determinable upon as estate tail. And even though after an estate determinable upon lives of a term can be limited a remainder, yet after an estate determinable, upon an estate tail of a term, one cannot limit a remainder; [such a] remainder will not be good as an executory devise because an estate tail can by common possibility, it will have a perpetual continuance but thus it will not have a life.

And the Statute 32 Hen. VIII, of leases made by a tenant in tail,<sup>2</sup> put a lease for three lives and twenty-one years in equal balance. *Coke*, li. 3, 98; land given to A. and his heirs during the life of B., though this is an estate that goes to the heirs, yet it is but an estate for life and the wife will not have dower. And there is a great [difference] between a limitation upon an estate for life and upon an estate tail.

And thus he held that here there was no estate tail of this term nor any limitation of an estate tail because the estate of the devisor will not bear such an estate nor such a limitation of such estate. And thus the estate of Alexander was not determinable upon his death without issue male, but Alexander was the absolute owner of the land to dispose of it. And on account of this, his assignee will have a good right to the whole term.

---

<sup>1</sup> *Weldon v. Elkington* (1578), *ut supra*.

<sup>2</sup> Stat. 32 Hen. VIII, c. 28 (*SR*, III, 784-786).

And for authorities in point, to Carie's Case, in 9 Jac., cited above, he gives no response because he does not know of such judgment. 28 Hen. VIII, Dyer 7,<sup>1</sup> that a termor devised his term to A. and the heirs of his bodies, the remainder to B., is a void remainder and A. can alien all of this term. Coke, li. 10, fo. 87, that the first devisee can alienate all of the term. But note, in Coke, li. 10, 87, there was no remainder put.

Also, if this limitation will be good, it will be a perpetuity of a chattel, which is mischievous; as an inheritance, there cannot be such a perpetuity. And in Coke, li. 10, fo. 52, many inconveniences are dependent upon such a perpetuity of a chattel if it will be good. And here this will be a perpetuity if it will be a good limitation because, as appears in Coke, li. 5, in Saffin's Case,<sup>2</sup> by a fine, not a common recovery, this possibility will not be destroyed if it will be good. But I conceive it is hard to make a real difference between the limitation of a chattel for life with a remainder over and this limitation for an estate tail with a remainder with a remainder over because a chattel will not bear an estate for life and yet such a limitation of a chattel for life with a remainder over is agreed by divers authorities to be good. And it will be as well in this case. See Peacock's Case, 28 Eliz., cited in lib. R., fo. 114, that if a chattel is demised to A. and his heirs male of his body, he has but an estate so long as he has a male heir.

Query by me [Arthur Turnour] in this case, if Alexander had died without disposing of it and without issue male, whether Rafe will have the residue of the term. Also note that an estate for life can be limited after an estate tail as if land is given to A. in tail, the remainder to B. in tail, the remainder to C. for life, this remainder to C. is good because it is a possibility that this life could last longer than the estates tail.

Second, for the second point, though it is not material to the judgment, as he has argued, yet in it, he will deliver his opinion. And in this point, he agreed with DENHAM that, if this remainder had been good either as a remainder or as an executory devise to Rafe, that even though Rafe died in the lifetime of Alexander, that when Alexander died without issue male, the executor of Rafe will have it because, even though it was but a mere possibil-

---

<sup>1</sup> *Anonymous* (1536), 1 Dyer 7, 73 E.R. 17.

<sup>2</sup> *Saffyn v. Adams* (1605), 5 Coke Rep. 123, 77 E.R. 248, also Croke Jac. 60, 79 E.R. 50.

ity in Rafe, the testator, and not a chose in action nor a thing in possession in the testator, yet it was such a thing that goes to the executor. Weldon's Case, Plowden, overruled this point though the devise was there of the land and here it was of a term because land and a term are the same for this purpose. Coke, li. 8, fo. 95. If a man seised of land in fee devise it to A. in fee and A. die in the lifetime of the devisor, the heir of A. will not take because there was no conveyance to A. and thus nothing vested in A., *quod nota*. Coke, li. 1, in Shelley's Case; Boraston's Case, Coke, li. 3.<sup>1</sup> If a termor devise his term to his executors until his son come to the age of twenty-one years and then to the son and the son dies before full age, yet his executor will have it. In the case cited in the King's Bench, it was a doubt whether such a possibility could be devised. But here, the doubt is solely whether the executor will have it. It is a consequence if it can be devised; if it can be devised, the executor will have it. And he thought that it could be devised, and he agreed that the executor will have it.

TANFIELD, Chief Baron, agreed with BROMLEY, baron. But I was not present at his argument.

139

**Salter and Garraway v. Malapert**  
(Ex. 1616)

*Customs duties are not discharged by compounding for the forfeiture for not paying them.*

*Customs duties are not payable when a ship is forced into a port by a tempest and is not unloaded.*

1 Rolle Rep. 383, 81 E.R. 551

---

<sup>1</sup> *Wolfe v. Shelley* (1581), 1 Coke Rep. 88, 76 E.R. 199, also 1 Anderson 69, 123 E.R. 358, Moore K.B. 136, 72 E.R. 490, Jenkins 249, 145 E.R. 176, 3 Dyer 373, 73 E.R. 838; *Hynde v. Ambrye* (1587), 3 Coke Rep. 16, 76 E.R. 664, 1 Eq. Cas. Abr. 190, 194, 21 E.R. 980, 984.

Salter and Garraway brought an action of debt upon the Statute of 1 Jac., c. 33<sup>1</sup> [for the not paying of customs], as farmers of the king for so much in the pound against Petre Richarde and Isaac Malapert, merchant strangers. The case was this. The plaintiffs are the farmers of the king of his customs, and the defendants brought in into a port a ship with goods and unloaded, the customs not paid. And afterwards, they compounded with the king for the forfeiture because the farmers by the grant of the customs do not have the forfeiture, but it continued in the king. And afterwards, the farmers brought [an action of] debt against them for the custom, *scil.* 12d. of the pound. And the defendants pleaded this matter in bar, upon which there was a demurrer. And it was argued divers times at the bar.

And now, the court did not argue it because, as they said, they all agreed in one [opinion], *scil.* that judgment will be given for the plaintiffs.

But TANFIELD, Chief Baron, delivered the reason to be because the sum of the pound became a duty by the bringing in of the goods into the haven and the chattels vested. And it is a casual chattel and can be resembled to a deodand or goods of felons. And in this Statute, the second clause of the forfeiture was only for the security of the custom and to have a penalty for the non-payment of it. And according to this resolution, he, by the assent of the court, commanded that judgment would be entered for the plaintiff.

Note: TANFIELD said also that this custom will be due when a ship is brought into a haven with the intent to unload there, but not when it is thrown there by a tempest.

**Standish v. Short**  
(Ex. 1616-1618)

*In this case, the devise in question did not pass an interest in the property in question to the plaintiff parson.*

J. Bridgman 103, 123 E.R. 1232

---

<sup>1</sup> Stat. 1 Jac. I, c. 33 (SR, IV, 1062-1064).

In an [action of] ejectment on a lease made by George Walker, parson of the parish of St. John the Evangelist in London, 14 June 14 Jac. [1616], of a messuage called The Swan in the said parish, *habendum* from the Annunciation [25 March] last past for three years, whereupon the plaintiff was possessed until he was ejected by the defendant the 15 June in the same year.

And, upon not guilty pleaded, the jury found that the said messuage did lie within the City of London and that it was an ancient city and that, by the custom, every citizen being a freeman of London, by his will in writing, may devise all his houses and lands and any part thereof in the said city, as well in mortmain without license, as in any other manner in fee, in tail, for life, or for years, etc. and that the said custom and all other customs of the said City the 7 of Ric. II [1383 x 1384] were confirmed by an Act of Parliament. And they found that William Daringre, citizen and freeman of London, the tenth of May 34 of Edw. III [1360], was seised in fee, as well of the said messuages, as of other lands in London in fee and, the tenth of May 1360, and, in the 34 of Edw. III, made his will in writing and thereby did devise the said messuages by the name of his tenements in these words following. And first he devised a quit rent of 40s. a year to the parson of St. John the Evangelist and his successors to pray for souls, and he did devise to the said parson and his successors a chamber with two cellars thereupon lying on the north side of his tenement to pray for souls, and then followed this clause:

*Item, lego et ordino quod unus capellanus celebret in Ecclesia Sancti Johannis praedictis statim post decessum meum pro anima mea et animabus praedictis et quod idem capellanus percipiet annuatim de tenemento meo 8 marks pro stipendio, et volo quod idem capellanus ad matutinas missas et omnibus aliis horis canonicis in ecclesia praedicta intersit per dispositionem rectoris ejusdem qui pro tempore fuerit, et de residuo si quod clarum fuerit ultra solutionem dicti tenementi. Volo quod Richardus, filius Elizabethae uxoris meae, scolatizando adjuvetur quousque ad legitimam aetatem pervenit ad ordines sacerdotales percipiend. et cum sacerdos fuerit. Volo quod idem Richardus dictum cantarium occupet pro termino vitae suae si voluit et si non de residuo praedicti tenementi neque de cantario nihil percipiet, sed rector antedictus qui pro tempore fuerit, et 4 magistri sufficient. parochiam praesentent et invenient unum capellanum ad dictum can-*

*tarium occupandum in perpetuum de tenementis meis in dominica parochia non legatis, salvo quod lego de dictis tenementis meis rectoribus et successoribus suis illam mansionem quam Johannes Sherman modo tenet reddendo inde annuatim tot. quiet. reddit. de omnibus tenementis meis exeunt. Item, volo quod si dominica Cantuaria pro defectu dicti rectoris vel successorum suorum retardavit, et ultra 40 dies inoccupat. fuerit, quod dict' camer' solarii et mansiones erunt Gardianis de Ponte. Et id quod clarum fuerit et residuum ultra solutionem et reparationem praedict. volo quod ponatur sub custode rectoris et 4 parochianorum ad providendum ornamentum et libros dominicae ecclesiae.*

And the devisor died the same day seised of the said tenements. And they further found that the messuages wherein etc. is parcel of one of the tenements in the will, out of which the testator did ordain that the said chaplain should have eight marks for his stipend and that Henry Tyting was parson of the said church at the time of the death of the devisor, and that the church was void by his death, and that the lessor was presented, admitted, instituted, and inducted, and that he entered into the said messuages upon the defendant and did expel him and made the lease to the plaintiff, who entered and was possessed until the defendant ejected him. And whether the defendant was guilty or not, they prayed the opinion of the court.

And I conceive the plaintiff ought to have judgment. And the question is whether the parson, by this devise, shall have the houses [from which] the said eight marks are limited to be paid to the chaplain or not. And I conceive that the parson shall have it. In the *Comment.* 413b,<sup>1</sup> it is taken for a rule that, in the expounding of wills, the law shall interpret the words of the devisor and shall direct their operation according to the intent of the devisor so that, to the matter, form, and order limited in last wills, the law does submit to them, and wills that they should be observed. And although that, in conveyances or deeds executed by men in their lifetimes, the law requires apt words to make estates, yet, in wills, the intent of the devisor is sufficient, either to limit the estate or to describe the person that shall have it.

---

<sup>1</sup> *Newis v. Lark* (1571), 2 Plowden 403, 75 E.R. 609, Benloe 196, 123 E.R. 138, Inner Temple MS. Petyt 511, vol. 13, f. 53v.

And, therefore, if land be given to one *in perpetuum*, if it be by grant or feoffment, yet there passes but an estate for life. But, if it be given by will, it is an estate in fee. And 4 Edw. VI, *Estates*, 78.<sup>1</sup> If one devises his land to another, paying £10 to his executors or any other person, the devisee has an estate in fee; so if one devises his land to give or dispose of or sell at his will, this is a fee simple. 19 Hen. VIII, 96; 7 Edw. VI, *Devise*, 38.<sup>2</sup> And the reason in all these cases is because that, by these words, the intent of the devisor appears that a fee shall pass, and, therefore, the defect of words shall not defeat his intent. And, as the intent is sufficient without apt words to make an estate, so is it also to describe the person who shall take the devise, although he be not formally named according to the precise rule in grants, as in 21 Ric. II, *Devise*, 17,<sup>3</sup> where one devised land to one for life, the remainder to another for life, the remainder to the church of St. Andrew's in Holborn, and it was adjudged that, after the death of the devisees for life, the parson of the church shall have the land, for inasmuch as the church was not capable, it shall be taken that the intent of the devisor was that the parson, who is as it were the father of the church and so the head of it should have the estate. And in the 13 Hen. VII, 17.<sup>4</sup> In every devise, the intent of the devisor shall be taken, for, if a man devises all his goods to his wife and that, after his decease, his son and heir shall have his house, although that no devise of the house be made to the wife by express words, but by implication, because the heir is not to have the house during the wife's life, yet, because the intent of the devisor was that the son should not have it during the life of his wife, she shall have the house for her life, to which all agreed.

Then, in our case:

First, the devisor wills that a chaplain shall celebrate for his soul and that he shall have eight marks out of his tenements yearly for his stipend, but, if he had stayed there, the devise should have been void, for the chaplain is not such a person as may take these eight marks as a rent, and, therefore, he

---

<sup>1</sup> Mich. 4 Edw. VI, Brooke, Abr., *Estates*, pl. 78 (1550).

<sup>2</sup> YB Trin. 19 Hen. VIII, f. 9b, pl. 4 (1527); 7 Edw. VI, Brooke, Abr., *Devise*, pl. 38 (1553).

<sup>3</sup> Pas. 21 Ric. II, Fitzherbert, Abr., *Devise*, pl. 27 (1398).

<sup>4</sup> YB Hil. 13 Hen. VII, f. 17, pl. 22 (1498).

goes further, and, first, he limits what service the priest shall be and this he appoints to be done by the disposition of the parson.

Second, he disposes of the residue of the profits of the tenement for such a time, *viz.* until Richard shall be 24 years of age and be a priest, and he devises that he shall be preferred to the chantry before any other, if he will accept it, and if not, that he shall have nothing.

Third, he makes provision for the perpetual continuance of the chaplain in these words, *scil.* that the parson and four of the best of the parishioners shall present and find a chaplain to perform the said chantry forever, *de tenementis meis superius non legatis*, which is the said tenement out of which the said eight marks are limited to be paid.

Fourth, he inflicts a penalty upon the parson if the chantry should be void, *scil.* that the other land devised by him to the parson shall go to the Wardens of London Bridge for the reparation thereof.

Fifth, he makes a perpetual disposition for the residue of the profits of the tenement, *viz.* that they shall be put into a chest under the custody of the parson and four of the parishioners to buy ornaments and books for the church.

And these parts of the will being well considered, as I conceive, it will be clear that the intent of the devisor was that the parson should have this tenement, for, here, the main scope of his will is that a chaplain shall be maintained perpetually and that he shall have an eight marks stipend out of that tenement and that it shall be provided and found by the parson and four of the parishioners and that the residue of the profits shall be bestowed by them to buy ornaments and books for the church so that a perpetual charge is imposed upon the parson, *scil.* to find the priest and to buy ornaments etc., and this charge is to be defrayed with the profits of the tenement, and that can be done by none but by him that shall be the owner of the tenement. And, therefore, it follows that the parson shall have the tenement.

And that such implication in a will is sufficient to make an estate is proved by the 15 Hen. VII, 126.<sup>1</sup> If one devises his land to be sold for payment of his debts, the executor shall sell the land, for, because the charge to pay debts lies upon the executors, his intent shall be taken to have them sell

---

<sup>1</sup> YB Trin. 15 Hen. VII, ff. 11, 12b, pl. 22 (1499).



the land. And 22 & 23 Eliz., Dyer 171.<sup>1</sup> A man seised in fee of divers manors devises them to his sister in fee, 'except my manor of D. which I do appoint to pay my debts', and makes two executors and dies, and one executor dies, and the other sells the manor, and [it was] adjudged good, for so his intent shall be taken, and not to relinquish it to his sister. And 19 Hen. VI, 24 and 25, and 1 Edw. VI, *Devise*, 36.<sup>2</sup> If one devise that his executor shall sell his land, this is no devise of the land to them, but an authority, for they may perform the devise to sell the land, although they have no estate therein, and the vendee shall be in by the devisor. But, if one devise that his executors shall grant a rent charge out of his land or that they shall give the land in fee or in tail to J.S., this is an implied devise to them, for, otherwise, they cannot perform the intent of the devisor. Trinity 9 Eliz. 516. And, so in the 40 Assis. 26,<sup>3</sup> one did devise his land in London to A. and his heirs to find twelve marks for two chaplains and grants that the parson and the parish may distrain for this if it be behind, and, there it is debated whether the king shall have the twelve marks or not, and it is agreed there that the chaplains have no estate in it because they are removable at the will of A., but, because the distress is given to the parson who is perpetual, it was adjudged that the king shall have the twelve marks, whereupon I do observe that, by this distress limited to the parson and the parishioners, the twelve marks were vested as a rent in the parson, and so made it a mortmain.

But it may be objected that the last clause in the will for the disposing of the residue of the profits goes only to the land devised to the Wardens of the Bridge. But this cannot be: first, because that the land devised to them is only a chamber and a mansion of little value and that is to repair the Bridge, and that is a work of such charge that no surplusage can be intended; secondly, the clause is *id quod clarum fuerit ultra solutionem et reparationem etc.*, which are the very words in the clause used for the disposing of the residue to R. for the time and cannot be referred to the devise of the Wardens of the Bridge because that the things devised to them are apparently to be for the reparation only and no

---

<sup>1</sup> *Miller v. Moore* (1580), 3 Dyer 371, 73 E.R. 832, 110 Selden Soc. 381, Lincoln's Inn MS. Misc. 488, p. 84.

<sup>2</sup> YB Mich. 19 Hen. VI, ff. 23, 25, pl. 47 (1440); 1 Edw. VI, Brooke, Abr., *Devise*, pl. 36 (1547 x 1548).

<sup>3</sup> YB 40 Edw. III, Lib. Ass., f. 245, pl. 26 (1366).

payment is limited out of it, but the tenement, out of which the stipend is to be paid, is first charged with this payment, and then with the reparation of the tenement and then with the ornaments and books for the church.

And, afterwards, this case was argued by *Coventry*, the King's Solicitor [General], for the plaintiff, and by Serjeant *Chibborne* for the defendant. And Michaelmas 16 Jac. [1618], the barons, *viz.* TANFIELD, BROMLEY, and DENHAM openly declared their opinion that the land was not demised to the parson by this will, and, thereupon, they commanded judgment to be entered for the defendant, which was entered accordingly.

141

**Newsham v. Carew**  
(Ex. 1617-1619)

*A conveyance of dubious and inconsistent wording will be construed in favor of the grantee.*

J. Bridgman 100, 123 E.R. 1229

In an [action of] ejectment, the case was this. A bishop makes a lease of a rectory to J.S. for twenty-one years and dies. The successor, before the Statute 1 Eliz.,<sup>1</sup> makes a lease of this to J.N. *habendum* from the 20 December 1 Eliz. [1558], being the day of the date, for fifty-six years from thence next ensuing the end of the lease to J.S. and dies. And the fifty-six years are expired from the 20 of December 1 Eliz. And if this second lease be ended or not is the question.

And I conceive that the lease shall begin from the 20 of December and so it is ended before the lease made to J.S., for the argument of which case, the true sense and meaning of this ill penned *habendum* is to be considered, for, thereupon, all the difficulty of this case does depend. And as to that, I conceive there are but four ways to expound this *habendum*. And, if it be taken in any of these constructions, this lease shall begin by computation

---

<sup>1</sup> Stat. 1 Eliz. I, c. 19 (SR, IV, 381-382).

from the 20 of December 1 Eliz. and so shall end the 20 of December 12 Jac. [1614], which is before the lease made to the lessor of the plaintiff.

And the first way is to observe the first part of the *habendum, scil.* from the 20th day of December then next following to be only material and good, and the last part, being repugnant thereto, is void.

The second way is to take the first words of the limitation of the beginning of the estate to be void and the last words, *scil.* 'next following the determination and end of the term of J.S.' etc. to be good.

The third way is to construe as well the first as the last words of the commencement to be void by reason of the direct repugnancy in them.

And the fourth and last construction is to make such construction as all these words by a reasonable exposition may agree together.

And according to any three of these constructions, *viz.* the first, the third, or the fourth, it is apparent that the lease to J.N., under whom the defendant claims, did end the 20th of December 12 Jac., which was before the entry of Anthony Rudd, the last bishop, and the lease made to the lessor of the plaintiff, and then this lease is good. And, therefore, my endeavor is to prove that this *habendum* ought to be taken in any of these three ways, *viz.* the first, third, or fourth, and to disprove that it cannot be taken in the second way.

For the argument whereof, I shall speak to the first and second together; for that that I will speak of the first will be a manifest disproof of the second.

And as to this, I conceive that it is a rule infallible in the exposition of deeds that, when two clauses are contained in a deed, the one contradicting the other, the first shall be good and the last void. 2 Edw. II, *Feoffments and Deeds*, 94.<sup>1</sup> One gave land to R. with A., his daughter, in frank marriage, *habendum* to R. and his heirs, with a warranty to him and his heirs; they died, and their son brought an [action of] *mort d'ancestor*, and, because the first clause was in frank marriage and the other in fee, the justices doubted to which of them they should have regard, and at last [it was] adjudged that, when there were several or two clauses in a deed repugnant or of divers natures, that more regard ought to be taken to the first than to the last. But [it is] otherwise in wills, for, there, the last part of a will shall control the first,

---

<sup>1</sup> *Blaunket v. Simonson* (1309), YB Hil. 2 Edw. II, f. 26, Selden Soc., vol. 17, p. 126, pl. 61, Fitzherbert, Abr., *Feoffments & faits*, pl. 94.

as if one first devises land to A. and after[wards] devise this to another, and it is to both in fee, yet the last devise shall stand. 19 Edw. III, *Tail*, 1.<sup>1</sup> In a writ of *ad terminum qui praeteriit*, the tenant pleaded a gift in frank marriage to his father and mother by deed, which was thus, that is to say *habendum* to them for their lives, and [it was] resolved that the gift in frank marriage, being first, that it is good, and the *habendum*, being contrary, is void. And there, the same rule is given, where two clauses are contained in a deed and the one is contrary to the other. And in Tracy and Throgmorton's Case, *Comment.* 153,<sup>2</sup> it is a ground in law that, if the *habendum* in a deed be contrary to the estate given by the premisses, the *habendum* shall be void, as if a grant be made to one and to his heirs *habendum* for life, the *habendum* is void. 13 Hen. VII, 23 and 24, and Dyer 272.<sup>3</sup> A termor grants his term to another *habendum* after the death of the grantor; [it was] adjudged that the *habendum* is void. And 2 Edw. IV. If one release all his right in Blackacre, which he purchased of J.S., and, in truth, he did not purchase it of J.S., but of another or else had it by descent, yet is the release good, for the first clause shall stand and the other shall be void. And Dyer 292b.<sup>4</sup> One having a close called Callis lying in Hurst in the County of Wilts, makes a lease of his close called Callis in the County of Berks, and [it was] adjudged that it shall pass, for the first words shall be and the other shall be void. And Dyer, 32 Hen. VIII, 47b,<sup>5</sup> a lease was made for life without impeachment of waste and, if it happen him to make waste, that then it shall be lawful for the lessor to enter. Shelley conceived there that the condition was void because it was repugnant to the former grant, but some conceived that the grant shall be intended that he shall not be punished by action. Whereupon I collect that, if the condition in the last clause cannot

---

<sup>1</sup> YB Pas. 19 Edw. III (1345), Rolls Ser. 31b, vol. 13, p. 43, pl. 17, Fitzherbert, Abr., *Taile*, pl. 1.

<sup>2</sup> *Throckmorton v. Tracy* (1555), 1 Plowden 145, 75 E.R. 222, also 2 Dyer 124, 73 E.R. 272, 124 Selden Soc. 93.

<sup>3</sup> YB Pas. 13 Hen. VII, f. 22, pl. 9 (1498); *Lilly v. Whitney* (1568), 3 Dyer 272, 73 E.R. 605.

<sup>4</sup> *Norris's Case* (1570), 3 Dyer 292, 73 E.R. 656.

<sup>5</sup> *Anonymous* (1540), 1 Dyer 47, 73 E.R. 104.

agree with the first, the last is void. And so [is] Dyer 56b.<sup>1</sup> If I release to A. all actions which J.S. has against him, the release is good, and the words, *viz.* ‘which J.S. has against him’, are void, for, by words subsequent, a deed may be qualified and abridged, but not destroyed.

And as to the third manner of exposition, *viz.* to construe all the words of the limitation, as well the first as the last, to be void, there is a rule in law that, when words in a deed, plea, or record are so repugnant that the true sense thereof cannot be known to the court what is to be judged or construed upon them, that all shall be taken to be void, as appears by divers books. 33 Hen. VI, 26.<sup>2</sup> In an action on the case wherein the writ was that, whereas the plaintiff had a way by reason of his tenure, the defendant had levied a wall, whereby his way was stopped, and there Priscot said that the writ was not good for the repugnancy. And 9 Hen. VII, 3a;<sup>3</sup> one pleaded *nul tiel record et hoc paratus est verificare per idem recordum*; this was adjudged insufficient because the plea is repugnant, *viz.* the first part which is not a record and the last that there is such a record. And Dyer 70, 5 Edw. VI.<sup>4</sup> And so here, if these two limitations in the beginning of this lease are so repugnant one to the other that they cannot consist together, then both shall be adjudged void. And then, there being no certain time put for the beginning of the lease, the lease shall begin presently, as in 3 Edw. VI, 6, a man made a lease for years to commence after the end of a lease made to J.S. and, in truth, J.S. had no lease, the lease shall begin presently.

And as to the fourth manner of exposition, I conceive that these ambiguous words shall be construed ‘if it may be’ that all may be good as to a reasonable exposition. And that is that the fifty-six years shall begin from the 20 December 1 Eliz. But the lease does not take effect in possession until the end of the other lease, for *terminus annorum* has two significations, *scil.* one the time or number of the years and the other the estate or interest of the term. And, therefore, if one grants his term, the estate passes thereby. And this diversity is taken and explained [in] the 35 Hen. VIII, 6, and in

---

<sup>1</sup> *Reade v. Bullocke* (1543), 1 Dyer 56, 73 E.R. 125.

<sup>2</sup> *Right v. Anonymous* (1455), YB Trin. 33 Hen. VI, f. 26, pl. 10.

<sup>3</sup> YB Trin. 9 Hen. VII, f. 2, pl. 3 (1493).

<sup>4</sup> *Withers v. Iseham* (1552), 1 Dyer 70, 73 E.R. 148.

Coke's 1 Rep., Cheddington's Case.<sup>1</sup> So that I conceive that the first words in the *habendum* here ought to be applied and referred to the time or number of years, according to the first definition of the term, and the last shall be applied to the last definition and shall be taken only as words explanatory put in for better caution by the bishop to avoid contention between the lessees, *viz.* that the last lessee shall not meddle with the possession until the end of the first term. And, by this construction and no other may all the words agree together. Dyer, 9 Eliz., 261b.<sup>2</sup> An abbot and convent did make two leases of two parcels of land to two persons [in] 1531 for thirty-one years, and, after[wards], the successor, [in] 1535, reciting both the leases, made a new lease to the other in these words, '*noveritis nos praedictum abbatem etc. dictis 31 annis finitis et completis concessisse*' to the lessee the said land held from the day of the making of these presents, '*terminis praedictis finitis*' until the end and term of 31 years from thence next following. And the justices of the Common Bench held that it shall commence to take effect in possession at the end of the former term, and not before, and 'from the day of the making of these presents' is but a declaring of the first sentence, which is obscure to some intents, and, if it were not so expressed, the lessee shall have but a lease for four years, which was not the intent of the parties, as it should seem, but the Court of the King's Bench was of the contrary [opinion], but, afterwards, the case was resolved upon another point, *viz.* that the lease was void because that the words '*a die confectionis*' etc. were erased by the lessee himself. But admitting that, in this case, the lease should not begin until the end of the first lease, yet that is no proof that, in our case, the lease shall not begin presently, for, in this case of the 9 of Eliz., the true grant in the premisses shows the intent of the parties to make a lease in reversion and that shall control the words in the *habendum* '*a die confectionis*'. Also these words are qualified by other words in the *habendum*, *viz. termino praedicto finito*. Thirdly, the former lease is recited as a good lease without doubt. But, in our case, the first lease is not received as a lease in truth, but is termed a pretended lease. And yet, in this case, there were diversities of opinions if the lease shall commence

---

<sup>1</sup> *Lloyd, ex dem. Roberts v. Wilkinson* (1596-1598), 1 Coke Rep. 148, 76 E.R. 337, also Moore K.B. 478, 72 E.R. 707.

<sup>2</sup> *Elliott v. Holder* (1567), 3 Dyer 261, 73 E.R. 580, also 109 Selden Soc. 129, Jenkins 231, 145 E.R. 161.

presently or not. And [in] Michaelmas 10 Jac. [1612], Thomas Moor brought an [action of] ejectment against John Musgrave upon a lease made to him by William Moore the fifth of May 10 Jac. [1612] of a messuage, etc. in C. in the County of Cumberland *habendum* from the Feast of the Annunciation [25 March] last past for twenty-one years, whereby he entered and was possessed until the defendant the same day did eject him, to which the defendant pleaded not guilty. And the jury found that William Moor was seised in fee and made a lease to the plaintiff *habendum* from the Annunciation of the Virgin Mary last past for the term of twenty-one years next ensuing the date hereof etc., and judgment was given for the plaintiff,<sup>1</sup> whereby it appears that the term shall begin from the first limitation.

And after[wards], the case was argued on the bench by all the judges, and DENHAM, BROMLEY, and TANFIELD were of opinion for the defendant, wherefore judgment was given against the plaintiff.

British Library MS. Hargrave 30, f. 3  
(Turnour's reports)

Nusam, plaintiff in *ejectione firmæ* against Sir John Carey. Hilary term, 16 Jac. 1, 1619.

The case was thus. A. being a lessee for years, the reversion to B., B. made a lease of this land to C. He [ . . . ] to C., his executors, and assigns 'from the 20th day of December aforesaid,' this being the day of the date this lease was made to C., 'until the full end and term of sixty years then next following the determination and end of A.'s pretended lease whether it be by law or by time.' Note, in the lease made to C., there was no recital of the lease to A., but it is only mentioned in the *habendum* as is aforesaid. And in the lease to C., there is a reservation of £10 annually at two terms, *scil.* at the feast of St. John the Baptist and the 20th of December 'the next following.'

Note it was conceived by all that B., when he made this lease to C., was in doubt whether the lease to A. was good or not. But the term continued divers years afterwards, and A. enjoyed it accordingly.

---

<sup>1</sup> *Moore v. Musgrave* (c. 1613), Hobart 18, 80 E.R. 169, Jenkins 292, 145 E.R. 212.

The sole doubt is when this lease will be said in construction of law to take its commencement, *scil.* whether from the 20th of December 1 Eliz., because then many of the sixty years in the lease made to C. waste and spend during the continuance of the lease as A. had because the term of A. continued for fifteen years after this lease made to C. or whether from the end and determination of A.'s lease because then C. gains fifteen years in his lease that otherwise expends during the term and possession of the said A. That A. has a good lease in being for the aforesaid term notwithstanding B. seemed to be doubtful, whether the lease to A. was good or void in law.

DENHAM, baron: By him, this lease made to C. commenced in computation 'from the 20th day of December and then shall begin to spend', but it commences in possession and benefit from the end or determination of A.'s lease. And this is proved by the limitation of the party and the intent of the party and the good construction in law. First, if there is an express limitation made by the party, the intendment of the law is tolled and will not take place. And here, there is a limitation of the party, and it is certain. 9 Eliz., Dyer 261;<sup>1</sup> a man seised of land or a vill and two hamlets of the said vill devised all his lands in the vill and in one of the hamlets, nothing of the land in the other hamlet passed because of the intent expressed. And here is it apparent that B. conceived that the lease that A. claimed was void because he called it a 'pretended lease.' Thus he conceived it to be but a pretence and no verity.

Also, the reservation of the rent at such a feast 'then next following' and a covenant to pay the rent accordingly manifests that B. intended it to be a present lease to C.

It was objected that a benign construction will be made for the benefit of the lessee. He answered that B. here was a bishop and that this is a lease made by a bishop which will not have favor in the continuance of it though it was made one month before the Stat. 1 Eliz. and thus outside of the said Statute. And another construction that he has made cannot be made in this case without violence to the letter and intention of the party. 9 Eliz., Dyer 261, *casus Hiberniae*; a man made a lease for twenty-one years in A.D. 1531 to A. and afterwards in A.D. 1535, the successor of the lessor, reciting the first lease *verbatim*, made a new lease of this land to another *habendum et tenendum a die confectioe praesentia termino praedicto finito usque ad finem*

---

<sup>1</sup> *Elliott v. Holder* (1567), *ut supra*.



*terminum 31 annorum tunc immediate sequentem*, which case is equally dubious when the lease began because the justices of the Common Bench and of the Queen's Bench were of different opinions.

Note there was a recital of the former lease in the second lease etc., but here there is no recital in this lease to C.

BROMLEY, baron, [held] to the contrary that this lease to C. began in computation and interest from the end of A.'s lease and not from the 20th of December 1 Eliz., which is the date the lease was made to C. First, the words of the lease itself directly proves it, as he conceived. Second, the intent of the parties, which appears out of the words, also proves it. Third, it is a good rule that has been taken that every grant will be expounded more strongly for the grantee.

First, the words. The words 'then next' etc. must have some other words to answer to it. And the words which answer to the 'then' etc. are 'the determination' etc. And on account of this here, even though, in the beginning of this *habendum*, the lease seems to have a beginning from the 20th of December, yet the last words control it. And *posteriores cogitationes meliores*.

Second, the exposition apt for the words and the intent is, as he conceived, that, if the lease made to A. is a void lease in law, as the eye of the law sees, then this lease to begin now from the 20th of December, but, if the lease to A. be good in law, then the lease to C. begins from the determination of A.'s lease. And he cited Coke [ . . . ], fo. 23; it is a good case to express that the latter words can control the former because, there, the first words give a fee as strongly as can be and the last words restrain it to a lease for years. Also here, the last words in the *habendum*, which mention the lease to A., are entirely frustrated and void if this lease to C. will not have its beginning from the determination of the lease made to A. And it is not the office of a judge to make a construction by which any of the words will be frustrated if all can stand together, but it is the office of a judge to make such a construction by which all of the words of a deed can stand if it can be.

Third, that a benign interpretation will be made for the benefit of the grantee. And divers cases are cited upon this ground. The reason of this case lies in a narrow room. And he remembered two cases only, 9 Eliz., Dyer, *casus Hiberniae*, which is no authority on any part because the case there remained in doubt, and Moore and Musgrave's Case, resolved in this court, to which judgment I give my consent. The case was thus. Moore, by a deed

dated 5 May 10 Jac., leased certain land to F, *habendum* 'from the feast of the Annunciation [25 March] last past for the term of twenty years next ensuing the date hereof'. And, in [an action of] *ejectio firmæ* brought by the lessee, the plaintiff declared that Moore such a day and year made a lease to the plaintiff etc. *habendum* from the feast of the Annunciation last past, and, upon not guilty pleaded, the jury found in a special verdict that the lease was made as it was first recited, and yet judgment was given for the plaintiff and that this lease was found by the jury will agree with the lease alleged in the declaration because the first limitation in this *habendum* shall take place and the lease will be in law said to begin from the feast of the Annunciation past and not from the date of the lease. But yet he concluded that, in the principal case here, the first limitation will not take place by reason of the subsequent words in this case, which are not in the case of Moore and Musgrove, cited above. And thus our case here differs from this case.

TANFIELD, Chief Baron, agreed with BROMLEY: And upon mature deliberation upon the construction of the law and the intention of the party and *ut res magis valeat quam pereat*, he held that the lease to C. began but upon the end and determination of the lease to A. The dubious limitation of the beginning of this lease was upon a doubt, which the lessor conceived, whether the lease to A. be conceived, whether the lease to A. be void or not. And here, there is no certainty of the continuance of this to lease to C. until the last words. When there is no beginning, the law will say that it begins forthwith. Thus if a man make a lease to A. *habendum* for twenty-one years after a lease for years made to B. of the same land be determined and ended, there, if B. had no lease, the lease to A. begins forthwith because the law there says, if the lease to B. is void, that this lease to A. begins forthwith. Where the words are dubious, the judges will make such a construction that stands with the law and as near to the intent of the party as can be.

Hill and Grange's Case, Plowden, *Commentaries*.<sup>1</sup> A man leased a house with all the lands pertaining to the same house, by the letter and natural sense and propriety of the said words, the land cannot pass. Yet the judges there aided the intention of the parties and construed the said words according

---

<sup>1</sup> *Hill v. Grange* (1556), 1 Plowden 164, 75 E.R. 253, also 2 Dyer 130, 73 E.R. 284, 124 Selden Soc. 106, British Library MS. Harley 1691, f. 97.

to the sense intended by the parties that ‘pertaining’ will be taken there as ‘occupy’, ‘use’, or ‘lying’ with or at the house.

32 Eliz., rot. 112, in the Common Bench, Carter and Ryght’s Case;<sup>1</sup> A. was seised of the manor of Odiham in Odiham and of divers quilletts and parcels of land in Odiham not parcel of the manor. And A. levied a fine of all and declared the use of the fine to be of all the said quilletts and parcels of land and of all his lands and tenements in Odiham to be to the use of E., his wife for life and of the manor of Odiham to the use of B., his son, etc., and he died. Now the wife by reason of the general words of all his lands in Odiham etc. and the manor was in Odiham also, she claimed to have the manor also for her life; it was adjudged that the wife will not have the manor for life, but, upon all the words, the construction will be made or as the last words had been first recited, *scil.* of the manor to the use of his son and all the others of his lands in Odiham to the use of his wife for life or as the latter words had been an exception, *scil.* of all his lands in Odiham except his manor to the use of E. his wife for life and of the manor to the use of his son. Thus a construction will be made either by an exception or by a transposition of the words to make all of the words and the sense intended by the party to stand.

Littleton’s Case [was] a man made a feoffment rendering a rent to a stranger upon a condition etc. Though this was called a rent, yet it was not a rent. And in this case in the case of a condition, it must be paid etc.

Thus, in this case, the construction will be made as near to the intent of the party as can be. And here, violence will be offered to the words and the intent of the lessor if the words in the *habendum* will be cut off in the midst and all of the latter words rejected.

And he cited Dyer’s case of the leases in which there was an uncertainty in their beginning and the construction that had been made upon them. Easter 17 Eliz., in the Common Bench; a tenant in tail made a lease to A. for forty years and died. His issue entered and avoided this lease because it was not warranted by the Statute. And the issue continued in possession of this land for seven years and afterwards made a lease for twenty-one years of this land to B. to begin from the expiration and determination of the lease made to A. Here, it was said to be the intention that the words implied that it will

---

<sup>1</sup> *Carter v. Ringstead* (1590), Croke Eliz. 208, 78 E.R. 464, 2 Leonard 47, 74 E.R. 347, Owen 84, 74 E.R. 916.

be an expectation of a future determination of the lease made to A., which, in truth, was avoided and determined by the law seven years before etc., a construction was made that this lease to B. began from the date of the same lease and did not expect to have a commencement as the years mentioned in the lease made to A. will be passed. And this construction was made for the advantage of the lessee.

Michaelmas 20 & 21 Eliz., in the Bench; A., seised in fee, made a lease for twenty-one years to Righte and afterwards made another lease of this same land to B. for years *habendum* to B. from and after the date of the years of the lease made to Righte which words were dubious and nonsensical. It was resolved that the lease to B. began from the end of the lease made to Righte because this seemed to be the intention of the lessor and this construction is more for the advantage of the lessee.

Easter 20 Eliz., in the Common Bench, upon a special verdict, a western case. A lease was made to A. for twenty-one years to begin from the Nativity of Christ [25 December]. Now, according to the letter of the lease, it should begin from the very nativity of Christ and so this lease should be merely fruitless for so it should be determined many hundred years before it was made because it was not made to begin from the Feast of the Nativity of Christ because, if it had been thus, this lease began from the said feast last past perhaps. And this case was strongly urged by the counsel of the lessor to be a void lease and, by the importunity of the counsel of the lessor, a special verdict was found because the judge before whom the evidence was given conceived it to be a good lease, and thus it was afterwards resolved accordingly, and that this lease began from the memorial feast of the Nativity of Christ, according to the common intent, *ut magis valeat quam pereat*.

Thus, in this case, a benign construction will be made for the advantage of the lessee. And the better construction and that will be more near to the intent of the party will be, as he conceived, to construe these words to amount to a double *habendum* because B. conceived a doubt whether the lease to A. be good or not. And, if the words in this case had been divided by the lessor himself into a double *habendum*, then they had been without doubt as if the words had been *habendum* to C. for twenty-one years from the 20th of December if the lease of A. be void and *habendum* to C. for twenty-one years from the end and determination of A.'s lease if his lease be good. If the *habendum* in our case had been divided into a double *habendum*, the

words then had been without an ambiguity. And, by him, the law now will bear such a construction of them as if it had been thus divided because this was the intent.

And that such a construction had been made, he cited Windham's Case, Coke, li. 5, fo. 7,<sup>1</sup> where a joint *habendum* had been taken by the law and construed as a double *habendum* to support the intent of the party. And as well as in the cases above cited, the contrariety which the words sounded were reconciled by a favorable construction. Thus, the words in this case are reconcilable by such a construction as he before has made.

And judgment was given if any cause not be shown etc.

9 Eliz., Dyer 261,<sup>2</sup> where a grant was expounded more strongly for the grantee in the beginning of the lease, as here. Coke's reports, fo. 806, in the construction of the law upon the beginning of the leases, the more strong construction will be taken against the lessor and more beneficially for the lessee.

142

**Muschamp v. Bluet**  
(Ex. 1617-1619)

*In this case, the devise in issue created only life estates and the condition did not enlarge them into anything greater.*

British Library MS. Hargrave 30, f. 6  
(Turnour's reports)

Mustian, plaintiff, [brought an action of] *ejectione firmæ* against Bluett. And upon *non culpabilis* pleaded, a special verdict was found, *scil.* that Sir William Cocke was seised in fee of this land in Tottenham. And he, being seised, made his will in this manner having issue divers sons, Michael, Henry,

---

<sup>1</sup> *Wyndham v. Debney* (1589), 5 Coke Rep. 7, 77 E.R. 58, also Moore K.B. 191, 72 E.R. 524.

<sup>2</sup> *Elliott v. Holder* (1567), *ut supra*.

Matthew, etc. And he devised this land to Michael and Henry upon condition that, if they sell this land to any but to Matthew, that then Matthew shall have it as of his gift. And afterwards, he appointed that Michael and Henry pay £40 *per annum* out of this land to the wife of the testator for the life of the wife. Henry died without issue. Michael had issue and died without any sale etc. The doubt was whether the heir of Michael will have the land or the heir general of the testator because it seems Michael was not the oldest son of the testator.

The doubt in this case was what estate passed to Michael and Henry because, if the fee passed, then Michael, by survivorship, had the fee and it descended to the heir of Michael, and his heir, by consequence, had a good title.

*Thomas Crewe* [argued] that Michael had the fee by this demise. And this case he divided into two points, first, when the land was devised to Michael etc. upon the condition that, if he sell to anyone but to Matthew, that then Matthew will have it as of the gift of the testator, that the fee passed to Michael by these words, not by any foreign intendment, but by a reasonable construction because, though by the express words of the devise to Michael, only an estate for life passed, yet when it was limited afterwards that, if he sell etc., that then, there, these words enlarged his estate because, by it, he had the power to sell. And he could not sell the fee unless it be in him. If A. devise land to B. to sell, there, even though by the express limitation only an estate for life passed to B., yet, by these words, 'to sell', the estate of B. is enlarged. And this implication takes place notwithstanding the expression before and B. will have the fee because the power is given to the devisee to sell the fee. And it is to be agreed that, if a lease for life is made upon a condition to alienate in fee, that the lessee takes the fee in this case because, otherwise, he cannot give the fee. And this is not only a dispensation of the forfeiture, but it is a confirmation of the lessor. And he resembled it to the case where a feoffor and a feoffee upon a condition join in a conveyance; it is good, and the possibility the feoffor passes.

[It was] objected that the fee did not pass by this devise to Michael because here it is an estate limited to Matthew and no estate can be limited after an estate in fee. 19 Hen. VIII, 8;<sup>1</sup> a man devised land to A. in fee and,

---

<sup>1</sup> YB Trin. 19 Hen. VIII, f. 8, pl. 1 (1527).

if he die without an heir, that B. will have the land; this devise is void to B. because a fee cannot depend upon another fee. He answered that, by way of a limitation upon a contingency, an estate in fee can determine and the land can remain over. And on account of this, [it was] adjudged in *Webbe and Herring's Case*, in the Bench,<sup>1</sup> the first case that was adjudged in this court after Montagu was made Chief Justice of this court, that a man devised that, after the decease of his wife and of his son without an heir, that the land remain and go to his three daughters; it was objected that this remainder to the daughters was void because the fee passed to the first devisee; it was adjudged, notwithstanding that it was a good remainder and it will be construed here that, if he died without issue, that then the remainder [is good] because, after an estate in fee, the fee cannot depend. But they there agreed that, by a contingency and limitation in a will, an estate in fee can determine and the land remain over.

And he cited a case in 5 Eliz. [1562 x 1563] that a man seised of land in fee had issue, two sons, A. and B., and he demised part of this land to A. for his part and the other part of this land to B. for his part; there, by reason of this word 'part', which implies that each of them will have a part in the inheritance of their father, the judges conceived that the fee in this case passed to the devisees though the express words passed but an estate for life. And for authorities in this case, [see] Coke, li. 9, fo. 128;<sup>2</sup> a man devised etc., there [it was] said that each restraint implied, and it is a maxim in a will, that the parties, if the restraint is not to be limited, have the power to do this which he has prohibited, that is the cause that he restrained them and, on account of this, the words of restraint by an implication enlarges the estate given by the express words. Thus, in this case, this restraint of Michael that he not sell implies that Michael had such an estate etc. and not only for life or, otherwise, the restraint will be vain.

---

<sup>1</sup> *Webb v. Herring* (1616), 3 Bulstrode 192, 81 E.R. 162, Croke Jac. 415, 79 E.R. 355, 1 Rolle Rep. 398, 436, 81 E.R. 563, 590, Moore K.B. 852, 72 E.R. 949, J. Bridgman 84, 123 E.R. 1217, 1 Eq. Cas. Abr. 180, 21 E.R. 972.

<sup>2</sup> *Sonday's Case* (1611), 9 Coke Rep. 127, 77 E.R. 915.

2 Eliz., Dyer 171, in Frencham's Case;<sup>1</sup> the intention there took place against the letter. 7 Edw. VI, Bro., 432; a man devised land to another to give, sell, or do with it at his will and pleasure; this is a fee simple by reason of the intent. 19 Hen. VIII, 9, ac[ord];<sup>2</sup> a man devised to another the fee simple of his land; there, the fee passed, but, by the devise of his fee simple land to the other, the fee did not pass, as he thought, because it did not amount to so much. And he said that this diversity will reconcile divers cases. If there be uncertainty in the capacity of the person who takes in a will, the rule of the law will not be broken, but it will be examined by the rule of the common law.

But if there is uncertainty of the estate which passes in a will, there, the intention will be taken and the rule of law can be broken. Com., fo. 340;<sup>3</sup> a devise to A. and his heirs, A. died in the lifetime of the devisor, his heir takes nothing. But in Fuller's Case, 36 Eliz. [1593 x 1594],<sup>4</sup> [it was] adjudged that, if a man devise land to A. for life, the remainder to B. in fee, B. dies before the devisor, who died, A. enters and dies, the heir of B. takes the remainder because it was an estate for life that he can take at the death of the testator. 28 Hen. VIII, Dyer 36; a man devised that A. will have *gubernationem terrae*; there, A. cannot sell, as is there said, because there is no word of sale in the case, the devisee could have sold and, by consequence, etc. 22 Edw. III, 16; Perkins 160; and Littleton;<sup>5</sup> where a fee passes in a will without express words.

Second point: Admit that the fee did not pass by these first words, yet by the latter words, when the devisor appointed that Michael etc. pay £40 *per annum* to the wife of the devisor for her life, there, the fee passed to Michael by these words. If a man devise land to A. paying £10 *per annum* to B. for the life of B., there, A. has the fee on account of this; otherwise, B. will not be certain of this annuity for his life because B. could survive A. But if the

---

<sup>1</sup> *Turke v. Frencham* (1559), 2 Dyer 171, 73 E.R. 375, also Moore K.B. 13, 72 E.R. 407, Benloe 68, 123 E.R. 53, 1 Anderson 8, 123 E.R. 325.

<sup>2</sup> YB Trin. 19 Hen. VIII, f. 9, pl. 4 (1527).

<sup>3</sup> *Brett v. Rigden* (1568), 1 Plowden 340, 345, 75 E.R. 516, 524.

<sup>4</sup> *Fuller v. Fuller* (1595), Croke Eliz. 422, 78 E.R. 664, Moore K.B. 353, 72 E.R. 624, 1 Eq. Cas. Abr. 216, 407, 21 E.R. 1000, 1137.

<sup>5</sup> YB Mich. 22 Edw. III, f. 16, pl. 59 (1348); J. Perkins, *A Profitable Book*; T. Littleton, *Tenures*.



limitation of the payment had been but for the life of A., then the payment had not enlarged his estate. And where the fee passes by reason of these words 'paying such sum', he cited the authorities in 15 Eliz., Dyer 317; and 22 Eliz., Dyer 371; 4 Edw. VI, tit. *Estates*, 78; 29 Hen. VIII, Bro. 126; and Coke, *Repts.*, fo. 36 and 709.<sup>1</sup>

*Yelverton*, Attorney General of the king, to the contrary: First, it is to be agreed that the words of limitation in this case do not carry an estate in fee. Thus, the doubt is whether the words of circumlocution joined with the words of limitation carry with them an estate in fee. It is a power that no conveyance in the law gives so large and liberal a construction to the judges, as in the case of a will. But yet, without doubt, the intent expressed is the better rule to be the guide [than] construction by implication. They are endless and uncertain. And therefore, unless the implication arise out of the express words, it is of little credit.

And he divided the case into two points before moved, first, that the fee did not pass by the first words, which are but a restraint of sale. He agreed that, [if a] man devise land to another to sell at his pleasure, that a fee passes. But he took this difference, if a man devise land to J.S. upon a condition that he sell it to A., by this limitation to sell generally, the estate of the devisee is not enlarged because it will be construed that he must sell, but this estate, which is devised to him, because of the power to sell, will be according to the estate, by which it is but an estate for life. Thus, the word 'sell' being general and indifferent will be applied to the estate devised to the person who is to sell. But if a man devise land to A. to be sold by him to B. and his heirs, there, A. has the fee. Thus, if a man devise land to A. and that A. and his heirs can sell to B., there the fee passes to A. by necessity. 17 Eliz., in the Common Bench; a man devised land to a wife to employ upon her and her children; there, the fee passed by reason of the employment which goes and extends to the posterity. And thus he held the law [to be].

But here, no construction can be made of any intendment by the devisor to give a fee to Michael for divers reasons, first, because the testator did not intend to Matthew a greater estate upon the sale to a stranger than he

---

<sup>1</sup> *Vernon v. Vernon* (1572), 3 Dyer 317, 73 E.R. 718, also 4 Coke Rep. 1, 76 E.R. 845, Benloe 210, 123 E.R. 147, 3 Leonard 28, 74 E.R. 519; *Ager v. Pool* (1580), 3 Dyer 371, 73 E.R. 832; Mich. 4 Edw. VI, Brooke, Abr., *Estates*, pl. 78 (1550).

himself gave to Matthew upon the sale. And here, but an estate for life can be sold by Michael etc. to the stranger. Nor will Matthew have a greater estate but for life because the words are, 'if Michael sell it to a stranger, that Matthew will have it as of my gift', by which words Matthew will have but an estate for life.

A man made a lease for life to A. upon condition that he enfeoff B., which he did, accordingly, the fee passed because, here, there was no forfeiture inasmuch as the forfeiture is given but by a condition in law. And here, there is an express condition which will press the lessee to make the feoffment. And also power is given to the lessee by implication to pass the fee.

Second, if a fee passes upon this general power 'to sell' and by these first words, then the limitation to Matthew will be void because the fee will pass absolutely by the sale, and then the limitation to Matthew will come too late. 26 Eliz., in the Common Bench, Sir Thomas Lovell devised land to Henry, his son, and his eldest issue male, and, if Henry die without such issue, that, then, the land remain to John, his son. And he died. Henry had issue, a daughter only, and died. It was resolved in this case, that Henry had but an estate for life because this word 'such' is a restraint to the issue formerly mentioned, which is such eldest issue male. But if the last words had been 'and if Henry die without issue male' or 'without issue', then an estate tail will be passed to Henry.

25 Eliz., in the Exchequer; a man had issue two sons, Richard and Gilbert, and he devised land to Richard 'and, if Richard die without issue whereby my land shall descend to Gilbert, then Gilbert shall have it to him and his heirs'. Now, the doubt was what estate Richard had, and it was adjudged that it was not an estate tail in Richard because, though the first words implied it, yet the latter words, 'whereby my land' etc., controls it because etc.

12 Jac. or Eliz., in *Slowgbye's Case*,<sup>1</sup> he being seised of the manor of Fremington in the County of Devon, he devised that J.S. could make copyhold estates and take fines to his own use. It was adjudged that J.S. had no estate in the manor by such a demise nor no interest, and, on account of this, all copies made by him were void because he was not *dominus pro tempore* nor as much as a tenant at will, *quod nota*. This came in question

---

<sup>1</sup> Cf. *Gay v. Kay* (1599), *Croke Eliz.* 661, 78 E.R. 900.

between certain copyhold tenants upon copies granted by J.S. and the heir of the manor. And in this case, the intent was lame and it did not take effect for default of more ample words. But an apparent intent in implication will draw an estate.

A man, by his will, charged his eldest son upon his blessing that he pay a £10 an[nuity] out of his land to B. It is a good devise of a rent to B. because it is so forcible an implication. [In] 5 Eliz., a man devised the manor of Da. to B., his second son without and, next after, he said 'Item, I give and bequeath my manor of Sa. to B. my second son and his heirs'. There, B. had but an estate for life in the manor of Da., but, if it had not been in two distinct and separate clauses, but in one, without the name of the party, but in the end of the sentence, as the man devised his manor of Da., 'and I give and bequeath my manor of Sa. to B., my second son and his heirs', there, B. would have had a fee in both manors.

The second point [is] that the fee did not pass by the latter words of limitation of the payment of the £40 an[nuity] to the wife of the devisor for her life because, here, this rent is first charged upon the land and the devise of the land is subsequent to Michael, and thus the appointment of payment of this rent by Michael will not enlarge the lease of Michael. And on account of this, the case is not other but that A. is seised of Whiteacre and he devised a rent annually out of this acre to B. for the life of B. and then he afterwards devised this Whiteacre to C. and, by his will, he devised that C. pay this rent to B. This payment of C. will not enlarge his estate because the land is charged with this rent. But if a man devise land to A. and, afterwards, devise that A. pay or grant a rent *de novo* of £10 *per annum* to B. and his heirs out of this land, there, A. has a fee by this devise, *quod nota*.

But here in our case, there is a charge imposed first upon the land by the testator and then afterwards he demised the land to Michael etc. and appointed him to pay this rent. The payment of this rent by Michael will not enlarge his estate.

*Adjornatur.*

J. Bridgman 132, 123 E.R. 1253

Thomas Muschamp, Knight, and Margaret, his wife, and Thomas Lock, Esq., and Jane, his wife against Colan Bluet, Michael Sampson, Edward Jenny, and Elizabeth, his wife.

In an action of trespass for that the defendants, the first of January 14 Jac. [1617], by force and arms, the close of the plaintiff at Tottenham did break and enter *et possessionem tenementorum praedictorum a praedicto primo Januarii usque diem billae, scil. 20 Maii 15 Jacobi haberunt, tenuerunt, et custodierunt ad damnum £40 quo minus etc.* The defendants pleaded not guilty.

The jury found that, before the trespass, Sir William Lock, Knight, was seised in fee of the said tenements and held them in socage and that he and Matthew Lock, his son, were joint tenants in fee of other copyhold lands in Tottenham and that he had issue, Thomas, Matthew, John, Henry, and Michael, that, the 15 March 1549, Sir William made his will in writing and thereby devised these tenements to Henry and Michael in these words:

I give to Thomas, Matthew, John, Henry, and Michael, my five sons, my dwelling house in Bow Lane and my house at the Lock in Cheap and my house at the Bell in Cheap to the intent that they or some of them may dwell in them and keep the retaining shop still in my name to continue there.

Item, I give to John Lock my house that Paris dwells in.

I give to Henry Lock my house that John Edwards dwells in.

I give to Michael Lock the three houses wherein W., B., and P. dwell.

I give to Henry Lock the house that Kew dwells in.

I give to Matthew Lock the two houses wherein S. and T. dwell.

I give to Henry and Michael Lock all my houses in the Poultry, Bucklersbury, and St. John's and a house that Goodman dwells in.

I give to Matthew Lock all my houses at Dowgate in the Vintry.

I give to Thomas Lock all my houses in Cheap lying in St. Peter's Parish.

I give to Thomas Lock my land at Martin and Wimbleton that I may give him, except one farm called Martin Holts, which I give to Henry and Michael Lock.

I give to all my five sons the half of the leg entry which I purchased of late.

And as touching my lands at Tottenham, my son Matthew is joined purchaser with me of the most, and the rest of all my houses and land there which is freehold, I give to Henry and Michael Lock upon this condition, that, if they shall sell it to any man but to Matthew Lock, my son, then he to enter upon it as of my gift by this my will.

Item, all the houses and lands that I have given jointly betwixt my sons is that they shall bear part and part-like, going out of all my houses and lands, upon my blessing, as well freehold as copyhold, to pay to my wife Elizabeth for dowry £40 every year during her life out of all my lands and houses, as well copyhold as freehold, for which sum I am bound, as appears by certain indentures etc., and which of my sons refuses to bear his part of the aforesaid sum of £40, I will that he or they shall enjoy no part of my bequest by me to them given in this my will, but my gift given to him or them to go to the rest of my well-willing sons which be content to fulfil this my will and bond that I am bound in to be performed.

Sir William Lock died seised. And Elizabeth, his wife, did survive him. Henry and Michael did enter into the said tenements and paid their parts of the said £40 to the said Elizabeth; Henry dies, and Michael paid his part of the said £40.

Thomas Lock was son and heir of the said Sir William and had issue, Matthew Lock, his son and heir, and dies. Matthew, the son of Thomas, devises the said tenements to the plaintiffs, *habendum* from the death of the said Michael for seven years. The 28 of July 15 Jac. [1617], Michael Lock died seised of the said tenements.

And the said Colan Bluet, Michael Sampson, and Elizabeth Jenny, the defendants, are the next heirs of the said Michael. And the said Bluet, Sampson, and Jenny, in the right of the said Elizabeth, his wife, after the death of the said Michael Lock, did enter, upon whom the plaintiffs did enter, upon whom the defendants re-entered and made the trespass.

But whether the entry of the plaintiffs was legal or not the jury did doubt. And, if [it be] legal, they found for the plaintiff, if not, for the defendants.

And I conceive that judgment ought to be given for the plaintiffs, for I conceive that Henry and Michael Lock had but an estate for their lives by this

devise, which, by their deaths, is ended so that nothing can descend to the heirs of Michael, being the survivor, and, by consequence, the lease made to the plaintiffs by Matthew Lock, the heir of the devisor, is good, and the entry of the plaintiffs is lawful.

And the case upon the whole matter, I conceive to be this. Sir William Lock, being seised of certain land in fee and being joint tenant with Matthew Lock, one of his sons, of copyhold land within the same town, had issue Henry, Michael, Thomas, and two other sons. And, by his will, devised to his sons divers lands severally. And after[wards], he says 'touching my lands at Tottenham, my son Matthew is joined purchaser with me already of the most, and the rest of all my land there, which is freehold, I give to Henry and Michael, upon condition that, if they sell it to any but to Matthew, my son, then he to enter as of my gift'. And then, he declares that, of all these bequests, his sons shall bear part and part-like, out of all his copyhold lands and free, to pay to Elizabeth, his wife, for her dowry £40 a year during her life, and that son which shall refuse to bear his part shall not enjoy any part of his bequest, but it shall be to the residue etc. Sir William Lock dies; Henry and Michael enter and pay their parts of the £40. Henry dies, and then Michael dies. And now, the question is whether the defendants, being heirs of Michael, shall have the land or the plaintiffs, who claim under the devisor.

And for the better arguing of this case, I will first observe that here is not any express words of limitation of an estate to make any greater estate to pass than an estate for life. And then, I will show that here are no words in any part of this will to signify any certain intention in the devisor to make an estate of inheritance to pass by this devise.

And as to the first, the devise is only to his two sons, *viz.* 'the rest of all my houses and lands there, which is freehold, I give to Henry and Michael Lock.' And these are all the words of limitation of the estate, and these, without question, in a deed of feoffment, will not make a greater estate than for life. And so is Littleton 1.<sup>1</sup> If one purchase land *in perpetuum* or to him and his assigns *in perpetuum*, this is but an estate for life because it wants these words, 'his heirs', which words make the inheritance in all feoffments and grants. And this is an infallible rule in grants, unless it be in some special

---

<sup>1</sup> T. Littleton, *Tenures*, s. 1.

cases, as in frank marriage or frankalmoigne, which, being words of art, do pass an inheritance with these words, 'heirs'.

And, in cases of grants, no intention of the grantor, although it be apparent in the grant, will make an estate of inheritance to pass, as in 19 Hen. VI, 73; 20 Hen. VI, 36.<sup>1</sup> A gift to B. and C. *et haeredibus* with a warranty to them and their heirs is no fee simple because the words of limitation are uncertain to whom *haeredibus* shall be referred. And so [it is] all one as if it were omitted, and, then, the clause of warranty, although it does declare a certain intent to give an estate in fee, will not amend the matter in a grant. And so in the 1 Rep., Shelley's Case,<sup>2</sup> if one gives land to one *et liberis*, or *et iis suis*, or *semini suo*, it is but an estate for life, and not an estate in tail, yet there is an apparent intent, but that will not suffice in a grant.

But I agree that, in the case of a devise, although the apt words to make an estate of inheritance to pass are omitted, yet, if the intent of the devisor appears by any express matter contained in the will, an estate of inheritance shall pass, for it is sufficient to pass the inheritance. And so Litt. 133b; 19 Hen. VIII, 9b.<sup>3</sup> If one devises land to another *in perpetuum*, the devise by these words shall bar an estate in fee; so if one devise land to another 'to give, dispose, or sell at his pleasure', this is an estate in fee simple. 19 Hen. VIII, 9b; 7 Edw. VI, B.<sup>4</sup>

But yet the law has restrained such intent, for, first, it ought to be agreeable to law, and not repugnant to it, for, although in Scholastica's Case, in the Comment.,<sup>5</sup> it is said that a will is like to an Act of Parliament, yet a will cannot alter the law or make a new form of an estate which is not allowed by the rules of law, as an Act of Parliament is. And [it was] so adjudged in the Common Bench, Hilary 37 Eliz. between Jermin and Ascot, Coke's 1 Rep.

---

<sup>1</sup> YB Trin. 19 Hen. VI, f. 73, pl. 2 (1441); YB Trin. 20 Hen. VI, f. 35, pl. 5 (1442).

<sup>2</sup> *Wolfe v. Shelley* (1581), 1 Coke Rep. 88, 76 E.R. 199, also 1 Anderson 69, 123 E.R. 358, Moore K.B. 136, 72 E.R. 490, Jenkins 249, 145 E.R. 176, 3 Dyer 373, 73 E.R. 838.

<sup>3</sup> YB Trin. 19 Hen. VIII, f. 9, pl. 4 (1527).

<sup>4</sup> YB Trin. 19 Hen. VIII, f. 9, pl. 4 (1527).

<sup>5</sup> *Newis v. Lark* (1571), 2 Plowden 403, 75 E.R. 609, Benloe 196, 123 E.R. 138, Inner Temple MS. Petyt 511, vol. 13, f. 53v.

85, in *Corbet's Case*,<sup>1</sup> that, by a devise, a man cannot give an estate and determine part thereof by a condition and make the residue to continue. And, if land be devised to one in tail, he cannot determine the estate as to the devisee himself and yet preserve the estate to the issue, as was endeavored in this case.

And 28 & 29 Hen. VIII, *Dyer* 33.<sup>2</sup> If land be devised to one in fee and, if he does not perform such an act, the land shall remain to another, the remainder is void, for no such remainder can be limited by the rules of law.

This intent ought to be expressed in the will and collected out of the words of the will and cannot be averred or supplied by any foreign matter, as in *Matthew Manning's Case*, 8 Rep. 95b.<sup>3</sup> Always, the intention of the devisor, expressed in his will, is the best expositor, director, and disposer of his words. And *Lord Cheney's Case*, 5 Rep. 68;<sup>4</sup> Sir Thomas Cheney devised certain land to Henry, his son, and the heirs male of his body, the remainder to Thomas Cheney of Woodley and the heirs male of his body upon condition that he or they or any of them shall not alien, and the question was whether there could be an averment that the intent of the devisor was to restrain Henry and his heirs from aliening. And [it was] resolved that no such averment could be received, for the construction of wills ought to be collected out of the words of the will.

The intent of the devisor ought to be manifest and certain, and not dubious, as in a devise of land to one forever. Here, the intent is to give an estate in fee simple, for no other estate can continue forever. So, if the devise be to one and his heirs and, if he dies without heir, that it shall remain to another, his intent appears that the word 'his' in the first devise shall be taken for the heirs of his body, for the law will sooner presume him to be dead without issue than to be dead without an heir.

And now to examine our case with the rules of law, there are three clauses in this will, as I conceive, upon which the pretenses of the defendants

---

<sup>1</sup> *Germin v. Arscot* (1595), in *Corbet v. Corbet* (1599-1600), 1 Coke Rep. 85, 76 E.R. 191, also Moore K.B. 364, 72 E.R. 631, 1 Anderson 186, 123 E.R. 422, 2 Anderson 7, 123 E.R. 517.

<sup>2</sup> *Anonymous* (1537), 1 *Dyer* 33, 73 E.R. 73.

<sup>3</sup> *Clark v. Manning* (1609), 8 Coke Rep. 94, 77 E.R. 618.

<sup>4</sup> *Lord Cheney's Case* (1592), 5 Coke Rep. 68, 77 E.R. 158, also Moore K.B. 727, 72 E.R. 867.



are founded to have an estate in fee pass by this devise, to which I shall make answer severally.

The precedent clause to the devise [is] ‘and as touching my lands at Tottenham, my son Matthew is joined purchaser with me of the most, and the rest of all my houses and lands there, which is freehold, I give to Henry and Michael Lock’ etc. And as to this, I conceive that here is no color to enlarge the estate to the devisees, but this clause is only a description of land which he does not intend to devise and which, in truth, he cannot devise because that Matthew ought to have it by survivor[ship] and is principally named therein because of preventing any question between Matthew and the two devisees after his death, for, otherwise, they might perhaps have pretended that all the lands in Tottenham should pass to them especially because they were purchased, as it might very well be presumed, with the money of the devisor and he was the reputed owner thereof. But these words make no declaration as to the estate which he intends to demise to Henry and Michael.

The condition or limitation annexed to the devise [is] in these words, ‘upon condition that, if they sell it to any man but to Matthew Lock, my son, then he to enter upon it as of my gift by this my will’. And I conceive that this clause does not show any intent of the devisor to enlarge the estate first limited to Henry and Michael or to give an estate in fee to them, for it is not if they alien in fee or in tail or if they or their heirs do alien, which words, or any words to such intent, would have declared a manifest intention that the devisees should have a fee simple, but here an alienation in general only is restrained, which ought to be taken for a legal alienation and such a one as they may make by reason of the estate devised to them.

And that it shall be so intended, first, it is to be considered that this condition is a restraint annexed to the estate and is as a conjunct to the estate and, therefore, cannot be properly more large than the estate itself, for it is a rule that every restraint or exception in an assurance ought to operate upon the estate or the thing before granted, as in the Comment. 370, *Zouche’s Case*,<sup>1</sup> an exception is an exemption of that contained in the general words, and, if it be not contained in the generality, it can be no exception in the specialty, and, therefore, if one leases Whiteacre, excepting Blackacre, the exception is vain.

---

<sup>1</sup> *Stowel v. Lord Zouch* (1562), 1 Plowden 353, 75 E.R. 536.

This exception of alienation is more proper to be annexed to an estate for life than in fee, for he who makes a lease for life or years may restrain the lessee by a condition that he shall not alien, but the feoffor cannot restrain the feoffee from aliening, as in Littleton 84. If a feoffment be made on condition that the feoffee shall not alien, the condition is void, for the feoffee has the power to alien to whom he will, for, if that condition were good, that would take from him the power which the law gives him, which would be against reason. But, if the condition be that he shall not alien to such a person, naming the person, or any of his heirs or his issues, this is a good condition because it takes not away the power to alien in fee. And *Vernon's Case*, 4 Rep., fol. 3.<sup>1</sup> An estate in fee conveyed by the husband or his ancestor to a woman for her jointure is not a jointure within the Statute of 11 Hen. VII,<sup>2</sup> which restrains alienations made by women, for to restrain such an estate as cannot be aliened is repugnant and against the rule of law and, therefore, not within the intention of the Act.

But it has been objected on the other side, first, that this condition is not void because it does not restrain all their power, but leaves them to the liberty to alien to Matthew; second, if the condition be void, yet it is sufficient to declare the intent of the devisor that a fee should pass.

And, as to the first, I conceive that the condition is void, for to restrain generally and that he shall not alien to any but to J.S. is all one, for, then, the feoffor may restrain him from aliening to any except to himself or such other person by name whom he may well know cannot, nor never will, purchase the land so that this condition shall take away all his power and shall make a perpetuity in the feoffee, which is quite contrary to law. Neither is there any authority to warrant this restraint, for Littleton leaves the feoffee at liberty to alien to any except to such a one in particular.

And, as to the second, I do agree that, if the condition to restrain the alienation had been expressly to restrain the devisees and their heirs or to have restrained from aliening in fee or in tail or for another's life, although the condition had been void, yet had it been sufficient to have shown the intent of the devisor and to have caused an estate in fee to have passed. And,

---

<sup>1</sup> *Vernon v. Vernon* (1572), 4 Coke Rep. 1, 76 E.R. 845, also 3 Dyer 317, 73 E.R. 718, Benloe 210, 123 E.R. 147, 3 Leonard 28, 74 E.R. 519.

<sup>2</sup> Stat. 11 Hen. VII, c. 20 (*SR*, II, 583).

therefore, I do agree to the case in the 9 Rep., fol. 127,<sup>1</sup> where one devised to his wife for life and, after her decease, his son William to have it and, if William shall have issue male, that he shall have it, and, if he have not issue male, his son S. shall have it, and, if he has issue male, his son shall have it, with like remainders to his other sons, ‘and my will is, if any of my sons or their heirs male, issues of their bodies, alien, then the next heir to enter’ etc. And it was resolved that the son should have an estate in tail by this devise, first, by reason of these words, ‘if he have no issue male’, which is as much as to say if he die without issue male; secondly, because he and his heirs male are restrained to alien, for every restraint, especially in wills, implies that the party, in case he were not restrained, had power of the thing restrained. And so [is] Baker’s Case, Hilary 42 Eliz., rot. 143.<sup>2</sup> A devise to the husband and wife, the remainder to their two sons upon condition that, if they or their heirs go about to alien etc. is a fee simple also, for the heirs being restrained to alien shows fully that the heir shall have the land, for otherwise he cannot alien it.

But here, in our condition, there are not any words to show the intent of the devisor that an estate in fee shall pass, but the devisees are restrained to alien generally, which, as already I have shown, is more agreeable to an estate for life than an estate in fee simple. At the least, he does not show any certain intent that the devisees shall have an estate in fee. But that remains dubious, and, therefore, the safe way is to take the same according to the rules of law.

The third clause to explain the intent of the devisor in this case is the clause of the charge imposed upon the land by the devisor, *viz.* ‘Item, all the lands I have given jointly betwixt my sons is that they shall bear part and part-like, going out of all my lands, as well free as copyhold, to pay to my wife Elizabeth for dowry £40 every year during her life out of all my lands’, etc. And I conceive that this clause makes nothing as to the enlargement of the estate. And yet, I do agree that, if one devise land to another, paying £20 or another sum in gross, this is a good devise in fee. But it is otherwise when the land is devised to one paying an annual rent or bearing an annual charge

---

<sup>1</sup> *Sonday’s Case* (1611), 9 Coke Rep. 127, 77 E.R. 915.

<sup>2</sup> *Shailard v. Baker* (1600), Croke Eliz. 744, 78 E.R. 977.

with the profits thereof, as in *Collier's Case*, 6 Rep.,<sup>1</sup> where one devised land to his wife and, with the profits, that she should bring up his daughter and that, after her death, the estate should remain to his brother, paying to other persons 40s., and the value of the land was £3 *per annum*, and [it was] agreed there that the brother had a fee simple. And this diversity was resolved in that case that, if the devise had been to the brother to the intent that he should maintain his daughter with the profits or pay out of the profits thereof so much to one and so much to another, that this is but an estate for life, for he is sure to have no loss. So is it if it be to pay certain sums yearly under the value of the land, for he may pay it out of the profits and is sure to be no loser. And this is in effect our very case, for, first, the charge is imposed for dower, which cannot be intended to exceed the annual value of the land; secondly, it is to be paid out of the land, and, therefore, there is no charge imposed upon the person of the devisee, but only upon the land devised to him, so that he takes the land with this charge and, when his estate determines in the land, yet the charge always remains upon the land and the devisee is discharged thereof. And, therefore, this charge may as well be if he have an estate for life as if he have a fee simple.

And, as to that in *Boraston's Case*, 3 Rep. fol. 20b; between *Wallock and Hammond*,<sup>2</sup> where a copyholder devised his land, paying to his daughter and to each of his younger sons 40s. within two years after his death, and surrendered accordingly, and died, and [it was] agreed that the devisee had an estate in fee, although the annual profits exceeded the money that was to be paid. And the reason is plain, for it is not limited to be paid out of the land or profits, but it is a payment in gross, and it may happen that the devisee may die before he can receive so much of the profits.

And afterwards, *viz.* *Trinity 17 Jac.* [1619], all the barons, *scil.* *TANFIELD*, *BROMLEY*, and *DENHAM*, delivered their opinions severally that *Henry and Michael Lock* had an estate only for their lives because there are no express words in the devise to make any greater estate to pass and the condition or

---

<sup>1</sup> *Collier v. Walker* (1595), 6 Coke Rep. 16, 77 E.R. 279, also *Croke Eliz.* 379, 78 E.R. 625.

<sup>2</sup> *Hynde v. Ambrye* (1587), 3 Coke Rep. 16, 76 E.R. 664, 1 Eq. Cas. Abr. 190, 194, 21 E.R. 980, 984; *Wellock v. Hammond* (1590), *Croke Eliz.* 204, 78 E.R. 460.

clause of the charge imposed by the will does not necessarily imply that they should have a greater estate than for life, for such estate may satisfy both these clauses as well as an estate in fee and the condition is more proper to be annexed to an estate for life than in fee.

Wherefore they resolved, that judgment should be given for the plaintiffs. But, because Sir Thomas Muschamp, one of the plaintiffs, died hanging the action, no judgment could be entered.

143

**Beddoe, *qui tam* v. Sanderson**  
(Ex. 1617)

*An informant's pleading need not be so precise as a pleading by a party to a contract.*

Croke Jac. 440, 79 E.R. 376

[An] information [was brought] in the Exchequer for that the defendant, *per viam corruptae barganizationis et cheviansiae factae* between the defendant and one Edward Hayns, received of one John Hayns, administrator of the said Edward Hayns, between the 23rd June 14 Jac. I [1616], £65, *viz.* for the use and occupation of a house in Clerkenwell in the County of Middlesex, from Midsummer 14 Jac. I [1616] to Michaelmas 14 Jac. I [1616] £15, *et pro absentione et detentione solutionis* £1000, from the 16th April 1614, for six months then following £50, *ubi revera praedictum messuagium adtunc valebat dimittendo per annum £20 et non ultra*, and, therefore, he demanded £3000, being the treble of the value of the £1000 so forborne.

After a verdict for the plaintiff, upon not guilty pleaded, it was moved in arrest of judgment that this information was not good, first, because he does not show the certainty what the bargain was, but generally, *per viam corruptae etc.*

*Sed non allocatur*, for it was said that so was the usual course in the Exchequer, being grounded upon the receipt, and that is to be proved in evidence. But it was agreed that, in pleading to avoid a bond or an assurance,

it ought to be particularly pleaded and shown, for the party is privy to the manner of his contract, but the informer is not privy thereto, and, therefore, it suffices him to show the particulars upon the evidence.

Secondly, because it is not shown that the house was not worth above £20 a year at the time of the bargain, for, peradventure, by fire or tempest, it may fall, *in toto vel in parte*, so as, at the time of the receipt, it was worth but £20. And here *adtunc valebat* cannot be referred to the time of the bargain, for there is no time laid thereof, but there are three times alleged, *viz.* first, between the 23d June 14 Jac. I, secondly, the occupation of the house from Midsummer to Michaelmas, thirdly, the forbearance of the money from 16th April 14 Jac. I for six months following. And, then, it is said *ubi revera messuagium praedictum adtunc valebat etc.*; so it is uncertain to which of those times 'adtunc' refers. And, if it should refer to the last, as properly *adtunc* always refers to the last antecedent, as 28 Hen. VIII, pl. 19, Dyer, Bold's Case,<sup>1</sup> is, that it ought to be so expounded, then this is no offence. And it is uncertain to which of the times it shall refer, and so the information is not good, for the defendant ought to be certainly and precisely charged who is to be fined and imprisoned, and not by argument and implicitly. And precedents were shown that, in such cases, the usual course is to allege it to be of such a value and no more at the time of the bargain, when the want of the value of the house is the sole offence and chevisance which is pretended. And for that purpose were cited precedents in the Exchequer in Trinity term 43 Eliz., roll 102, Harrison v. Bagshaw; in Michaelmas term 43 Eliz., Farnaby v. Beth; and in Trinity term 3 Jac. I, roll 132; and Loveday's Case in the *New Book of Entries*.<sup>2</sup> Wherefore, it was prayed that the defendant might be discharged.

And, after the argument at the bar by the Attorney General [*Yelverton*] and Serjeant *Chibborne*, in maintenance of the information, and by *Thomas Crewe* and *Davenport*, and *George Croke*, for the maintenance of the exceptions, it was adjudged for the plaintiff.

---

<sup>1</sup> *Bold v. Molineux* (1536), 1 Dyer 14, 73 E.R. 31, also Benloe 13, 123 E.R. 10, 1 Anderson 1, 123 E.R. 321.

<sup>2</sup> *Cooke, qui tam v. Loveday* (1605), E. Coke, *A Booke of Entries* (1614), 'Information', pl. 17, f. 393, also 8 Coke Rep. 65, 77 E.R. 573, Croke Jac. 210, 79 E.R. 183, Jenkins 283, 145 E.R. 204.

Vide Fox's Case, Dyer 16; Stradling's Case, Plowden 193, 202; and the Year Book 3 Edw. IV, pl. 21.<sup>1</sup>

144

**Rex v. Executors of Dacombe**  
(Ex. 1618)

*A beneficial interest in a trust is forfeited to the Crown upon the attainder of felony of the beneficiary of the trust.*

Croke Jac. 512, 79 E.R. 437

King James made a lease to Sir John Dacombe and others of the provision of wines for His Majesty's house for ten years in trust for the earl of Somerset [d. 1645]. They made a lease for all the term, except one month, rendering £900 a year. The earl of Somerset being afterwards attainted of felony,<sup>2</sup> the question was whether the trust which was for the said earl was forfeited to the king by this attainder. And it was referred to all the justices of England by command from the king to be considered of and to certify their opinions.

TANFIELD, Chief Baron, now delivered all their opinions to be that this trust was forfeited to the king and that the executor shall be compelled in equity to assign the residue of the term and the rent to the king. And he cited a case to be adjudged 24 Eliz. where one Birket had taken a bond in another's name and was afterwards outlawed that the king should have this bond and that, in 24 Eliz., one Armstrong, being lessee, for years, assigned the lease to another in trust for himself and, being attainted of felony, this trust was forfeited to the king. But he said they all held, and so it was resolved in another case, that a trust in a freehold was not forfeited upon an attainder of treason.

---

<sup>1</sup> *Regina v. Fox* (1557), 2 Dyer 164, 73 E.R. 359; *Stradling v. Morgan* (1560), 1 Plowden 199, 75 E.R. 305; YB Mich. 3 Edw. IV, f. 21, pl. 16 (1463), or YB Mich. 3 Edw. IV, f. 26, pl. 21 (1463).

<sup>2</sup> *Earl of Somerset's Case* (1616), 1 State Trials 351 (F. Hargrave, ed., 1776).

Note: This case I had from the report of Humphrey Davenport, who was of counsel in this case.

Jenkins 293, 145 E.R. 213

A. has a lease for years in trust for B.; B. is attainted of felony. The king shall have it.

Hobart 214, 80 E.R. 361

The earl of Somerset had obtained a grant of the licence of wines for years and took it in the name of Sir John Dacombe in trust for him, whereupon, the king willed the Chief Justice [Montagu] and me [Hobart] to call the judges and to give an opinion whether it were forfeited by his attainder of felony, which we did. And it was resolved *una voce* that it was forfeited.

And after[wards], it was resolved so in the [Court of] Exchequer in cases of chattels real and personal and things in action of that sort.

118 Selden Soc. 475

Attorney General v. Carr.

Upon a bill exhibited by the king in the exchequer chamber against the [former] earl of Somerset, Sir John Dachham, now lord chancellor of the duchy [of Lancaster], and others, the case appeared to be thus. The earl of Somerset, to have the wines when he was in the favor of the king, procured the letters patent of the king to be granted to Sir John Dachham and two others upon the nomination of the earl and in trust for the earl that they for ten years should have the provision of wines for the household of the king, the nature of which was to have as much of the wines as they bought [?] at the price of the king for the provision of the king and then to resell that which was surplus at the best rate that they could. Sir John Dachham and the other two, in consideration of £3500 given, made a lease for the entire term except one month to one Jacob, who did not have any notice of the trust between the earl and the patentees, reserving the rent of £900 *per annum*, in which lease there was also a covenant that Jacob should have the benefit of this month after the lease expired. The earl of Somerset was attainted of felony.

A bill was exhibited by the king in the exchequer chamber against the earl and the others upon a supposition that the trust was forfeited to the king.



The earl, being imprisoned in the Tower [of London], has refused to answer, and Sir John Dachham upon his answer confessed the trust, and now, upon a privy seal, he [the king] sent to all of the justices of England for the declaration of their opinion whether this trust was forfeited to the king or not upon the attainder of the earl.

SIR LAWRENCE TANFIELD, Chief Baron of the Exchequer, declared the opinion of all of the judges of England to be, upon conference, that this trust was a thing forfeited to the king notwithstanding that the letters patent were originally granted to the patentees and the interest of the lease was not ever in the earl himself and [was] afterwards assigned by the earl to others in trust for him, because it is all the same where the lease is made originally to one in trust for another and where the lease [is] made to the lessee and it is assigned over in trust for the benefit of the lessee. And the case of one Jones in 24 Eliz. [1581 x 1582] was cited to be adjudged that where obligations were made to certain persons in their names for another [ . . . ] *cestui que trust* it was alleged those obligations were forfeited. And in 29 Eliz. [1586 x 1587], in the case of one Armstrong, it was also adjudged that a trust should be forfeited.

2. [It was] resolved that the lease made to Jacob was not to be touched inasmuch as he had not had any notice of the trust and he came in upon good consideration.

3. It was doubted what should be done in this case inasmuch as the *cestui que trust* could not be brought in to answer, whether a decree could be made against him or not, that thus he stood completely in contempt of the court.

And the court wished to consult what to [do], and yet they said that it was not [ . . . ] for counsel to speak on his behalf as he was thus disobedient to the orders of the court.

I was not present, but I heard it by relation of Master Richard Towneson.

[Orders of 13 Feb. and 16 and 28 Oct. 1618: Public Record Office E.124/24, f. 394, E.124/26, f. 167, E.124/27, f. 109.]

144a

**Ivatt v. Warren**  
(Ex. 1618)

*The Court of Exchequer has jurisdiction over disputes over tithes for houses in London.*

3 Gwillim 1054, Western 88,  
3 Eagle & Younge 1203

11 May 1618, 16 Jac.

Whereas Elizabeth Ivatt, widow, exhibited an English Bill into this honorable court against Simon Warren, Thomas Burmsowe, and other defendants, setting forth thereby that the late Queen Elizabeth being seised in right of her crown of England of and in the impropriation of the parish church and rectory of St. Buttolph's without Algate, London, and all messuages, barns, stables, oblations, obventions, duties, and appurtenances to the said rectory and parish church belonging, by Her Grace's letters patents, dated the 8th day of June in the 30th year of her reign [1588], demised unto one George Puttenham, Esq., the said rectory and impropriation for divers years yet to come enduring and under the rent of £22 *per annum* and under divers covenants therein expressed, and, after the death of the said late queen, the inheritance thereof descending to His Majesty that now is, it pleased His Majesty, among other things, to grant the reversion and the said inheritance unto one Francis Phillips and Francis Moris, Esquires, under the fee farm rent of £22 *per annum* and shows that the said inheritance and the said interest of the said rectory by mesne conveyances coming unto Sir Thomas Carsfield, Knight, Robert Fulnetby, Esq., and Thomas Alsworth, gent., they, by their indenture bearing date the 20th of November in the 12th year of His Majesty's reign [1614], demised the said rectory with the appurtenances unto John Ivatt, the plaintiff's late husband, from the birth of our Lord God next following after the date thereof during the term of eleven years and that the said John Ivatt, being possessed of the said rectory by virtue of the said demise, made his last will and testament in writing, and thereof made the plaintiff his executrix and died, after whose decease, the

plaintiff proved the said will and thereby became possessed of the said lease and rectory and ought to receive all duties and tithes belonging to the said rectory according to the ancient customs, ordinances, decrees, laws, and statutes of this realm of England which the parishioners and inhabitants of the said parish within the City of London and liberties thereof ought to pay unto the plaintiff for the tithes of their several houses after the rate of 2s. 9d. in the pound and that the defendants, with others of the parishioners combining together, go about to defraud the plaintiff of her just and due tithes by taking great fines and reserving small rents, which, in time, may be a means to impair and diminish His Majesty's fee farm and, for relief therein, prayed the aid of the court;

Upon which bill, process of subpoena being awarded against the defendants, the said defendant Warren and others appeared in this court and put in their plea unto the said bill and thereby set forth that there is no law for the payment of tithes for houses within the City of London and suburbs thereof, but only by a decree confirmed by Act of Parliament made in the 37th year of the reign of King Henry VIII,<sup>1</sup> in which decree, there is a proviso that, if any variance do arise for the payment of tithes in London and the liberties thereof, that, then, upon complaint made to the Lord Mayor of the said City, His Lordship shall end the same, or, if he shall not end the same within three months, then upon complaint to be made to the Lord Chancellor of England for the time being, His Lordship should end the same, and, thereby, demanded judgment of the court whether they ought to make any other answer to the plaintiff's bill as, by the said plea here remaining of record appears;

Which plea, by an order of the 28th of January *anno* 13th *Regis Jacobi* [1616], was overruled and the defendants enjoined to make direct answers to the plaintiff's bill.

And the said defendant Warren, by several orders of this court, did put in several answers and thereby set forth that there was a custom within the said parish that, both at the time of the said decree and since, the parishioners of the said parish have paid a less sum of the tithes of their houses then after the rate of 2s. 9d. in the pound. And the said Warren also said that he dwells in the house of Amable Coxe within the said parish and that, about two years

---

<sup>1</sup> Stat. 37 Hen. VIII, c. 12 (SR, III, 998-1000).

past, he took the lease of the said house of the said Amable for the term of twenty-one years, and under the rent of £9 *per annum* and that he paid unto her £30 for a fine. And further, he said that he thought he was not chargeable in law to pay tithes for the same by reason of an express clause mentioned in the said decree that, where a less sum then 16d. ob. in the 10s. rent and 2s. 9d. in the 20s. rent has been accustomed to have been paid for tithes, then, in such places, the inhabitants should pay after such rate as has been accustomed to be paid for tithes and also that there is another proviso in the said decree that the same should not charge any sheds which were not parcel or belonging to any mansion house nor should pay any tithes for the same, but the same ought to be freed from the payment of tithes. And he further said that, about three or four years since, the said Amable Coxe did erect and build the house wherein the said defendant Warren now dwells part upon a shed and part upon the waste ground belonging to the house wherein Robert Coxe, late husband of the said Amable, lately dwelt and occupied the said shed and waste ground together with his mansion house and paid to the proprietor of the said rectory or parsonage 4s. *per annum* for the tithes of the said mansion house, shed, and waste ground, for which reasons he says that he has forborne to pay any tithes for the said house and partly by reason of a grant or covenant made by Thomas Scot, Esq., and Bridgett, his wife, who were reputed the proprietors of the said rectory, unto the said Amable Coxe that she, the said Amable, should not be compelled to pay for the said house wherein the said Amable dwells with the sheds and waste grounds nor for any houses or buildings to be erected upon the same, but only 4s. *per annum* for the tithes thereof for the term of threescore years, as by the said several answers remaining in this court more at large appears;

Unto which the plaintiff replied, and the defendant Warren rejoined and descended to a perfect issue. And since, there were several orders for the bringing in of the tithes into this court due from the defendant Warren after 2s. 9d. in the pound according to his rent of £9 *per annum* to be delivered to the plaintiff.

But by an order of the 12th of February last, the said Warren was to bring £3 14s. 3d. for three year's tithes into this court, there to remain until the hearing of the cause, and for witnesses to be examined on both parts, and publication to be had the first day of this Easter Term, and the said cause to

be heard the second sitting of this term at Serjeants' Inn, as by the said order appears.

And this present day [11 May 1618], the said cause coming to hearing before the Lord Chief Baron [TANFIELD], and the residue of the Barons of this court, in the presence of the learned counsel on both parts, touching the tithes due and payable by the said Warren for the house he now dwells in, where, upon a full and deliberate hearing of the said cause, for that the defendant made no sufficient proof of any custom within the said parish for the payment of the tithes, or that the said house was anymore discharged by the branches or provisoes of the said decree and act of Parliament of the 37th year of Henry VIII, or that the covenant mentioned to be made by Thomas Scott and Bridgett, his wife, to the said Amable ought any way to prejudice the plaintiff, and the said court conceiving the meaning of the said decree and act of Parliament was that the inhabitants within the City of London and liberties thereof ought to pay for the tithes of their houses after the rate of 2s. 9d. in the pound according to the true value as the same were worth to be let *per annum*, and that, if the same had been a shed, as was pretended, yet ought the same to be discharged of tithes no longer than the same is continued a shed, for, being converted to a dwelling house, the same ought to pay the tithes according to the true value;

It is, thereupon, ordered and decreed by this court that the said sum of £3 14s. 3d. due for the three year's tithes now remaining in court shall be forthwith delivered to the plaintiff, and the said defendant Simon Warren to pay the residue of the tithes now due unto the plaintiff besides the said tithes now remaining in court and shall from henceforth pay to the plaintiff or her assigns, or any other that shall be proprietor or farmer of the said rectory for the tithes of the said house 2s. 9d. *per annum* to be paid quarterly by equal portions according to the true intent and meaning of the said decree of the 37 Hen. VIII, and that all those who shall hereafter inhabit and dwell in the said house shall pay the tithes for the same as is before expressed, according to the true intent and meaning thereof.

And it is likewise ordered that the said Simon Warren, his executors, or administrators shall pay forthwith unto the plaintiff or her assigns the sum of £6 13s. 4d. towards her costs and charges sustained in the prosecuting of the said suit.

145

**Rex v. Death**  
(Ex. 1618)

*Where the king is a joint creditor, he can levy upon the entire debt.*

Croke Jac. 513, 79 E.R. 438

It was found by an inquisition that one York had recovered £500 in an action on the case for words against John Allen.<sup>1</sup> Afterwards, John Allen and Edward Allen purchased land in fee and aliened it to John Death. York was outlawed, and so his debt became forfeited to the king. The question was whether the king should have execution of the moiety of the moiety of John Allen or the entire moiety.

And it was resolved that he should have the entire moiety, although York should have had but the moiety of the moiety, but the debt coming to the king, he shall by his prerogative have execution of the entire moiety. And it was adjudged accordingly.

146

**Anonymous**  
(Ex. 1618)

*Usage cannot create a right against the Crown.*

2 Rolle, Abr., *Prerogative le Roy*, pl. B, 4, p. 194

Henry II granted to the Burgesses of Dublin *quod sint quieti theolonio* of passage, pontage, and *omni consuetudine per totam terram nostram Angliae, Normaniae, Walliae, et Hiberniae ubicunque venerint ipsi et res eorum*. Even though the citizens have been all times after this grant until this day exoner-

---

<sup>1</sup> *York v. Twine* (1605), Croke Jac. 78, 79 E.R. 67.

ated of the great custom, which is called *magna antiqua custuma in Anglia et magna nova custuma in Hibernia*, yet they shall not be discharged of the said custom by this charter because the words '*theolonium et consuetudo*' can be applied to divers things and, where the words in the grant of the king can be applied to divers things, they will not be extended to the said great custom, which is the ancient inheritance of the king, by any usage whatever. Michaelmas 16 Jac. [1618] in the Exchequer resolved, query.

147

**Beddoe, *qui tam* v. Winchcombe**  
(Ex. 1619)

*The Statute of Usury does not apply to contracts that do not involve a repayment.*

British Library MS. Hargrave 30, f. 5v  
(Turnour's reports)

Bedo, *tam pro domino rege quam pro seipso*, informed in the Exchequer against John Winchcombe upon the Statute of Usury.<sup>1</sup> And he alleged that, between the first of March and the first day of April *anno* 6 & 7 Jac. [1609], there was communication and a corrupt agreement made between the defendant and one Ayliffe for the loan of £700 by the now defendant to the said Ayliffe which was in this manner, *scil.* that the defendant lend to Ayliffe £700 and that the £700 and usury for it will be returned and repaid in this manner, *viz.* that Ayliffe will lease land to Benedict Winchcombe that is worth more than £100 *per annum* for forty years and that he will lease this land back to Ayliffe for the whole term rendering £100 *per annum* for twenty-one years payable at the two feasts equally and, afterwards, a peppercorn each year if it be demanded during the term etc. And all of this [was] in trust for John Winchcombe, the now defendant, which conveyance was executed in May following accordingly. But Benedict Winchcombe has not made any lease back to Ayliffe according to the agreement, but Ayliffe has continued the

---

<sup>1</sup> Stat. 13 Eliz. I, c. 8 (SR, IV, 542-543).

possession of the land. And the £100 has been paid annually accordingly to John Winchcombe, the which amounts beyond £10 by the year for each £100. And on account of this, the plaintiff prays for the treble [value] which is £2100.

And upon *non culpabilis* pleaded by the defendant, a trial was had at the bar. And the defendant gave in evidence, first, that there was no communication between the defendant and Ayliffe for the loan of £700 or of borrowing of such a sum, but an offer was made to the defendant of a bargain of an annuity of £100 *per annum* for twenty-one years for £700, which bargain had been offered by Ayliffe to others who had refused it. And this could be the case of any man who takes a bargain or provides an annuity for a younger son. And it could be the case of any of the jury. And on account of this, it appertains to them to be vigilant etc. And the defendant does not use to expose money for interest. And this he much insisted that there was no communication or speech of the loan or borrowing of money, but only of a bargain, *quod nota*.

Secondly, [he argued] that the offense of this corrupt agreement supposed is precisely laid in the information to be between the first day of March and the first day of April *anno 6 & 7 Jac.* and, if this agreement was made after this time, the plaintiff will not have judgment upon this information because, it being so penal, if there was no such agreement in this time proved, the plaintiff will not have judgment. And on account of this, they endeavored to prove that the first communication between Ayliffe and the defendant upon this bargain was in May *anno 7 Jac.* [1609], which was after the time laid in the information for the agreement, and to prove it they showed the conveyances, which bore a date afterwards etc., *quod nota* that the time alleged for this agreement is material because, if the agreement is not within the time alleged, then there is no such agreement upon which the plaintiff complains.

The attorney for the king [*Coventry*], for the plaintiff and the king, [argued] that, upon this information, judgment will be given for the king. First, he said that it is true that the deeds and conveyances made in execution of this corrupt agreement bear date in May 7 Jac., but yet the corrupt agreement, which is always precedent, could be done within the time alleged in the declaration. And this he endeavored to prove by circumstances because this is the business of darkness and secrecy. And on account of this, it is not to be



so punctually proved. Also, he said that it is to be observed for a rule that a usurer, by the showing of any deed that he will produce in which in truth the usury is unwrapped, will not be condemned; his deeds shown by him shall never condemn him [because] they are always so cunning.

Second, he enforced all circumstances to prove that the intention of Ayliffe was to borrow money and not of a bargain etc.

Note: It was admitted that this bargain for £700 to have £100 *per annum* for twenty-one years is beyond £10 *per annum* for each £100 and within the Statute if it is upon a loan of money and not upon a direct bargain. But if it is upon a direct bargain, it certainly is not to be taken to be within the Statute.

I [Arthur Turnour] did not hear the verdict. Note I conceive to have heard that the verdict in this case was for the defendant.

148

### **Standish and Tryon's Case** (Ex. 1620)

*A debtor of a debtor of the crown can voluntarily pay the money due into court and be discharged therefrom by an order of the court.*

British Library MS. Hargrave 30, f. 74, pl. 2  
(Turnour's reports)

Tryon, being a merchant stranger, was fined in the Star Chamber £15,000, and one Standish, who was indebted to him by several obligations of £400 informed the Attorney of the King of this, who, in the Exchequer, prayed that this money due to Tryon, being a prisoner in the Fleet [Prison], could be paid to the king and brought into this court, upon which motion, Tryon, by a [writ of] habeas corpus, was brought to the bar. And being demanded by the court in what sum the said Standish was indebted to him, he confessed that he was indebted by several obligations to him in £400 principal debt and damages for interest to £100 beyond this. Upon which confession and the confession of the debtor of the principal debt, it was ordered

that Standish bring into this court the money, and for so much of the money as Standish bring into the court, that Tryon bring into court the obligations for the said sum, and for so much that he brought into court, he will be discharged against Tryon. But before he brought in the money, this court will not enjoin the obligee to bring in the obligations nor make any bargain. And for the damages for interest, the parties are to stand to the order of this court.

And thus, upon this confession without an inquisition or *scire facias*, this money due to the debtor of the crown, without other record, will be taken for the king.

And TANFIELD, Chief Baron, cited a precedent, Easter 10 or 11 Edw. II, in this court, where one Johannes de Monte Casino, being seised of land, became indebted to the king, and he died seised and his land descended to his son and heir, who sold part of it to one Simon de Malwyn, by which the said Simon became indebted to the said heir by a recognizance in Chancery in a great sum, and the said parties being present in court *allocutus, scil.* being demanded by the court of the sum due to the heir of the debtor of the king, it was confessed, by which without any inquisition or *scire facias*, this debt was taken into the hands of the king for the part of his debtor. And the debtor was discharged for it against the debtee, who was the debtor to the king.

149

### **Amcotts v. Catherich**

(Ex. 1621)

*Where a man holds land in special tail with his wife and has a son by her, his second wife is not entitled to dower rights in that land.*

Croke Jac. 615, 79 E.R. 525

[An action of] trespass [was brought] by *quo minus* in the Exchequer for lands in Penchard in the County of Durham. Upon not guilty pleaded and a special verdict found at the assizes in Durham, the case was that a husband and wife, tenants in special tail, had issue, and the wife dies. Matthew Amcotts, the husband, makes a deed of feoffment to the use of himself for life

and, after, to the use of Alexander, his son, in tail, and a letter of attorney to make livery. Before livery is made, he takes Susan to wife, and, after[wards], livery was made to those uses. The husband dies. The tenant endows Susan, who takes the defendant to husband. Alexander, the son, enters and brings [an action of] trespass.

The question was whether this dower was well assigned. This case was argued at the Exchequer bar two several terms.

The first question was, whereas a husband, tenant in special tail with his wife, having issue by her, and she dies, and he taking a second wife makes a feoffment, whether this second wife be dowable of this possession and that the assignment of dower to her were good.

The second question [is], admitting she were dowable, yet, inasmuch as this livery was made upon a deed of feoffment sealed before the coverture, yet executed after, to the use of the husband for life, whether she be now dowable.

It was resolved and so adjudged that she is not dowable, for this livery does not gain to the husband any new estate, but, being *eodem instanti* drawn out of him, it does not gain to him any seisin whereof his wife is dowable, for, at the first, before his feoffment, he had not any estate whereof the wife was dowable, being such a tenant in tail that his issue by his second wife could not inherit. 44 Edw. III, pl. 24; 46 Edw. III, pl. 24.<sup>1</sup> Then, when he has not any estate before the feoffment whereof the wife was dowable, he has not by his feoffment gained any such estate to make her dowable, as where a tenant for life makes a feoffment, as 3 Hen. IV, pl. 6, or a joint tenant makes a feoffment, as 34 Edw. I, 'Dower', 178.<sup>2</sup>

And TANFIELD cited that it was adjudged, where a married man took a fine and by the same fine rendered the land to another in tail, his wife shall not be endowed thereof because, although he took it in fee, yet it is instantly out of him; wherefore here etc. And for the other point, it is not now questionable. Wherefore it was adjudged for the plaintiff.

---

<sup>1</sup> YB Trin. 44 Edw. III, f. 21, pl. 24 (1370); YB Mich. 46 Edw. III, f. 24, pl. 8 (1372).

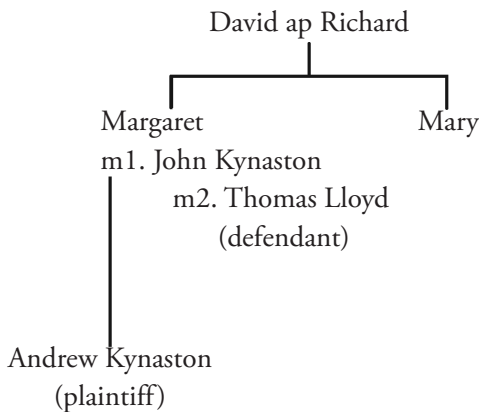
<sup>2</sup> YB Mich. 3 Hen. IV, f. 6, pl. 27 (1402); YB Pas. 35 Edw. I, Rolls Ser. 31a, vol. 5, p. 512, Fitzherbert, Abr., *Dower*, pl. 178 (1307).

**Kynaston v. Lloyd**  
(Ex. 1621)

*In this case, the conveyance is issue was held to be an entail granted to a daughter, and not a jointure.*

W. Jones 13, 82 E.R. 8

Kinaston was the plaintiff in the office of pleas in the Exchequer in [an action of] *ejectione firmæ* against Thomas Lloyd and others, defendants, for lands in Bodley in the County of Denbigh. And, upon a special verdict, the case was as follows, that David ap Richard was seised in fee of lands of the value of £20 *per annum* and, in consideration of marriage of Margaret, his daughter, to John Kinaston and £115 paid by John Kinaston, he conveyed the lands to the use of himself for life, remainder to John and Margaret in tail, remainder to Margaret in tail, remainder in fee to the right heirs of David. And Margaret and John having issue, Andrew Kinaston, David and John died. And Margaret married Thomas Lloyd, the defendant, and they levied a fine. And Andrew Kinaston would enter pretending that the estate was forfeited by [Stat.] 11 Hen. VII<sup>1</sup> and leased to the plaintiff, the defendant ousted him.



<sup>1</sup> Stat. 11 Hen. VII, c. 20 (SR, II, 583).

The case at bar was argued for the plaintiff by *Glanvill* and *Jeffryes* and on the part of the defendant by *Jones* and *Croke*. And afterwards, in the term of Michaelmas 19 Jac. [1621], the Chief Baron [TANFIELD] and all of the barons, *una voce*, resolved that this estate was out of the Statute of 11 Hen. VII because it was that the land [moved] from the father of the wife. And the argument to the contrary was [it was] a gift of the interest that the husband had. And without argument of the judges, judgment was given for the defendant.

Croke Jac. 624, 79 E.R. 537

[An action of] ejectment [was brought] for lands in Boditham in Denbighshire of a lease of Andrew Kynaston for three years. Upon not guilty pleaded and a trial in the County of Salop, being the next county, upon a special verdict, the case was found to be thus. David ap Richard being seised in fee of the lands in question, which were found to be of the annual value of £20 now and at the time of the assurance, and having only two daughters and co-heiresses, *viz.* Margaret and Mary, by indenture between him and John Kynaston 31 Eliz. [1588 x 1589] covenanted with the said John Kynaston, in consideration of marriage between the said John Kynaston and the said Margaret and in consideration of £115 to be paid by the said John Kynaston at such days, to assure those lands by fine to the use of himself for life and, after, to the use of the said John Kynaston and Margaret and the heirs of their bodies, remainder to the heirs of the body of Margaret, remainder to the said Mary and her right heirs. The assurance was made accordingly, and the marriage took effect. John Kynaston paid the £115. Afterward, the said John Kynaston and Margaret had issue, Andrew Kynaston, the lessor of the plaintiff. The said John Kynaston died. His wife, Margaret, takes a second husband and aliens by fine to J. Lloyd, the defendant. Andrew Kynaston enters for the forfeiture and lets to the plaintiff. And, whether this were an estate within the Statute of 11 Hen. VII, c. 20, was the sole question.

It was several times argued at the bar on the plaintiff's part by *John Jeffery* and *Glanvill* and by Serjeant *Jones* and *George Croke*, on the part of the defendant. And [it was] much enforced on the plaintiff's part that it was within the words and intent of the Statute, it being purchased by the husband for a valuable sum of money according to the estate, for it is but a reversion

expectant upon an estate for life of £20 a year, for which £115 is a sufficient consideration.

But against, it was argued that it was the land of the wife's father, so it is an inheritance moving from the ancestor of the wife and is in consideration of marriage, which is intended the principal and original consideration. Although there be a payment of money, yet this is a real consideration, the other [being] but personal, which is not regarded so much. And, therefore, it is out of the Statute of 11 Hen. VII, c. 20. Also, it is as a gift in frank marriage, where the donees have an inheritance by those words; so here.

And all the barons were of opinion that this is not any jointure within the Statute of 11 Hen. VII, c. 20, because the land moved from the wife's father and her advancement in marriage is intended to be the cause of the gift, and not the money. And this appears because the limitation is to her and her husband in special tail and, after, to the wife in general tail and, for default of her issue, to her sister in fee; so as the father principally intended the advancement of his daughter. And, although the husband paid £115, that is not intended as a valuable price for the land, but to have the estate limited to him as well as to his wife, so as he might have the lands although he had no issue. Wherefore, it was adjudged for the defendant.

A case was cited 36 Eliz. in the Court of Wards,<sup>1</sup> where Smith, being seised of lands of the value of £12,000, by indenture, covenanted with Sir John Littleton in consideration of marriage between William Littleton, son of the said Sir John Littleton, and Margaret, daughter and heir of the said Smith, and for 1300 marks paid by the said Sir John Littleton to assure the lands to the use of himself for life and, after, to the use of Smith for life and, after, to the use of William Littleton and Margaret and the heirs of the body of the said William on the body of the said Margaret, remainder to the right heirs of William Littleton, the lands being held by knight's service *in capite*. The marriage took effect; the conveyances were made accordingly; afterward, Smith died. The question was whether this was a conveyance within the Statute of 32 Hen. VIII, c. 1,<sup>2</sup> for the advancement of his child that the king should have a third part or as a conveyance for that money, for, then, the king

---

<sup>1</sup> *Littleton's Case* (1594), Moore K.B. 746, 72 E.R. 878, *sub nom. Smith's Case*, Popham 53, 79 E.R. 1170.

<sup>2</sup> Stat. 32 Hen. VIII, c. 1 (*SR*, III, 744-746).

should have nothing. And it was resolved that it was a conveyance within the Statute of 32 Hen. VIII, c. 1, although money was part of the cause, yet the principal cause by intendment was the daughter's marriage and advancement. Wherefore, by the advice of the chief justices upon a case made and argued before them, it was resolved to be within the Statute, and a decree was made accordingly.

Palmer 213, 81 E.R. 1048

Edward Llinaston v. Lloyd *vel* Flood Powell ap Thomas in [an action of] *ejectione firmæ*, Trinity 19 Jac., Exchequer.

The case upon a special verdict was David ap Richard, seised of land now in demand in fee, had issue two daughters, Margaret and A. And upon an agreement between him and John Llinaston that the said John Llinaston will marry his daughter Margaret, he covenanted to levy a fine of this land. And it was in consideration of the marriage to be celebrated between the said John and his daughter and also in consideration of £115 paid to him by the said John Llinaston. And this fine will be to the use of the said David and his heirs until the marriage takes effect and, when the marriage takes effect, then of the moiety to the use of Margaret and John and the heirs of their bodies engendered, remainder to the heirs of the body of Margaret, remainder to the right heirs of A., his second daughter, and for the other moiety to the use of Richard A. for life, who was the father of David, for life, remainder to David himself for life, remainder to Margaret and John in special tail, remainder to Margaret in general tail, remainder to the right heirs of A., the second daughter.

Afterwards, the marriage was celebrated and the fine was executed accordingly. And Margaret and John had issue, Andrew Llinaston, who was the lessor of the plaintiff. And John Llinaston died. Margaret took as husband Thomas Lloyd, the defendant. And Margaret and Thomas, the second husband, levied a fine to the use of Margaret and Thomas in special tail, remainder to the right heirs of Thomas, upon which Andrew Llinaston, pretending this to be a forfeiture of the jointure by the Statute of 11 Hen. VII, entered and leased to the plaintiff.

The point was whether this estate tail will be said to be an inheritance and purchase of the husband within this Statute and will be said an advance-

ment of the wife by him in regard to the money paid by him to the father of the wife or whether the consideration of affection specified by the father in the marriage of his daughter will be preferred and said the cause of the grant so that the estate will move from the father and not from the husband.

*Glanvill*, for the plaintiff, [said] that this is a jointure within 11 Hen. VII and will be a purchase of the husband because it is land that is only of £20 value *per annum* and because the estate of the husband and wife is to begin after two lives and the remainder afterwards is not to the heirs of the husband, but of the father, by which it is a clear purchase to pay £115 for such an estate. And when there are several considerations in one grant, the law marshals them and prefers the most worthy. If the valuable consideration outweigh the estimation of the consideration of marriage, he said that there is a difference between a gift of frank marriage made with a cousin or daughter and another estate tail made with them because the frank marriage is the cause of the gift on account of which, if they are divorced, there the wife will have all of the land because it was an advancement for her. 13 Edw. III, *Attachment*, 21; 31 Edw. III, pl. 8; D. 13 and 147b.<sup>1</sup> And goods also. 26 Hen. VIII, 7; *Natura Brevium* 130; Fitz., *Detinue*, 61.<sup>2</sup>

It is otherwise of an estate entailed to them. There, if they are divorced, they will have it jointly for lives. 13 Edw. III, 92; 7 Hen. IV, 16,<sup>3</sup> which proves that the law respects the intent of the donor because, here, though there was a mention of marriage and [ . . . ]<sup>4</sup> the land for a less price, yet the money was the moving cause. Also where a valuable consideration and [one] of nature concur, the valuable [one] has precedence, as by 7 Coke 40.<sup>5</sup> If a father, by a deed, in consideration of £20 paid by his son, covenant to stand seised to his use, this does not raise a use unless it be enrolled and yet, [for

---

<sup>1</sup> Mich. 13 Edw. III, Fitzherbert, Abr., *Attachment sur prohibition*, pl. 8 (1339); *Anonymous* (1536), 1 Dyer 13, 73 E.R. 28; *Villers v. Beaumont* (1557), 2 Dyer 146, 73 E.R. 319, also Benloe 39, 123 E.R. 31.

<sup>2</sup> YB Mich. 26 Hen. VIII, f. 7, pl. 1 (1534); *Natura Brevium*; Mich. 34 Edw. I, Fitzherbert, Abr., *Detinue*, pl. 61 (1306).

<sup>3</sup> YB Trin. 7 Hen. IV, f. 16, pl. 9 (1406).

<sup>4</sup> *fortasse afford* in Palmer.

<sup>5</sup> *Bedell v. Bedell* (1607), 7 Coke Rep. 40, 77 E.R. 470, also Jenkins 289, 145 E.R. 209.



the] son, it is a sufficient consideration for himself to raise a use. But when it concurs with money, the law does not regard it, but the money, and it will enure as a bargain and sale. Thus is 3 Coke 81.<sup>1</sup> If one in debt to another in consideration of natural affection give his goods to his son, this does not defeat the creditors, but they will be first served because a consideration that should avoid their real debts must be as high and a natural consideration is not so high a value in law, by this book, Trinity 25 Eliz., 2, in the Court of Wards, Strange's Case<sup>2</sup> was that the father, being tenant *in capite*, for a consideration of money, sold to his son and heir apparent; and he died; and the son, being of full age, was sued for primer seisin because this was an advancement within [the Statute of] 32 [Hen. VIII]. But it was resolved that it was a purchase and not an advancement for the valuable consideration which merged the consideration. And even though, in this case, the land moved from the father of the wife and he be a donor, yet the law regards the occasion of the gift, which was the money paid, as Dy. 172.<sup>3</sup> One levied a fine to the conusee rendering to the wife of the conusor; this is an advancement of the son within [Stat.] 32 Hen. VIII; yet he came in under the conusee, but he was only the instrument, as the father here. And 2 Coke, Beckwith's Case;<sup>4</sup> the law regards him who pays the consideration where he had the right and returned the use to him.

And he relied greatly upon Beaumont's Case, Dyer 148,<sup>5</sup> by which, inasmuch as the husband paid consideration, it was a jointure by his procurement and within the Statute, as by the words of 34 Hen. VIII.<sup>6</sup> An estate

---

<sup>1</sup> *Attorney General v. Twyne* (1601), 3 Coke Rep. 80, 76 E.R. 809, also Moore K.B. 638, 72 E.R. 809.

<sup>2</sup> *Regina v. Savage* (1590), Moore K.B. 715, 72 E.R. 859.

<sup>3</sup> *Lane's Case* (1559), 2 Dyer 172, 73 E.R. 379.

<sup>4</sup> *Colgate v. Blithe* (1589), 2 Coke Rep. 56, 76 E.R. 541, also Gouldsborough 12, 67, 75 E.R. 963, 999, 1 Anderson 164, 123 E.R. 409, 4 Leonard 88, 74 E.R. 749, Moore K.B. 196, 72 E.R. 528.

<sup>5</sup> *Villers v. Beaumont* (1557), *ut supra*.

<sup>6</sup> Stat. 34 & 35 Hen. VIII, c. 20 (SR, III, 919-920).

tail procured by the king is the same as<sup>1</sup> an estate made by him in tail to the subject.

And on account of this, he prayed judgment for the plaintiff.

*G. Croke*, for the defendant, thought that this is not a jointure or an advancement of the wife by the father of the wife and that the husband was advanced by his wife or her friends by an estate that is joint to them. This is not a jointure within this Statute, as is Com. 464.<sup>2</sup> And by these conveyances, it is apparent that it is an advancement on the part of the father and that his affection for the daughter is the attractive cause of the estate and only regards the advancement of his daughter because the use is limited to the father and his heirs until the marriage was had and, when the marriage was had, then this joint estate begins, so that the marriage, and not the money paid, is the motive for it. Also the residue of the estate after this joint estate is limited to the wife in general tail and the remainder to the other daughter of the father in fee so that it respects his heirs only, and not the heirs of the husband notwithstanding this money paid because, if the payment of the money be solely regarded, the limitation of the uses to the stranger will be void. Also, it is clear that the remainder in general tail to the wife, or the remainder to the other daughter, is not a jointure within this Statute. And never has it been seen that it will be a jointure for part of a limitation of an estate to the same person and for another part of the estate not.

Also, he took a difference when consideration of love or affection is expressly made part of the consideration. There, even though money be part of the consideration also, the natural consideration overcomes the other, as when it is expressed that in consideration of parental etc. and a sum of money. It is otherwise when it is an implied consideration of affection and money concurs. There, the express valuable consideration will be preferred, as the case in 7 Coke 40b, cited before. And, if in this case, he had expressed that, in consideration of his affection to the son and the money, he covenanted to stand seised, there the natural affection only raises the use. But the son or cousin etc. are not but implied considerations. And that the natural consideration will be preferred is apparent. Com. 307, 309b,<sup>3</sup> where it is said

---

<sup>1</sup> *en equipage ove* in Palmer.

<sup>2</sup> *Eyston v. Studd* (1574), 2 Plowden 459, 75 E.R. 688.

<sup>3</sup> *Sharington v. Strotton* (1565), 1 Plowden 298, 75 E.R. 454.

that the greater consideration raises a use and will be preferred before any recompense. It is there said that such natural consideration of the ancestor of the husband will be consideration within this Statute. Also, in Beaumont's Case, Dy. 146b, 147b, the consideration of money prevailed, which was not mentioned in the indenture of marriage or the jointure which proves that, if the marriage had been mentioned, it will draw the use because, otherwise, the valuable sum expressed will be preferred. Also, in the case of frank marriage put before, even though there be a consideration of money paid by the husband, yet, if they are divorced, he will have all, as if a wife, upon a promise of marriage, convey her land, even though rent be reserved, she will have her land back, notwithstanding the rent, which is a valuable consideration. Dyer 312; *Natura Brevium* 205; 2 Coke 74.<sup>1</sup> And thus, in a stranger, if consideration of affection has been expressed, it carries the use.

Also, it is to be considered that this sum of money is only a personal and transitory consideration that quickly perishes. And on account of this, it is not to be compared to real and natural consideration, which always remains, as Dy. 112b; in a lease of a house and implements rendering rent, the rent issues from the house, and, [upon an] eviction of the implements, there will not be an apportionment of the rent.

Also, this cannot be a jointure of the husband when the fee is limited to a stranger and not to the husband or his heirs. 44 Edw. II, King's Bench, between Tudman and Ward; the bishop of Exeter gave land in tail to his servant in consideration of his service and *pro maritaggio consanguinitiae suae*, and the jury found that she was his cousin, and the question was whether it will be a jointure within this Statute and an acquisition by the husband for the consideration of service or whether it will be said an advancement of the bishop to his cousin, and it was resolved that it was not a jointure made by the husband, but an advancement by the bishop because this natural consideration merged the other, which was only personal and executed. And where the heir had entered for a forfeiture, it was not congeable. Easter 16 Jac., in the King's Bench, between Heckman and Tompson;<sup>2</sup> Crackoff, in consider-

---

<sup>1</sup> *Andrews v. Blunt* (1572), 3 Dyer 311, 312, 73 E.R. 704, 706; *Natura Brevium*; *Lord Cromwell v. Andrews* (1601), 2 Coke Rep. 69, 74, 76 E.R. 574, 583, also 2 Anderson 69, 123 E.R. 550.

<sup>2</sup> *Kirkman v. Thompson* (1618), Croke Jac. 474, 79 E.R. 404.

ation of £700 paid to him by Richard Boles and that the daughter of the said Richard marry the son of Crackoff, conveyed land to the husband and wife and the heirs of the body of the wife, remainder to the heirs of the body of the father, and it was resolved to be a jointure within the Statute even though he received money because the land moved from the father of the husband, by which he concluded for the defendant.

At another day, *Jeffrys* of Lincoln's Inn argued for the plaintiff, which I did not hear.

But, in response to his argument, Serjeant *Jones* argued as follows. First, he said sometimes statutes are extended by equity beyond the words. 5 Coke 14; [Stat. of] 13 Eliz.<sup>1</sup> was taken beneficially for the suppression of a wrong, as the fraudulent recovery against a person is within the Statute. Sometimes [it is] by way of restriction of the words, as the same Statute, 10 Coke 60,<sup>2</sup> even though the words are that a lease will be void, this will be intended against the successor, not himself. Thus, this Statute of 11 Hen. VII was made to suppress wrongs of wives, and it will be largely taken against them. But it will be intended where the land is of the provision or acquisition of the husband or his ancestors and not the lands of the wife herself or her ancestors. And that this Statute will be taken by equity, he cited Dy. 96, 97; Dy. 228, E; 3 Coke, *Lincoln College Case*.<sup>3</sup> This Statute will be expounded by acts that tend to the disinheritance of issue and not of those which corroborate an act made for issue. Com. 459, *Easton and Stud's Case*.<sup>4</sup> A husband and wife alienated lands of the wife and retook an estate to themselves; he dies; she could alienate, and this will not be a jointure within this Statute.

Then the question is here, whether the consideration of marriage or the money will have the prevalence. And he held that the law will esteem it the land of the wife. He agreed that, where money only is expressed in the

---

<sup>1</sup> *Case of Ecclesiastical Persons* (1601), 5 Coke Rep. 14, 77 E.R. 69; Stat. 13 Eliz. I, c. 10 (SR, IV, 544-545).

<sup>2</sup> *Stanton v. Green* (1613), 10 Coke Rep. 58, 60, 77 E.R. 1013, 1017.

<sup>3</sup> *Regina v. Duchess of Somerset* (1554), 1 Dyer 96, 73 E.R. 209; *Ashton's Case* (1564), 2 Dyer 228, 73 E.R. 504; *Lincoln College's Case* (1595), 3 Coke Rep. 53, 76 E.R. 757, also Moore K.B. 255, 72 E.R. 564, 2 Anderson 31, 123 E.R. 530, 2 Leonard 56, 74 E.R. 354.

<sup>4</sup> *Eyston v. Studd* (1574), *ut supra*.

deed, there, it will not be any averment of consideration of marriage or blood, according to Dy. 148; 7 Coke 40; 8 Coke 93.<sup>1</sup> But where both considerations concur expressly in the deed, there *naturae vis maxima*, and there is no need to enroll the deed, but a use will arise upon the natural consideration, and it will merge the money.

Also, he agreed with the case of 3 Coke, in Gwin's Case,<sup>2</sup> that when a fraudulent conveyance is made upon consideration of blood, that a subsequent conveyance of the same land upon consideration of money will avoid the first. But he said that, if a subsequent conveyance be upon consideration of money and blood together, that this will not avoid the first because the blood merges the consideration of money. 26 Eliz. 2, in the Court of Wards, the case between Gilbert Littleton and Smith was that Smith, in consideration of £1300 and marriage, covenanted to stand seised to the use of William, the son of Gilbert, and his wife, who was the daughter of the said Smith, in tail; Smith dies. And it was resolved there that livery will be sued for the third part of the land because the land was given for an advancement of his daughter, and this notwithstanding the consideration of money expressed in the deed.

And there was another case in the Court of Wards, which was thus. Coffin, having no issue, in consideration of £100 covenanted to stand seised to the use of his wife for life and then to the use of one Coffin, his cousin, and his heirs. Coffin died. And it was resolved that, during the nonage of the heir and the lifetime of the wife, the king will have the third part of the land notwithstanding the consideration of money expressed because the conveyance was for the advancement of the wife within the Statute of Wills.<sup>3</sup>

And he put the case of the Bishop of Exeter cited before. And as to the case of *causa matrimonii praelocuti* brought by the wife who made a feoffment upon consideration of money or rendering rent with a clause of distress, there the writ did not lie because the consideration of marriage came only by an averment and not expressly within the deed of feoffment. But if it be express, it will be otherwise.

---

<sup>1</sup> *Villers v. Beaumont* (1557), *ut supra*; *Bedell v. Bedell* (1607), *ut supra*; *Smallman v. Powys* (1610), 8 Coke Rep. 93, also 2 Brownlow & Goldesborough 291, 123 E.R. 948.

<sup>2</sup> *Attorney General v. Twyne* (1601), *ut supra*.

<sup>3</sup> Stat. 27 Hen. VIII, c. 10 (SR, III, 539-542).

And he also agreed that, if a man take a wife [who is a] copyholder in fee and then he purchase the frank tenement of the copyhold to himself and his wife in tail, this is a jointure within the Statute, that the copyhold is extinct, and all this is in the wife by the purchase of the husband when she accepts the purchase after the death of the husband.

Also, he agreed with the case in Chancery, where the husband and wife sold the land of the wife and, with this money, purchased other land to the husband and wife, that this is a jointure within the Statute of 11 Hen. VII because the money was a chattel vested in the husband which he could dispose of at his pleasure in what manner he wished. And thus, when he purchased other land with it, the law will not be of another construction but that it will be the purchase of the husband and thus a jointure to the wife.

And finally, at this term [Trinity 19 Jac., 1621], it was resolved by TANFIELD, Chief Baron, and all of the barons that this was not a jointure within the Statute of 11 Hen. VII. And judgment was entered accordingly. And their reason, as I heard, was that the land moved originally from the ancestor of the wife, and not from the husband or any of his ancestors and, even though the husband paid a sum of money, yet it was not to be an advancement of the wife by him, that he had a consideration for his money, *scil.* to be joined with his wife in the estate tail special where otherwise it was intended an advancement of the wife only.

151

### **Faliell's Case**

(Ex. 1623)

*The question in this case was whether a return of an inquisition was sufficient or not.*

2 Rolle Rep. 395, 81 E.R. 874

In the Exchequer, *Noy* moved the exception to the return of the inquisition that *fuit inquisitio indentata capta coram commissionariis domini regis virtute commissionis huic inquisitioni annexa* and it did not show any particulars

by which it appeared what authority they had, as 5 Coke, Page's Case,<sup>1</sup> where [there is a] difference. And thus it was resolved in Dakins' Case, in the Court of Wards,<sup>2</sup> where a difference was taken between an inquisition by force of the writ; there it is good to say *inquisitio etc. virtute brevis huic inquisitioni annexa*. But [it is] otherwise in this very case.

Second, in the end, he said that, to this part, the commissioners and jury have put their seals, but he did not say that, to the other part, *penes juratores remanentes*, the commissioners have put their seals, and this was resolved bad and insufficient in Rathborne's Case, 15 Jac., in the Court of Wards because the Statute of [ *blank* ] Hen. VIII,<sup>3</sup> as to the inquisition returned, says that the jury and the escheator will put their seals and, to the part with the jurors, that the escheator will put his seal.

152

**Beddoe, *qui tam* v. Vanlore**  
(Ex. 1623)

*A contract cannot be worded so as to avoid the Statute of Usury where it is in substance usurious.*

British Library MS. Hargrave 30, f. 140  
(Turnour's reports)

Bedo, *tam pro domino rege quam pro seipso*, preferred an information against Sir Peter Vanlore upon the Statute of Usury<sup>4</sup> for a corrupt agreement for the loan of £600 for six months to have £31 which was 20s. over the sum of £10 *per annum* for £100. And he alleged in special that, for the loan of £600 from 22 January 19 Jac. [1622] until 22 June *anno* 20 [Jac., 1622], he had taken £31 upon this agreement. And upon *non culpabilis* pleaded and a

---

<sup>1</sup> *Attorney General v. Page* (1587), 5 Coke Rep. 52, 77 E.R. 133.

<sup>2</sup> *Dakins' Case* (1611), Ley 31, 80 E.R. 608.

<sup>3</sup> Stat. 1 Hen. VIII, c. 8 (SR, III, 4-5); Stat. 3 Hen. VIII, c. 2 (SR, III, 23-24).

<sup>4</sup> Stat. 13 Eliz. I, c. 8 (SR, IV, 542-543).

trial at the bar, the case upon the evidence was thus. John Hawkins did borrow of Sir Walter Vanlore £300 upon interest and Sir Peter Vanlore did also demise a meadow in the parish of Newberry, being the inheritance of the said Sir Peter, to the said John Hawkins rendering £28 *per annum*, which John Hawkins demised to J.S. for fewer years for £30 *per annum* which was 40s. *per annum* beyond the rent paid to Sir Peter. And John Hawkins was also seised of a messuage called The Pelican, an inn in Newberry aforesaid, which he had demised with the implements in it for 100 years to others rending £80 *per annum*. And John Hawkins having occasion to use £300 more, desired to borrow the same also of Sir Peter Vanlore. But Sir Peter would not lend it to him upon a bond nor upon a mortgage of his messuage aforesaid. But it was agreed that a deed of absolute bargain and sale of the said messuage should be made to Sir Peter by which the reversion and rent thereof passes as also that the said John Hawkins should surrender up his said lease in the meadow to the said Peter and that, thereupon, Sir Peter would let him have £300 more and that, however, the whole £80 rent passed by the grant, yet Sir Peter would take but £60 thereof *per annum* and restore the other £20 *per annum* to John Hawkins and an absolute deed of bargain and sale was made to Sir Peter of the inheritance. And John Hawkins also surrendered his estate in the meadow to Sir Peter having gotten in the under lease made to J.S. And upon this lease, it was endorsed that he will pay his £30 *per annum* to Sir Peter. And further he agreed, upon payment of the £600 at the end of two years, the said Sir Peter will reassure the fee simple of the messuage.

And these matters [were] resolved in this case, first, whether an agreement was made by this loan of money to pay beyond £10 *per annum* for £100 and for security an absolute deed of bargain and sale was made to the debtee of the land and the debtor relied only upon the promise of the debtee for reassuring the land upon the repayment of the money which though the deed is absolute, yet if the agreement is that it will be but in that nature of a mortgage, that it is usurious and void because it is a chevisance or shift to avoid the Statute.

Second, if a corrupt agreement is made in private between two for a loan of money and security is made by an absolute deed of land but it is so secret it cannot be proved and these deeds [are] sealed before witnesses and before the sealing nothing is spoken before the witnesses of any reassuring of the land but immediately after the sealing the party who lends the money and



who takes this absolute estate by the deed declares before the witnesses that it is agreed that, if the money is paid within the two years following, that he will reassure the land, now it will be intended that this was their agreement before the sealing because otherwise, by such a shift as aforesaid, the Statute could be avoided.

Note: The question in this case was whether it was an absolute sale of the land by their agreement because the agreement is the thing to be respected or whether it was a loan of money and a mortgage.

Note: In this case it was declared that the receipt of £31 was for the loan of £600 from 22 January 19 Jac. to 22 June following, being six months.

Now, it was said by the counsel of the defendant a loan must be proved and a receipt by the hands of John Hawkins of the said £31 for the loan for this time. And this time was after the aforesaid conveyance was made. And now Sir Peter has not received this £20 for the half year of J.S. as the money of John Hawkins because John Hawkins has surrendered his term.

[It was] answered by the Attorney [General *Coventry*] that the surrender was void being upon a usurious contract and thus the first lease revived and this it will be the money of John Hawkins.

153

**Beddoe, *qui tam* v. Cutts**  
(Ex. 1623)

*It is usury where the creditor receives the full legal interest but the debtor does not have the full principal for the full term.*

British Library MS. Hargrave 30, f. 145v, pl. 1  
(Turnour's reports)

Bedo informed against Cutts that the said Cutts by way of a corrupt bargain and agreement had received of Cooke for the sum of £100 the second day of May of such year until the second day of October following beyond the sum of £10, *scil.* he had received £5 the 14th of September. The case upon the trial was thus. Cutts did lend to Cooke £100 for six months to repay £105

and did receive his £5 shortly after the day and agreed to continue for six months more so that in the obligation it was forfeited, but yet it was continued and remained not renewed. And before the end of the six months, Cutts arrested Cooke and accepted £5 from him for interest before the day and took a new security for £100 so that now there was not here any corrupt bargain or money but a receipt before the day.

[It was] resolved by the court, if money is lent upon a good agreement, as £100 for six months for £100 and £5, if the £5 is received before the day, this is usury and will be punished, as here upon such an information.

[It was] resolved that, if an obligation of £200 for the payment of £105 becomes forfeited and the obligee accepts the £5 and is content to continue it for six months more, though this obligation was forfeited, yet now, if upon this new agreement, he receives more than £10 *per annum*, the obligation is forfeited.

One Hollingsworth's Case, 40 Eliz.,<sup>1</sup> [was] cited that, upon a statute acknowledged at first good and upon a good agreement and by a new defeasance made afterwards and put upon it, it can be usurious and all depends upon it.

A man comes to borrow £200 and the lender at first will say that he will have £100 in money and the other £100 in wares [ *blank* ].

## 154

### **Parkenson's Case** (Ex. 1623)

*A question in this case was whether a conveyance of land is effectual where the location of the land is mistaken in the deed.*

*Another question was what estates are created by a use limited to the husband and wife and the survivor of them and the heirs of the survivor of them.*

British Library MS. Hargrave 30, ff. 175v, 179, 223v, 227v  
(Turnour's reports)

---

<sup>1</sup> *Hollingsworth v. Parkehurst* (1597 x 1598), Noy 2, 74 E.R. 974.

The indenture of grant and covenants was of land in Blagden and Bletsoe in the possession of J.S. And there was no enrollment of this deed nor livery made upon it. But the grantor levied a fine to the grantee of it according to the intent, and the fine was of land in Blagden and Bletsoe in the parish of Horton, where Bletsoe is not within the parish of Horton. And on account of this, the doubt is whether any land in Bletsoe passed by this fine.

*Bankes* argued that the land in Bletsoe passed by this fine because there is sufficient certainty for it without the parish and because the adding of the parish does not vitiate it. Also, where a fine and the precedent indenture vary, the fine will be guided by the precedent particularity in the indenture. 1 Hen. V, 9.<sup>1</sup> If I enfeoff two in fee to them and their heirs and then, by a fine, the estate is limited in another manner, as in this case, of necessity, it must, *scil.* to the heirs of one, yet the sense will be guided by the precedent indenture etc. There is a good grant made. The variance between the precedent indenture and the fine whether the party will be stopped to claim another estate than this grant is limited by the fine. 5 Ma., Di. 157.<sup>2</sup> The former indenture will rule the fine. And Co., li. 2, 73.<sup>3</sup> And for the first reason, *scil.* because there is sufficient certainty without [naming] the parish, he cited Co., li. 9, 27, Abbot of Strata Marcella's Case, and Plow., *Com.*, fo. 257,<sup>4</sup> *dicto manerio spectanto* refers to the said things which could belong to the manor.

An indenture of grant was made of such a certain house and land pertaining to the same in Blagden and of such certain land in Blesoe and Fogfield in the parish of Horton *habendum* to J.S. and his heirs. And there was a covenant in the same indenture to make farther assurance to the same use. And no livery was made upon this deed, nor was this deed ever enrolled. But afterwards a fine was levied by the grantor to the grantee. And the fine was of a messuage and land in Blagden, Blesoe, and Fogfield in the parish of Horton.

---

<sup>1</sup> YB Trin. 1 Hen. V, f. 8, pl. 19 (1413).

<sup>2</sup> *Puttenham v. Duncombe* (1558), 2 Dyer 157, 73 E.R. 341, also 1 Anderson 18, 123 E.R. 331.

<sup>3</sup> *Lord Cromwell v. Andrews* (1601), 2 Coke Rep. 69, 73, 76 E.R. 574, 581, also 2 Anderson 69, 123 E.R. 550.

<sup>4</sup> *Case of the Abbot of Strata Marcella* (1591), 9 Coke Rep. 24, 77 E.R. 765, also *sub nom. Regina v. Vaughan*, Moore K.B. 297, 72 E.R. 591; *Hales v. Petit* (1562), 1 Plowden 253, 75 E.R. 387.

And in truth, the messuage and land in Blagden were not in the parish of Horton. And on account of this, the doubt is whether the messuage and land in Blagden pass by this fine.

And [it was said] by Serjeant *Davenport* that yet the messuage and land in Blagden to the use limited in the indenture did pass by this fine. Co., li. 2, 73; 5 Ma., Di. 157. The indenture is as *prima intentio* directing and guiding; the fine is *ultima intentio et perficiens*. It cannot be denied but that, if livery had been made upon the indenture of grant, the land in Blagden had well passed by the livery. The doubt is here upon the omission of this word 'and' in the fine because, if the fine had been of a messuage and land in Blagden and in Blesoe and Fogfield in the parish of Horton, then it had been agreed that the land in Blagden would have passed by the fine though it is not in the parish of Horton. But he answered that, even though this word 'and' be omitted in the fine, yet the fine will be construed according to the indenture which is the ground etc. 7 Hen. VI, 8; 18 Edw. III, 29, by Bereford.<sup>1</sup> And the difference which will end this doubt is taken, Co., li. 6, fo. 66,<sup>2</sup> between *brevia amicalia* and *brevia adversaria* because the first is but a common conveyance and by consent and such will not be construed strictly and thus this is here but a conveyance by consent. And, on account of this, it will be guided by the intent expressed in the indenture. 39 Edw. III, 19. It is in *brevibus adversariis*.

Also, here, the fine had been good for the lands in Blagden if the fine had rested there without more because a fine levied of land in a hamlet has been good. 21 Edw. III, fo. 14; 8 Edw. IV, 16.<sup>3</sup> And thus the last words being added, in the parish of Horton, do not vitiate and avoid that which was good before. 23 El., Di. 376.<sup>4</sup> He cited 21 Edw. III, tit. *Ayde*, pl. 25; 12 El., Di., fo. 292.<sup>5</sup> And he said that, if a man covenants to levy a fine of certain land

---

<sup>1</sup> YB Mich. 7 Hen. VI, f. 8, pl. 12 (1428); YB Trin. 18 Edw. III, f. 29, pl. 34 (1344).

<sup>2</sup> *Avery v. Crat* (1606), 6 Coke Rep. 63, 66, 77 E.R. 348, 356.

<sup>3</sup> YB Pas. 21 Edw. III, f. 14, pl. 17 (1347); YB Mich. 8 Edw. IV, f. 16, pl. 20 (1468).

<sup>4</sup> *Windham v. Windham* (1581), 3 Dyer 376, 73 E.R. 843, also 1 Anderson 58, 123 E.R. 352.

<sup>5</sup> Pas. 12 Edw. III, Fitzherbert, Abr., *Ayde*, pl. 25 (1338); *Norris's Case* (1570), 3 Dyer 292, 73 E.R. 656.

in Blagden and a fine had been levied of this land in Blagden in the parish of Horton where it is not in the parish of Horton, yet it will pass by this fine, which will be guided by the indenture.

Second point: A use is limited to the husband and wife and the survivor of them and the heirs of the survivor of them. The doubt is what estate is in them.

And [it was said] by Serjeant *Davenport* this is but one use and not several uses in point of limitation, not divided, though executed but in part and executory in part. He agreed that they are seised but of an estate of freehold now and yet the fee is not a new estate when it vests and executes. Littleton. If land be given to two and the heirs of one, he who has the fee does not have a divided estate. 12 Edw. IV, 2;<sup>1</sup> 27 Hen. VIII, 21. In pleading, the pleading in this case varies from the truth of the case, and thus in other cases of necessity. Here, it is not pleaded that they were seised of the freehold, the reversion *inde*. See the book of precedents of such a plea. But here, it will be pleaded that they were seised *simul et hereditibus* of the survivor according to the words of the indenture. Here, in this case, it will not be pleaded that they were seised of the freehold, the reversion *inde*, nor that they were seised in fee, but it will be pleaded as aforesaid according to the truth of the case and according to the words in the indenture. Co., lib. 1, 174, in *Diggs*' Case, and Com. 477, *Nichol*'s Case.<sup>2</sup> If a lease for life be made and the lessor grant over that, if the lessor die without issue, that the lessee will have the fee, there it is a separate estate and it is pleaded as a reversion. 35 Hen. VI, 23, by Fortescue.<sup>3</sup> The law does not permit a fraction where it can be entire. Thus, he held that the fee is thus executed that if they were disseised, there is no need of any regression by the survivor because, otherwise, the Statute 27 Hen. VIII<sup>4</sup> does not settle the use. 26 Hen. VI, tit. *Ayd*, pl. 77.<sup>5</sup>

---

<sup>1</sup> YB Pas. 12 Edw. IV, f. 2, pl. 5 (1472).

<sup>2</sup> *Diggs v. Palmer* (1598-1600), 1 Coke Rep. 157, 76 E.R. 352, also Moore K.B. 603, 72 E.R. 787, 2 Anderson 205, 123 E.R. 622; *Nichols v. Nichols* (1575), 2 Plowden 477, 75 E.R. 711, also Benloe 245, 123 E.R. 173.

<sup>3</sup> YB Mich. 35 Hen. VI, ff. 19, 23, pl. 28 (1456).

<sup>4</sup> Stat. 27 Hen. VIII, c. 10 (SR, III, 539-542).

<sup>5</sup> Trin. 26 Hen. VI, Fitzherbert, Abr., *Ayde*, pl. 77 (1448).

Here, it is a fee; it is not a contingent use because, if it be certain that this limitation happens during the particular estate or at the end of it, it is not contingent. Co., li. 10, fo. 85, Lovisse's Case,<sup>1</sup> where it is contingent. Also, here, the fee is not in abeyance. Chudleigh's Case, Co., li. 1.<sup>2</sup> Thus, in truth, he confessed he could not tell in whom the fee is for it is in none *de facto*. And on account of that, he asked how the cases cited in Co., li. 2, fo. 36, in Sir Rowland Heyward's Case,<sup>3</sup> will be pleaded. Where an election is to be made, how will it be pleaded that the party is seised before the election?

Third point: Land was conveyed to the husband and wife and the survivor of them and to the heirs of the survivor of them. The husband made a feoffment in fee of this land and died. And the wife survived. Whether the wife will have the fee simple notwithstanding this feoffment [was a question].

And [it was said] by Serjeant *Davenport* that the wife, notwithstanding this feoffment made by the husband, will have the fee. And the fee was not destroyed because, here, it was not a contingent and divided estate. Archer's Case, Co., li. 1.<sup>4</sup> Land given to A. for life, the remainder to the right heirs of J.S.; by a feoffment by A. during the life of J.S., this remainder is destroyed. Co., li. 10, fo. 51.<sup>5</sup> It is executory to some purpose. If such are leased for three lives, they are not forfeited. Register 230, tit. *Formedon in Discender*, a good case.

Here it is seisin executory which by no alteration will be divested. 8 Edw. II, tit. *Cui in vita*, 28.<sup>6</sup> In a case the feoffor can enter for a forfeiture, as where it is to A. for life, the remainder to the right heirs of J.S., and A. makes a feoffment, the feoffor can enter, but, where land is given to two and the heirs of the survivor of them, such feoffment is not forfeited.

---

<sup>1</sup> *Proust v. Worthen* (1613), 10 Coke Rep. 78, 77 E.R. 1043, also Brownlow & Goldesborough 103, 123 E.R. 839.

<sup>2</sup> *Chudleigh's Case* (1589-1595), 1 Coke Rep. 113, 76 E.R. 261.

<sup>3</sup> *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.

<sup>4</sup> *Baldwin v. Smith* (1597), 1 Coke Rep. 63, 76 E.R. 139, also Croke Eliz. 453, 78 E.R. 692, 2 Anderson 37, 123 E.R. 533.

<sup>5</sup> *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.

<sup>6</sup> 8 Edw. II, Fitzherbert, Abr., *Cui in vita*, pl. 28 (1314 x 1315).

Fourth point: A disseisee made a feoffment by a deed and delivered the deed out of the land and within the same deed is a letter of attorney made to a stranger to enter and make livery *secundum formam cartae* and livery is made accordingly, yet the land does not pass because the deed is void, not being delivered on the land. 18 Hen. VII, Kelway 51; 8 Hen. VI, 6; 12 Edw. IV, 4.<sup>1</sup> If the son, in the lifetime of the father, makes a feoffment by a deed with a letter of attorney etc. [and] the father dies, and livery is made *secundum formam cartae*, it is void. See in Coke, *Book of Entries*, fo. 197; 8 Hen. IV, 14; Co., li. 5, fol. 35; Jenning and Bragg's Case, the delivery of the deed as escrowed by the disseisee; 30 Edw. III, 31, the opinion of Moubraye, that the deed is void etc.<sup>2</sup>

Serjeant *Thomas Crewe*, at another day, argued that the livery was well executed for the manor and that the land passed by the deed of feoffment. And he took this difference. If a man makes a feoffment of land in which he had nothing and sealed and delivered the deed out of the land, and not upon it, with a letter of attorney within the deed to J.S. to enter and make livery *secundum formam cartae* and, afterwards, the feoffor purchases the land and the attorney afterwards makes livery accordingly, yet this does not make the deed of feoffment good and nothing passes. But, if a man has a right of entry in land and makes such a charter of feoffment out of the land and delivers it out of the land and within the charter is such a letter of attorney, if the attorney enters and makes livery, it is good to pass the land. And he said that an authority to make livery, which is a common conveyance, will not be resembled to the other authority nor construed so strictly. And on account of this, in Michaelmas term 31 & 32 Eliz., in the Common Bench, it was resolved, if a letter of attorney is to make livery of Blackacre and Whiteacre and the attorney makes livery in Whiteacre only, it is good for it, and this authority though it was executed but in part is good for this part. Thus, if the letter of attorney be to make livery to A., the feoffee, and A. makes a letter of

---

<sup>1</sup> *Anonymous* (1503), Keilway 51, 72 E.R. 209, 116 Selden Soc. 420; YB Mich. 8 Hen. VI, f. 6, pl. 15 (1429); YB Pas. 12 Edw. IV, f. 4, pl. 9 (1472).

<sup>2</sup> *Chybnal v. Wytton* (1586), E. Coke, *A Booke of Entries* (1614), 'Eiectione firmæ', pl. 7, f. 197; YB Mich. 8 Hen. IV, f. 14, pl. 14 (1406); YB Mich. 8 Hen. IV, ff. 12, 14, pl. 13 (1406); *Jennings v. Bragg* (1595), Croke Eliz. 447, 78 E.R. 687; YB Mich. 30 Edw. III, f. 31 (1356).

attorney to another to receive livery and the attorney of the feoffor makes livery to the attorney of A., it is good because the sages of the law will make the construction of this authority, not as of other authorities, but as of a common conveyance. And for an authority in this case, he cited Coke, *Book of Entries*, 195, in Browne's Case.<sup>1</sup>

Serjeant *Davenport, e contra*: If a disseisee who had a right of entry seals and delivers a deed of feoffment out of the land with such a letter of attorney, the land does not pass. It is otherwise if the disseisee delivers it but as an escrow to be delivered as his deed upon the land.

First point: A feoffment in fee was made of land to the use of the husband and wife for their lives and for the life of the survivor of them and to the use of the heirs of the survivor of them. The husband made a feoffment of this land to J.S. in fee and died; the wife survived and entered. What estate does she have? [The question is] whether the wife, by her entry, has reduced the fee and is seised in fee or whether she has reduced but the freehold for her life and is seised but for life.

Serjeant *Thomas Crewe* argued that she has reduced but the freehold and that she, by her entry, is seised but for her life because the use limited to the heirs of the survivor of them during the life of the husband and wife is but a contingent use and, by the feoffment of the husband, it is destroyed and choked. First, that this use limited to the right heirs of the survivor of them is at first and during the lifetime of the husband and wife but a contingent use. And for this, he cited the Register, fo. [ *blank* ]. That by the feoffment of the particular tenant, as here, by the feoffment of the husband, this contingent use is destroyed. Coke, lib. 1, fo. 66, and, there, the opinion of Gascoigne in 7 Hen. IV, 23, is denied for [good] law.<sup>2</sup> And in 17 Eliz., Di. 340,<sup>3</sup> there is some opinion that this possibility of a future use is reserved and concerned in the custody of the law etc., but yet it seems, by the feoffment, it will be destroyed.

---

<sup>1</sup> *Browne v. Terry* (1595), E. Coke, *A Booke of Entries* (1614), 'Eiectione firmæ', pl. 6, f. 195.

<sup>2</sup> *Baldwin v. Smith* (1597), *ut supra*; *Fitz v. Simond* (1405), YB Mich. 7 Hen. IV, ff. 22, 23, pl. 2.

<sup>3</sup> *Brent's Case* (1575), 3 Dyer 339, 73 E.R. 766, also 2 Leonard 14, 74 E.R. 319.



If the case had been before the Statute 32 Hen. VIII, cap. [ *blank* ],<sup>1</sup> which gives an entry to the wife after the death of the husband notwithstanding his feoffment so that the wife had been forced to bring her [action of] *cui in vita*, the wife, in this case, by her action will reduce but the freehold for her life because there was not more in the wife at the time of the alienation. And Co., li. 8, 72;<sup>2</sup> this Statute of 32 Hen. VIII gives an entry to the wife where she can have a *cui in vita* at common law. And 21 Eliz., Di. 363,<sup>3</sup> [is] to this purpose. And the Statute of 32 Hen. VIII does not defeat the discontinuance of the husband by the death of the husband before the entry by the wife, but it prevents the prejudice which was to the wife at common law to be put to her action and it gives an entry to the wife. But, by her entry, she will reduce but that which she could have reduced at common law by her action.

Serjeant *Davenport, e contra*, [said] that the wife, by her entry, will reduce the fee and it is a seisin in fee because the wife, by the aid of the said Statute of 32 Hen. VIII, has a right of entry, and, where one has a right of entry, it reduces mesne contingencies because a right will support a contingency. Co., li. 1, 66.<sup>4</sup> And on account of this, if land be conveyed to the husband for life, the remainder to the wife for life, the remainder to the first son of their bodies engendered etc., as is usual in conveyances, if the husband makes a feoffment in fee to another and afterwards has issue, a son, and dies and the wife survives and enters, this will reduce the contingent estate in remainder because the wife has a right of entry. But by a right of action, a man recovers only his own right.

And here, there is but a use in the first limitation and that the words 'to the heirs of the survivor of them' are words of limitation of the former estate and not of creation of a new estate, and, here, there is no reversion remaining. Where a lease is made with a condition to have a fee, there, there are several estates in the creation. 9 Edw. III, 28.<sup>5</sup> Land was given to the husband and

---

<sup>1</sup> Stat. 32 Hen. VIII, c. 28, s. 6 (*SR*, III, 785).

<sup>2</sup> *Greneley v. Greneley* (1609), 8 Coke Rep. 71, 77 E.R. 583, also 1 Brownlow & Goldesborough 131, 123 E.R. 711.

<sup>3</sup> *Anyon v. Lloyd* (1579), 3 Dyer 363, 73 E.R. 815, 110 Selden Soc. 373.

<sup>4</sup> *Baldwin v. Smith* (1597), *ut supra*.

<sup>5</sup> YB Mich. 9 Edw. III, f. 28, pl. 10 (1335).

wife and their heirs; the husband alienated all and died; the wife will have all. Thus, if the wife died, the husband living, the alienee will have all; thus, where the gift is to the heirs of the survivor because this differs solely in the present estate. Register, fo. 239; there, land was given to the husband and wife and the heirs of the survivor of them. And Co., lib. 10, fo. 51, is cited; 8 Edw. II, Fitzh., tit. *Cui in vita*, 28.<sup>1</sup> And in this case, all passed out of the feoffor by the livery and the contingent remainder will be in abeyance until the possibility happens. Plow., *Com.*, fo. 35; Coke, lib. 10, fo. 51, in *Lampet's Case*.<sup>2</sup> A man leased to the husband and wife for twenty-one years, the remainder to the survivor of them for twenty-one years; the husband cannot grant this because, in this case, neither the husband nor the wife had nothing until the survivor. Thus, if land is given to the husband and wife and to the heirs of the body of the survivor of them, the estate tail in the present is in none of them. If land is given to A. for life, the remainder to the right heirs of J.S. [and] A. makes a feoffment, it is forfeited. Co., li. 1, in *Archer's Case*.<sup>3</sup> But here, this feoffment of the husband is no forfeiture will be agreed.

First, a feoffment in fee was made of land to the use of the husband and wife for their lives and the life of the survivor of them and afterwards to the use of the heirs of the survivor of them. The husband made a feoffment in fee of this land to J.S. and died. The wife survived and entered.

*Noy* argued that the wife, by her entry, had reduced but an estate for her life. He said that this possibility, because thus it was because it could be that both of them might die in one instant and then there would be no survivor to take, to increase the estate of the survivor is like a condition precedent until it happens; this estate for the inheritance is not in the husband nor in the wife nor in both of them. That it is not in them to grant. But to destroy is in their power because, by the feoffment, this possibility passes as extinguished in the land. And this possibility to increase must be reduced in an act at the time when it happens; otherwise, it will never vest.

---

<sup>1</sup> *Lampet's Case* (1612), *ut supra*; 8 Edw. II, Fitzherbert, Abr., *Cui in vita*, pl. 28 (1314 x 1315).

<sup>2</sup> *Colthirst v. Bejushin* (1550), 1 Plowden 21, 35, 75 E.R. 33, 57; *Lampet's Case* (1612), *ut supra*.

<sup>3</sup> *Baldwin v. Smith* (1597), *ut supra*.

First, he examined this case by the rule of the common law as if such grant and conveyance with such a limitation had been made at common law, *scil.* to the husband and wife for their lives, the remainder to the heirs of the survivor of them. And he said that 43 Eliz., in the Bench, in Sparke and Sparke's Case,<sup>1</sup> cited this case to be a western case and adjudged, *scil.* land was given to two for their lives, the remainder to the survivor of them for twenty-one years after his death; this remainder was in none of them to grant because it was a condition precedent which perhaps will never happen because it could be that there will be no survivor if they die in one instant and in which, if it happen that there will be a survivor, it is yet uncertain.

Note, that here, this feoffment being made by the husband it could be doubted whether here there be the old and ancient use re-vested in the husband and thus no abeyance because there is no person in whom it can vest by intention. And he objected Lord Pagett's Case. 19 Hen. VI, fo. 34,<sup>2</sup> of a feoffment to enfeoff a stranger who refused or to re-enfeoff the feoffor upon request who did not request to what use the feoffee had it.

Note that it is here a conditional abeyance. 10 Ass., pl. 15;<sup>3</sup> a lease for years was made to A. upon condition, if he be disturbed or interrupted, that A. will have the fee; there, if he is interrupted, because he could be interrupted and still continue the possession, upon which the fee could increase, the fee could increase, but if a lease for life be made upon condition if he be disseised, he will have the fee; there, if he be disseised, he will not have the fee. And a power to increase a fee can be destroyed by a feoffment of him who had the particular estate.

Note that the Statute of 27 Hen. VIII does not preserve contingent uses, *scil.* uses limited to persons not *in esse*. Chudleigh's Case. If a feoffment be made to the use of A. for life, the remainder to the right heirs of J.S. [and] A. is disseised, this remainder is not preserved because it was not a use executed by the Statute 27 Hen. VIII, but it was a use at common law, which is but a trust, and no subpoena lies against the disseisor. And he said that the case cited in Co., lib. 1, fo. 134, in Chudleigh's Case, is not [good] law, which

---

<sup>1</sup> *Anonymous* (1574 x 1575), cited in *Spark v. Spark* (1601), Croke Eliz. 840, 841, 78 E.R. 1066, 1067.

<sup>2</sup> YB Mich. 19 Hen. VI, f. 34, pl. 72 (1440).

<sup>3</sup> YB 10 Edw. III, Lib. Ass., f. 26, pl. 15 (1336).

is cited out of the book 32 Hen. VI, nor is there such a case in the book, but, as he conceived, the case intended is in F., tit. *Feffments*, pl. 99. See 11 Ric. II, tit. *Detinue*, Fitzh., pl. 46.<sup>1</sup>

Note that Chief Baron Walter said *obiter* he conceived that this use of the inheritance was neither in the husband nor in abeyance but in a third person, whom I [Arthur Turnour] conceive to be the feoffee.

155

### Bishop of St. David's Case (Ex. 1623)

*A conveyance cannot have its beginning in the future.*

British Library MS. Hargrave 30, ff. 170, 176  
(Turnour's reports)

A., bishop of St. David, 30 August 27 Eliz. [1585], by an indenture dated the same day and year demised land to three, *habendum* to them successively *sicut nominantur in carta* for their lives *a die datus* rendering rent payable at the first day of December etc. And the first of September, he made a letter of attorney to make livery *secundum formam cartae*, and the attorney made livery on the eleventh day of the same month of September *secundum formam cartae*.

*Noy* argued that this is not a void lease, but it is a good lease against A. himself and against his successor, not merely void by the death of A., but it is voidable by his successor by his entry and it can be made good by him by his acceptance.

Here, there is a lease for life made by an indenture dated in August 27 Eliz. by a bishop, and it is *habendum a die datus* and, in September afterwards, the same bishop made a letter of attorney by a deed to B. to make livery to the lessee for life *secundum formam cartae praedictae*, and in the same month

---

<sup>1</sup> Hil. 32 Hen. VI, Fitzherbert, Abr., *Feffements et faits*, pl. 99 (1454); *Salman v. Wille* (1388), YB Pas. 11 Ric. II, Ames Found., vol. 5, p. 283, Fitzherbert, Abr., *Detinue*, pl. 46.

of September, the attorney made a livery *secundum formam cartae praedictae*, which was also before any rent day appointed by the lease, that this livery was well executed.

He agreed, if a man in August makes a feoffment in fee or a lease for life of land *habendum* from the following Michaelmas and the feoffor or lessor himself makes a livery to the feoffee or lessee before Michaelmas *secundum formam cartae*, yet this livery is not good, but it is a void feoffment or lease. Com. 156.<sup>1</sup>

But if a man by an indenture dated and delivered in August makes a lease to another *habendum* from the following Michaelmas for his life and, after Michaelmas, the lessor himself makes livery *secundum formam cartae*, this will be a good livery and the land does not pass only by the livery but by the livery and the deed together. And the deed in this case will be like a testimonial of the estate which is to pass. But the livery cannot look backwards. And the case for this upon which he relied for it is the case in Trinity 16 Jac., rot. 100089 in the King's Bench, between Greenwood and Tyler, in *ejectio firmae*.<sup>2</sup> And the case was, a husband and wife seised of land in the right of the wife in fee, the husband and wife, by an indenture, made a lease to B. *habendum* to B. *a die datus* for his life *vel habendum* from the following Michaelmas (as the case was) for life, and after Michaelmas, the husband and wife themselves went to the land and made livery to the lessee *secundum formam cartae*. First, it was resolved that the livery made by the lessor himself after the day was good even though it was *secundum formam cartae*; second, it was resolved that it did not pass by the livery solely, but by the deed also, because, otherwise, being in the case of a married woman, he cannot be a party to it without a deed.

He took a diversity between things that lie only in grant and cannot pass without a deed; there, the deed is the essence and there, if the deed is not good in itself, a subsequent act does not make it good, as in Co., li. 2, 55.<sup>3</sup> Attornment at a void grant *in futuro* cannot make it good because the thing cannot pass without a deed. But in the case of land, where the deed is but a

---

<sup>1</sup> *Throckmorton v. Tracy* (1555), 1 Plowden 145, 75 E.R. 222, also 2 Dyer 124, 73 E.R. 272, 124 Selden Soc. 93.

<sup>2</sup> *Greenwood v. Tyler* (1618), Hobart 314, 80 E.R. 456, Croke Jac. 563, 79 E.R. 482.

<sup>3</sup> *Buckler v. Harris* (1597), 2 Coke Rep. 55, 76 E.R. 537, also 2 Anderson 29, 123 E.R. 529, Moore K.B. 423, 72 E.R. 671, Croke Eliz. 450, 585, 78 E.R. 690, 828.

testimonial of the estate which is to pass solely and is not of the substance because land can pass without a deed and passes by livery, there, the deed, by a subsequent act, can be made good. And even though it could be objected that a deed is required in this case and it is necessary in the case of a lease made by a bishop [or] by a corporation, yet he answered that a deed in this case is necessary only in respect of the quality of the person of the grantor and of his capacity in which he had the land. And the deed is not necessary in respect of the thing granted, *scil.* land.

He agreed, if a monk made a deed of feoffment and afterwards is deraigned and makes livery *secundum formam cartae*, it is not good because this deed at the time of its making was void. And thus in the case of a married woman who makes a feoffment by a deed, the husband dies, and she makes livery to the feoffee *secundum formam cartae*, this will not be good because the deed is void in itself.

Michaelmas 10 Eliz., in the Common Bench; he cited it out of Lord Ellesmere's reports; a lease was made of land and of a common in gross for life and within the deed was a letter of attorney to make livery to the lessee *secundum formam cartae* and livery was made of the same land accordingly by the attorney *secundum formam cartae*, and, afterwards, the deed came to be erased in a material place in the grant of the common, which could not pass without a deed and the livery of the land was made *secundum formam cartae* and the deed now void, yet it was resolved that the livery remained and the land now passed by it.

He agreed where a lease for life is made *habendum* from the following Michaelmas and, before Michaelmas, the lessor made a letter of attorney to one to make livery *secundum formam cartae* and the attorney did not make livery until after Michaelmas and then made livery *secundum formam cartae*, perhaps this will not be good because the attorney by his delay will not have the power to make it good which if he made it at the time when the authority was given to him it had not been good. And there, if the lessor himself had made livery at the time when he gave this authority when he made this letter of attorney it had not been good and the attorney cannot do more that the lessor himself could have done at the time when he made the letter of attorney. And he cited Littleton, cases in his chapter on Continual Claim.<sup>1</sup>

---

<sup>1</sup> T. Littleton, *Tenures*, ss. 414-443.

If a man makes an attorney to make a claim at the time when he could have entered into the land and the attorney delayed his claim until he could not enter for doubt of death and made his claim so near to the land as he dared, it is not good.

But when a lease for life is made *habendum* from the following Michaelmas and, after Michaelmas, the lessor makes a letter of attorney to make livery *secundum formam cartae* and he does it accordingly, *scil. secundum formam cartae*, it is good because, at the time when the lessor gave this authority to the attorney, the lessor himself could have done it himself, and, on account of this, it will be good, being done by an attorney, because such things that a man can do by an attorney is as good being done by an attorney as if it had been done by himself. 32 Hen. VI, 21; 30 Edw. III, 41.<sup>1</sup>

Second point: The bishop made a lease for life, remainder for life, rendering rent, which lease was not warranted by the Statute, and he died. This lease is not merely void by the death of the bishop against the successor by the Statute 1 Eliz.,<sup>2</sup> but it is voidable by the successor by his entry, or he can make it good against himself also by his acceptance of the rent, *scil.* against the said successor who accepts it, because the Statute does not intend to make this lease merely void against the successor, but that it will be voidable by him if he wishes. And it will be avoided if he wishes, being a lease for life, by his entry because the Statute does not intend to enforce an avoidance of it upon the successor because it could be more beneficial to the successor perhaps to have the rent than the land. And the Statute intends a benefit to the successor. And it could be that the successor had a rent charge out of this land in his natural capacity so that, if the land is in him, his rent charge is suspended, but, if he continues the lease, he can have the rent charge and the rent reserved upon the lease. This lease is good against the bishop himself who made it. And this lease is not merely void against the successor. And on account of this, acceptance by him makes it good. 10 Hen. VI.<sup>3</sup> If a husband makes a lease for life of the land of the wife, rendering rent, and he dies, and the wife accepts it, this does not bind the wife because, by this lease made by the husband, the husband gained the fee to himself; thus, it was a new reversion and

---

<sup>1</sup> YB Hil. 32 Hen. VI, f. 22, pl. 4 (1453); YB Mich. 30 Edw. III, f. 31 (1356).

<sup>2</sup> Stat. 1 Eliz. I, c. 19, s. 4 (SR, IV, 381-382).

<sup>3</sup> YB Mich. 10 Hen. VI, f. 11, pl. 38 (1431).

on account of this, the acceptance by the wife does not make it good. But, as 38 Edw. III, 33, is, when a bishop makes a lease for life, he gains no new reversion because the difference is, where a man has land in another's right, as before in the right of his wife, and makes a lease for life, he gains a new reversion, and where a man has land in another capacity, as a bishop has in his political capacity, he makes a lease for life not warranted by any statute, the reversion is still in him in the same capacity. Also, here because it is the same reversion and the rent came to the successor and he accepted it, he is bound to warrant by the Statute *de Bigamis*. 38 Hen. VIII, Di., and 39 Hen. VI, 27.<sup>1</sup>

And for authorities in the point, 9 Jac., in the Common Bench, Walter, plaintiff, and the Dean and Chapter of Norwich, defendants;<sup>2</sup> it was adjudged that a lease for life, not warranted by any Statute, was not void by the death of the bishop until an entry by the successor. And Easter 4 Jac., rot. 100041, the Bishop of London and Wheeler's Case, for lands in Paddington, that acceptance of the rent by the successor upon a lease for life made by the predecessor will bind him for his time. And Hilary 17 Jac., in the Common Bench, the Bishop of Gloucester's Case, agrees; this is [ . . . ] before, fo. 400.<sup>3</sup>

Serjeant *Davenport, e contra*: First point: Where a lease for life is made *habendum a die datus* and the lessor delivers the deed the same day and, after the day, the lessor makes a letter of attorney to make livery *secundum formam cartae* etc. which is done accordingly by the attorney that no estate passes because this deed is void at the beginning in point of limitation so that, if the lessee enters after the day without livery by force of this deed, he will not be a tenant at will.

He agreed and said that, where the lessor himself, before the day, made livery *secundum formam cartae*, that, there, it is not good and nothing passes. And, for this, he cited Hogge and Crosse's Case, mentioned in Co., li. 2, fo. 55, in Buckler's [Case].<sup>4</sup> And in this case, Justice Fenner took this rule, where

---

<sup>1</sup> Stat. 18 Edw. III, stat. 3, c. 2 (SR, I, 302); *Whorewood v. Lord Lisle* (1546), 1 Dyer 61, 73 E.R. 135; *Scot v. Dogge* (1460), YB Mich. 39 Hen. VI, ff. 26, 27, pl. 37.

<sup>2</sup> *Walter v. Dean and Chapter of Norwich* (1612), Moore K.B. 875, 72 E.R. 967, 1 Brownlow & Goldesborough 21, 123 E.R. 640, Owen 136, 74 E.R. 956.

<sup>3</sup> *Bishop of Gloucester's Case* (C.P. 1622), British Library MS. Hargrave 30, f. 134v.

<sup>4</sup> *Hogg v. Cross* (1591), Croke Eliz. 254, 78 E.R. 510; *Buckler v. Harris* (1597), *ut supra*.



the lessee or feoffee, by his entry before livery by force of the deed, will not be a tenant at will, there, by the livery made by the lessor himself *secundum formam cartae*, nothing passes.

He agreed where the letter of attorney is made within the deed itself to make livery and the attorney forebears and does not make livery until after the day and then makes livery *secundum formam cartae*, that, in this case also, it is not good. And for this, he cited Buckler's Case, Co., li. 2, fo. 55. The case of a grant of a reversion from a day to come, an attornment after the day by the tenant will not make this void grant to be good. And he said, in this case, Chief Justice Popham put this case of a letter of attorney etc. and held that it is not good and it does not make it to pass according to the deed.

He agreed and said that, if the lessor himself makes livery after the day and this livery was made *secundum formam cartae*, that still it is good and the land in this case passes by both, *scil.* as well by the deed as by the livery. And for this, he said that in Trinity term 17 Jac., in the King's Bench, it was adjudged that, in such a case, the land passes by both, as well by the deed as by the livery, and that the rent reserved by the deed and the warranty contained within the deed remained. But, in this case, he said it was put and said that, if the livery be made by an attorney, as in our case here, it will be otherwise.

And for this, he took this rule, if there be a deed of lease for life or fee and there is a defect within the said deed in point of limitation of the estate, as in our deed here, and this defect be continuing as it is until the day be passed, if livery be made by the lessor himself or by the attorney during the continuance of this defect, *scil.* before the day *secundum formam cartae*, that it is not good. But if the defect be removed or is not continuing, as if the day be passed, if livery in person is made by the lessor or feoffor *secundum formam cartae*, it is good though it is done *secundum formam cartae* because the lessor or feoffor can make livery without any deed and *forma cartae* is but a limitation of the estate. But in a case of livery by an attorney, it is otherwise because a livery by an attorney cannot be done without a deed of feoffment or lease because it must be a certain thing to which this authority must refer and, where a man has but an authority and it is not absolute, but relative to a deed, which deed is void and the authority is restrained to it, then this act, which refers to the void deed, being done but by force of such authority, is also void. And if this livery by an attorney will be good, it first must make a void deed good and afterwards amount to a livery etc.

It has been objected that the deed in this case will be only directory etc. He answered it is not so only but that it is both, *scil.* the deed as the livery are but one conveyance and those which the law conjoins no man should separate. 12 Edw. IV, 4,<sup>1</sup> how these words '*modo et forma*' will be expounded.

It was objected that, where a man can make livery in person, he can do it by an attorney. He answered that this is where the act done by an attorney is absolute without reference or relation or with reference to a good thing. This act done by an attorney is as good as if it had been done in person. A man can make livery in person without a deed of feoffment, but thus he cannot by an attorney. Co., li. 9, 76, in Comb's [Case],<sup>2</sup> where a copyholder in person can surrender into the hands of tenants, but not by an attorney, and other cases put there, which act cannot be done by an attorney. 2 Ma., Di. 109;<sup>3</sup> an infant made livery by an attorney; it was void; but if he did it in person, it is but voidable. 30 Edw. III, fo. 31,<sup>4</sup> a good reason is given by Mowbray; thus he held that livery by the lessor himself after the day *secundum formam cartae* had been good, but not by an attorney because he had but a mere authority which had relation and it was to execute a void deed and thus this authority and the act by force of it is void. Co., *Lib. Entr.*, 197.<sup>5</sup>

If a man make a lease for life of four separate parcels of land rendering rent and makes a letter of attorney to make livery and the attorney makes livery but of one part or two and not of all, it is not good because the lessor by it, by this act of the attorney is prejudiced in his rent because it now does not issue out of the entire, but it was otherwise if it be upon a feoffment in fee where there was no rent because there is no prejudice to the feoffor. And he cited 12 Ass., pl. 24; 10 Hen. VII, 15.<sup>6</sup>

---

<sup>1</sup> YB Pas. 12 Edw. IV, f. 4, pl. 9 (1472).

<sup>2</sup> *Atlee v. Banks* (1613), 9 Coke Rep. 75, 77 E.R. 843.

<sup>3</sup> *Rugway v. Wolcot* (1554), 2 Dyer 108, 73 E.R. 239.

<sup>4</sup> YB Mich. 30 Edw. III, f. 31 (1356).

<sup>5</sup> *Chybnal v. Wytton* (1586), E. Coke, *A Booke of Entries* (1614), 'Eiectione firmæ', pl. 7, f. 197.

<sup>6</sup> YB 12 Edw. III, *Lib. Ass.*, f. 36, pl. 24 (1338); YB Hil. 10 Hen. VII, f. 15, pl. 13 (1495).

Second point: That the lease for life made by the bishop not warranted by any statute is merely void by the death of the said bishop against the successor, he agreed it is not void against the bishop himself who made it, but good against him, but, in the instant of his death, it is killed against the successor because he has observed there is a great difference between an avoidance at common law and an avoidance by a statute law. And in the Statute 1 Eliz., which says that it will be void, Co., li. 10, 62,<sup>1</sup> that by the very death of the bishop, a grant of an office etc. is void before there is a successor elected, *quod nota*. And it cannot be prejudicial to the successor that this lease will be thus merely void by the death of his predecessor because, in judgment and presumption of the law, the land is of a greater value than the rent, 13 Hen. VII, 27,<sup>2</sup> and, on account of this, in a disclaimer by the tenant, the lord cannot hinder it. But query in 16 Hen. VII, 2.<sup>3</sup>

156

### **Nichol's Case** (Ex. 1624)

*A seizure upon a judgment does not change the ownership of the property seized, but it remains in the ownership of the judgment debtor until sold.*

*Thus, where the goods of a judgment debtor have been seized and then a prerogative writ of extent issues, the Crown has priority over the private creditor.*

British Library MS. Hargrave 30, f. 178  
(Turnour's reports)

Nichol's case, who was the under sheriff to Sir William Fleetwood in Buckinghamshire, the case was thus. A writ of extent out of the Chancery at the suit of A. upon a recognizance against B. was delivered to the said under sheriff returnable at a certain day afterward. And upon this, the said sheriff took the

---

<sup>1</sup> *Stanton v. Green* (1613), 10 Coke Rep. 58, 77 E.R. 1013.

<sup>2</sup> *Abbot of Hide v. Bengier* (1498), YB Trin. 13 Hen. VII, f. 27, pl. 6.

<sup>3</sup> YB Mich. 16 Hen. VII, f. 1, pl. 2 (1500).

goods of B. in execution and, in truth, sold them to B. and took a security from him for the money. And after the day of the return of this writ but, before [a writ of] *liberate* was awarded, a prerogative writ of extent upon a debt assigned to the king by one C. which was due to him from the said B. was delivered to the said under sheriff, who impaneled a jury. And they would not find the said goods seized by the sheriff, as aforesaid, in execution at the suit of A. to be now the goods of B., but found the special matter and that B. had no other goods.

And now, upon a motion, it was resolved by the court that the return was bad and the sheriff should have been amerced for it, see *Stringfellow's Case*, 3 Edw. VI, Di.,<sup>1</sup> and that the said goods seized by the sheriff before the *liberate* was awarded should have been taken in execution for the king to satisfy his debt. And they ordered that the sheriff assign to the prosecutor for the king the said bond taken of B. for the money.

This could seem to be a harsh case because, without an inquisition found by the jury that these were the goods of B., the sheriff cannot seize them for the king and the jury would not find them to be the goods of B.

Note: If the goods are seized for a subject and are *in custodia legis* at the suit of a subject, yet, if a process of extent comes for the king, these goods will be seized for the king because, before the ownership is altered and vested in another person, upon a process of extent, it will be seized for the king. And if goods are attached in London, yet, upon a process of extent, they can be seized if it comes before the recovery and judgment because the attachment itself does not alter the ownership, but the recovery and judgment subsequent. 9 Hen. VII, 6;<sup>2</sup> if the sheriff attach a cow, that the ownership is not out of the party until the day that he makes default etc.

**Rex v. Viscount Lisle**  
(Ex. 1624)

*In this case, a writ of extent was improperly excuted in the land of a third party.*

---

<sup>1</sup> *Stringfellow v. Brownsoppe* (1549), 1 Dyer 67, 73 E.R. 142.

<sup>2</sup> YB Mich. 9 Hen. VII, f. 6, pl. 2 (1493).

28th of June, in Trinity [term] 23d of King James, in the King's Remembrancer's Office.

On a [writ of] extent against Sir John Dudley, Lord Viscount Lisle, the manor of Wellow in Worcestershire was seized into the hands of the crown, and the sheriff having taken the cattle of one Margaret Hullens, on the lands seized under the extent, she applied to the court, alleging that the lands were copyhold held of the bishop of Worcester. Whereupon, it was ordered that the copyhold lands should be discharged of the extent and that no further process should issue against them on the said seizure.

158

**Anonymous**  
(Ex. 1625)

*The issue in this case was whether taxes are due for a parsonage in lay hands.*

British Library MS. Hargrave 30, f. 208v, pl. 1  
(Turnour's reports)

Note that a parsonage impropriate in the County of Dorset was taxed for fifteenths. And the farmer [of the tax] distrained for it. And the farmer [of the parsonage] here pretended that this parsonage was impropriated to a chantry and came to the king by the Statute of 2 Edw. VI<sup>1</sup> so that, before the dissolution of the chantry, it was not charged with fifteenths and that, after this time, this parsonage had paid procurations etc. and it had been discharged of fifteenths and the Statute of 21 Jac.<sup>2</sup> by which this fifteenth was granted appointed that it will be levied as it had been usually paid. And this parsonage had not ever paid fifteenths unless some undertenant had igno-

---

<sup>1</sup> Stat. 2 & 3 Edw. VI, c. 35 (SR, IV, 74-78).

<sup>2</sup> Stat. 21 Jac. I, c. 34 (SR, IV, 1263-1269).

rantly paid it. And on account of this, he prayed to be discharged and *eo potius* because no other adjoining parsonage had paid it.

It was answered on the other [side] that originally fifteenths were paid for their goods, but now, of recent times, it has been used to be taxed for the land and that this parsonage had paid them before.

Chief Baron WALTER directed that a bill will be preferred in the Exchequer chamber so that all of this matter can be examined because now they are at issue [as to] whether it has used to pay it or not.

159

**Anonymous**  
(Ex. 1626)

*The issue in this case was whether a bill of exchange can be assigned to the crown.*

British Library MS. Hargrave 30, f. 215, pl. 1  
(Turnour's reports)

Note that a bill of exchange due to a merchant, debtor to the king, was assigned to the king, and, upon it, process of extent to enquire and seize the land of this debtor by this bill is awarded for the king. Now, it was moved by the counsel of this debtor by this bill that this bill of exchange not being sealed by the debtor, but it is only signed with his name, is not a thing assignable to the king. It is true that a chose in action that is certain can be granted to the king, as a debt certain by an obligation, but this is not a debt; no action of debt lies for it, but the remedy upon it at our law is by way of an action upon the case upon *assumpsit* and to give this bill in evidence.

Chief Baron WALTER hesitated because [an action of] debt does not lie upon it but he said that the estates of many merchants consist upon these bills and the party, when he assigns it to the king, swears that it is a true debt and that no suit has been commenced upon it. And he gave a rule to the defendant that, if he will rely upon it, that it is not assignable, he can demur, and then he will have the resolution of the court; otherwise, they could plead as they will.

A precedent was show in 6 Jac., Semaigne's case,<sup>1</sup> that a bill of exchange was assigned. See Dowdale's case, Coke, li. 6;<sup>2</sup> [there was] an action of case which was founded upon an instrument called a policy though [it was] made between merchants. And in Coke 4 Inst. 142,<sup>3</sup> [there was] such an action of case upon such a policy.

160

**Tilston, *qui tam* v. Chelshire**  
(Ex. 1626)

*Where an informer upon an information made upon a seizure is nonsuited, he does not pay court costs.*

British Library MS. Hargrave 30, f. 215, pl. 3  
(Turnour's reports)

Tilston informed *tam pro domino rege quam pro seipso* against Chelshire, a merchant, upon a seizure of a certain quantity of flax brought from parts beyond the sea and landed by him at Liverpool in the County of Lancaster without a custom compounded or agreed for *contra formam statuti* by which they are seized *in manibus domini regis* as forfeited. And this seizure was in the time of the late King James. The defendant pleaded that a custom was agreed for before the landing of these goods. And issue [was] taken upon it. And, upon a trial at the bar by a jury of Middlesex, after evidence [was] given, the informer being demanded was nonsuited.

*Lenthall* moved for Tilston, the informer, that he not pay [court] costs to the defendant upon the Statute of 18 Eliz., cap. 5,<sup>4</sup> which gives costs

---

<sup>1</sup> *Semayne v. Gresham* (1604), 5 Coke Rep. 91, 77 E.R. 194, Yelverton 29, 80 E.R. 21, Moore K.B. 668, 72 E.R. 828, Croke Eliz. 908, 78 E.R. 1131.

<sup>2</sup> *Richardson v. Dowdale* (1605), 6 Coke Rep. 46, 77 E.R. 323, also Croke Jac. 55, 79 E.R. 47.

<sup>3</sup> E. Coke, *Fourth Institute* (1644), p. 142.

<sup>4</sup> Stat. 18 Eliz. I, c. 5, s. 4 (SR, IV, 616).

against the informer where he informs upon a penal statute and afterwards becomes nonsuited, because this information here [was] not brought upon a penal statute nor founded upon it, but it is founded upon the seizure before of these goods for the king as forfeited by a penal statute.

Chief Baron WALTER said, here, there was a seizure of these goods for the king as forfeited for being landed, the customs not agreed for *contra formam statuti*, and the information here is grounded upon this seizure; thus, the information is not grounded upon the penal statute. And on account of this, this case is not within the said Statute of 18 Eliz., and on account of this, he thought that the informer [should] not pay costs.

But the court advised further.

And *Lenthall* said that there was a precedent in the Exchequer in the time of King James agreeing for the aforesaid reason that an information for goods forfeited for non customs, as it is in this case, and the informer is nonsuited, that he does not pay costs.

Note: It seems to me [Arthur Turnour] that it is mischievous now at this day that no costs will be given against an informer upon an information made upon a seizure because they many times seize without cause to draw a composition,<sup>1</sup> and, if they cannot, then they put in an information upon this seizure and put the owner to a farther charge, and he will have no costs.

161

**Chambers v. Jarvis**  
(Ex. 1626)

*Where a bill is filed in the Court of Exchequer against an Exchequer clerk, the defendant need not put up bail.*

British Library MS. Hargrave 30, f. 216, pl. 2  
(Turnour's reports)

---

<sup>1</sup> I.e., an out of court settlement.



If [a writ of] *quo minus* is brought against one who has the privilege of this court, *scil.* against a clerk of this court, there, he must put in bail in such suit against him. But, if a bill is filed in this court against one who has the privilege of this court, *scil.* against a clerk etc., as *presenti in curia*, there, because the plaintiff has taken this advantage against the defendant upon the privilege of the defendant, the defendant does not put in bail, according to Chief Baron WALTER.

162

**Anonymous**  
(Ex. 1626)

*If an infant is in the wardship of the king for all of his lands, he does not pay a subsidy to the king for this land.*

British Library MS. Hargrave 30, f. 216v, pl. 2  
(Turnour's reports)

Note that this court was moved that two infants in the County of Lancaster, who were in the wardship of the king for all of their land and for which land such an annual rent is reserved to the king during the minority upon a lease made by the court of wards that, for this land thus being in the hands of the king, they could be discharged of subsidies taxed by them for this land.

Chief Baron WALTER: If an infant is in the wardship of the king for all of his lands, he does not pay a subsidy to the king for this land, but, if he is in wardship but for a third part, as is frequent, he pays a subsidy for it because an infant purchaser pays a subsidy. And, if an infant is in wardship to a common person, and not to the king, there, a subsidy will be paid for this land and the guardian must pay it, according to the words of the Statute. Also, an infant, for goods left or bequeathed to him, will not be charged [for] the subsidy.

But he advised that, in this case, an affidavit will be made that all of the land of which these infants are seised are in the wardship of the king and then the said infants will be discharged.

163

**Redishe's Case**

(Ex. 1626)

*The question in this case was whether the General Pardon pardons issues forfeited in the duchy of Lancaster.*

British Library MS. Hargrave 30, f. 215v, pl. 2  
(Turnour's reports)

King James, who was of late, had granted by his letters patent divers issues forfeited in the duchy court to the said Redishe. The General Pardon by the Statute of 21 Jac.<sup>1</sup> was made. The doubt was whether these issues which accrued to the king in the right of his duchy and are forfeited in the duchy court will be pardoned by this Pardon.

It was objected that the said Pardon extends only to the royal issues, those issues that the king has as king, and not to those that he has in the right of his duchy because the words of the Statute seem to refer to the issues which will be estreated into the Exchequer only and these issues forfeited in the duchy never come into the Exchequer nor are they estreated there.

*Curia advisare vult.*

164

**Anonymous**

(Ex. 1626)

*Where there is an express contract to pay a rent, the lessee must pay it without a demand for it by the lessor.*

---

<sup>1</sup> Stat. 21 Jac. I, c. 35 (SR, IV, 1269-1275).

British Library MS. Hargrave 30, f. 119, pl. 1  
(Turnour's reports)

[It was] adjudged by Chief Baron WALTER and the whole court that, if a man make a lease rendering rent and, in the lease, there is a covenant to pay the rent or the lessee is bound to pay the rent without more words, there, by this covenant or obligation, it is become a sum in gross and it must be paid or tendered without a demand. But, if the covenant or the condition of the obligation be to pay the rent according to the indenture, this does not alter the nature of the rent. Also, if there be an express covenant in the indenture to pay the rent and the lessee is bound to perform all covenants in the indenture, now, because there is an express covenant in the deed to pay it, the rent is to be paid or tendered without a demand and it is become like a sum in gross. And this was the case of Andrews, bishop of Winchester. Thus, if a man make a lease rendering rent and the lessee be bound to perform all covenants, payments, and agreements within the lease, now, because he is bound to perform all payments, the nature of the rent is altered by it.

165

**Anonymous**  
(Ex. 1627)

*One cannot prescribe to have a right of commons in a forest.*

British Library MS. Lansdowne 1094, f. 36, pl. 1  
(Ravenscroft's reports)

*Noy* held and said that the law was always thus that commoners cannot prescribe to have commons for sheep in the edge<sup>1</sup> of the forest or generally by all of the forest because such commons they will not have in the forest. But they can prescribe to have common for their sheep in their lawns and outparts of the forest. And this was not contradicted by anyone.

---

<sup>1</sup> lyse MS., i.e. list.

**Anonymous**  
(Ex. 1627)

*The issue in this case was whether an obligor of a bond that was levied upon by the king can allege by a plea that he is no longer bound by the bond, he having performed his obligation.*

British Library MS. Hargrave 30, f. 121, pl. 1  
(Turnour's reports)

A. was bound to the king, by which he was a debtor to the king by this obligation, and the condition of this obligation was that a third person, *scil.* Sir Isaac Sidley, being sheriff of Kent, render a true account to the king of his office. And, by inquisition after[wards], [it was] found that B. was indebted to A. by an obligation and this obligation [was] seized for the king, and, upon this, process issued against B. And he came and pleaded that Sir Isaac Sidley had performed the condition of this obligation, by which A. became bound to the king etc. so that A. is not indebted to the king and demanded judgment whether this court will proceed.

It was moved at the bar that this is not any good plea but that B. must answer solely to his debt to A. and not to the debt by A. to the king, because even though A. has satisfied the king or the king is satisfied upon this bond, still A. will have the privilege of this court to sue here against B.

Chief Baron WALTER thought as before he had said, fo. 207,<sup>1</sup> that this plea will be good, but, because it was said at the bar that the usage of this court has been otherwise, he directed them to demur upon this plea if they will and then we will deliver our opinions upon consideration, which we will not now upon a motion.

---

<sup>1</sup> *Attorney General v. Cave* (Ex. 1627), 118 Selden Soc. 545, Paynell Exch. 54.

**Rex v. Vandebrook**  
|(Ex. 1628)

*The issue in this case was the priority of a debt assigned to the crown due from a decedent's estate.*

British Library MS. Hargrave 30, f. 270v, pl. 1  
(Turnour's reports)

Philip Burlimak became a debtor to the king.<sup>1</sup> And Sir Nowell Caron was indebted to Burlimak by an obligation of £300. And 22 May 4 Car. [1628], this debt was assigned by Burlimak to the king after the death of Sir Nowell Caron. And upon this, a *scire facias* issued out of this court against the executors or administrator or occupiers of the goods and against the heir and terre tenants of the land of the said Sir Nowell to show cause why they should not pay this debt. And one James Vandebrooke was returned administrator of Sir Nowell and garnished. And he appeared and pleaded several judgments had against [him] as administrator to Sir Nowell by confession before 22 May 4 Car. [1628], which is the time of the assignment, upon divers obligations entered into by Sir Nowell, and he concluded his plea that he had fully administered the goods and that he had no goods etc. *praeterquam bona* to such value *quae non sufficiunt ad satisfaciendum debitum praedictum*.

And I [Arthur Turnour] was of counsel with Burlimak and moved for judgment for the king because, when it appears that the administrator had goods of the intestate in his hands, though a common person had a judgment against him older than the assignment to the king of the debt, still the king will be satisfied first because, though the goods in the hands of the administrator are liable to the judgment for the subject, yet, if an extent or process for the king comes before execution for the subject made and perfected, the king will be pre-

---

<sup>1</sup> [In margin:] See this case of Vandebrooke by Trinity term record *in anno quarto Caroli Regis*, rot. 18, in London, and the record continued till May 5 Car. and judgment entered for the king upon a demurrer joined upon a special plea of *plene administravit* by the defendant to the debt of £300 to Burlimack.

ferred. 21 Edw. IV, 21, by Littleton and Brian;<sup>1</sup> a debt to the king is, first and forthwith, to be paid by the executor at his peril. Coke, li. 9 [ *blank* ] Meriell Tresham's Case<sup>2</sup> seems by the plea to accord, be the debt of the subject older.

Also, the administrator is at no prejudice because the judgment is to recover the debt *de bonis testatoris* and, then, upon the special *fieri facias* to levy *de bonis testatoris et si sibi constare poterit* that the executors have wasted etc. And this execution for the king will be no *devastavit*. *Quod nota*. Thus, the administrator is not at prejudice.

But note; in liber P, f. 67, if A. has judgment against B. in [an action of] debt and B. is also bound to C. and B. dies, [and] C. assigns this obligation to the king and afterwards the executor of B. pays A. his debt upon his judgment, this is good against the king inasmuch as the debt now due to the king was not of record before the death of the testator.

Note: In this [case], upon a demurrer joined, divers days upon my motion [were] given to the defendant to speak to this; otherwise to have judgment. And afterwards, this case was agreed between the parties and judgment [was] passed.

Note: Judgment [was] given for the king in this case upon agreement for certain days for payment.

Public Record Office E.125/6, f. 292v (1 May 1629)

Whereas the 13th day of February in Hilary term last [1629], it was ordered by this court that judgment should be entered upon the record of the demurrer joined between the king's majesty and Jacob Vandenbrooke, administrator of the goods and chattels late Sir Noell Caron's, knight, deceased, except good cause should be showed to the contrary the first Friday of this term and since the said defendant obtained further time to show cause until this present day, now, upon the motion of Mr. Gates desiring judgment to be entered for the king's majesty, it is thereupon ordered by the court that judgment shall be entered for the king's majesty upon the said record except

---

<sup>1</sup> YB Pas. 21 Edw. IV, f. 21, pl. 2 (1481).

<sup>2</sup> *Brokesby v. Tresham* (1612), 9 Coke Rep. 108, 77 E.R. 891, also 1 Brownlow & Goldesborough 51, 123 E.R. 659.

good cause shall be showed to the contrary tomorrow sennight and that day to be peremptory.

168

**Anonymous**  
(Ex. 1629)

*The issue in this case was whether a defendant can plead a defense of the legal capacity of the plaintiff to sue after he has entered a general appearance.*

British Library MS. Hargrave 30, f. 268v, pl. 3  
(Turnour's reports)

In [an action of] trespass for entering his close etc. brought by [a writ of] *quo minus*, the defendant appeared in Easter term and imparled. And afterwards in Trinity term, the defendant came and pleaded a conviction of the plaintiff for a recusant and pleaded further the Statute 3 Jac. [c. 5]<sup>1</sup> by which a recusant convict is disabled to sue, as a man excommunicated, and thus demanded judgment whether he will be [required to] answer.

The plaintiff replied and showed that the defendant appeared in Easter term and imparled until Trinity term etc.

The defendant demurred upon the replication.

The sole question was upon this branch of the said Statute of 3 Jac., cap. 5, whether this disability to the person of the plaintiff can be pleaded by the defendant after an imparlance, because an imparlance seems to be an admission by the defendant that the plaintiff is a person able to sue.

---

<sup>1</sup> Stat. 3 Jac. I, c. 5 (SR, IV, 1077-1082).

**Case of the Weavers of London**  
(Ex. 1629)

*A patent from the crown cannot prohibit a person from practicing a lawful occupation, but it can require him to submit to the regulation of the occupation in a particular place.*

British Library MS. Hargrave 30, f. 276v  
(Turnour's reports)

*Noy* moved for judgment in the case of the Weavers of London upon a charter made in the time of Henry II, and it [was] confirmed and [was by] prescription because [it was said] by him silk weaving is weaving. And the verdict now found has found that it was weaving. Also, there is a difference between a charter before time of memory and confirmed by Parliament and a charter granted at this day. He agreed that a charter that no one [may] use the trade of weaving is void but that no one [may] use it in such a particular place, which is a place of meeting or congregation, because it does not extend it to the country etc. unless one will submit himself in it to the government of such, there, [it is a] good charter because merchandise is as free as other things, and, if the king grants a charter that there is no user of the trade of merchandise, it is not good, but that one not use it in such a place unless he submit himself to the government of such, this is good for the supportation of the government. And he cited the case of the archbishop of York, *quod ratione dominii sui apud Ripon* by prescription in himself and his predecessors claimed a liberty that no one [may] use such a mystery in this town *sine licentia archiepiscopi* etc., and the case of the abbot of Westminster that, by a charter, he had a fair and had a liberty *quod nullus mercator nec alius durante feria per septem leacas in circuitu feriae illius merchandisas aliquas alibi quam in eadem feria vendat sub forisfactura earundem*. And *Noy* cited a case in 3 Edw. I, in the Parliament roll, No. 1, the first case in this year, that a sale in the house of the king himself, *scil.* in Whitehall, was within it.



In ancient times before the time of memory, other liberties were granted and other regalias perhaps [were] used that had been used after the Statute of Magna Charta.

And note there is no franchise but it implies a restraint, but, if they misuse it, it is a cause for seizure.

And he said that this is a charter before the time of memory and the use averred shows the construction that has been made. And he cited Hil. 41 Eliz. *in banco regis*, rot. 450, the case of these Weavers. And he cited 38 Hen. VI, a patent to the Tapestry Makers then in London and a liberty granted to them to search and for the government of them in any parts of the realm. *Quod nota*. Thus to the Goldsmiths of London to say [?]. And he cited Mich. 10 Hen. VI, in this court, in the case of the Linen Weavers, an action [was] brought upon this charter, and 3 Hen. VII, another action brought by the bailiffs of these Weavers, and 11 Eliz., in an action by the bailiffs of the Weavers against Foorthe and Lashe, and Pas. 3 Hen. VI, in the pleas of this court, the bailiffs of the Weavers against Smith and Potkin in Clerkenwell and St. John's Street.

170

### **Miller's Case** (Ex. 1629)

*A fine that was assessed in one of the high courts and sent to the Exchequer for collection cannot be challenged in the Court of Exchequer.*

British Library MS. Hargrave 30, f. 250, pl. 3  
(Turnour's reports)

Note that Serjeant *Hetley* moved here for one Miller, upon whom a fine was imposed in the high commission court for nonappearance, as it was informed. And it was estreated briefly into the Exchequer, as the usage is, no cause of the fine being mentioned in the estreat roll. And on account of this, he moved to have a [writ of] *certiorari* to remove the cause at large so that he

could plead to it, alleging that the high commission does not have the power to impose a fine in such a case.

The court, Chief Baron Walter being absent, denied it and said that the usage is, if a fine is imposed in the [courts of] King's Bench, common bench, or star chamber and a transcript is estreated into this court, that the cause for which the fine was put is never mentioned in the estreat roll nor appears nor are they to examine the cause. And they will not make a precedent in this case.

But note that, in the case of a fine imposed by the commissioners of sewers and estreated here, a *certiorari* has been granted to remove all [of the record].

171

**Longe v. Dorrell**  
(Ex. 1629)

*The issue in this case was whether an action for defamation lies for filing a petition in Parliament that contains defamatory words.*

British Library MS. Hargrave 30, f. 251v  
(Turnour's reports)

Longe and Dorrell's case, where George Longe, Clerk of the Office of Pleas in this Court [of Exchequer] was plaintiff in an action upon the case for scandalous words against Dorrell. And the plaintiff has declared that he was a justice of the peace in the County of Middlesex and also he had been a commissioner for the rating of such subsidies given to the king and [a person] of good reputation and that the defendant had reduced to writing certain scandalous words of the plaintiff and published them to divers [persons]. The words were large, but the beginning was 'that the plaintiff George Longe by color of his office, *innuendo* his office of justice of the peace, had oppressed divers of the inhabitants of the parish of etc. by striking or putting out some that were rated and taxed in the subsidy and by putting in others that were not rated or taxed etc.'

The defendant pleaded that he was also a justice of the peace and that the common fame and voice was that the plaintiff had done such things and that thus it being a Parliament time, the defendant preferred a petition in Parliament against the plaintiff. (And note that it was not preferred upon common fame, but the defendant in his petition in Parliament had positively charged the plaintiff that he had done such things.) And to have the truth examined, he published it.

And this case descended to a particular issue, *scil.* whether one Gunstone to whom the defendant had published this writing were a knight or burgess in the said Parliament or a witness to be produced in Parliament in that business.

And a verdict [was] found for the plaintiff.

Serjeant *Crawley*, of counsel with the defendant, moved in arrest of judgment because, in this case, there are some actionable words and others [that are] not actionable. And the words which are actionable in themselves, which are the words mentioned before, the plaintiff by his *innuendo* had wrested them to such construction which in this construction are not actionable for the plaintiff by an *innuendo* cannot make a cause of action but he may mar a cause because the court will not make another construction of the words that the plaintiff himself had made. And here the said words before had been actionable if they had been applied to the plaintiff as a commissioner of the subsidy, but not being applied to him, as the plaintiff himself had applied them, *scil.* as a commissioner of the peace. And thus, admitting the other words are actionable, yet, if the words are by this misconstruction made by the plaintiff are not actionable and entire damages are given for all, the plaintiff will not have judgment. And he cited *Osborn's case*, Co., li. 10.<sup>1</sup>

*Noy*, to the contrary, for the plaintiff, moved to have judgment. Where the words are actionable in part and not actionable in part and entire damages are given, it has been attempted (because this is not a novelty) before to have the judgment arrested, but they have not prevailed for divers reasons: perhaps the words are of one context and, by omission of part, the residue will not make sense and by addition of the idle words and the words not actionable with the actionable words, the said words will be frustrated. It will be a means of licentiousness of speech and yet the party will be without a remedy.

---

<sup>1</sup> *Osborn's Case* (1613), 10 Coke Rep. 130, 77 E.R. 1123, also Jenkins 270, 145 E.R. 194.

And another reason appears out of the verdict, which answers all objections, because the entry of the verdict is *et assident damna ratione verborum scandiliosorum praedictum etc.* Thus the court will make the construction that the jury assessed the damages by reason of the words only which are scandalous.

Also, he said that the recital in which offices the plaintiff had been employed is only but to show that trust had been reposed in him and to aggravate the scandal.

Also, he said that the words are not the less scandalous inasmuch as they were spoken of him that he had done it by color of his office of justice of the peace though it did not pertain to the said office, because certainly it did not pertain to any office, nor no commission was granted expressly, and the offense was the greater where he did such a thing, *scil.* to put in and put out such as were not taxed or to put out such as were taxed for the subsidy by color of his office of justice of peace than if he had done it by color of being a commissioner because, where a man has power ordained to one end, as a person who is a commissioner of the peace has power to see that the peace not be broken, and, if he has a commission of oyer and terminer, he can try it, if he uses this power to another end, it is punishable, and it is a greater offense if he uses this power to the other end than it was ordained, that if he has erred in the business about which his power is conversant.

And on account of this, if he, as justice of the peace and by color of this office, had done that which was spoken of him, it had been a greater offense in him than if he had done it by color of the commission in which he was a commissioner for rating the subsidy.

(But this reason, I [Arthur Turnour] conceive, does not hold because where he is a commissioner for rating the subsidy, there, it is a trust reposed in him and, on account of this, it is a greater offense in him to falsify this trust than for a stranger to do the act in which no trust was reposed.)

And he cited a case in this court, Mich. 2 Edw. II, *communis*, in the Office of the Lord Treasurer's Remembrancer, Sir Peter Osborne, that before the time of Henry [ *blank* ] the fifteenths were not certain, and in Lincoln the Treasurer of the king came there and called for the books and found fault the books were lower than they had been, and the mayor of the town intending to do some acceptable service therein, although he were no commissioner, yet, as mayor, conceiving he had thereby power, although he had none, he would

and did put in and tax some that were not taxed and did alter others and on account of this, [he was] here questioned etc.

27 Ass., pl. 44,<sup>1</sup> oppression by ministers by color of their office [is] enquirable in an eyre. 27 Ass. 57.<sup>2</sup> And in 38 Ass., pl. 11,<sup>3</sup> a steward, by color of his [court] leet, took money from bakers and permitted them to sell *contra assisam pro redemptione* etc. And in Hil. 27 Edw. III<sup>4</sup> in the bench in eyre, [it was] presented that one Thomas Molinax, chief justice to the duke of Lancaster, when one Barwicke had a pardon of the king of an offense and pleaded it, that he respited the allowance of it and committed Barwicke again to prison, and for this, Molinax was fined, which is a good case.

But error in judgment in an officer, for this, he will not be punished. 27 Ass., pl. 23;<sup>5</sup> a presentment was that where a commission was granted to him and to others which he did sole without the others and put people to fine, to which it was said that that which was alleged by the presentment could not be taken with another meaning, but that it was an error of judgment.

2 Ric. III, fo. 9 and 10;<sup>6</sup> it was one of the questions by the king to the justices, and there, [it was] held that the party will not be punishable for an error in judgment. And the case of the steward of the abbot of Crowland [was] cited that *colore libertatis de infangthief judicabit hominem morti contra legem etc. ubi pro eo libertas seisita fuit in manu regis et nulla poena senseshcalo*.

Also, here, the aforesaid words are spoken generally of the plaintiff that he had oppressed etc. by putting in and putting out of the subsidy and he did not say that the plaintiff did it when he was a commissioner for rating the subsidy, and on account of this, it cannot be applied to this office. And the defendant has spoken them otherwise.

*Adjornatur.*

And afterwards, *Calthrop*, of counsel with the defendant, moved in arrest of judgment:

---

<sup>1</sup> YB 27 Edw. III, Lib. Ass., p. 138, pl. 44 (1353).

<sup>2</sup> YB 27 Edw. III, Lib. Ass., p. 141, pl. 57 (1353).

<sup>3</sup> YB 38 Edw. III, Lib. Ass., p. 224, pl. 11 (1364).

<sup>4</sup> Note YB Trin. 27 Edw. III, f. 6, pl. 25 (1353).

<sup>5</sup> YB 27 Edw. III, Lib. Ass., p. 135, pl. 23 (1353).

<sup>6</sup> YB Mich. 2 Ric. III, ff. 9, 10, pl. 22 (1484).

1. Because, here, all was done in the pursuit of justice and, where a man follows a course in law, he will not be punished. 11 Eliz. Di. 285.<sup>1</sup> No punishment was ever appointed for a suit in law, even though it be false and for vexation. 13 Hen. VII, Kelway, fo. 26,<sup>2</sup> [is] to this purpose.

2. Because the damages are given here entirely, thus certainly damages were given for the petition preferred in Parliament. Co., li. 5, 35.<sup>3</sup> The damages will be inferred to be given for all complained of. And for this, see there and Co., li. 10, in Osborn's [case], where the damages must be severed. He answered to this that the plaintiff in his declaration does not mention anything of this deed in Parliament but it came in in the bar of the defendant, and the plaintiff, by his replication, has excluded all of this matter.

3. He said that, upon the entire record, it appears that there is no cause of action, because, if a petition be preferred in Parliament, as here, and a day is given to examine it and one published a copy of it to a stranger who was not any member of the house of Parliament nor any witness to be produced, no action lies because, it being published by the petition preferred to the house of Parliament, which is the representative body of the entire realm, it cannot be said to be published to the other, because it was published to all before.

See Owen Wood's case, Co. li. 4, fo. 14,<sup>4</sup> that, if a man prefer a bill in the [court of] star chamber against one and charge him with divers things which are scandalous but are examinable there, no action lies, but, if he speaks the said things in another place pending the action, query whether an action lies for it if they are false, and he thought it will; otherwise, a man will have a protection for scandal of a man by preferring a suit.

4. It was said that the issue was joined upon the intention.

---

<sup>1</sup> *Lord Beauchamps v. Croft* (1497), 3 Dyer 285, 73 E.R. 639.

<sup>2</sup> *Lord Beauchamp v. Croft* (1497), Keilwey 26, 72 E.R. 182, 115 Selden Soc. 349.

<sup>3</sup> *Playter v. Warne* (1583), 5 Coke Rep. 34, 77 E.R. 105.

<sup>4</sup> *Buckley v. Wood* (1591), 4 Coke Rep. 14, 76 E.R. 888, also Moore K.B. 705, 72 E.R. 853, Croke Eliz. 230, 248, 78 E.R. 486, 503, 2 Anderson 28, 123 E.R. 528.

**Jones v. Countess of Oxford**  
(Ex. c. 1629)

*When a penal bond is levied upon by the crown, the crown will take only the face value of the bond plus interest, but not the penalty.*

British Library MS. Hargrave 30, f. 268, pl. 1  
(Turnour's reports)

In Joanes' case against Diana, countess of Oxford, administratrix to her late husband, at the trial in the Guildhall, London, it was said by [Chief Baron] WALTER that, if an obligation of £200 found by inquisition be seized for the king to satisfy a debt to the king, which obligation has a condition for payment of £100 and it appears by the inquisition also, the king will recover only the £100 and damages<sup>1</sup> since the time of the inquisition found, when it became a debt to the king because the king does not take a penalty.

Query because thus the debtor of the king will lose the damages for all times before the inquisition.

[See] before, f. 8000.<sup>2</sup>

**Note**  
(Ex. temp. Car. I)

*A lessee of the royal revenue can be paid out of the profits of the land of a debtor to a taxpayer, and this will discharge the obligations of the taxpayer and of his debtor.*

---

<sup>1</sup> I.e. interest.

<sup>2</sup> *Rex v. Countess of Oxford* (Ex. 1629), Paynell Exch. 322, 466.

British Library MS. Hargrave 30, f. 268, pl. 2  
(Turnour's reports)

Note: It is the usage in the Exchequer that, if A. is bound to the king with a condition to pay money to B. who is one of the farmers [of the revenue] the said A. being indebted to B. and the farmers by a grant to the king having power to take such obligations to the king with conditions for the payment of money to them and, upon this, process of extent issues against A. and, by inquisition, a debt due by a bond from D. to A. is found and seized and, upon this, process of extent issues against D. and, by an inquisition, certain land is found, of which D. was seised, and extended to the annual value and, upon a *levari facias* awarded, money is levied, now, this appearing, the court will order that this money that is levied will be paid to B. and that A. will be discharged for as much of his debt to B. and that D. will be discharged for as much of his debt to A.

174

**Anonymous**  
(Ex. 1625 x 1630)

*In a trial upon an information qui tam upon a penal statute, the informer can request talesmen to fill up the jury without a warrant from the Attorney General.*

British Library MS. Hargrave 30, f. 268, pl. 3  
(Turnour's reports)

Note: If, upon such a debt in aid found by inquisition and seized for the king, a plea is put in and issue [is] joined, upon which a trial is [had] and, because the jury does not appear full, a tales was prayed by the counsel of the prosecutor, it was objected by the counsel of the defendant that [there is] need to have a warrant to the Attorney General of the king to pray for a tales, otherwise it should not be granted.

But Chief Baron WALTER, *de bene esse*, granted a tales without a warrant and said that it will be entered upon the *postea* so that the other party will have advantage of it if it does not need to be granted without such a warrant.



But it was agreed by the counsel of the defendant that, upon an information upon a penal law that is *tam pro domino rege quam pro* the informer, that the informer can pray for a tales without such a warrant.

175

**Note**

(Ex. temp. Car. I)

*Where goods are seized for the king, a claimant can recover them upon putting up an indemnity bond if he acts before the goods are sold.*

British Library MS. Hargrave 30, f. 268v, pl. 1  
(Turnour's reports)

Note: It is usual in the Exchequer, if goods are seized for the king and are appraised, then, if the party who claims the ownership comes in and pleads and puts in a surety to stand to the order of the court, before this that they are sold and the money drawn down into the [Office] of the Pipe, he will have restitution of his goods unless there be a special cause to have a view of the goods upon the trial, as it was in Crop's case.<sup>1</sup> But, after the money be drawn down into the Pipe, the court cannot award restitution.

176

**Anonymous**

(Ex. 1625 x 1630)

*After a demurrer, if the plaintiff discontinues his action, he is liable for court costs.*

British Library MS. Hargrave 30, f. 268v, pl. 2  
(Turnour's reports)

---

<sup>1</sup> *Ward, qui tam v. Cropp* (Ex. 1629), Paynell Exch. 283, 289, 294, 313, 460.

Note that Chief Baron WALTER thought upon the Statute of 4 Jac., cap. 3,<sup>1</sup> which gives [court] costs to the defendant upon the nonsuit of the plaintiff in a verdict passed against the plaintiff that, if the plaintiff, after a demurrer joined, discontinue his action, it will be within the equity of the said Statute to render costs.

177

**Anonymous**  
(Ex. 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.*

British Library MS. Lansdowne 1094, f. 48, pl. 2  
(Ravenscroft's reports)

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 the same came to him [by] the second presentation. It will serve but as a confirmation of the first presentation. And admitting that the second presentation voids the first, then what reason but that he will be discharged of the payment of the 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,<sup>2</sup> as Baron Denham said.

And *Edwards*, at the bar, cited the case [ . . . ] by Baron Denham.

---

<sup>1</sup> Stat. 4 Jac. I, c. 3 (SR, IV, 1141).

<sup>2</sup> Perhaps *Curtis's Case* (Ex. 1628), Paynell Exch. 152, 243.

**Attorney General v. Hide**  
 (Case of Gillingham Forest)  
 (Ex. 1625 x 1630)

*A person cannot have a right of commons in a forest by mere usage, but there must be a record of it.*

British Library MS. Hargrave 30, f. 126v, pl. 1  
 (Turnour's Reports)

[It was] said by Chief Baron WALTER to be resolved that those who are not inhabitants nor did not have land within the forest [of Gillingham], though he had land within the purlieu, will not have a common within the forest for two reasons:

1. The Statute of 33 Edw. I<sup>1</sup> is express that those who have land within the purlieu or when it was disafforested will not have a common within the forest in respect of the benefit which he had by the disafforestation of his land.

2. Because a man cannot have a common in a forest by usage, but one must show a record of allowance of it in an eyre.

Note: It was said that the lord treasurer of England has the power of vert in forests.

Note: It was said that a chief forester in fee cannot prescribe for windfalls.

Note: In the Case of Selwood Forest, below,<sup>2</sup> Noy, being Attorney General, agreed that, for a claim of a common in a forest to be taken by the mouths of his cattle, there is no need to show any allowance, but for any claim of a liberty in any forest, he must show an allowance.

[Orders of 19 Oct. and 9 Nov. 1628 and 8 Feb. 1629: Public Record Office E.126/3, ff. 108, 111, 130.]

---

<sup>1</sup> Stat. 33 Edw. I (SR, I, 144).

<sup>2</sup> *Attorney General v. Earl of Pembroke* (Case of Frome Selwood Forest) (Ex. 1630), see below, Case No. 179.

**Attorney General v. Earl of Pembroke**  
(Case of Frome Selwood Forest)  
(Ex. 1630)

*The issue in this case was whether there can be a right of commons in a forest.*

British Library MS. Hargrave 30, f. 126v, pl. 3  
(Turnour's reports)

It was said (1) that in the covert of the forest, *scil.* in the woods, one cannot claim a common for sheep, but in the wastes, perhaps it is otherwise. Query of this, because Noy, now Attorney General, had affirmed it for [good] law.

(2) That by unity of possession of the land to which the common in the forest is claimed in the king that he is also seised of the forest, the common is extinct as the land to which a common is claimed was part of the possessions of some abbey or monastery which came to the king by the Dissolution.

(3) If the land to which the common in the forest is claimed to pertain was also part of the forest in the time of King John and afterward disafforested, as to this land, one cannot now claim a common in the forest by the ordinance of Edward I, which is resolved to be a statute,<sup>1</sup> and so resolved and decreed in the case of Braydon Forest in this court, that it was a statute and act of Parliament, and as to such land that was disafforested and put out of the perambulation of the forest, one cannot have a common now in the forest. And by one of these means, commons used by many men since this time in the forest are lawfully defeated and discharged.

[Orders of 10, 12, and 14 Feb. and 19 Apr. 1631 and 8 Feb. 1632: Public Record Office E.125/10, ff. 61, 62, 70, 80v, 365v.]

---

<sup>1</sup> Stat. 33 Edw. I (SR, I, 144); *cf.* Stat. 34 Edw. I, c. 6 (SR, I, 149).

**Attorney General v. Curriton**  
(Ex. 1630)

*Where the crown in a suit to recover possession of property pleads generally or has been out of possession for twenty years, the defendant can plead generally.*

British Library MS. Hargrave 30, f. 269|  
(Turnour's reports)

An information [was] exhibited by Sir Robert Heath, Attorney General for the king, against Mr. Curriton of Cornwall and divers others for intruding in divers lands in the counties of Cornwall and Devon. And by the information, it is shown that one Truggion was seised in fee of these lands and, in 19 Eliz. [1576 x 1577], the said Truggion was attainted in a *praemunire*, by which the lands of which he was seised in fee simple were forfeited to the queen and that an office was found 5 Car. [1629 x 1630] by virtue of a commission under the Great Seal (and before this information [was] exhibited), by which the seisin in fee in Truggion of these lands at the time of his attainder was found etc.

And now, the defendants came in in this court and pleaded the general issue of not guilty.

And *Noy*, of counsel for the king in this case, moved this court that the defendants must plead specially and make a title otherwise that a seizure of the land upon this general issue can be awarded for the king. And he said first that, upon a general information preferred for the king without a special title in it made for the king but only *sicut patet per plurima* records and memoranda of the Exchequer, it, being general, implies nothing as to such information, although, by the common law, to such general information, if the defendant pleaded the general issue, a seizure of the land will be awarded, yet now, by the aid of the Statute 21 Jac., cap. 14,<sup>1</sup> to such information, the defendant can plead the general issue and no seizure will be awarded. But when a special title is made to the king in the information upon particular

---

<sup>1</sup> Stat. 21 Jac. I, c. 14 (SR, IV, 1221).

records, there, the defendant will not be admitted to [plead] the general issue. But, if he pleads the general issue, a seizure for the king will be awarded because it is not aided by the Statute of 21 Jac., ca. 14. And thus he said that it was resolved before in the case of the tenants of Edilnestowe in the County of Derby about a year since,<sup>1</sup> with whom Mr. Leving of our house<sup>2</sup> was of counsel, but with this diversity, if the king and those under whom the king claims had not been in possession nor taken the profits for twenty years before the information [was] exhibited, there, if the defendant pleaded the general issue, yet by the aid of the said Statute of 21 Jac., no seizure will be awarded for the king. But here, there is a new title accrued to the king, which, now, is by the office found [in] 5 Car. And on account of this, the king was in possession in law because, without an office, the king is not entitled to the possessions of those attained. And it seems that no office had been found before.

But *Bramston* and *Henden*, serjeants, moved for the defendants upon the said Statute of 21 Jac. and upon an affidavit made that they have been in quiet possession for twenty years before this information [was] exhibited, that they can be admitted to the general issue and no seizure [be] awarded.

But *Noy* [argued] against, that no such affidavit should be admitted in this case because it is to swear contrary to the record, to outswear the record, because, by the office, the possession was vested in law in the king. And the Statute does not speak of actual possession.

DENHAM, TREVOR, and VERNON, barons, thought that the defendants should plead specially and though the Statute of 21 Jac. is a statute of grace and, by it, the king has remitted part of his prerogative (1) in this, that upon a general information, the defendant can plead generally and seizure for the king will not be awarded by the aid of this Statute as it should before at the common law. Thus now, in such a case, the possession will not be removed. And the words 'any information' in the said Statute will be construed to extend to any general information. (2) Where the king has been out of possession for twenty years before the information [be] exhibited, that, there, the defendant can plead the general issue and the possession will not be removed.

---

<sup>1</sup> *Attorney General v. Moseley* (1627-1629), Public Record Office E.126/3, ff. 172v, 208v; E.125/6, f. 214.

<sup>2</sup> Arthur Turnour was a member of the Middle Temple.

But it seems by this office found before the information [was] exhibited, the king was in possession in law.

181

## **Holden and Duncombe's Case** (Ex. 1630)

*A creditor cannot go against the assets of a decedent's estate to satisfy the personal debts of the administrator. Such a levy can be quashed upon a simple motion.*

British Library MS. Hargrave 30, f. 270  
(Turnour's reports)

Jane Holden became a debtor to the king. Process of extent issued against the said Jane to enquire and seize, among other things, the debts and specialties of the said Jane. And by inquisition, it was found that William Duncombe and Thomas Duncombe, in several obligations, stood bound to John Holden and that they thus being indebted to the said John Holden, the said John Holden died intestate, and that the said Jane is his administratrix. And the said debts and specialties were seized into the hands of the king as the debts and specialties of the said Jane. And upon this, process issued against Duncombe.

And *Weston*, of counsel with Thomas Duncombe, moved that no process should issue for the king in this case against Duncombe because these debts due to the intestate were not seizable nor should have been seized.

And [it was said] by the court upon this motion for Duncombe this seizure was discharged because they were not seizable and ordered that no process issue upon it. And it was said to be frequent that this is done upon a motion without a plea. And the court did not allow anything to be spoken to the contrary.

But it seems to me this could have been said seemingly:

1. That here, there is an extent and seizure *de facto* and, if it is not *de jure* and lawful, it is not to be reversed or quashed by a motion, but by a plea or by a demurrer if there be conceived to be a cause appearing in the extent or inquisition.

2. Here, there being a seizure *de facto*, if they are not seizable *de jure*, Duncombe is not a party who, by a plea, can reverse this extent, much less by a motion. It is not every party, but a party rightfully entitled to the suit, who can reverse an extent. The administratrix is rightfully entitled to reverse this extent if it is not lawful, but not Duncombe, because Duncombe, though he is a party interested, yet he is not a party prejudiced for he may plead anything to the debt if it be not a due debt and, if it be a due debt, he will be discharged against the administratrix by this payment to the king. Query, however, of this.

3. That these debts, perhaps, are seizable though not assignable by the administratrix because whatever thing be in the power and disposition of the debtor of the king will be liable and the administrator can discharge these debts. And the administrator, by the law, after the debts of the intestate [are] satisfied, will have the residue to his [own] use. And here it does not appear that any debts of the intestate remain unsatisfied. Also, it could be that the administratrix has satisfied the debts of the intestate with other of his own goods and then she can retain them by the law to satisfy herself. And thus, the administratrix not quarrelling with this seizure, Duncombe should not.

Yet, because the administratrix was a debtor to the king in her own right and she had these debts of the intestate in another right etc., upon motion, this seizure was discharged, as is aforesaid.

182

### **Porter v. Nichols**

(Ex. 1631)

*Where a special plea of a defendant amounts only to a plea of the general issue and the plaintiff shows this for a special cause of a demurrer, if the defendant will not amend his plea, judgment will be given against the defendant.*

*In this case, the defendant's plea was a good special plea which was more than a plea of the general issue.*

*An action in trover for profits of land must be tried in the county where the land lies.*



British Library MS. Hargrave 30, ff, 272, 273v  
(Turnour's reports)

Porters and Nichols' case. The case was thus. A. brought an action of trespass upon the case upon a trover and conversion of a certain quantity of corn at such a place in the County of Middlesex. The defendant pleaded that he was the parson imparsonnee etc. of the church of etc. in the County of Derby and that this corn [was] grown in this parish and was set out for tithes as the tenth part from the other nine parts and that the defendant was possessed of them *ut de bonis suis propriis* and that one J.S. claiming the inheritance in the said parsonage did take them from him and did give them to the plaintiff, who was possessed and lost them at the place in the declaration and the defendant found them and took them etc. The plaintiff demurred in law upon this plea and showed for the cause of his demurrer that this plea of the defendant amounted but to the general issue of *non culpabilis*.

*Noy* argued for the plaintiff that this plea amounted but to the general issue. And he cited 35 Hen. VI, fo. 2;<sup>1</sup> Trin. 44 Eliz., *in banco*, rot. 461, in an action of trover etc.; and Trin. 2 Jac., in the common bench, rot. 1320, in Conal and Blackman's case, in a case of waif,<sup>2</sup> it was good that such [a one] was lord of the manor etc. And [it was said] by him, if the evidence in the plea is of matter in law, he will have it by a plea, but, if it is of matter of fact, he will not have it, but he pleaded the general issue. Trin. 7 Jac. *in banco*, rot. 843. And he said that sometimes it is convenient that the action will be laid in another county and not in the proper county.

Serjeant *Bramston* [argued] for the defendant to the contrary that this plea is the general issue and more by reason of the special matter in it which is fit to be referred to the judgment of the court. See *Doctor and Student*, cap. 53, of color in pleading, and Coke, li. 10, in *Leyfield's case*.<sup>3</sup> And he said that the defendant will have this special plea by reason of the gift by J.S. to the

---

<sup>1</sup> YB Mich. 35 Hen. VI, f. 2, pl. 3 (1456).

<sup>2</sup> *Court v. Blackman* (1604), *Noy* 109, 74 E.R. 1074.

<sup>3</sup> *St. German's Doctor and Student* (T. F. T. Plucknett and J. L. Barton, edd., 1974), 91 Selden Soc. 293-297; *Leyfield v. Hillary* (1611), 10 Coke Rep. 88, 77 E.R. 1057, also Croke Jac. 317, 79 E.R. 272, 1 Bulstrode 154, 80 E.R. 846.

plaintiff alleged in the plea, which is color, and can be a doubt to the laymen. He agreed that, if the defendant had pleaded solely that he was possessed of this corn *ut de bonis suis propriis* until the plaintiff took it and the defendant retook it, that this amounts but to the general issue, but, here, there is special matter that the defendant was possessed etc. until J.S., who is a stranger, took it and gave it to the plaintiff and that this gift by J.S. to the plaintiff is special matter. He cited 5 Hen. VII, 18 and 19; 28 Hen. VI, 4; 31 or 21 Hen. VI, 36; 21 Hen. VI, 37; 7 Hen. VI, 35; 6 Hen. VII, 7.<sup>1</sup> See the *Old Book of Entries*, fo. 675; there is a good precedent of a special plea by color of a taking and retaking, which case proves our case and it is not as strong, and Coke, *Book of Entries*, fo. 41;<sup>2</sup> in [a case of] the archbishop of Canterbury, and, there, it is our very case, and such a special plea [was] allowed.

But *Noy* answered to this case that, there, the plaintiff admitted the plea and had not demurred, but, if he had demurred and shown it for the cause, it had been a good cause.

Chief Baron DAVENPORT was strongly against these foreign trials, *scil.* trial in foreign counties, and that the title to land in the County of Derby will be tried in Middlesex by a supposed conversion in Middlesex of part of the profits of this land. And he said that the judges, with unanimous consent, have all sought to suppress these foreign trials. And on account of this, he thought the plea was good.

See the Statute of 4 Hen. IV, cap. 18,<sup>3</sup> for the examination of attorneys, and especially that they [should] make no suit in foreign counties.

See below, fo. 9016,<sup>4</sup> judgment [was given] for the defendant.

Now, this term [Mich. 7 Car. I, 1631], Chief Baron DAVENPORT, for himself and all of the other barons, they all concurring with him, delivered

---

<sup>1</sup> YB Hil. 5 Hen. VII, f. 18, pl. 11 (1490); YB Pas. 5 Hen. VII, f. 19, pl. 1 (1490); YB Mich. 28 Hen. VI, f. 4, pl. 19 (1449); *Grey v. Lusterley* (1443), YB Pas. 21 Hen. VI, f. 36, pl. 3; *Scarburgh v. Pevenet* (1443), YB Pas. 21 Hen. VI, ff. 36, 37, pl. 4; YB Pas. 7 Hen. VI, f. 35, pl. 36 (1429); *Broker's Case* (1490), YB Mich. 6 Hen. VII, f. 7, pl. 4.

<sup>2</sup> *Archbishop of Canterbury v. Kempe* (1596), E. Coke, *A Booke of Entries* (1614), 'Action sur le case', pl. 33, f. 41; also Croke Eliz. 539, 78 E.R. 786.

<sup>3</sup> Stat. 4 Hen. IV, c. 18 (*SR*, II, 138-139).

<sup>4</sup> Renumbered as f. 273v.

the opinion of the court in the said case. And *per totam curiam*, judgment [was] given for the defendant and that the plea of the defendant is a good plea and a special plea and does not amount to the general issue.

They agreed, according to Leyfield's case, Coke, li. 10 [ *blank* ], that where the plea of the defendant amounts but to the general issue and the plaintiff shows it for a special cause of a demurrer, if the defendant will not amend his plea, judgment will be given against the defendant.

Also, they agreed that a special plea must answer the point of the action, which is double in this case: (1) the ownership of the plaintiff; (2) the conversion by the defendant. And here in this special plea, the defendant answered to both of these points, and his plea required a special response from the plaintiff because, here, the defendant confessed and avoided for the property and possession of the plaintiff and, when the defendant confessed and avoided in point of title, this is a good response. And here, the defendant has confessed such ownership and possession in the plaintiff, that the plaintiff could have had an action against all except against the defendant. And the defendant is not bound to confess an indefeasible ownership and possession in the plaintiff, but to confess ownership and possession in the plaintiff, and this at any time, and this is sufficient. And, if he can avoid this, it is a good plea, as he has done in this case. And for this [was] cited 5 Hen. VII, 15, where the difference is; 35 Hen. VI, 2; 37 Hen. VI, 6.<sup>1</sup>

And here, he has shown in point of title of the realty that he is the parson and this corn pertains to his inheritance.

It has been objected that, here, there must be color, as in trespass, Coke, li. 10 [ *blank* ] in Leyfield's case, that no color is to be given in justification for tithes, and this special plea [of] title alters the trial [of] the general plea and prevents a foreign trial, and, on account of this, [it is] good. There is a general inconvenience to the realm in a foreign trial.

And we concur with our predecessors in preventing and suppressing this because, by a special plea, this can be prevented, which, in a case of realty or inheritance, will not be a foreign trial, and this [is] by the common law before the Statute of 6 Ric. II.<sup>2</sup> And for this [was] cited 10 Edw. III, 7; 12

---

<sup>1</sup> YB Hil. 5 Hen. VII, f. 15, pl. 6 (1490); YB Mich. 35 Hen. VI, f. 2, pl. 3 (1456); YB Mich. 37 Hen. VI, f. 6, pl. 12 (1458).

<sup>2</sup> Stat. 6 Ric. II, stat. 1, cc. 2, 3 (*SR*, II, 27).

Edw. III, 7; 14 Edw. III, in [an action of] account as bailiff brought against one in Middlesex of land in the County of York; 21 Edw. IV, 74, by Bridges; and Fitz., tit., *breve*, pl. 479 and 274; 18 Edw. III, 32.<sup>1</sup> The law does not endure a foreign trial if it concerns realty. And, in transitory actions, if it concerns realty and it appears by a plea, there will not be a foreign trial. And our very case is in Coke, *Book of Entries*, fo. 41, and this case has been endeavored to be answered because, there, there was no demurrer tendered, but yet he said that the opinion of the court in this case is well known by divers reports of this case, and he cited 21 Edw. IV, 65.<sup>2</sup>

And thus, judgment by the whole court [was] given for the defendant.

183

### **Collins v. Moone**

(Ex. 1631)

*Writs de rege inconsulto lie to the Court of Exchequer.*

*An issue in this case was whether a writ de rege inconsulto that does not recite the issue between the parties is good.*

British Library MS. Hargrave 30, f. 272v  
(Turnour's reports)

[An action] in trespass [was brought] by Collins for entering into a house in Wye. And this action was brought to try whether this house be part of the parsonage of Wye.<sup>3</sup> And the defendant had pleaded to issue, and issue [was] joined. And the jury [was] returned for a trial at the bar this term. And

---

<sup>1</sup> YB Hil. 10 Edw. III, f. 7, pl. 19 (1336); YB Trin. 12 Edw. III, Rolls Ser. 31b, vol. 1, p. 586 (1338); YB Hil. 21 Edw. IV, f. 74, pl. 1 (1482); Fitzherbert, *Abr., Briefe*, pl. 479; Fitzherbert, *Abr., Briefe*, pl. 274; YB Mich. 18 Edw. III, f. 32, pl. 6 (or pl. 7) (1344).

<sup>2</sup> YB Mich. 21 Edw. IV, f. 65, pl. 41 (1481).

<sup>3</sup> [In margin:] Moone was the lessee of Maxie. Note [that] the grant by the king to Maxie in fee farm was also recited in the writ, so that this concerned the king in his fee farm rent.

the day before the trial would be, a writ *de rege inconsulto* was brought, reciting in this writ the information brought by the king and the judgment upon it for the king (before, f. 7000, in this book<sup>1</sup>) and that a writ of trespass was brought by Collins in this court in which issue was joined (but the issue was not recited in the writ of trespass nor recited in the writ *de rege inconsulto*). And in the writ *de rege inconsulto* is an inhibition that the barons not proceed to the trial of this issue *rege inconsulto*. And the day after, the jury appeared at the bar. And then, it was moved that the court would not proceed to the trial of this issue by reason of this writ. And the effect of the writ was opened. And exceptions were taken to this writ:

1. That a writ *de rege inconsulto* will not be granted to the Court of Exchequer because it is a proper court for that which concerns the king.

But to this, it was answered, and agreed by Chief Baron DAVENPORT, that he could have this writ to this court.<sup>2</sup>

2. That this is a personal action of trespass in which damages are to be recovered, and, there, he will not have a writ *de rege inconsulto* to stay such an action. But in *ejectio firmæ*, he will have [such an action] because, there, possession is to be recovered and will be evidence against the king.

He answered that in [an action of] trespass, where a special issue is joined which concerns the king in the inheritance of the king or a fee farm rent, and this issue was recited in the writ *de rege inconsulto*, so that it can appear to the court that it concerns the king, that the said writ *de rege inconsulto* is well awarded.

But here, in this writ *de rege inconsulto*, the issue that was joined in the writ of trespass was not recited so that it does not appear to the court by this writ *de rege inconsulto* that the issue joined in the writ of trespass concerns the king, for it is not recited nor appears what the said issue was.

But note that it was recited in the writ *de rege inconsulto* that this issue was joined upon the action of trespass and in the record of the proceeding upon it, in which record it will appear that it concerns the king. And it is an express inhibition in the writ *de rege inconsulto* that we not try this issue.

---

<sup>1</sup> *Attorney General v. Collins* (Ex. 1633), see below, Case No. 194.

<sup>2</sup> [In margin:] And a precedent [was] cited, in 10 Hen. VI, in a case of the Silk Weavers of London, that such a writ was awarded to this court.

But the court adjourned the jury until Michaelmas term, and, in the meantime, it will advise whether this writ *de rege inconsulto* be good for this reason, that the issue joined in the writ of trespass is not recited in the said writ *de rege inconsulto* so that, by this writ, it does not appear to the court that the said issue concerns the king.

And the manner of the carriage of this case was greatly disliked, that the issue will be joined and this writ brought to the court but the day before that the trial will be at the bar of this court.

Note that *Noy*, who was [of counsel] for Collins said:

1. That he [the defendant] will not have a writ *de rege inconsulto* for that which concerns the king in point of tenure or for a rent service that the king has out of it. But he agreed that, where it concerns the king in respect of the fee farm rent that the king has out of this land, there, a writ *de rege inconsulto* lies because, where one will not have the aid of the king, there, one will not have a writ *de rege inconsulto*. And he cited 46 Edw. III.

2. But he said that this writ was not good for the aforesaid reasons.

And cases were cited in which a writ *de rege inconsulto* had been awarded. Hil. 18 Eliz., in the common bench, rot. 926, between Blomfield and Harris, and Mich. 32 & 33 Eliz., adjudged in the common bench, in a case *de rege inconsulto* in ejectment.

**Elborowe v. Bateman**  
(Ex. 1631)

*The lessee of a parson and the vicar of the same parish cannot be co-plaintiffs to sue for their separate rights against the same defendants, who are parishioners.*

British Library MS. Hargrave 30, f. 273v, pl. 1,  
2 Gwillim 472, 1 Eagle & Younge 374

The farmer of the impropriate rectory of Pancras and the vicar of that church joined in an English bill in the Exchequer chamber against several owners of several lands in Kentish Town, which is within that parish, and

suggest divers *moduses* to be paid, some of them are to be paid to the parson and some to the vicar, and that the defendants have refused to pay them to the farmer of the parsonage and to the vicar and that they have preferred this bill here to avoid a multiplicity of suits.

The defendants have demurred to the bill. First, [it was] agreed that a suit for tithes or for a *modus* can be in this court. Secondly, the second doubt was whether the farmer of the parsonage and the vicar can join in one bill for their several duties or whether they must prefer several bills.

And [it was ruled] by DENHAM and WESTON, barons, they must prefer several bills because the inheritances are now several and divided, though the vicarage originally was derived out of the parsonage. But it seemed to Chief Baron DAVENPORT that they can join in a bill in equity. But afterwards, in his absence, the demurrer was allowed, and the plaintiffs [were] ordered to prefer several bills.

Public Record Office E.125/10, f. 226v (26 October 1631)

Whereas John Elborowe, clerk, has exhibited an English bill into this court against Katherine Bateman, widow, and Daniel Bateman, gentleman, touching payment of tithes claimed to be due to the vicar of Kentish Town and whereas Margaret Bust, widow, has also exhibited an English bill against the above named parties and one Robert Stacey touching tithes claimed to be due to the parson there, now, forasmuch as Mr. Newdigate, of counsel with the said defendants did this day inform the court that his Majesty's Attorney General is named a defendant in the bills, which tithes are claimed in lands belonging to the manor of Tottenham, which is his Majesty's, part of which manor lies within Marylebone Park, and therefore desired that the said other defendants might not be forced to answer until his Majesty's Attorney General had been first attended therein, it is thereupon ordered that, until his Majesty's Attorney General have first answered the said bills, the said other defendants shall not be compelled to answer the same for that the same might be to his Majesty's prejudice.

**Ratcliffe v. Buett**  
(Ex. 1631)

*The word 'knight' is part of a knight's name, and to omit it is a misnomer.*

British Library MS. Hargrave 30, f. 276  
(Turnour's reports)

In an action of debt brought in the office of pleas in this court by Sir John Ratcliffe, baronet, against one Buett by *quo minus*, as a debtor of the king, the defendant appeared and pleaded an indictment of the plaintiff by the name of Sir John Ratcliffe, knight and baronet, as a recusant, and a conviction upon it. And he pleaded further according to the clause in the Statute of 3 Jac., ca. 5,<sup>1</sup> by which he will be disabled to sue an action, and he demanded judgment whether he shall answer.

The plaintiff demurred in law upon the plea:

1. The words of the Statute are 'that a popish recusant convict shall be disabled as a person lawfully and duly excommunicated'. Thus, he will be to this purpose in the same state as an excommunicated person. And he said that the defendant in this case had imparled and after the imparlance had pleaded this conviction, because he said that, after a general imparlance, he cannot plead an excommunication in the plaintiff.

2. The plaintiff has brought this action by the name of John Ratcliffe, baronet, and the defendant<sup>2</sup> has pleaded a conviction of one John Ratcliffe, knight and baronet, who is another person, because 'knight' is part of his name.

Chief Baron DAVENPORT [said] that there are some additions to be given by the Statute of Henry VIII<sup>3</sup> which are but declaratory of the quality of the person, but knight and serjeant at law are part of one's name, and, on account of this, a recovery against J.S. who is a knight and not so named does

---

<sup>1</sup> Stat. 3 Jac. I, c. 5 (*SR*, IV, 1077-1082).

<sup>2</sup> plaintiff *MS*.

<sup>3</sup> Stat. 1 Hen. V, c. 5 (*SR*, II, 171).



not bind J.S., knight, because J.S. and J.S., knight, differ as much as J.S. and J. Do. Thus, in this case, he has pleaded that another person was convicted.

And see 21 Edw. IV, fo. 72,<sup>1</sup> that knight is part of the name.

And day [was] given to the defendant to maintain his plea. But in this case, [it was] doubted whether the averment does not aid it.

186

**Spiller v. Litler**  
(Ex. 1631)

*An imperfect sheriff's return can be cured by an amendment, even after a verdict.*

British Library MS. Hargrave 30, f. 277v, pl. 1  
(Turnour's reports)

Sir Henry Spiller, plaintiff, [brought an action] in trespass against Litler, and, a verdict being found for the plaintiff, it was moved in arrest of judgment because, upon the *distringas*, it is returned in the dorse of it '*executio istius brevis patet in*' without more and the name of the sheriff [is] put to it and the panel [is] annexed to it, but these words '*quadam schedula huic brevi annexo*' were omitted. Thus here, there is no return because, though the schedule was annexed to the writ, yet there is no reference by those words to it and, though an imperfect or insufficient return is aided, yet no return, as this is, is not aided.

But it was argued for the plaintiff by *Henden* and *Berkeley*, serjeants:

1. That this will be amended upon an examination of the sheriff whether he intended to make a good return because the sheriff is the clerk to endorse it and these words are but words of form which are omitted and this omission being but a default of the clerk, it will be amended. And he cited 12 Hen. VII,

---

<sup>1</sup> YB Mich. 21 Edw. IV, ff. 71, 72, pl. 56 (1481).

19; 37 Hen. VI, 12; 19 Hen. VI, 48; 2 Hen. IV, 8 or 18; and Hil. 19 Jac., rot. 3057, in the common bench; and Coke, li. 8, 160, in Blakemore's case.<sup>1</sup>

2. If it is not amendable, it is aided by the Statute.<sup>2</sup> See 37 Hen. VI, 11; 3 Hen. VII, 14; Hussey's case; Coke, li. 6, that pledges will be entered afterwards; 14 Hen. VII, 12;<sup>3</sup> and Pas. 21 Jac. in the common bench between Walter, plaintiff in [an action] in debt, and Higgenbottom, defendant, upon the *habeas corpora*, it was returned 'nomina inter' Walter, plaintiff, and Higginbottom, defendant, and the word 'juratorum' [was] omitted, yet, it being moved in arrest of judgment after a verdict for this, judgment was given.

And upon an examination of the sheriff, it was amended.

187

## **Attorney General v. Clerkenwell Churchwardens** (Ex. 1631)

*Churchwardens who defraud the poor can be fined and ordered to restore the money to the poor.*

British Library MS. Hargrave 30, f. 279, pl. 2  
(Turnour's reports)

Noy, Attorney General, exhibited an information this term in this court against the churchwardens of the Parish of Clerkenwell. And the information was grounded upon that part of the Statute of 1 Jac., cap. 9,<sup>4</sup> by which alehouse keepers must sell one full quart of ale for a penny and, if one offend against this part of the Statute and it is proved as it is appointed by the Statute, he forfeits for every offense 20s. to be levied by the constables

---

<sup>1</sup> YB Pas. 12 Hen. VII, f. 19, pl. 2 (1497); YB Hil. 37 Hen. VI, f. 12, pl. 2 (1459); YB Hil. 19 Hen. VI, f. 48, pl. 1 (1441); YB Mich. 2 Hen. IV, f. 8, pl. 39 (1401); *Blackamore's Case* (1610), 8 Coke Rep. 156, 77 E.R. 710.

<sup>2</sup> Stat. 8 Hen. VI, c. 12 (*SR*, II, 248-249).

<sup>3</sup> YB Mich. 14 Hen. VII, ff. 11, 12, pl. 21 (1498).

<sup>4</sup> Stat. 1 Jac. I, c. 9 (*SR*, IV, 1026-1027).

or churchwardens of the parish to the use of the poor and that the alehouse keepers in this parish have offended against this law and it has been proved and the said churchwardens have levied the said penalty and have restored it to the same alehouse keepers as the poor, which tends to the encouragement of the offenders and the defrauding of the poor in truth.

The defendants came in in court and confessed themselves guilty.

*Noy*, Attorney General, moved this court to fine them because he said that in truth the churchwardens were brewers and the alehouse keepers took their ale from them and, on account of this, they so much favored them that they restored the money to them as the poor. But he said that they are but ministers of the law and not moderators of the law. And he said that, in the printed book called *Magna Charter* bearing the date of 1556,<sup>1</sup> cited in Rastal, tit. *Escheator*,<sup>2</sup> that that in the chapter entitled '*Capitula Escheatoriae*', in which it is declared which things are enquirable by the escheator, that one of which he inquires is '*de elemonizis substractis*'. And on account of this, it is to be enquired of here, though if they had not so ingenuously confessed it, he would have proceeded against them in another court.

And they were each fined £5 to the king and ordered to restore the money to the poor. And they were committed to the marshall until they pay their fine to the king and restore the money for the poor.

188

## Fludd's Case

(Ex. 1631)

*The issue in this case was the sufficiency of the pleadings of the terre tenants to a writ of extent against their land.*

---

<sup>1</sup> *Magna Charta cum Statutis* (1556), f. 162v.

<sup>2</sup> Rastell, *Les Termes de la Ley*, or possibly W. Rastell, *Collection in English of the Statutes*.

British Library MS. Hargrave 30, f. 280  
(Turnour's reports)

A charge [was] put *in super* upon Sir Thomas Fludd, *scil.* Thomas Fludd *militem nuper receptorem generalem comitatu Canciae pro denario per Thomam Fludd generosum deputatum suum receptorum de J.S. nuper firmario* of such land at such annual rent etc. for five years arrearages. It seems this charge was put *in super* upon Sir Thomas Fludd upon the showing of the acquittances made to J.S., the farmer, upon the receipt of his rent by Thomas Fludd, the deputy. And upon this charge, process of extent was awarded to enquire of what lands Sir Thomas Fludd was seised at this time. And by inquisition, [it was] found that he was seised of such land. And now, one Ellis and others came in as terre tenants of this land, and *pro placito dicunt quod praedictus Thomas Fludd, generosus, deputatus praedicti Thomi Fludd, militis, nuper receptoris generalis praedicti comitatu Canciae, non recepit praedict. leperal. arrearag. reddet et denar. summas in schedula praedicta mentionata et super praedicto Thomo Fludd, milite, receptore, in forma praedicto onerata nec aliquae eorundem [?] prout pro dicto domino rege nunc superius supponitur et hoc parati sunt verificare etc.*

And I [Arthur Turnour] moved the court that this plea was not good, *scil.* because the defendant could not traverse the charge nor here have they concluded with a trial by a jury.

And *per curiam*, it [was] thought that the plea [was] not good, and [they] gave a day to the defendants to put in a plea by which they will abide.

And the defendants waived this plea and put in another plea.

And on account of this, query whether the charge be traversable or not because it is harsh that such a charge put *in super* will conclude the party. 2 El., Dier 177,<sup>1</sup> that a certificate of the messenger recorded in Chancery and put by a *mittimus* into the Exchequer, in which a contempt is recorded, this must be credited as true and no traverse, by the law, can be taken to it.

---

<sup>1</sup> *Bartue and the Duchess of Suffolk's Case* (1560), 2 Dyer 176, 73 E.R. 388, also Jenkins 220, 145 E.R. 151.

**Bancroft v. Heron**  
(Ex. 1631)

*The issue in this case was whether an audita querela can be grounded upon Magna Carta or upon a release.*

British Library MS. Hargrave 30, f. 281v  
(Turnour's reports)

Dr. Bancroft, *debitor domini regis*, brought an action of debt or covenant against Sir Edward Heron in the Office of Pleas of this Court [of Exchequer], and he had recovered 2000 marks. And the defendant was taken in execution and committed to the Fleet [Prison] in execution. And the *capias*, upon which he was delivered to the warden of the Fleet, recited the execution for Bancroft, *debitor domini regis*.

Heron brought *audita querela* and recited in it the suit here in the office of pleas by Bancroft against Heron (and omitted to mention [that it was] according to the true record that he is *debitor domini regis*) and recited the Statute of Magna Carta, ca. 11,<sup>1</sup> and the Statute of *Articuli super Chartas*<sup>2</sup> that no common plea be from henceforth held in the Exchequer, and also a release made to Heron, and he did not say shown before to the court. And upon its being recited in a writ out of the [court of] common bench directed to the warden of the Fleet whether *ea de causa et non alia detentus fuit*, he was commanded to deliver him. And upon a *habeas corpus* granted out of this court against Heron directed to the warden of the Fleet, he has returned this matter.

*Noy*, Attorney General, said that this is the first *audita querela* grounded upon the aforesaid statutes but [writs of] *supersedeas* have been awarded and they should be pleaded, as 9 Edw. IV, 53,<sup>3</sup> is. But here, this *audita querela* is also grounded upon a release.

---

<sup>1</sup> Stat. 25 Edw. I (Magna Carta), c. 11 (*SR*, I, 115).

<sup>2</sup> Stat. 28 Edw. I, c. 4 (*SR*, I, 138).

<sup>3</sup> *Yong v. Clerk of the Hanaper* (1470), YB Hil. 9 Edw. IV, f. 53, pl. 18, also Jenkins 131, 145 E.R. 92.

**Anonymous**  
(Ex. 1631 x 1645)

*No action upon a penal statute can be tried by justices of the peace.*

British Library MS. Hargrave 30, f. 266, pl. 2  
(Turnour's reports)

Note that an information was preferred in this court upon a penal law, as upon the Statute of 21 Hen. VIII<sup>1</sup> for killing and selling calves between January and May, upon which no information can be preferred before the justices of the peace because the said Statute limits the suit to be 'in one of the king's courts'.

And it was said by the court that an information can be preferred here in this court upon this Statute because no information can be preferred upon this Statute before the justices of the peace by force of their commission of the peace because this construction was made upon the Statute of 21 Jac., cap. 4,<sup>2</sup> that where no information can be preferred before the justices of the peace upon a penal law, before the Statute of 21 Jac., ca. 4, by force of their commission of the peace, there, upon such a penal law, one could inform in this court notwithstanding the Statute, even though the party offending before the said Statute of 21 Jac. could have been indicted before the justices of the peace by force of their commission of oyer and terminer because thus one could upon every penal law. And thus it [was] said to have been resolved formerly in the [court of] common bench upon this Statute of 21 Jac.

Second, if this information is not within the said Statute of 21 Jac., then no oath is to be taken according to this Statute.

---

<sup>1</sup> Stat. 21 Hen. VIII, c. 8 (*SR*, III, 289-290).

<sup>2</sup> Stat. 21 Jac. I, c. 4 (*SR*, IV, 1214-1215).

Note: It was Farington's case<sup>1</sup> in the [court of] common bench in an information upon the Statute of 23 Hen. VIII, cap. 4,<sup>2</sup> against brewers for the [. . .]<sup>3</sup> and in this case, this difference [was] taken. And it was said, where the penal law appoints the suit to be 'in any of the king's courts', that this, as was resolved in Gregory's case,<sup>4</sup> will be intended in one of the courts at Westminster. And this Statute of 21 Jac. will not be construed to amount to a repeal of all the said statutes. But the mischief intended to be prevented was that it will not be tried but in the proper county.

But Chief Baron DAVENPORT relied upon the difference aforesaid.

But it seems the word 'commenced' in the Statute of 21 Jac. makes this doubtful.

191

**Anonymous**  
(Ex. 1631 x 1645)

*Payment is not a good defense where the payment was made after the plaintiff filed suit.*

British Library MS. Hargrave 30, f. 270v, pl. 3  
(Turnour's reports)

[A writ of] *quo minus* [was sued] against an executor, who pleaded that at such time which was after his appearance and imparlance in this court, a suit was begun against him and a recovery [was] had against him in an inferior court etc.

---

<sup>1</sup> *Farrington, qui tam v. Keymer* (1628), Croke Car. 112, 79 E.R. 698, Hutton 98, 123 E.R. 1128.

<sup>2</sup> Stat. 23 Hen. VIII, c. 4 (SR, III, 366-368).

<sup>3</sup> contenc. MS.

<sup>4</sup> *Gregory v. Blachfield* (1596), 6 Coke Rep. 19, 77 E.R. 282, Moore K.B. 412, 599, 72 E.R. 663, 784.

*Per curiam:* This is not a [good] plea because, after he had notice of this suit here, he should not pay another before this is satisfied.

And Chief Baron DAVENPORT cited the case that, if the party will not sue an execution upon a recovery in *quo minus*, that the king can, which proves that the king is interested in this suit.

192

**Eggesfield v. Fabian**  
(Ex. 1632)

*A clergyman who has been inducted and who has paid or agreed to pay first fruits will be put into possession of the church by the Exchequer.*

Lincoln's Inn MS. Misc. 495, f. 8, pl. 2

Note: In Eglesfield's case here, [it was] resolved, if a clerk is admitted, instituted, and inducted in[to] a benefice and no other and has compounded with the king for the first fruits and gives security to the king for payment of it, that this court for the revenue of the king of the said first fruits will put the party into possession upon a bill preferred here, though the defendant has answered to the title of the plaintiff because the defendant in his [action of] *quare impedit* will recover damages if he has title. And in Cheney Roe's case for the parsonage of Rampton in the County of Cambridge, though it was there greatly opposed by reason of a sequestration obtained in Chancery, yet this is a court for the revenue of the king and, on account of this, he is the incumbent *de facto* and no other will put him in possession.

Public Record Office E.125/6, f. 105v (5 November 1628)

Whereas in the cause depending in this court by English bill between John Eggesfield, bachelor of divinity, plaintiff, and John Fabian, clerk, master of arts, and other defendants touching the vicarage of Chew and the chapel of Dundry thereunto annexed in the County of Somerset whereunto both the said parties do pretend right by several presentations and inductions and both have compounded for their first fruits, it was ordered by the court on



Saturday the 25th day of October this term [1628] that an injunction should be awarded for the quieting of the possession with the plaintiff except the defendant should this day show cause to the contrary, now, upon the hearing of Sir Heneage Finch, knight, serjeant at law and recorder of the City of London, of counsel with the said defendant, and of Mr. Baber, of counsel with the parishioners of Chew, and of Mr. Weston and Mr. Lenthall, of counsel with the said plaintiff, the court does not think fit to grant any injunction but do think fit that the profits of the said vicarage and chapel should be sequestered. And whereas the court is informed that there is a sequestration out of this court already granted to the father, brother, and cousins and other near and special friends of the said plaintiff, it is now ordered by the court that a new sequestration shall be made to six indifferent persons to be allowed by this court to demise, compound for, levy, collect, and receive the tithes and from time to time all and singular the profits of and belonging to the said vicarage and chapel and the glebe lands thereof until the right and title of patronage be determined between the said parties and that a supersedeas shall be made to discharge the said former sequestration and that the other suits brought by the plaintiff against the said church wardens in the spiritual court of Wells shall cease. And, touching the serving of the cure of the church, vicarage, and chapel in the mean time, the court does desire the lord bishop of Bath and Wells, in whose diocese the same church is, to appoint some learned man and preacher to serve the same during the pendency of the suits to serve the cure there and to order and appoint what fit stipend and allowance such person shall have for serving the said cure, the same to be paid and allowed out of the profits of the premises collected or to be collected from time to time by the sequestrators to be allowed by this court.

Public Record Office E.125/7, f. 213 (10 February 1630)

Whereas in the cause depending in this court by English bill between John Eggesfield, clerk, bachelor of divinity, plaintiff, and John Fabian, clerk, defendant, touching the vicarage of Chew and the chapel of Dundry in the County of Somerset whereunto both the said parties were presented, admitted, instituted, and inducted by several presentations and after[wards] upon a *quare impedit* commenced and prosecuted in the Court of Common Pleas by the said defendant's patron against the said plaintiff, the said patron, by verdict and judgment, has recovered the possession thereof and one hundred

twenty pounds for damages and whereas, for that the possession of the said vicarage and chapel were by order of this court upon the said bill awarded to the said plaintiff, the said plaintiff gave security by recognizance in this court to abide the order of the court touching the mesne profits of the premises and, whereas, upon a reference to Sir Thomas Trevor, knight, one of the barons of this court, it was ordered by the court that the said plaintiff should bring into this court the sum of one hundred and forty pounds which himself confessed he had received of the profits of the said vicarage and chapel and that a commission should be awarded wherein both parties should join to enquire what other profits the said plaintiff had received above the said one hundred forty pounds, which commission was awarded accordingly and executed, and it is certified by all the commissioners in the said commission named that the profits received by the said plaintiff do amount to one hundred four score five pounds six shillings besides forty-two pounds allowed for serving the cure and other deductions, now, upon hearing of Mr. Noy and Mr. Pritcherghe, of counsel with the said defendant, and of Mr. Bankes, of counsel with the said plaintiff, it is this day ordered by the court that the said Fabian shall have and receive out of this court the sum of one hundred pounds parcel of the said one hundred and forty pounds and shall have such monies as yet remain in the sequestrators' hands and the parishioners' hands and that the said Eggesfield giving a release of errors upon the said judgment in the said *quare impedit* shall then have the sum of forty pounds residue of the said one hundred and forty pounds remaining in court and shall retain the residue of the profits certified by the said commission to be received by him in respect he is charged with the said one hundred and twenty pounds recovered by the said defendant's patron upon the said judgment.

[in margin:] 12 *die Februarii* 1629[/30], received this day and year above written of his Majesty's Remembrancer of this court by virtue of this order the sum of one hundred pounds. I say received £100. /s/ John Fabian.

[in margin:] *Primo die Maii* 1630, received the day and year above written of his Majesty's Remembrancer of this court by virtue of this order as assignee to Mr. Eggesfield the sum of forty pounds. /s/ Israel Butchers

Public Record Office E.125/10, f. 212v (15 October 1631)

Whereas in the cause late depending in this court by English bill between John Eggesfield, clerk, bachelor of divinity, plaintiff, and John Fabian, clerk,

defendant, touching the vicarage of Chew and the chapel of Dundry in the County of Somerset, the said plaintiff, by order of this court, had the possession of the said vicarage and chapel upon security given by him to abide the order of this court touching the mesne profits thereof and, after the said plaintiff was evicted from the possession, a commission was awarded wherein both parties joined to enquire what profits the said plaintiff had received whereby it was certified by all the commissioners that the profits received by the said plaintiff did amount to one hundred four score five pounds six shillings besides forty pounds allowed for serving the cure and other deductions and in regard it was alleged on the behalf of the said plaintiff that he had paid and was charged and chargeable to pay divers sums of money due and payable out of the said vicarage and chapel for pensions and other charges during the time of his incumbency and possession thereof, there was allowed unto him by order of this court the sum of four score five pounds six shillings part of the profits certified to be received by him as aforesaid besides the said forty pounds allowed for serving the cure as aforesaid and for that upon motion made in trinity term last and upon affidavit made by the said Fabian that he had lately been sued in the ecclesiastical court at Wells for the sum of twenty pounds due and payable out of the said vicarage and chapel to the church of Bristol during the time of the said plaintiff's possession which he ought to have paid and for that the court was informed that there were divers other sums of money due and payable out of the said vicarage and chapel to the church of Wells amounting to the sum of fifteen pounds which should likewise have been paid by the said plaintiff and were since demanded of the said defendant, it was thereupon ordered by the court on Saturday the five and twentieth day of June last that the said plaintiff should forthwith pay and discharge the said twenty pounds due to the said church of Bristol and all other sums of money which were due and payable out of and for the said vicarage and chapel during the time he was incumbent and had the possession thereof or else should show good cause to the contrary on the first Tuesday of this term and that he should be served with a subpoena with the tenor of the said order thereunto annexed commanding him to perform the same, now forasmuch as the said defendant has made affidavit that the said plaintiff was served with a subpoena to him directed under the seal of this court with the tenor of the said order thereunto annexed about six weeks since and for that the court is informed that the said plaintiff has neither paid the said pensions and duties nor showed any cause to the con-

trary, it is now absolutely ordered by the court upon the motion of Mr. Dynne, of counsel with the said defendant that the said plaintiff shall forthwith pay and discharge the said twenty pounds due and payable to the said church of Bristol and all other pensions, duties, and payments issuing, due, and payable out of and for the said vicarage and chapel or either of them for and during all the time that the said plaintiff had the possession and was incumbent thereof being removed by injunction of this court awarded the third day of November in the fifth year of the king's majesty's reign [1629] and shall also pay to the said defendant all such costs and charges as he has been or shall be put unto by reason of the said plaintiff's default in not paying the said pensions, duties, and other payments. And it is further ordered by the court that process of *scire facias* shall be made forth upon the recognizance wherein the said plaintiff and others are bound as aforesaid to abide the order of the court.

193

**Duckett and Bird's Case**  
(Ex. 1632)

*The crown cannot levy execution of a judgment against its debtors' debtors to the fourth degree.*

Lincoln's Inn MS. Misc. 495, f. 61

John Duckett and William Bird and Giles Bird by recognizance [were] bound unto the king [on] 17 November 4 Car. [1628] in £120. (It was a sheriff's recognizance.) And upon this, an extent issued and an inquisition [was] taken on 18 June 8 Car. [1632] whereby a debt from one Ralph Willett to the king's debtor was found and seized, and an extent issued upon this against Willett, and an inquisition upon it [was] taken 19 of the same June, whereby a debt from one William Harding by bond unto the said Willett was found and seized. And an extent upon it issued against Harding and an inquisition upon it [was] taken the 21st day of the same June, whereby a debt from one William Hopton unto the said Harding was found and seized, which course of finding of the debts aforesaid unto the said Harding by the said last inqui-

sition being in the fourth degree, the court does utterly mislike and disallow of. And it is thereupon ordered by the court at the motion of Mr. *Mason* that the said last extent and inquisition shall be quashed and void and that no further [ . . . ] nor proceeding shall be had or made thereupon.

194

**Attorney General v. Collins**  
(Ex. 1633)

*In an information of intrusion upon the property of the crown, where the crown has been given possession pendente lite, possession will not later be restored to the defendant where the defendant later files a special plea.*

British Library MS. Hargrave 30, f. 269v, pl. 1  
(Turnour's reports)

In Collins' case for the rectory of Wye in the County of Essex, an information of intrusion was exhibited for the king upon a special title for the king set forth in the information, *viz.* a judgment and recovery for the king in this court. The defendant pleaded the general issue, upon which an injunction was granted to establish the possession with the king. And then, the defendant, by the license of the court, put in a special plea and then moved to have the injunction dissolved.

[It was said] by the court here is an injunction well granted and though a special plea is put in, upon which the Attorney General for the king has demurred, perhaps, it is a frivolous plea and does not answer to the title alleged in the information. This court will not restore the possession being before established with the king by an injunction. But it gave a day to hear the Attorney General for the king.

[Order of 17 Nov. 1628: Public Record Office E.126/3, f. 262.]

[Related cases: *Collins v. Moone* (Ex. 1631), see above, Case No. 183.]

**Attorney General v. King**  
(Ex. 1634)

*In this case, a vintner was fined for selling contaminated wine.*

Lincoln's Inn MS. Misc. 495, f. 19, pl. 1

An information [was] exhibited by Noy, Attorney General, against Jacques King for the selling of wines knowing them to be mixed and corrupted. And upon not guilty pleaded, a verdict [was] found at the bar against the defendant. And the said Attorney General moved to have the judgment of the court and for the matter of it that the court put a fine upon the defendant for this deceit and also that they adjudge him to stand upon the pillory. And he cited a case in Hil. 2 Edw. I, rot. 42, in the King's Bench.

But the court, in this case, put a fine upon the defendant to the value of the wines thus sold by him because they should have been cast away.

But, for the judgment of the pillory, *curia advisare vult* because it [was] not found nor charged by the information that the defendant had done the act, *scil.* had mixed and corrupted them, but that he had sold them knowing them to be corrupted. And also further, the deceit was another mischief in this case for the defendant and his company did buy small Anjou wines at low rates, which were such wines as would not keep nor hardly brook the sea, and, by sophisticating them with clary and sulphur, made them keep beyond their time so the good [person] that bought stronger wines at higher prices and that would of their own nature keep pure was beaten out.

**Attorney General v. Anonymous**  
(Ex. 1635)

*In a suit for intrusion into the property of the crown, where the crown alleges a specific title, the defendant must plead specially.*

British Library MS. Hargrave 30, f. 269v, pl. 2  
(Turnour's reports)

An information [was] exhibited by the Attorney General for the king against divers for intruding in several marshes in Essex. And in the information, it was alleged that King Henry VIII was seised of them etc. and that they descended to King Edward VI and thus to the king who now is by mesne descents. And the defendants would have pleaded *non culpabilis* and retain their possession. And it was argued in court.

And the Attorney General, *Sir John Bankes*, said that they must plead specially by reason [that] this information is not general but founded upon several descents, also, that this land is not within the Statute<sup>1</sup> because it is land lately gained from the sea, of which there can be no such possession against the king.

But I [Arthur Turnour] think that, notwithstanding the several descents alleged, it does not alter the case inasmuch as it is but matter in fact and it does not put the defendants to a special plea, but it must be particular matter of record that puts the defendant to a special plea. And to the last reason, that this land is not within the Statute because it is land recently gained, I answer that this contradicts the former and the information because, then, Henry VIII was not seised of it nor were there such descents.

197

**Attorney General v. Appleton**  
(Ex. 1636)

*Upon an information of intrusion upon the lands of the crown, the defendant must plead specifically as to his own title.*

British Library MS. Hargrave 30, f. 269v, pl. 3  
(Turnour's reports)

---

<sup>1</sup> Stat. 21 Jac. I, c. 14 (SR, IV, 1221).

An information of intrusion [was] exhibited against Sir Henry Appleton, William Sheldon, and Giles Vanderputt alleging that such land was gained from the sea, some within twenty years, some within fourteen years, and that King James was seised of it *in jure coronae prout per quam plurimam* in this court appears and that it descended to the king that now is [and] that he was seised until the defendants intruded.

And *Lenthall* and *Brian*, for the defendants, moved the court that the defendants could plead the general issue and retain their possession. And a precedent [was] cited by them in Pas. 1 Car. *ex parte rememeratoris thesaurarii*; and there, the case was that an information of intrusion [was] exhibited in land in Goldborow in the County of Devon, and, in the information, seisin was alleged in King Edward VI by virtue of a statute and mesne descents to the king, and *non culpabilis* [was] pleaded by the defendant.

But note [that] no order was shown that it was discussed or that the defendant retained the possession.

The Attorney General [*Sir John Bankes*] [argued] to the contrary that it is a silent precedent and not disputed, also it is for inland land and not for land gained from the sea, thus, [it is] not a match for this case, and that this case for this land gained from the sea differs from other land because there cannot be possession until it is left by the sea because perhaps, at the ebb water, some few sheep could be upon it, but this is no possession.

Chief Baron DAVENPORT: The common law forces the defendant to plead specially against the king, otherwise to lose his possession. This question now is upon the Statute<sup>1</sup> by which the king declares that he intends to depart with part of his prerogative. And he seemed to doubt that an affidavit is not sufficient proof that the king has been out of possession.

Public Record Office E.125/20, f. 26v (26 January 1636)

Whereas his Majesty's Attorney General has exhibited several informations into this court against Sir Henry Appleton, baronet, and other several persons for intruding into several parcels of lands lying in several places which have been deserted and left by the sea and so belong to his Majesty as the said Mr. Attorney alleged, unto which information divers of the defendants

---

<sup>1</sup> Stat. 21 Jac. I, c. 14 (SR, IV, 1221).



have appeared, and for that his Majesty's said attorney desired they might be ordered to plead specially and the defendant's counsel humbly prayed that they might be admitted to plead the general issue, this day was appointed for counsel on both sides to be heard therein and for bringing of precedents in the case, now upon hearing of his Majesty's said attorney and of Mr. Bryan and Mr. Lenthall being the defendants' counsel and, upon hearing the precedents now produced and reading and perus[ing] of the Statute of 21 *Jacobi*<sup>1</sup> and upon hearing of divers affidavits for the continuance of possession of the said defendants and others under whom they claim for the space of forty, fifty, and sixty years last past, forasmuch as it appears that the case will as well concern his Majesty as the subject, the court forbore to proceed any further therein but will consider thereof and then will give such order therein as shall be fit and, in the mean time, things to remain as now they are.

[This case is cited in S. A. Moore, *A History of the Foreshore* (1888), p. 285.]

198

## Henry's Case (Ex. 1636)

*The issue in this case was when can the king sue his debtors' heirs.*

Lincoln's Inn MS. Misc. 495, f. 10, pl. 1

Allen Henry's Case.

A *scire facias* for the king [was] issued reciting that A. was a debtor to the king by an obligation and that A. is dead and, on account of this, the sheriff is commanded by this writ to garnish the executor etc. *necnon heredem terrarum et tenementorum quae suae fuerunt etc.* And upon this, the sheriff returned that *scire fecit B. heredem dicti A. etc.*

[It was said] by Chief Baron DAVENPORT the *scire facias* is bad, and, here, there appeared no cause to charge the heir of A.

---

<sup>1</sup> Stat. 21 Jac. I, c. 14 (SR, IV, 1221).

(1) The *scire facias* is bad because it should have been to garnish the heir of the obligor and not *heredem terrarum et tenementorum* etc. because it is improper etc., and the return also [is] bad. And see Coke, li. 3, fo. 15, in Sir William Harbert's case<sup>1</sup> [in] accord.

(2) It does not appear that, here, there is any cause to charge the heir because [it is] not recited in the obligation that A. had bound his heir and, on account of this, it is too short.

But note that by a clause in the Statute of 33 Hen. VIII, ca. 39,<sup>2</sup> that the heir will be charged though he [is] not comprised in the recognizance, obligation, or specialty made to the king or to another to his use.

199

**Eaton's Case**  
(Ex. 1637)

*In this case, a sequestration of the profits of a church was granted.*

Lincoln's Inn MS. Misc. 495, f. 8, pl. 1

The case of Mr. Eaton, parson of the church of Ostenhanger in the County of Lancaster. As appears by the records in the first fruits office, the said church was presentative and in the time of Henry VIII was the last presentation to it, but this incumbent, as it was informed, lived until the time of Edward VI. And the manor and advowson of the church being granted out of the crown, there had been no presentation to it since the death of that incumbent in the time of Edward VI, but it had been neglected by the patron, and now the king presented by lapse this church [to] the said Eaton, who was admitted, instituted, and inducted and had entered into a bond for his first fruits to the king.

---

<sup>1</sup> *Harbert's Case* (1584), 3 Coke Rep. 11, 15, 76 E.R. 674, 663, also Moore K.B. 169, 72 E.R. 510.

<sup>2</sup> Stat. 33 Hen. VIII, c. 39, s. 52 (SR, III, 891).

And upon a petition to Chief Baron Davenport, a commission for the sequestration of the profits was granted. And upon a motion in court to dissolve this sequestration, notwithstanding there had been such a discontinuance of the presentation, yet inasmuch as it appeared by the records of this court that it was presentative and it remains in charge to the king upon the records for tenths etc., the sequestration was confirmed and continued. But it was ordered that the said parson now exhibit a bill in the Exchequer chamber against such parishioners who refused to pay tithes, to which bill they will answer forthwith. And so it was done.

200

### **Crispe and Powell's Case** (Ex. temp. Car. I)

*The issue in this case was whether the debtor of a judgment debtor can raise matters of error that arose before he was sued.*

Lincoln's Inn MS. Misc. 495, f. 8v, pl. 4

Crispe is a debtor to the king, and Tilsley is indebted to Crispe, and Tilsley died. And after his death, upon [a writ of] extent against Crispe, the debt due from Tilsley, who is dead, to Crispe is found and seized, and a *diem clausit extremum* is awarded to enquire of what goods and chattels Tilsley was possessed at the time of his death, which process is erroneous because the debt due from Tilsley was not seized into the hands of the king at the time of the death of Tilsley. And an inquisition is found and returned that Tilsley at the time of his death was possessed of such goods and they are seized for the king.

And the said Powell came in and appeared at the said inquisition and claimed ownership of the said goods and traversed that Tilsley was not possessed of the said goods *ut de bonis suis propriis* at the time of his death. Thus, he pleaded ownership in himself and denied the ownership of Tilsley in the said goods. And issue is joined upon it. And a verdict is found for the king against Powell that they were not the goods of Powell.

Still, Powell moved in arrest of judgment that the process upon which the said goods were seized into the hands of the king is erroneous and bad for the reason aforesaid and, on account of this, no judgment is to be given for the king. And it was doubted whether Powell can allege it, inasmuch as his plea is found against him and he cannot now take advantage of the error in the proceeding before to which he was not a party or privy. And it was said by his counsel that, when he appeared and pleaded to the inquisition upon which the seizure for the king is, that now he is made a party to the entire record and, on account of this, takes advantage of any error in it.

201

**Attorney General v. Acton**  
(Ex. 1637)

*The statute which forbids the use of timber to make charcoal does not apply to the use of the branches of the timber trees.*

British Library MS. Hargrave 30, f. 267v  
(Turnour's reports)

Upon an information exhibited against Mr. John Acton<sup>1</sup> for applying or causing to apply so many timber [trees] or part of the timber of the trees, etc., the defendant has pleaded *non culpabilis*. And the opinion of the court [was] that the employing of the branches of the timber was not within the Statute<sup>2</sup> but the employing of that part of the tree that was timber [was]. And this information was thus for employing part of the timber of the trees, and, this not being proved, a verdict at the bar was against the king.

---

<sup>1</sup> *Attorney General v. Walter Acton*, Public Record Office E.159/473, recorda, Mich. 9 Car. I, rot. 26.

<sup>2</sup> Stat. 1 Eliz. I, c. 15 (SR, IV, 377); Stat. 23 Eliz. I, c. 5 (SR, IV, 667).

**Rex v. Vermuyden**  
(Sutton Marsh Case)  
(Ex. 1637)

*Dry land washed up by the sea belongs to the crown, not to the riparian landowner.*

British Library MS. Add. 35958, ff. 428, 450v  
(Hardres MS. reports)

An information [was brought] in the Exchequer chamber *ex parte regis* for intrusion in 7000 acres of land against Sir Cornelius Vermuyden, William Wilde, L. George, Michael Holdsworth,<sup>1</sup> [and others]. And it was shown how these 7000 acres of land, called Salt Marsh, lie next to Sutton Magna in Holland in the County of Lincoln *inter fluxum et refluxum maris et aquam sal-sam et marinam*. And it showed further how they were relict by the sea and how King James was seised of them in his demesne as of fee. And by his letters patent dated 9 December 11 Jac. [1613], he granted to Peter Ashton and others all of the place called Salt Marsh abutting *juxta* or *prope altum mare*. And it showed also divers other abuttals of it. And it granted further *omnes terras suas in occupatione diversorum hominum cum toto incremento maris adtunc vel in posterum* and concluded *omnia quae quidem praemissa fuerunt in vel prope mare, viz.* between high and low water mark. And this grant was in fee. And it showed further how Peter Ashton survived and how, in 11 Car. [1635 x 1636] by an enrolled deed, he did regrant and surrender to the now king all of the said premises *virtute cuius* the king was seised until the said intrusion of the defendants.

They made divers pleas. Sir Cornelius Vermuyden, except 2089 acres, pleaded not guilty, and for them, he pleaded they were abuttals different from the information, showing how they lie *juxta* Sutton and to the seashore and to the ebb of the sea. And he showed how they were relict by the sea and also that King James was seised of Long Sutton in Holland in the County of Lincoln and how Holland contains divers hundreds and there *habetur conseu-*

---

<sup>1</sup> The Lord George Michael of Holdsworth *MS*.

*tudo quod domini maneriorum habebunt maritimum seu [ blank ] per fluxum et refluxum maris relictum et de mari projectum* and how these lands were relict and projected upon the manor of Sutton, of which the king was seised in the right of the duchy of Lancaster *per fluxum et refluxum maris per temporis incrementum*. And he showed how they descended to King Charles. And he pleaded his grant of them to him [of his duchy seal].

It was opened and argued at the bar by *Lenthall*, of counsel with the defendants. First, he questioned whether the duke of Lancaster, by a grant of *jura regalia* and other words in it, will have *marescum maris relictum* and thrown upon his manors where that such reliction is done *per incrementum temporis paulatim* or insensibly by little and little, [whether] this privilege can belong to the subject. *Relictus est maris ressessus, et projectus est maris proluvio*. Thus, in this [whether] it can or will be part of the adjacent manor, especially in this case of the duke, is now the question.

I conceive that if *maris ressessus*, as Bracton says, *in acquirendo rerum dominio*, lib. 2, ca. 2,<sup>1</sup> and Selden, in his description of the *mare clauso*,<sup>2</sup> calls it a bare place left from the sea, without other addition *mare a limine* [?], it is where the sea goes in her fluxes and refluxes up gravel and such kind of slimy stuff which by little and little and by continuance of time become firm ground. Bracton, lib. 2, ca. 2, and also 22 Ass. 93.<sup>3</sup> He says, if water insensibly and *paulatim* and in the process of time, and not in one day or one year, gain upon the soil of the other, the person who has the water will have the advantage of it. And Bracton calls it *incrementum* [ . . . ] lands.

But in 18 Hen. III, *membrana* 22, rot. claus., in the case of the Town of Scarborough, there, restitution was granted of land gained by the sea by a sudden inundation because this Bracton calls *incrementum apparens*. And in Dyer 326,<sup>4</sup> there, many cases are put to this purpose.

The second question [can be] whether this *jus alluvionis* or *projectiore* by the sea crosses any prerogative that the king has in the sea *jure domini* or

---

<sup>1</sup> *Bracton on the Laws and Customs of England* (S. E. Thorne, ed., 1968), vol. 2, pp. 43-45.

<sup>2</sup> J. Selden, *Mare Clausum* (1635).

<sup>3</sup> YB 22 Edw. III, Lib. Ass., p. 106, pl. 93 (1348).

<sup>4</sup> *Anonymous* (1573), 3 Dyer 326, 73 E.R. 737.

*proprietatis*. I hold that it will not. And in this case, it is to see what allowances such grants, and especially this charter to the duke of Lancaster, have had. By statute, as appears [in] Plo. 213,<sup>1</sup> the duchy is now settled in the crown and no one can have it but the king, and as [his] natural body *in corpore incorporali*, and they are only separate as to the ceremonies in conveyances. The words of the charter to him appear [in] Plo. 215. There, in the first place, it is *omnes honores, possessiones, dominia* etc., secondly, *omnes libertates et jura regalia, consuetudines, franchisias*, etc. And all these are confirmed by an act of Parliament for allowances. The see 10 Hen. IV, 7;<sup>2</sup> where *non omittas* issued in the case of [the] duke, which is a prerogative, that belongs to the king. And in 3 Hen. VIII, rot. 112, Plo. 216, a *precedendo* [was] granted in a *casu regis*. The difference between him and the king is only in survey orders [and] government process, but not in person. 9 Rep. 25 and 26.<sup>3</sup>

There are some things called flowers of the crown which are incidents inseparable to it.

In 24 Hen. VIII, rot. [ *blank* ], ports were leased by the duke of Lancaster, which is a privilege that belongs to the king.

Objection: 35 Hen. VI;<sup>4</sup> ornaments of the crown are not liable to custom.

Answer: There is a difference between ornaments and interests. I agree with the case of ornaments because, by the common law, the horse and spurs of a knight cannot be put in execution because they are part of his honor and it is not seemly for him to go on foot; thus of ornaments worn on St. George's Day; also such grants have been in all ages made to him. [In] 6 Hen. VII, a lease of land gained from the sea was made to him. And in 3 Hen. VII, customs were leased to him. In 2 Hen. VIII, a salt cote erected between high and low water mark was demised and enjoyed. [In] 3 Hen. VI, a salt cote *super litas maris* was leased. In 35 Hen. VI, tofts [were] leased as *marescum et altum*

---

<sup>1</sup> *The Case of the Duchy of Lancaster* (1562), 1 Plowden 212, 75 E.R. 325, also 2 Dyer 209, 73 E.R. 462, Jenkins 224, 145 E.R. 155, British Library MS. Hargrave 4, f. 128.

<sup>2</sup> *Rex v. Lord L'Estrange* (1409), YB Hil. 10 Hen. IV, f. 7, pl. 5.

<sup>3</sup> *Case of the Abbot of Strata Mercella* (1591), 9 Coke Rep. 24, 25-26, 77 E.R. 765, 768-769.

<sup>4</sup> YB Mich. 35 Hen. VI, f. 25, pl. 33 (1456).

*maris cum domino maris*. And in 6 Hen. VI, [there was a] lease of ports. And there are thirty or forty precedents that these things in our case have been leased. Thus, by law and custom, these have been allowed and such allowance made 12 Jac. *jure ducatus*, and not *coronae*.

Now, for the reasons:

The first reason by which these lands projected should belong to the adjacent manor in respect of the insensibility of the gaining of it [is] because, when they will be in the king, there should be certainty in the beginning, continuance, and end. But in our case, the one hundredth increase cannot be perceived.

Also, the second reason, [is] if this will belong to the king, it is impossible for the subject to avoid intrusion and he has not the means to avoid it. And by 8 Rep., *Tourson's case*,<sup>1</sup> when there is an inception *juris regalis*, it must be apparent of record. And it is not in our case.

The third reason is taken of the congruity of the person of the king whose little increases are not looked upon or not worthy to be regarded by the king; as in waste, small things are not esteemed. There are two sorts of laws, *jus privilegii* and *jus commune*. And these laws do not cross the one the other because, as Bracton says, *de acquirendo rerum dominio jus est forsque bonum jubens et malum prohibens*.

Now, I will examine cases of ports and creeks. There is a threefold right that the king has in these things. First, there are jurisdictions, second, franchises, as *mercatum*, both 2 Edw. III, 7,<sup>2</sup> and 18 Edw. I, 3, *proprietaes*, by which no one can throw anchors upon the land of the subject without the assent of the king, but, by his assent, he can. And this was the case of *Morgan in Bristol*.<sup>3</sup> Thus it is of islands encompassed with the sea. Now as long as it is *altum mare*, no one would deny the ownership, right, and privilege which the king has [in it] and during this time which is *mare persuens* which is the reason of denying of protection but it is properly a property in the king. But, when the sea leaves the shore, there, the law construes it in another nature because where before the sea and water was the principal, now the land and

---

<sup>1</sup> *Tourson's Case* (1610), 8 Coke Rep. 170, 77 E.R. 730.

<sup>2</sup> YB Hil. 2 Edw. III, f. 7, pl. 20 (1328).

<sup>3</sup> *City of Bristol v. Morgan* (1635), M. Hale, 'De Portibus Maris' in F. Hargrave, *Collection of Tracts* (1787), p. 81.



soil is the principal, and now it is not called *mare* but *litas seu ripa maris*. And, now, it is become part of the possession of the crown, *Corone*, 399,<sup>1</sup> and a portion of the part of the other between the high and low water mark, and, if wreck be claimed upon it, it will be tried by a jury. 15 Eliz., rot. 445; there was an issue tried upon an information exhibited in such a case, with which agrees 30 Edw. III, rot. 22. The reason is plain that now it is perfect soil and shore of the sea and not the sea itself because then [a writ of] *praecipie* would not lie for it. 18 Edw. IV, 4.<sup>2</sup> But it lies *de litore*, 13 Edw. III, *Entre*, 57;<sup>3</sup> 18 Edw. III, 13, and Sir Henry Constable's case, 5 Rep.,<sup>4</sup> come near to our [case], where it is held that this between the high and low water mark can be part of the manor. Pas. 11 Hen. VII, rot. 4, in Lincoln, an information [was] exhibited against the inhabitants for the taking of great fish and sturgeon, and they pleaded that they took it within the limits of the city, and judgment [was] given against the king. 31 Edw. I, rot. 32; [there was] a grant of wreck [*in omnibus terris marescis*, and [it was] held good. And this does not cross any jurisdiction that the king has in the sea because now it is land and soil and no part of the sea. And it is not inconvenient to have an interest in land if it is the waste of the king.

The fourth reason is the subject is bound to guard his lands and on account of this for the same reason it must be returned again. And, if a wreck in such a case will not be, all of the grants of wrecks within England will be to no purpose because, if it will be law that, where there is a small parcel [of land] between the manor and the sea, that this wreck does not belong to the lord of the manor, no one will have a benefit from them.

The fifth reason [is], when any royal prerogative is given to the king, something is always given to the subject in recompense for it, as of jurisdic-

---

<sup>1</sup> 8 Edw. II, Fitzherbert, Abr., *Corone*, pl. 399 (1314 x 1315).

<sup>2</sup> YB Pas. 18 Edw. IV, f. 4, pl. 24 (1478).

<sup>3</sup> YB Mich. 13 Edw. III, Rolls Ser. 31b, vol. 3, p. 174, pl. 78 (1339), Fitzherbert, Abr., *Entre*, pl. 57.

<sup>4</sup> *Constable's Case* (1601), 5 Coke Rep. 106, 77 E.R. 218, see also 1 Anderson 86, 123 E.R. 367; British Library MS. Lansdowne 1088, f. 69; S. A. Moore, *A History of the Foreshore* (1888), pp. 224-241 (Sir John Constable's Case and Sir Henry Constable's Case).

tion, the subject has for this his defense; thus of other things. But, in our case, only the cause of the nature gives it.

The second question [is] whether lands relict by the sea by *jus aluvionis* cannot be claimed by prescription and if it be an inherent prerogative in the king. And two things in it are whether prescription be well laid because it is laid to be *consuetudo patriae et Hollandiae*. It is clear that wreck, treasure trove, waif, [and] stray can be claimed by prescription. Thus, without doubt, by the same reason, the land can be bound. 3 Edw. I, rot. 100; prescription by all of the county [was] good. If it was part of the waste, it could be bound by prescription because it supposes a grant and a grant of a manor *cum incrementis* [is] good because Bracton says *in loco supra* that it is as *possidentur* before it happens; thus of a ward's. Dyer 108.

The second reason is because the king is entitled only by matter of fact, otherwise of record. 9 Rep., Strata Marcella's case,<sup>1</sup> agrees with the difference. And whether this custom will bind in respect of the uncertainty of the alleging of it, it seems that it will. There are divers precedents that a custom in the Weald of Kent [to pay no tithes of wood is good and [was] allowed. And there is such a custom in the County of Cornwall, and [it was] allowed. So of tithe fish by *consuetudine patriae*, [it was] good. So of gavelkind in Kent;]<sup>2</sup> so to have wreck, 25 Edw. III, rot. 49, in Surrey<sup>3</sup> and in Sussex, 18 Edw. I, rot. 30, a custom in a hundred to have wreck [was] allowed [to be] good, 15 Edw. I, rot. 25, to have *marescum* [was] good. Thus, by common law, if a man be bound to carry a load of hay, it will be according to a custom of the county. *Marescum* and *warescum* are metaphors and take for land left as not fitting to be used. *Inst.* 3. 8; 8 Hen. III, rot. 6, King's Bench. And Lincoln 31 Edw. I, ro. 1, *marescum est ibidem* called sixteen acres of land.

Now what inconvenience is there to claim it? Hil. 27 Edw. III, rot. 11, King's Bench; it was found by inquisition that the earl of Huntington, lord of the manor, had all of the sturgeons and great fish *jure sui dominii in aqua salsa et dulci* abutting *ad manerium*. 31 Edw. III, the Abbot of Peterborough's

---

<sup>1</sup> *Case of the Abbot of Strata Marcella* (1591), 9 Coke Rep. 24, 77 E.R. 765, also *sub nom. Regina v. Vaughan*, Moore K.B. 297, 72 E.R. 591.

<sup>2</sup> Words added from British Library MS. Lansdowne 1081, f. 178.

<sup>3</sup> Treasury MS.

case, which began in 23 Edw. III;<sup>1</sup> it was then debated but no judgment [was] entered. But in 41 Edw. III, issue was taken upon a *consuetudinem patriae* in such a case, and [it was] found for the abbot, and judgment [was] given for him. Mich. 16 Edw. III, King's Bench, rot. 140; there [was an] information for the taking of sturgeons by the countess of Lincoln<sup>2</sup> [as] wreck of the sea that she had *rationem manerii abuttantis ad manerium*, and judgment [was] given for her upon it. 43 Edw. III, rot. 13, in Norfolk; the abbot of Ramsden<sup>3</sup> had appropriated 600 acres situated *juxta mare et fluxum et refluxum maris* within the manor, and, there, no custom [was] alleged, yet it will bind. Trin. 17 Eliz., Sir Henry Constable's case; the father claimed such a privilege to his honours and manors *infra litora maris*, and it [was] found and judgment [was] given for him.

The third question is whether the defendants can be guilty of intrusion *omnino*. And, upon this, the question is the king granted lands by a patent and, before the patentee entered, one by tort entered and made a feoffment, and then he surrendered to the king again, whether the feoffee be an intruder before an office or other record to entitle the king. He cannot before entry. The patentee did not have possession [in order] to have an assize. Stamford, *Prerogative*, 78.<sup>4</sup> And it is in the nature of a devise before the devisee enters. Thus, a feoffment before an entry cannot be said [to be] a disseisin to him but it puts his estate to a [writ of] right. *Inst.* 240.<sup>5</sup> There, the difference is taken between such a title of entry that is not taken away by descent and a right. Also, when a patentee has only a right, he cannot grant more to the king [and not the land]. Also an entry or action cannot be granted except by the king, Bp. 143; Dyer 1b, 30b,<sup>6</sup> though it be to the king because then the king would

---

<sup>1</sup> *Abbot of Peterborough's Case* (1367), S. A. Moore, *A History of the Foreshore* (1888), pp. 157-158.

<sup>2</sup> *Countess of Lincoln's Case* (1342), S. A. Moore, *A History of the Foreshore* (1888), p. 151.

<sup>3</sup> *Abbot of Ramsey's Case* (1369), S. A. Moore, *A History of the Foreshore* (1888), pp. 158-159; Note (1573), 3 Dyer 326, 73 E.R. 738.

<sup>4</sup> W. Staunford, *An Exposition of the King's Prerogative* (1567), f. 78.

<sup>5</sup> E. Coke, *First Institute* (1628), f. 240.

<sup>6</sup> Note (1512), 1 Dyer 1, 73 E.R. 2; *Brevertton's Case* (1537), 1 Dyer 30, 73 E.R. 67.

be a protector from the injury. Bracton, lib. 5, ca. 10, agrees; and 3 Rep. 4, of a writ of error; 2 Hen. VII, 8; Littleton 447, the difference when it is by way of extinguishment, but, by act in law, there can be a right, not an escheat to the king without express words. Also, the king is not seised *in doménico suo ut de feodo* before an office. Also, it must inure by grant, not by surrender, because nothing is left in the king and a grant to the king is not in him before an office or record. Stamford, *Prerogative*, 54; 17 Edw. III, 10; 22 Edw. IV, 1.<sup>1</sup> And before an office, [there is] is no intrusion. 8 Rep. 170.<sup>2</sup>

Also, it is not said that it was in the king by *plura recorda*, to which there could be a traverse.

Also, the information is insufficient in itself because it and the patent vary in the boundaries.

Also the patent is *in tenura diversorum hominum*, which is void for the uncertainty. Dyer 293.

Thus, upon all of the matter, he concluded against the king.

*Rolle*, on the same day, answered the two objections taken to the answer of Sir John Jackson, one of the defendants in the information. One exception was because he pleaded the feoffment of the king as duke and did not express that livery was made by an attorney. He answered there is no need because, though livery is requisite, Plo. 215; 26 Hen. VIII, 9,<sup>3</sup> yet a feoffment implies a livery; thus of a lease for life or a gift in tail. 22 Edw. IV, 15, and Plo. 149,<sup>4</sup> agree; a feoffment for life made by an abbot unless it was dated *in domo capitulari*.

The second exception [was] he pleaded a grant of 1016 acres *per nomen* of the fifth part of 7000 acres, which cannot be. He answered this is nothing because it is an averment and it is the general form of conveyances. 14 Hen.

---

<sup>1</sup> W. Staunford, *An Exposition of the King's Prerogative* (1567), f. 54; YB Hil. 17 Edw. III, f. 10, pl. 34 (1343); YB Pas. 21 Edw. IV, f. 1, pl. 1 (1481).

<sup>2</sup> *Tourson's Case* (1610), *ut supra*.

<sup>3</sup> *The Case of the Duchy of Lancaster* (1562), 1 Plowden 212, 215, 75 E.R. 325, 330; YB Hil. 26 Hen. VIII, f. 9, pl. 3 (1535).

<sup>4</sup> YB Pas. 21 Edw. IV, f. 26, pl. 19 (1481); *Throckmerton v. Tracy* (1555), 1 Plowden 145, 149, 75 E.R. 222, 229, also 2 Dyer 124, 73 E.R. 272, 124 Selden Soc. 93.

IV, 30;<sup>1</sup> a grant by a name pleaded with *per nomen* [is] good because an averment is the same person. 1 Hen. VII; a grant of so many acres which he had by descent from his father need not show the number. Thus the *per nomen* does not vitiate this grant above, *scil.* 1016 acres, because it could be that the intent was not to pass more. Thus, one acre pleaded to be granted *per nomen* of ten acres is good; thus of a fine by the same reason. 13 Jac., King's Bench, Stacy and Read's case upon 2 Edw. VI;<sup>2</sup> a grant of the king of tithes [was] pleaded and the patent [was] entered *in haec verba* that it was in the tenure of Henry VIII and [there was] no averment of it; yet [it was] good. Thus 14 Jac., Faulkner and Faulker's case;<sup>3</sup> a grant of a rent out of all of his leased lands; it need not be averred in the pleading. Then, if it be alleged, it would not vitiate. Thus [it] is in our case.

*Bankes*, attorney [general], argued at another day that the king is seised of the British seas and the soil of it *jure coronae*. And this he endeavored to prove by authority [and] reason. And he answered to the objection made against it in the book of *Mirroure of Justices*, which was written before the time of William the Conqueror. It is said [in] cap. 1, fo. 8,<sup>4</sup> [that] the sovereignty of the land, sea, forests, chases, and parks belong to the king *jure coronae* and also that all seignories and lands were at first in the crown, and, afterwards, the king granted them to the lords and other men. Then, if he cannot show a grant of the king of the sea and the soil by the king, it remains in the king. In *Britton*, another ancient book, ca. 33, fo. 83,<sup>5</sup> it is specified that some things are more common, as the sea for navigation, some things less common, as fishing upon the sea. But this does not prove that the soil is common but only the fishing *quamdiu* that it remains part of the sea. *Fleta*<sup>6</sup> says *alia sunt communia*, as *litora maris*, *alia privata*, as fishing in the sea.

---

<sup>1</sup> *Boson's Case* (1413), YB Hil. 14 Hen. IV, f. 30, pl. 38.

<sup>2</sup> Stat. 2 & 3 Edw. VI, c. 13 (*SR*, IV, 55-58).

<sup>3</sup> *Fawkner v. Fawkner* (1616), 1 Rolle Rep. 422, 81 E.R. 580.

<sup>4</sup> *The Mirroure of Justices* (W. J. Whittaker, ed., 1895), 7 Selden Soc. 8.

<sup>5</sup> *Britton* (F. M. Nichols, ed., 1865), vol. 1, p. 213.

<sup>6</sup> *Fleta* (H. G. Richardson and G. O. Sayles, ed., 1972), 89 Selden Soc. 1.

These show a greater community in the sea than upon the land, *viz.* fishing and navigation. But to have the soil of the sea, which is permanent, this would be nothing because the soil of the sea will not be in the king. Bracton, lib. 2, cap. 1, fo. 8,<sup>1</sup> which [was] written in [the time of] Henry III, does not conclude that the soil belongs to any subject, but to the contrary, because he says that *bona inventaria fuerunt communia*, but now they belong to the king *jure coronae*; thus, he says of all other things which are *nullius in bonis*. And fo. 9, *ibidem*, he says these belong to the king *propter privilegium suum*. And in the same book, cap. 3, fo. 120,<sup>2</sup> he says that *wreccum maris, pisces grossi, et alia animalia vagrantia* belong to the king *propter privilegium*. And *ibidem*, fo. 170,<sup>3</sup> he say that they are things enquirable before the justices in eyre so that these things which are *nullius in bonis* belong to the king, thus these things to whom no other can make title. The same law is of islands and the soil of the sea. The ancient kings of England have styled themselves lords *omnium rerum Brittanicarum*. And [as to] the office of the admirals, who were before the conquest though they were augmented in the time of Richard I on his return from the Holy Land,<sup>4</sup> his grant was to have and [be] seised of *omnia et singula bona et super litora maris et inter fluxum et refluxum maris*. And in this famous record in 27 Edw. I in the Tower [of London] where all the agents of all nations were before the commissioners touching the dominion of the sea, there, it was agreed and acknowledged that the dominion of the sea belongs to the king from the time of which [memory runneth not to the contrary] etc. And there, also, [it was] held that power to execute jurisdiction upon it belongs to the admiral. And the kings by many ancient grants have conveyed the custody and wardship of the sea to others. 8 Hen. III, to Pierce de Lucy; thus in 9 Hen. III and 15 Hen. III and 22 Edw. I, membr. 8, [and] 23 Edw. I. These show that the king had perfect ownership in the soil.

In the old *Register*, which was written before the Conquest, fol. 25 and 26, it appears that the king can take one into his protection *tam per mare*

---

<sup>1</sup> *Bracton on the Laws and Customs of England* (S. E. Thorne, ed., 1968), vol. 2, p. 41.

<sup>2</sup> *Bracton*, vol. 2, p. 339.

<sup>3</sup> *Bracton*, vol. 3, p. 40.

<sup>4</sup> Island *MS*.

*quam per terras. Ibidem* 127 agrees there. And *Avowry* 192.<sup>1</sup> The king is called *conservator pacis tam per mare quam per terras*. Glanvill, who wrote in the time of Henry II, lib. 9, cap. 11,<sup>2</sup> [said that] purprestures made upon the sea or any branch of it belong to the king to punish, so that to all purposes, the king is seised of the sea *jure coronae*. In 6 Ric. II, *Protection*, 46;<sup>3</sup> the sea is called part of the inheritance of the king. And by a record in Hen. III which began<sup>4</sup> in 20 Edw. I, the Prior of Tilmore's case,<sup>5</sup> there, it was held that the soil of the place that was an arm of the sea belonged to the king, not to the bishop of Durham, who was the next lord adjoining to it, then *a fortiori*, all the residue of the sea belongs to him. See 2 Edw. III, 12. In 12 Assize, there is a query whether there will be an apportionment of the rent when the sea overflows the land.

It is clear that, if enemies of the realm gain part of the land, there will be an apportionment. Now, the sea is like an enemy so that it seems to me that there will be an apportionment. In 22 Ass. 92,<sup>6</sup> it says that be there a lord of a river and the river gains the banks of the other by little and little, the lord of the river will have it. And, if it be so in the case of a subject, *a fortiori* in the case of the king. In 46 Edw. III, *Conusans*, 36;<sup>7</sup> trespass for the taking of a ship upon the River of Hull and those of Hull demanding conusance and [they] could not have it because it was a royal river. See the book, and it is contrary because the conusance was granted. Those of Ireland are ruled by the same laws which we are, saving in some particular statutes, and it appears by the resolution of all of the court there in 8 Jac. in Sir John Davies' reports<sup>8</sup> that the sea is the inheritance of the king and all navigable rivers belong to

---

<sup>1</sup> Fitzherbert, Abr., *Avowrie*, pl. 192 (temp. Edw. I).

<sup>2</sup> *Glanvill* (G. D. G. Hall, ed., 1965), p. 113.

<sup>3</sup> YB Trin. 6 Ric. II, Ames Found., vol. 2, p. 49, pl. 35 (1382), Fitzherbert, Abr., *Protection*, pl. 46.

<sup>4</sup> Sic in MS.

<sup>5</sup> *Prior of Tynemouth's Case* (1292), S. A. Moore, *A History of the Foreshore* (1888), pp. 111-138.

<sup>6</sup> YB 22 Edw. III, Lib. Ass., p. 106, pl. 93 (1348).

<sup>7</sup> Pas. 46 Edw. III, Fitzherbert, Abr., *Conusans*, pl. 36 (1372).

<sup>8</sup> *The Case of the Royal Piscary of the Banne* (1610), Davis 55, 80 E.R. 540; S. A. Moore, *A History of the Foreshore* (1888), pp. 247-250.

the king and, where the sea ebbs and flows, the king will have the soil, and in Dyer 326,<sup>1</sup> where it is made a query to whom the soil gained by the sea will belong. Yet, afterwards, it was resolved for the king, as appears in Mich. 16 Eliz., rot. 445, in the Exchequer, in an information against William Hamond<sup>2</sup> for intruding into the land of the king gained by the sea; there, the issue was that it was not *pars litoris* or taken from the sea; admitting that it was, that it belonged to the king, and thus it was found by the verdict.

And in the book of 43 Edw. III, cited in Dyer 326b. The issue was whether an abbot had purchased those lands without a license, and it was found not, and, as it was pleaded that those lands were gained by the sea [and] so found, yet it was not pertinent or pursuant to the issue. And in 41 Eliz., the abbot of Peterborough's case,<sup>3</sup> which has been objected against the king, there, there was a custom *de consuetudine patriae*, [as] in our case, but the issue was whether these lands were purchased without a license and thus [it was] found and also *consuetudo patriae*, but it is not material. First, it was not the point in issue; second, no exception was taken to it; third, the jurors are not judges in such a case because it is a matter in law.

[As to the] objection of Sir Henry Constable's case, of Lane's case, that a lord of a manor can have the land between the high and low water mark, he answered this case is but one; it could be, still, it is not impossible because it could pass by a grant to him at first. But Coke 107;<sup>4</sup> there, [it is] said that the sea is of the allegiance of the king and he will have the profits [in] and upon it.

In Gregory Philpott's case,<sup>5</sup> now of late resolved in this court, where the question was upon an information whether the soil between the high and low water mark belongs to the king *jure coronae*, [it was] resolved with one voice

---

<sup>1</sup> *Anonymous* (1573), 3 Dyer 326, 73 E.R. 737.

<sup>2</sup> *Digges v. Hamond* (1573), 3 Dyer 326, 73 E.R. 738, 110 Selden Soc. 347; S. A. Moore, *A History of the Foreshore* (1888), pp. 219-221.

<sup>3</sup> *Abbot of Peterborough's Case* (1367), S. A. Moore, *A History of the Foreshore* (1888), pp. 157-158.

<sup>4</sup> *Constable's Case* (1601), *ut supra*.

<sup>5</sup> *Attorney General v. Philpott* (1629), S. A. Moore, *A History of the Foreshore* (1888), pp. 261-262, 895-907; decree of 26 November 1631, British Library MS. Hargrave 10, f. 69v; 2 Anstruther 607, 145 E.R. 981.



yes. *A multo fortiori*, the soil of the body of the sea belongs to the king if a branch of it belongs to him.

See *Instit.*, 260,<sup>1</sup> an infant born upon the sea is a subject, and *Doctor and Student* 127, the king is the lord of the narrow seas.<sup>2</sup>

In Selden's *Mare Clausum*, lib. 2, cap. 24, fo. 253, 254, there, his intention appears that the soil of the sea belongs to the king. And he calls the sea *sacrum patrimonium domini regis*.

Second, this realm is an island and environed with the sea and it is bounded by sea like a forest.

The third reason [is because] no subject can take title to the soil [because all of the soil] of this realm belongs to the king unless passed from the king by a grant because, as Bracton says, lib. 3, fo. 120, if a thing be *nullius in bonis*, it will be in the king.

And *Doctor and Student*, 5; this law which makes all things in common was not of reason but of necessity. And this is the reason of the island of England because *nulla terra incognita* and no place be common weal and everyone must be content with his bounds of freehold. By the common law, it will not be in abeyance. But, if our case [will be admitted], there will be a freehold nowhere. 8 Hen. IV, 2b;<sup>3</sup> [it is] said all goods which are not claimed by some other will be in the king in law. Brooke said in the *Abridgment* this case is of lands.

The third reason [is] all the profits of the sea belong to the king; therefore, the soil itself because what is the land except the profits. And anchorage is due to the king which shows that the soil belongs to the king. And in 5 Hen. V, in the pipe office, the anchorage was demised.

The fourth reason is because such lands have been in the crown and granted by it anciently. Such reason was used for which the king will have royal mines, in Plo. 314,<sup>4</sup> for such profits have been answered to the king and granted by him. 12 Edw. II. The king demised that salt marsh in Sussex for two lives as lands gained from the sea. [There is] such a grant in 1 Ric.

---

<sup>1</sup> E. Coke, *First Institute* (1628), ff. 260-261.

<sup>2</sup> *St. German's Doctor and Student* (T. F. T. Plucknett and J. L. Barton, edd., 1974), 91 Selden Soc. 292.

<sup>3</sup> YB Mich. 8 Hen. IV, ff. 1, 2, pl. 2 (1406).

<sup>4</sup> *Regina v. Earl of Northumberland* (1567), 1 Plowden 310, 75 E.R. 472.

II [in the pipe office. And in 2 Ric. II, there was a demise of an anchorage. In 8 Ric. II],<sup>1</sup> there was a demise for twenty-four years. And in several reigns of kings, there have been such grants of such lands and of salt marshes, as in Abergavenny, Portsmouth, Yorkshire, Gloucestershire, Essex, Lincolnshire, Norfolk, [and] Kent. And copperas<sup>2</sup> stone thrown by the sea upon the land belongs to the king, and they have been demised by him.

The fifth reason [is], if a meadow of a common person be overflowed by the water and, afterwards, it becomes dry, without question, the subject will have it again. Now, the shore is the great meadow of the king; thus, the same privilege will be to the king as to the subject. And, if one grants *aquam suam*, the soil is passed because *cuius est solum eius est usque ad coelam*, as in 14 Hen. VIII, 1,<sup>3</sup> of a nest of sparrows in a tree, it belongs to the king himself. 22 Ass. 92<sup>4</sup> agrees it to be from the sea.

The sixth reason [is] the king has the soil of navigable rivers and of the ports, which are called *gemmae regni*. Thus, by the same reason that the arms of the sea belong to the king, the body itself [does] because the body can privilege the branches, as no tithes can be paid for branches of great trees. Plo. 470.<sup>5</sup> But the branches will never privilege the bodies.

The seventh reason [is], if the king regains Calais, a subject who had lands at the first will not have them again though he has evidences to show for them. Thus, lands gained from<sup>6</sup> the sea is like lands gained from the enemy, as 7 Edw. IV.

The eighth reason [is] the subject and lords of manors have taken *litora maris* by grants. The grants of 5 Edw. III, 3,<sup>7</sup> and 39 Edw. III, 5, have been objected, where waifs and strays and royal fish can be claimed by prescription.

---

<sup>1</sup> Words added from British Library MS. Lansdowne 1081, f. 178.

<sup>2</sup> Copprise *MS*.

<sup>3</sup> *Bishop of London v. Nevell* (1522), YB Mich. 14 Hen. VIII, f. 1, pl. 1, 119 Selden Soc. 88.

<sup>4</sup> YB 22 Edw. III, Lib. Ass., p. 106, pl. 93 (1348).

<sup>5</sup> *Soby v. Molins* (1575), 2 Plowden 468, 75 E.R. 700, 1 Gwillim 133, 1 Eagle & Younge 60.

<sup>6</sup> per *MS*.

<sup>7</sup> YB Hil. 5 Edw. III, f. 3, pl. 11 (1331).

5 Rep. 107;<sup>1</sup> there was an inference out of those books that the soil belongs to the subject. He answered, first, it is only Lord Coke's inference; second, these things can be thrown beyond the high water mark; third, they were granted at first and, thus, good.

[To the objection] that all of the lords will lose their privileges, he answered, in all cases, it is not so. Also, they could have it by a grant and all it is good.

Third, I will answer the objections that have been objected that the subject has an interest in fishing and navigation. He answered this is not a consequence that he has an interest in the soil, as of highways and commons of the king.

The second objection [was], though a private person cannot have it, yet the duke of Lancaster had it because he has *jura regalia*. He answered it is not part of the record; second, the duke had no gift of the lands gained by the sea; third, though he has *jura regalia*, it was only within the county palatine of Lancaster because to make livery in one case is not in the other case. 21 Edw. IV, 60.<sup>2</sup>

The third objection [was], in 6 Car., this point was adjudged. He answered [that] then, the question was not directly in debate, but *obiter dictum*.

The second point, whether a *consuetudo patriae* prevails against the king in such a case, I conceive not. A custom can gain a freehold in profits out of the land of a subject but not the land itself, *a fortiori* in a case of the king because each subject in a demand or defense must make a title to the land in a real writ, *quare impedit*, avowry, etc. but never was it seen in a book of entries or a book of law whereby it was not made to the possession by prescription but it will be by a conveyance or descent.

*Doctor and Student*, 16b; there, it says no one, by prescription in land, makes a right in the case of a subject, but, in the case of the king, it is more clear. Plo. 498.<sup>3</sup> All lands at first came from the king, and no land can be

---

<sup>1</sup> *Constable's Case* (1601), *ut supra*.

<sup>2</sup> YB Mich. 21 Edw. IV, f. 60, pl. 17 (1481).

<sup>3</sup> *Grendon v. Bishop of Lincoln* (1576), 2 Plowden 493, 498, 75 E.R. 734, 741, also Benloe 293, 123 E.R. 206.

gained from the king except by matter of record. 2 Hen. IV, 7;<sup>1</sup> an entry upon a farmer of the king does not oust him. 5 Edw. IV, 4; Dyer 139.<sup>2</sup> Title of entry for a condition does not take away the land of the king without a patent. Plo. 553;<sup>3</sup> a recovery against the lessee for life of the king will not bind the king without a title. Thus, if it could not be gained by such means, *a fortiori* [not] by usurpation. *Nullum tempus occurrit regi*.<sup>4</sup> [The king will be confined to no time.] *Natura Brevium* 5; tender of a mark cannot be where the king is a party in a writ of right. 12 Hen. VII, 3; no lapse against the king. And Plo. 243, 244;<sup>5</sup> the Statute of Limitation<sup>6</sup> will not bind him. 6 Rep., Boswell's case, 20;<sup>7</sup> a usurpation gains nothing against him. 35 Hen. VI,<sup>8</sup> a custom does not bind the king for his goods, *a fortiori* not for his lands. [Custom will not bind him.]

The third point is upon the pleading. It is alleged to be a *consuetudo patriae quod omnes domini* will have *marescum maris secundum minus et minus per fluxum et refluxum maris*. The first exception is no county<sup>9</sup> [was] cited before to which this word *patriae* will have relation. Thus *patriae* will be understood [to be] England, and it will not be pleaded as a custom but as a law. 21 Edw. IV, 53;<sup>10</sup> [an action] in dower for the third part. Thus 22 Hen. VI, 28; of an innkeeper. Dyer 54; of merchants. 9 Rep., Combe's case; no

---

<sup>1</sup> YB Mich. 2 Hen. IV, f. 7, pl. 29 (1400).

<sup>2</sup> YB Trin. 5 Edw. IV, f. 4, pl. 5 (1465); *Duke of Norfolk's Case* (1557), 2 Dyer 138, 139, 73 E.R. 301, 302.

<sup>3</sup> *Attorney General v. Walsingham* (1573), 2 Plowden 547, 553, 75 E.R. 805, 813.

<sup>4</sup> No time limits run against the king. *Attorney General ex rel. Grimsby v. Eyre* (1456), YB Mich. 35 Hen. VI, f. 26, pl. 33.

<sup>5</sup> *Willion v. Berkley* (1562), 1 Plowden 223, 243-244, 75 E.R. 339, 370-374, also 1 Dyer 102, 73 E.R. 223, 109 Selden Soc. 63.

<sup>6</sup> Stat. 32 Hen. VIII, c. 2 (SR, III, 747-748).

<sup>7</sup> *Lowe v. Bishop of London* (1605), 6 Coke Rep. 48, 77 E.R. 326, also *sub nom. Lancaster v. Lowe*, Croke Jac. 92, 79 E.R. 79.

<sup>8</sup> *Attorney General ex rel. Grimsby v. Eyre* (1456), YB Mich. 35 Hen. VI, f. 25, pl. 33.

<sup>9</sup> authority *MS*.

<sup>10</sup> YB Mich. 21 Edw. IV, f. 53, pl. 19 (or pl. 22) (1481).

surrender of a copyhold by an attorney. See 18 Edw. IV, 15, and 11 Rep. 85; of the exercise of a trade.<sup>1</sup>

Second, this is a vagrant and uncertain custom, and on account of this, [it is] void. The words of a custom are *quod omnes dominii manerii* which can be inferred lords mediate and immediate and lords for a term of life or of years. And thus, they cannot prescribe; as Dyer 71,<sup>2</sup> of an officer for life and a custom alleged in the inhabitants [was] void for the uncertainty. 6 Rep., Gateward's case.<sup>3</sup> Also, the custom is *super tenementum* which is an uncertain word because *quicquid tenetur est tenementum*, as an advowson.

And the third exception is *quod particulariter habebunt*, which word *particulariter* has no certain signification. And also, a custom cannot begin at this day, as will be supposed by this word *habebunt*, but it should be *habuerunt* also, and thus are all the precedents.

The fourth exception [is] the words beyond are *sabulone prope terras et tenementa*. Now, this word *prope* is a relative or comparative [word], *secundum subjectam materiam*, but it should be *proxime*. 29 Edw. III, 10; *juris utrum juxta P. et venire facias* was awarded of B. and it was held bad because it supposed that it was in or adjoining. Also, a thing can be *prope* to another *a latere* or direct. Thus [it is] uncertain, and a custom must be pleaded with certainty. 3 Eliz., Dyer 164;<sup>4</sup> a custom during widow[hood] cannot [be] pleaded, as for life.

Fourth, this custom is not well applied because it is not averred that these 7000 acres of land are *marescum maris* or *sabulones*. Second, they do not aver the seisin of the king of this as *marescum maris* at the time of the grant. Also, it is said *postea* where they were divers times alleged before, and it is not expressed to which it will extend. See Kel. 187,<sup>5</sup> upon 8 Hen. VI.<sup>6</sup>

---

<sup>1</sup> *Rex v. Richards* (1542), 1 Dyer 54, 73 E.R. 118; *Atlee v. Banks* (1613), 9 Coke Rep. 75, 77 E.R. 843; *Darcy v. Allen* (1602), 11 Coke Rep. 84, 77 E.R. 1260, also Moore K.B. 671, 72 E.R. 830, Noy 173, 74 E.R. 1131.

<sup>2</sup> *Withers v. Iseham* (1552), 1 Dyer 70, 73 E.R. 148.

<sup>3</sup> *Smith v. Gateward* (1607), 6 Coke Rep. 59, 77 E.R. 344, also Croke Jac. 152, 79 E.R. 133.

<sup>4</sup> *Roswell's Case* (1567), 3 Dyer 264, 73 E.R. 585.

<sup>5</sup> *Anonymous* (1516), Keilway 187, 72 E.R. 364, 116 Selden Soc. 697.

<sup>6</sup> Stat. 8 Hen. VI, c. 9 (*SR*, II, 244-246).

For an answer to the objections, the great exception was because it did not allege seisin at the time of the surrender and right cannot be surrendered. He answered, in the case of a patentee, there is no need [for an] entry. Plo. 240. Also, the information expresses a seisin at the time of the surrender.

The second objection [was] the demurrer has confessed all. He answered this only that it is sufficiently pleaded. 5 Rep. 69.<sup>1</sup>

The third objection was the patent [was] after 11 Jac.; thus, it is taken away. He answered this does not appear and, though it be thus, yet without a title for them, it is not good. See 37 Ass. 11; 1 Hen. VII.<sup>2</sup>

The case above in the Exchequer was now recited and argued by Baron WESTON, who thought judgment must be given for the king. And first, he answered the exceptions taken to the information.

The first exception [was] these 7000 acres are recited to be lying *juxta* Long Sutton and that it was usually surrounded *ad fluxus et refluxus maris* which cannot be because *ad refluxus maris* the sea makes its regress and deserts the land. He answered these words are superfluous because it appears upon the information that these lands were part of the seashore and relict by the sea. The second answer [is] the defendants have confessed that this which is alleged in the information is true. Thus, the exception and advantage cannot be taken to it by them.

The second exception appears [to be] that, after the grant to Ashton by the king, that some of the defendants entered before the patentee entered, which it was a disseisin, and thus he could not surrender. He answered [that] this that is alleged by them goes against them because, the patentee had not entered, therefore, there was not or could [not] be a disseisin and the king could not be put out of possession and his estate could not be put to the right and the patentee partakes of the privilege of the king before his entry, not afterwards.

The third exception [was] there are divers issues which must be determined before judgment should be given. He answered there are some issues out of which matters in law arise, and these will be tried first. Second, there

---

<sup>1</sup> *Burton's Case* (1591), 5 Coke Rep. 69, 77 E.R. 159.

<sup>2</sup> YB 22 Edw. III, Lib. Ass., p. 218, pl. 11 (1348); perhaps *Crofts v. Lord Beauchamp* (1486), YB Trin. 1 Hen. VII, f. 28, pl. 6.

are some issues extracted out of the matter of law. And third, there are some issues collateral to the matter in question. These last issues need not be tried at all. And, if there are issues of the second sort, they should be tried after the matter in law. In our case, some are dependant upon the matter in law; some are collateral, and those do not need a trial because, first, it is confessed that King James was seised; second, that they intruded, and then they traverse with *absque hoc*. It is put that the king was not seised or that they did not intrude, which is contrary and repugnant in themselves and unnecessary *omnino* to be tried. And there are other issues which, though they were tried against the king, yet judgment can be given for him as the issue tendered that the patentee of the king was not seised so that he could surrender to the king; admitting this, then the king was [at] all times in possession so that they will be adjudged intruders.

There are two great points only in the case; first, whether the king was seised of these lands solely derelict by the sea *jure coronae aut jure ducatus Lancastriae*. I conceive that he is seised *jure coronae*.

[It was] objected the duke had *jura regalia et jus alluvionis* granted to him. First, he answered these privileges belong only to the county palatine and do not come to our case. Second, he answered, admitting that so, still they must be pleaded because we are not bound to take notice of them because they were confirmed to the duke by a private act.

The second objection [was], in 6 Car., there was a decree in such a case that such lands belong to the duke. He answered, in this decree, the ownership of the soil never came in question but the common in the land only. And also, this decree passed *sub silentio* and the counsel of the king were not called to it but the counsel of the duchy, who wished rather to maintain and enlarge their jurisdiction than otherwise admit that the king was not seised of them as duke.

The case is the king is seised of the manor of Sutton in Lincolnshire *jure ducatus Lancastriae*, outside of the county palatine, adjacent to the sea. And certain lands are relict by the sea next to the manor. Whether the king will be seised of them *jure coronae*, Bracton, Britton, Inst., and Grotius have been objected that an island derelict by the sea *nullius est in proprietate* but *conceditur occupanti* and *mare est liberum* and common for passage and fishing *jure gentium*. And they have objected out of Selden something that was for them, but the title of the book [*Mare Clausum*] and all [in] it seems *contra* to them.

As to fishing, no one will admit that *mare est liberum* for any foreigner to fish there. And 5 Rep., Sir Henry Constable's case,<sup>1</sup> cited by them, that prescription [lies] for land between the high and low water mark was contrary to them because, if it lies in prescription, it lies in ownership because there must be some person against whom prescription must be. And against the sea or another nation or subject, it does not lie, as is apparent; thus, it must be against the king. And this plainly demonstrates that, if there was not such a prescription, the king is to have the ownership.

In 6 Car., in [a case in] the Exchequer chamber concerning lands in Wapping,<sup>2</sup> there, it was decreed and agreed that the lands in the Thames between the high and the low water mark belong to the king. And as to the objection that it is part of the port of London, if it be admitted, then, that the lands in the ports belong to the king, by the same reason, the lands beyond because the king can increase or diminish the ports at his pleasure. And also, there is no land adjacent to the sea but it is within one port or another.

[As to the] objection the king should not be entitled to anything but by matter of record, he answered it is true generally, but not always, as in 3 Rep., Doughtie's case, 10, and 4 Rep., the Commonalty of Sadlers's case,<sup>3</sup> the difference is taken, when possession is *plena* and when *vacua*, as if a tenant of the king dies without an heir or if an ancestor of the king dies seised, the law throws the possession in[to] the king without an office because a freehold cannot be in suspense. The law is the same for chattels, as for treasure trove in or upon the land, flotsam, jetsam, etc.

And as to the objection that *sentit commodum sentire debet et onus*, they do not pursue it themselves because they give the lords of manors the title and not the terre tenants next adjacent.

And as to the case in 15 & 16 Eliz., Dyer,<sup>4</sup> it is only a doubt, but many authorities there [are] cited, as Trin. 43 Edw. III, rot. 30, the Abbey of

---

<sup>1</sup> *Constable's Case* (1601), *ut supra*.

<sup>2</sup> *Attorney General v. Philpott* (1629), *ut supra*.

<sup>3</sup> *Attorney General v. Downtie* (1584), 3 Coke Rep. 9, 76 E.R. 643; *Warden and Commonalty of Sadlers' Case* (1588), 4 Coke Rep. 54, 76 E.R. 1012, also 1 Anderson 180, 123 E.R. 418.

<sup>4</sup> *Anonymous* (1573), 3 Dyer 326, 73 E.R. 737.



Ramsey's case,<sup>1</sup> which is no authority for the defendants because, there, judgment was only given upon a presentment not upon an information.

And as to Hamon's case, 15 & 16 Eliz., Dyer,<sup>2</sup> entered 16 Eliz., rot. 449, remembrance [roll] in the Exchequer, the title of Hamon was that William Hamon enfeoffed him *absque hoc* that it was relict by the sea, and, upon this, judgment was given for him. And, if such an issue had been taken in our case, without doubt, the same judgment would have been given.

The second point, whether custom could prevail against the king in such a case, a negative *consuetudo patriae* could be good if it be well pleaded and applied, as [in] 30 Edw. III, 28. Thus in Hamon's case, *supra*. But, as it is pleaded in our case, it is bad because a custom must be reasonable and used from the time of which [memory runneth not to the contrary] etc. Now, in our case, it is alleged *quod domini manerii habebunt*, and it is not alleged that it was ever used. If a copyholder pleads, he must say that it is demised and devisable; thus of a common, that they have and should have etc.

Also, they allege *consuetudo patriae et paulatim antea*. Lincoln and Holland are expressed and which of them is intended by the word *patriae* is uncertain; thus [it is] bad for this cause.

Also, the custom to have derelicts<sup>3</sup> or sand is not well applied because it is not averred that these acres were derelict.

Also, the custom is alleged '*ad*' and the pleading '*prope*'. Now, *prope* signifies near unto a place and not *ad locum*, and it is taken also comparatively.

[It was] objected these defects were in the case of the Abbot of Peterborough and still judgment [was] given against the king. He answered there was more in this case than appears because [it is] where the power and favor of the abbot had a great operation with the court and there also, a *scire facias* was sued against the successor abbot upon a presentment in the time of his predecessor and no charge [was] made against the successor so that he need not have responded to it at all. And there also, the counsel of the king [did not] demur but took issue, which was found against the king and afterwards he would not speak in arrest of judgment. Thus, I do not see any reason

---

<sup>1</sup> *Abbot of Ramsey's Case* (1369), *ut supra*.

<sup>2</sup> *Digges v. Hamond* (1573), *ut supra*.

<sup>3</sup> devant relict *MS*.

for which judgment should [have] been given for the defendant. [Thus I say in this same case.

And upon this, I conclude that judgment must be given for the king.]

Baron TREVOR [argued for the king also] to the same intent.

[For the] first point, [the king] has such lands *jure coronae* because as the king is the supreme lord upon the land, so upon the sea. And in 11 Hen. VII, 7, as he has the common law to rule the land, so he has martial law and maritime law to rule the sea and the forest law for the government of it. And all of the land at first was derived out of the crown. Thus [it] be like the same case in all commonwealths in foreign nations. Also, the king, by his prerogative, has all things of excellency, as royal mines, thus the sea, being the chiefest and excellentest of the waters because, as it is said, all inferior rivers flow [to] and reflow from the sea. By the same reason, the king will have it. And, as the fresh shore is called *ripa*, so the salt shore is called *litus*. And this shore *quoad* use is common as Justinian said in cap. *de rerum dominio*.<sup>1</sup> And it is a maxim in our law that the thing in which no one can claim ownership is in the king. See Bracton, *de rerum divisione et rerum dominio*,<sup>2</sup> and Britton, *de perquisitione*. In 12 Hen. VIII, 2,<sup>3</sup> it is said that our law is consonant with the law of God, with which agrees Plo. 304.<sup>4</sup> And Littleton<sup>5</sup> says that the king is said in possession at all times of things which belong to a villein. And as the care of the commonwealth belongs to the king; it is reasonable to give the sea to him and to no other [person].

The second question is what large extent the *litus maris* contains. It extends as large as the natural and ordinary [course], not the forced course, of the water flow. And the natural course of the sea contains the daily and monthly spring tides, but those tides caused by tempest or the autumn tides etc. do not extend to our case. And, if the sea by reason of the breach of the bank overflow the adjacent lands, this does not give any title to the king. But,

---

<sup>1</sup> Justinian, *Institutes*, book 2, title 1.

<sup>2</sup> *Bracton*, vol. 2, p. 41.

<sup>3</sup> *Harcourt v. Spicer* (1520), YB Trin. 12 Hen. VIII, f. 2, pl. 2, 119 Selden Soc. 7, 8.

<sup>4</sup> *Sharington v. Strotton* (1565), 1 Plowden 298, 304, 75 E.R. 454, 463.

<sup>5</sup> T. Littleton, *Tenures*, s. 178.

if it continue upon the land so long that no mark of it can appear, it is otherwise. See Magna Charter, cap. 16; 18 Hen. VIII, ca. 15.<sup>1</sup>

The third point, whether a custom prevails against the king, he denied because, if it was in the king when it was a part of the sea, now, when it is made part of the dry land, it will not be taken from him. And [for] the reason for which the king will be preferred in such a case, see Bracton, lib. 2, cap. 1; *Doctor and Student*, cap. 8, fo. 22; *Barre*, 9 and 285.<sup>2</sup> If enemies possess a ship for one day, it is lost. And what time the subjects have to regain their right appears in 5 Rep. to be a year and a day. And Sir Henry Constable's case makes nothing against me because, there, it is only '*poit estre*' by the court. In Sir John Davies' reports, it is said that the sea is the inheritance of the king. Pas. 16 Jac., rot. 292, upon such an information, a special verdict was given, *sed nihil inde factum fuit*. The precedents of the grants by the king and queen as in Romney Marsh and Bromhall prove our case, that these lands belong to the king. And in 6 Car., upon the decree, then, our point was not dreamt on.

The fourth question [is] the king does not have it *jure ducatus* because such a grant of these privileges was not ever granted to him, and, if it was, still in our case, it is not pleaded.

[Thus, I conceive that judgment must be given for the king.]

Baron DENHAM [recited the case of Sutton Marsh, above, and argued for the king] to the same intent.

The first observation that he made was that informations are taken *stricti juris*.

Second, [he said] that, where the king makes his title in his information, the subject must make a better title.

Third, this title must be good, true, and certain.

Now, to consider our title by these rules, the defendants confess the quantity of the acres and that they lie [adjacent] *ad litus maris* and they are overflowed *per fluxus et refluxus maris*. But they plead further that the king is seised of them *jure ducatus in Comitatu Lincolniae in partibus Hollandiae*. And they allege the custom also *quod omnes domini qui habent plures terras*

---

<sup>1</sup> Stat. 25 Edw. I, c. 16 (*SR*, I, 116); perhaps Stat. 28 Hen. VIII, c. 15 (*SR*, III, 671).

<sup>2</sup> YB Pas. 7 Hen. VI, f. 33, pl. 28, Fitzherbert, Abr., *Barre*, pl. 9 (1429); YB Mich. 22 Edw. III, f. 16, pl. 63, Fitzherbert, Abr., *Barre*, pl. 285 (1348).

*prope ad mare habebunt marescum et sabulonem* projected and it is not mentioned that those lands in question were *marescum seu sabulonem*. And further it is said '*plures terras prope*', each word of which is completely uncertain. And their conclusion is '*ratione cuius*' those lands belong to them, which is not a consequent and, on account of this, mere surplusage and void, as it was resolved in Spencer and Knight's case, 34 Eliz., King's Bench,<sup>1</sup> in [an action of] prohibition for tithes; the parties alleged that the lands were part of the abbey *ratione cuius* the lands were discharged of the tithes, and [it was] held bad.

Also, they pleaded the grant of the king of those lands adjoining to the manor. And it is clear that the grant of the manor will not pass those lands.

And, as they allege a lease and *postea* a release, this *postea* will not aid them because it could be that the release was made after the lease ended. And pleas *contra regem* will be taken more strictly against the [private] parties.

The sole point in law is whether the king be seised of such lands *in jure coronae*. [To the] objection it has been [ruled] otherwise in the duchy court, he answered it is a rule among the civilians it is a good judge who will amplify his jurisdiction; so it could be this was the cause in this court. And also, there, the title of the land never came into debate, but the title of the common only. And a rule can be now held in this court that the judges of it will advance their own jurisdiction. In Haman's case, 16 Eliz., there was an *absque hoc* that it was *pars litoris maris*, which is confessed in our case. And it seems that they conceived that, if it was *pars*, then it belongs to the king. In Sir Henry Constable's case, there, it is resolved that land between the low and high water can be part of the manor of the subject and a subject can claim them; but Lord Coke refers us in this case to Lord Dyer's case, and, there, it is made a query. But out of this case, it could be collected that, if the inundation be sudden and by tempest, vehemens, and *inusitatas*, that these lands will not belong to the king unless the sea continues upon them so long as the metes and bounds of the sea are destroyed.

It is otherwise if they appear and they can [be] known and that the king will have them *jure coronae*. It seems by this reason that he will not be in by a condition, as a subject. Now, a subject, if he has two titles, he will be in by his ancient title. Now, the crown is the most ancient title in the king and the

---

<sup>1</sup> *Knightley v. Spencer* (1591), 1 Leonard 331, 74 E.R. 301, 1 Eagle & Younge 101.

most supreme and honorable [title]. And duchy land can be made part of the crown. And, if the sea belongs to the king, the soil, which is less worthy, also belong to him.

Also, if a man grants *aquam piscarum sive stagnum suum*, the soil passes as an accessory and a thing less worthy; thus, of a grant *de toto bosco*.

And, if the soil does not belong to the king, there will be fractions and divisions of the inheritance, which the law will not allow, because, in some times of the day, it will belong to the king, in other times of the day, it will belong to the subject. 6 Ric. II, *Proteccion*, 46;<sup>1</sup> the sea is said [to be] the inheritance of the crown. And 22 Ass.;<sup>2</sup> *brachium maris*, which is the flow and reflow, is called part of the sea. The Case of Mines, in Plo.,<sup>3</sup> was resolved upon precedents in our court of grants made now in our case. In the pipe office in Ric. II, rot. 12, there was such a grant by the king for life rendering a pair of gilt spurs. And such a grant was also [in] Sussex, Ric. II, rot. 1, rendering £14 *per annum*. And [in] 7 Ric. II, rot. 2; a grant was of a camdell between the high and low water mark, which is a weir for catching fish. And [in] 5 Eliz., there was a grant to the mayor of Romney *omnes terras arenas salsas et mariscas*. And such a grant [was] made to George Chute [in] 15 Eliz.

[Thus, upon these matters, I conclude for the king.]

[In Mich. 13 Car. [1637], the case of Sutton Marsh, cited above, was now recited by Chief Baron] DAVENPORT. [And he was of opinion for the king] to the same intent. Before I will discuss *cuius* title [ . . . ] the dominion, sovereignty, and ownership of the sea, I will enquire of the nature of the thing *circa quod* the question arises. The thing *circa quod* the question asked is the sea, *litus maris, portus maris, et ripa maris*. What is the sea? The origin of it appears in the *principio* which was the pleasure of God. And *dixit* may the waters congregate in one body in one place, and it was thus done. And it was named by God *maria, non mare, et terra arida* was called that of which the sea was severed. And, as to this which some object *quis reclusit ostiam maris*, God

---

<sup>1</sup> YB Trin. 6 Ric. II, Ames Found., vol. 2, p. 49, pl. 35 (1382), Fitzherbert, Abr., *Protection*, pl. 46.

<sup>2</sup> YB 22 Edw. III, Lib. Ass., p. 106, pl. 93 (1348).

<sup>3</sup> *Regina v. Earl of Northumberland (The Case of Mines)* (1567), 1 Plowden 310, 75 E.R. 472.

answered and said 'I have commanded the water to go to such a place and no further', and He has circumscribed the sea *terminum suum*.<sup>1</sup>

[To the] objection the sea is *corpus fluidum* and it cannot be compounded within its boundaries, he answered God has given to it its bounds beyond which it cannot pass. The sea is visible and corporal. But I agree that the common law, by its process, does not have jurisdiction *super altum mare* because it is *extra comitatum* and it is not circumscribed with acres as the land is. But still it is *infra visum legis*. And, if the sea leaves the lands that were before under it and alters its course, this varies the nature of this which was before because this which was before accounted part of the sea, now, [is] become part of the county subject to the common law and it is an inheritance according to the course of the common law.

The second consideration is of the *litore maris* which is called by the civil law that which is not removed or altered. And it must be *maximum fluctuum terminis*. But this does not agree with our law because, by the common law, it is known by two marks, the high and low water marks, and the land between these two marks is called *litus maris*. And, as the sea keeps its natural course, it is *divisum imperium* because by Sir Henry Constable's case, the admiral has jurisdiction upon the *fluxum* and the common law upon the *refluxum maris*; then, it is part of the county, and upon *fluxum*, it is *pars maris vel potius ipsum mare*. But, when the sea has totally left the land, now, it is *terra arida* and governed only by the common law.

The third consideration is *portus maris*, and what it is is well known.

Thus, of *ripa maris*, we agree with the civilians that the use of them is public but yet the inheritance of them is in the crown.

Now, to dispute to whom the inheritance of them, especially of the sea, belongs and also the ownership of them, I hold that by the common law of the land without the aid of any statute that during the time that these things remain in their natural and proper courses, they belong to the crown as part of the flowers and royal branches of it.

[It was] objected the rule of the imperial and civil law, which is *jus gentium*, is that the sea, land and water, is *nullius in rebus* and the use [is] public, and it admits ownership in anyone. And Bracton and Britton have been cited

---

<sup>1</sup> Genesis, chap. 1, vv. 9-10.

to confirm it. The second objection admits that they belong to the king, yet the *consuetudo patriae* is *ut* [*supra* and also these are duchy lands.

These are beautiful arguments and] specious pretenses. He answered I be not of such opinion because our law is contrary. And though I honor the civil law, still the common law must be preferred. And the civil law concerns the imperial kingdoms, but not other absolute monarchies, which are ruled by their own customs. And Bracton, in his first chapter,<sup>1</sup> says that other kingdoms are governed by the civil law and by *leges scriptas ut solum Angliae ubitur consuetudinibus suis et legibus non scriptis*, with which agrees the *Mirrou of Justice*. I reverence Bracton and Britton as sage and erudite men but I say as before these days it has been said by Cataline in Plowden's *Commentaries*<sup>2</sup> they should not be cited as authorities in our law if they are not in confirmation of it, and only as ornaments to it. And also Bracton agrees with himself in our point because, where in one place he says *quod mare est nullius in bonis*, in the other place, he says *quod conceditur regi propter privilegium*.<sup>3</sup> And he says also, if the king grants by his patents privileges upon the sea where *recurendum*, it is to the first words by which it appears that the king has dominion there.

And the sea, *litora maris*, etc. are settled in the king *jure coronae* as well before as after the reliction for three reasons:

First, because the sea and *litora maris* are visible and real inheritances and within the realm and part of the crown and within the allegiance of England and within the protection of the king and the king *ratione dignitatis regiae ad providendum salvationem maris et regni*. And, if all these things concur, it would be a consequence that the king must have something to sustain the charge of his dignity. And upon these considerations that the sea will be *nullius in bonis* is *oppositum in objecto* and in lesser things, *quando lex aliquid concedit, conceditur sive quo res ipsa esse non potest*.

In 22 Assize 61;<sup>4</sup> a grant of *cognitionis placitorum*, all incidents will go with it, as process. In 9 Edw. IV; a license to make a trench in another's land or he will have a licence to make a pier or gutter, also to amend it.

---

<sup>1</sup> *Bracton*, vol. 2, p. 19.

<sup>2</sup> *Stowel v. Lord Zouch* (1562), 1 Plowden 353, 357, 75 E.R. 536, 542 (*per Saunders*).

<sup>3</sup> *Bracton*, vol. 2, p. 45.

<sup>4</sup> YB 22 Edw. III, Lib. Ass., p. 99, pl. 61 (1348).

And that the sea is part of the crown and *infra regnum* and the inheritance of the king appears in 6 Ric. II, *Proteccion*, 46,<sup>1</sup> with which Sir Henry Constable's case agrees. Thus it is in the forest law; land could be *infra metas forrestae* not *infra regardum*. And, in such a case, a common person could have the profits of his woods. But, if it be *infra regardum*, it is otherwise.

And the *Commentaries upon Littleton*,<sup>2</sup> upon cap. 'continual claim', says that the sea is *infra regnum*. Thus, the sea is an estate settled in the crown subject to two laws derived from one person. See 5 Rep.;<sup>3</sup> flotsam and jetsam belong to the king by prerogative right. And we must adjudge according to our law, as in Littleton's case of villeinage,<sup>4</sup> because, by the civil law, *partus sequitur ventrem*; [this is] not by our law.

The second reason the sea is to be ruled by the law and customs of this realm [is], if the law will be otherwise, two principal rules of our law will fall to the ground. The one rule, by Littleton,<sup>5</sup> [is] all lands are in some person or [are] *in nubibus*. Second, every inheritance in land must be charged one way or the other.

Now, to examine our case by these rules, the sea is in some person or *in nubibus*, [*scil.*] in abeyance. And there are two sorts of abeyances, perpetual or temporal. A perpetual abeyance cannot be of the inheritance, as appears by Inst.,<sup>6</sup> but a temporal can be. But this is only in a case of necessity and for the salvation of the right of a third person, as [in the] case of a parson and a vicar. 27 Ass. 61;<sup>7</sup> if the issue be attainted *in vitae patris* and pardoned, still he cannot inherit, but the freehold [is] in abeyance for his life. See *Walsingham's* case and 3 Report, Doughtie's case.<sup>8</sup> It is said that a freehold could not be in

---

<sup>1</sup> YB Trin. 6 Ric. II, Ames Found., vol. 2, p. 49, pl. 35, Fitzherbert, Abr., *Protection*, pl. 46 (1382).

<sup>2</sup> E. Coke, *First Institute* (1628), f. 260.

<sup>3</sup> *Constable's Case* (1601), *ut supra*.

<sup>4</sup> T. Littleton, *Tenures*, s. 187.

<sup>5</sup> T. Littleton, *Tenures*, s. 646.

<sup>6</sup> E. Coke, *First Institute* (1628), ff. 342-343, 345.

<sup>7</sup> YB 29 Edw. III, Lib. Ass., p. 169, pl. 61 (1355).

<sup>8</sup> *Attorney General v. Walsingham* (1573), 2 Plowden 547, 75 E.R. 805; *Attorney General v. Downtie* (1584), 3 Coke Rep. 9, 76 E.R. 643.



abeyance and, on account of this, the king will be in possession without an office. A use limited for years, the remainder to the right heirs of J.S. [is] void upon this reason. 1 Rep., Chudleigh's case;<sup>1</sup> in 34 Eliz., Bridgewater's case, an inheritance granted in seventeen acres for one year and in another seventeen acres in another year is good because the inheritance is in someone at all times; thus, where coparceners make a partition for life of land; thus, if the sea will be guarded in *custodia legis* and yet it will be in no one when the time comes to reduce it; it is a possibility.

The third reason [is] if the common law will be according to the imperial law, the common law would be a *felo de se* because this realm is an island and the sea is the wall of it; now, if the walls of it will not be any part of it and it will be *nullius in bonis*, what will become of the realm? And this will be an exposing of our land to invasions and incursions. And these walls were the better part of the realm in 1588.<sup>2</sup>

This case [is] similar to the case of royal mines. If these will belong to the subject, it will breed contempt and pride.

Now, for authority on this point, [see] *The Mirrour of Justice*, which can be cited for an authority, as it was in the time of Henry VI. It said that the rights of the crown [be], among others, the sovereignty and dominion of the sea, and the chief ports of the land belong to the king as part of his crown, and the residue of the realm was conferred to others *pro defensione regni*. Judicial records, statutes, and customs are the law. Now, it appears by many judicial records that possession of the sea and the government of it belong to the king *jure coronae*. See Selden, in his *Mare Clausum*, which is a record in this court by commandment of the king.<sup>3</sup> In 20 Hen. VII, 4, [an action of] trespass *quare clausum fregit* lies though it is not enclosed if it be the inheritance of someone.

It appears also that the governance of the sea belongs to the king by all his patents of grants of the custody of it to the admirals in the time of Henry

---

<sup>1</sup> *Dillon v. Freine* (1589-1595), 1 Coke Rep. 113, 76 E.R. 261, also Popham 70, 79 E.R. 1184, 1 Anderson 309, 123 E.R. 489.

<sup>2</sup> This was the year of the defeat of the Spanish Armada which was sent to invade England.

<sup>3</sup> Order of 5 May 1636; Public Record Office E.125/19, f. 3v; S. A. Moore, *A History of the Foreshore* (1888), pp. 304-305.

III. And see Sir Henry Spilman's *Glossarium*, tit. 'Admirallus'. And the grants were there *de custodia marium nostrorum*. 19 Hen. VI, 7;<sup>1</sup> [in an action of] trespass for goods taken, the justification was that the court of the marshalsea is an ancient court of the time of which [memory runneth not to the contrary] etc. and that the party was amerced there and, on account of this, his goods [were] taken and the justification [was] held good.

In 3 & 4 and 4 & 5 Phil. & Mar., an assize was brought for the office of register in the admiral's court. And from the time of Henry VI, the grants recite that the kings were *domini marium suorum*. Now if the king grants the custody of a thing, this demonstrates that the king has the ownership of this of which he grants such custody, as the grant of the custody of the counties and marches of Wales. In 26 Hen. VIII, 7, the difference is taken between the grantee and the committee of the king.

In 3 & 4 Eliz., Dyer, it is said that a grant of the custody of a house to him who is in possession would be a surrender, with which agrees 43 Eliz. [And, in the time of Edward I,] avowry [and] replevin [was] brought of a ship, and, there, Bereford gave the rule that the peace of the king must be kept as well upon the sea as the land, and the defendant was ordered to answer [to the action].

In 2 Edw. III, 9,<sup>2</sup> [an action of] *mort d'ancestor* [was] brought against a husband and wife which alleged a fine with a non-claim and averred that the party was *infra quatuore maria* which belonged to the king, and the plea [was] allowed.

In 2 Ric. III, 7, it was agreed that the ports of the realm and the soil of them belong to the king and purprestures or usurpations upon them will be punished. 5 Rep., Sir Henry Constable's case, agrees.

In 8 Edw. II, *Corone*, it is said, if land could be seen, the coroner will have jurisdiction and not the admiral.

In 21 Hen. VI, an exception [was] taken that the port was not alleged to be in any vill, hamlet, or town, and it was said that it extends in such a vill, and issue [was] taken upon it. And for precedents in our case, Hamon's case is similar in point; there, issue was taken that the lands were not *pars litoris*

---

<sup>1</sup> YB Mich. 19 Hen. VI, f. 7, pl. 14 (1440).

<sup>2</sup> YB Pas. 2 Edw. III, f. 9, pl. 6 (1328).

*maris*; admitting that it was, then, the king will have it. And the jury found that it was not part or ever was.

And now, if it was a settled estate in the king before the reliction as an inheritance, it will not be altered or changed afterwards for any other title in the king as the *consuetudo patriae* or because the king was seised of his lands adjoining [it] *jure ducatus Lancastriae*. And an office is not needed because these lands are part of the crown.

But he did not insist greatly upon the last matters here because the pleading to the information was defective in many points. And upon all of this, judgment was given [*per totum*] for the king and also upon seven other pleas that have alleged a *consuetudo patriae* to this information.

[Other copies of this report: Yale Law School MS. MSSG R29, no. 27; Cambridge Univ. Lib. MS. Gg.2.20, ff. 1044, 1107v; Oxford, Bodl. MS. Rawlinson.C.96, ff. 177, 207; British Library MS. Lansdowne 1081, ff. 178, 199; British Library MS. Add. 35969, ff. 273v, 327; British Library MS. Add. 35972, ff. 134, 124, 122v; British Library MS. Harley 4811, ff. 258, 283.]

Cambridge Univ. Lib. MS. Dd.6.61, f. 78v

WESTON, puisne baron, [said] that it is a case of great consequence but it is not so general as is conceived because it will not extend but to the marshes that are part of the sea and not to the marshes that are extraordinarily surrounded.

Objection: That the duke of Lancaster had *jura regalia*, but he did not have lands left by the sea.

Answer: First, the lands are in the County of Lincoln, not in Lancaster. Second, he did not plead that they are part of the duchy.

The king [was] seised of the manor of Sutton in the right of the duchy of Lancaster, which [manor] adjoins to the sea. The lands adjacent were between the low water mark and the high water mark, and, after it was left by the sea, the king granted the manor over. The question is whether he will have the marsh left by the sea in right of his manor or as the king because, if in right of the manor, it passes to the patentee.

It is a question to whom it belongs when it overflows and [is] between the high water and low water marks.

Bracton has been cited and Grotius for the liberty of the navigators, and Mr. Selden has been cited, but his intent was not contrary to the title, which is *Mare Clausum*. And an island does not belong to the occupier.

Sir H[enry] Constable's case;<sup>1</sup> prescription [ . . . ] to have the lands between the high [ . . . ] and low water mark. The prescription is not brought against the sea nor against the subject nor against foreigners, *ergo* it must be against the king.

In the case of the walls upon the Thames, it was decreed for the king that it was in the port, as it has been said, and, if in the port, then *extra* because he has the power to enlarge ports and to make ports and there is no place but belongs to some [?] port.

Admit that *fiat nullius* until the sea has left it, to whom will it be left? It has been said the king should take as the lord; nay, always.

3 Coke, Dowie's case;<sup>2</sup> the king will be in ancient possession or no other can have [it]. 4 Coke, Commonalty of Sadlers' case.<sup>3</sup> The king upon an escheat will be in ancient possession without an office because of necessity thus, where the ancestor of the king dies and it descends to him, it is in the king without an office because *possessio vacua*.

Thus here, no one can make a title and, on account of this, it is in the king without an office. A stray is in the king until the owner comes. Thus of flotsam, 5 Coke, Sir H[enry] Constable's case. 15 & 16 Eliz., Dy.,<sup>4</sup> has been cited *ex utraque parte*. And for the manor, it has been said that *sentit onus* for repairs of the banks and thus he should have *commodum*.

The Statute of 18 Edw. III; 32 Ass.;<sup>5</sup> and Britton and Bracton have been cited.

---

<sup>1</sup> *Constable's Case* (1601), 5 Coke Rep. 106, 77 E.R. 218.

<sup>2</sup> *Attorney General v. Dowie* (1584), 3 Coke Rep. 9, 76 E.R. 643.

<sup>3</sup> *Warden and Commonalty of Sadlers' Case* (1588), 4 Coke Rep. 54, 76 E.R. 1012, also 1 Anderson 180, 123 E.R. 418.

<sup>4</sup> *Anonymous* (1573), 3 Dyer 326, 73 E.R. 737.

<sup>5</sup> Stat. 18 Edw. III, stat. 2, c. 3 (SR, I, 301); YB 22 Edw. III, Lib. Ass., p. 106, pl. 93 (1348).

The Abbot of Ramsay's Case, in 43 Edw. III, rot. [ *blank* ];<sup>1</sup> this was not upon an information but only upon an inquisition and it is only for a mortmain. The jury in the case found that they have not appropriated the soil to themselves.

16 Eliz., rot. 445, King's Remembrancer, an information against Hamond;<sup>2</sup> here, the issue was that it was no part of the seashore, and [it was] found for Hamond. If the defendants here have taken the issue, happily, they could speed as Hamond had speeded.

A further question is whether the custom that is alleged as *consuetudo patriae* will bind the king. 30 Edw. III, fo. 25.<sup>3</sup> But against the custom as it is pleaded are these following. First, it is not pleaded as a custom that must be *constans et perpetua*, and it is not alleged of any particular, as a copyhold must be devised and devisable. A prescription [ . . . ] be that they [ . . . ] and directly averred.

Second, it is alleged *consuetudo patriae* and in places named, and it is not shown which of them he intends [ . . . ] either Lincoln or Holland and both are named.

Third, it is alleged that they must aver adjacent lands, but this [was] never signified to the [ . . . ] must show [ . . . ] when it is to the [ . . . ] and here it is shown to be part.

It is true, as has been said, that [ . . . ] the exceptions can be in the case of the Abbot of Peterborough.<sup>4</sup> I have seen the case. It is [a] case in which the power or favor of the abbot prevailed. The issue was whether the predecessor of the abbot *adquisivit*; it was found *quod non adquisivit*, and it is not well grounded for the judgment in the case, nor in the present case.

Baron TREVOR [held] for the king. As to the first point that the king is seised of the sea and the soil of the sea, the king has marine law for the sea

---

<sup>1</sup> *Abbot of Ramsey's Case* (1369), S. A. Moore, *A History of the Foreshore* (1888), pp. 158-159.

<sup>2</sup> *Digges v. Hamond* (1573), 3 Dyer 326, 73 E.R. 738, 110 Selden Soc. 347; S. A. Moore, *A History of the Foreshore* (1888), pp. 219-221.

<sup>3</sup> YB Mich. 30 Edw. III, f. 25 (1356).

<sup>4</sup> *Abbot of Peterborough's Case* (1367), S. A. Moore, *A History of the Foreshore* (1888), pp. 157-158.

and forest law for the forests. No subject who has lands but which have been derived from the crown but he will not affirm that he must show how it was derived from the crown. Royal mines go to the king. The sea is under the allegiance of the king. The sea, which is the chief river, must go to the chief, who is the king. The difference [ . . . ] between *litus* and *ripas non* [ . . . ] *usum* as Bracton said. But [ . . . ] *proprie*. A subject cannot make a title to the soil of the sea, as it is first in the possession of the king, he will not lose his possession [ . . . ]. In Littleton, cap. ‘villenage’, if the king had a villein who [ . . . ] and [ . . . ] the king had possession by purchase, he will not lose the possession.

The king has the care of the sea against enemies [?] [ . . . ] and that they not [ . . . ] the land.

The Statute of 18 Edw. III [ *blank* ]. He has an admiral, who is a great officer. And Sir H[enry] Spelman [wrote] he had [ . . . ] of them and that there was an admiral of the south seas, other of others and an *officium admiralis marium litoris* and the ports. The profits of the sea belong to the king. 5 Coke, Sir H[enry] Constable’s case. 6 Ric. II; the sea is part of the crown.

And thus he concluded that the king is the owner of the sea and the soil.

[Orders of 19 April and 5 and 19 May 1637: Public Record Office E.125/20, ff. 391v, 396v, 420.]

[Note also S. A. Moore, *A History of the Foreshore* (1888), pp. 292-304.]

## **Odor v. Garnett**

(Ex. 1637)

*There can be no execution on a bond before the obligor is found to be in default.*

Lincoln’s Inn MS. Misc. 495, ff. 18, 22v

The said Odor became bound to the king by a bond, but it was with a condition to perform articles between the king and him or covenants. And upon a [writ of] extent against Odor, a debt supposed to be due from Garnett to Odor was found and seized.

And the chief baron, DAVENPORT, would not allow the seizure of the debts due to Odor upon this ground, until it is found that Odor has broken the covenants with the king. And yet upon an immediate bond to the king, as this is, in a similar case, it has been allowed.

Note: It was said by Baron TREVOR that, by the course of the Court of Exchequer, a bond to perform covenants is not assignable to the king.

204

**Smith v. Knightly**  
(Ex. 1637)

*Where an action of replevin is removed by a writ of certiorari and is not pleaded, a writ of procedendo will be granted.*

Cambridge Univ. Lib. MS. Gg.2.20, f. 1116v, pl. 3

[Between] Smith and Knightly, who made a recognizance in replevin in the right of one Braimes, who, as a man privileged in the Exchequer, sued [a writ of] *certiorari* to bring the record into the Exchequer.

It was said by Chief Baron DAVENPORT that, if [an action of] replevin be removed and then he would not count,<sup>1</sup> that [a writ of] *procedendo* will be granted. But this must be intended (as I conceive) when the plaintiff removes it because, otherwise, it will be in the election of the plaintiff or the defendant to remove the suit into another court or not. But he thought that, after an appearance and the count returned, *habendo*, and not *procedendo*, lies because the court is seised, and, also, in this return, *hab[endo is]* granted *nisi* etc.

[Other copies of this report: British Library MS. Add. 35958, f. 454; British Library MS. Add. 35969, f. 334v; British Library MS. Add. 35972, f. 122v; British Library MS. Harley 4811, f. 286v.]

---

<sup>1</sup> I.e. plead.

**Anonymous**  
(Ex. 1637-1639)

*A lease by an infant without a reserved rent is void.*

*An issue in this case was whether such a lease for the sole purpose of trying the title is valid.*

Lincoln's Inn MS. Misc. 495, f. 31

In [an action of] *ejectio firmæ* upon the general issue pleaded, a special verdict was found [that] the lessor to the plaintiff at the time of the lease made to the plaintiff was under age, *viz.* of the age of eighteen years and not more, and that this lease was made by the said lessor, being an infant, for the trial of the title of the lessor in *ejectio firmæ* to be brought by the lessee, and whether it was a good lease was referred to the court.

*Wright* argued for the plaintiff that, as it is found, though no rent is found to be reserved upon this lease made by the infant (and no rent in truth was reserved) that yet this lease is not void. Because it is expressly found that this lease was made by the lessor, being an infant, only to try his title in [an action of] *ejectio firmæ*, which is for his advantage, it is not void. Fitz., tit. *Grants*, pl. 12;<sup>1</sup> a presentment to a free chapel is good because he cannot [ . . . ] himself. 21 Hen. VI;<sup>2</sup> binding oneself to be an apprentice. 10 Hen. VI, 14;<sup>3</sup> submission to arbitration will bind an infant; it is for his benefit to be discharged of a suit. 36 Hen. VIII, 2.<sup>4</sup> Comment upon Littleton in Coke, *Institute*, 259;<sup>5</sup> that acts to his prejudice are void. A grant of a rent by fine or by deed cannot be pleaded nor granted [?] but he must show that he is under

---

<sup>1</sup> YB Pas. 26 Hen. VI (1448), Fitzherbert, Abr., *Graunt*, pl. 12.

<sup>2</sup> *Bottiller v. Newport* (1443), YB Hil. 21 Hen. VI, f. 31, pl. 18.

<sup>3</sup> YB Mich. 10 Hen. VI, f. 14, pl. 46 (1431).

<sup>4</sup> YB Trin. 26 Hen. VIII, f. 2, pl. 1 (1534).

<sup>5</sup> E. Coke, *First Institute* (1628), f. 259.



age and thus avoid it. 18 Edw. IV, 2; 22 Hen. VI, 3; Coke, Inst., sect. 547;<sup>1</sup> there, by the opinion of Coke it is not void, but voidable.

And, if it will be objected that perhaps the lessee will not bring an action and thus it could be to his prejudice, the solution [is] that, if the lessee will not bring an action, then the lessor, being an infant, can enter and avoid it.

*Shaftoe*, for the defendant [argued] that this lease made by an infant without a rent reserved is simply void in the creation of it; an infant cannot plead *non est factum* because he sealed it. But he can avoid it. If an infant deliver a deed upon the land, yet it is void. But, if he made livery of the land or deliver goods with his hand, this is but voidable. And in tit. *Voucher*, 267,<sup>2</sup> the warranty which is within the deed is void. A corporation aggregate or the king does not void a deed for nonage, but a corporation sole [may] avoid it for infancy. Trin. term in 26 Hen. VIII; if a prebendary, being a corporation sole, made a lease for years of part of his prebend; it was void by the resolution of the judges with the lord chancellor. Litt., sect. 258.<sup>3</sup>

The difference is where there is a rent reserved upon such a case made by an infant and where not. In the first case, it is but voidable and in the other void. Thus, an infant can make a lease to try a title if he has reserved a rent, and, on account of this, he is at no mischief. For authorities, [see] 9 Hen. VI, 6, by Paston; 18 Edw. IV, 2; 9 Hen. VII, 24; 13 Hen. VII, 17;<sup>4</sup> that the lessee by his entry is a disseisor. Trin. 30 Eliz. in the common bench in *ejectio firmæ*, Ashby v. Morgan; that the lessee by his entry is a disseisor. Hil. 32 Eliz., rot. 119, in the common bench, between Sly and Porcy, resolved accordingly.

The authorities against him are 22 Hen. VI, 3, the opinion of Serjeant Arderne; and Coke, Inst., fo. 308, his opinion.<sup>5</sup> And to them, he answered that the authorities with him are greater than the opinion of a serjeant. And,

---

<sup>1</sup> YB Pas. 18 Edw. IV, f. 1, pl. 7 (1478); *Corbet v. J.H.* (1443), YB Mich. 22 Hen. VI, f. 3, pl. 4; E. Coke, *First Institute* (1628), f. 308, s. 547.

<sup>2</sup> Fitzherbert, Abr., *Voucher*, pl. 267 (temp. Edw. I).

<sup>3</sup> T. Littleton, *Tenures*, s. 258.

<sup>4</sup> YB Pas. 9 Hen. VI, ff. 5, 6, pl. 14 (1431); YB Pas. 18 Edw. IV, ff. 1, 2, pl. 7 (1478); YB Pas. 9 Hen. VII, f. 24, pl. 7 (1494); YB Hil. 13 Hen. VII, f. 17, pl. 21 (1498).

<sup>5</sup> *Corbet v. J.H.* (1443), YB Mich. 22 Hen. VI, f. 3, pl. 4; E. Coke, *First Institute* (1628), f. 308.

for the opinion of Lord Coke, that it is not material to the case, out of which he observed it and to the meaning of it. And there are three books there cited to maintain his opinion, and they all are against him.

*Adjornatur.*

And in Easter term 15 Car. [1639], this case was argued again by *Woodroffe*, of our house, for the plaintiff, that this lease is not void, but voidable only. And his reasons were:

(1) Where an act is not to the prejudice of the infant, it is not void. And he cited Hil. 2 Car. [1627] in the King's Bench, rot. 234, between Knight and Stone;<sup>1</sup> [it was] resolved that a submission to arbitration by an infant is not void because it could be for his benefit. And here, upon this lease, fealty is incident which could be for his benefit. And he cited a case in 7 Car. in the King's Bench, in Sir Archibald Douglas's Case,<sup>2</sup> that a husband and wife made a lease by letters of attorney [in] which it was held that it was not void. And here, it was expressly found that this lease was made *ad triandum titulum*.

But Chief Baron DAVENPORT moved that the *utrum* in the conclusion of this special verdict is only whether this *dimissio* be *bona et sufficiens in lege*; this is referred to the court. And, thus, the doubt is whether it be a good and sufficient lease in law, which it is not. But the *utrum* should have been whether this *dimissio* be *bona et sufficiens in lege ad triandum titulum vel ad manutenendum actionem* and thus to have made<sup>3</sup> the question to some particular purpose. But it was said it will be intended upon the verdict, the question to be whether this be a sufficient lease between the lessor and lessee for this purpose, *scil.* to maintain the action. And it was said by him that, in the King's Bench, it has been held that a lease by an infant without a rent reserved and without more had been void. And now the question is whether the finding of it to be *ad triandum titulum* will alter the case.

---

<sup>1</sup> *Knight v. Stone* (1627), W. Jones 164, 82 E.R. 88, Noy 93, 74 E.R. 1059, Latch 207, 82 E.R. 348.

<sup>2</sup> *Anonymous v. Hopkins* (1629), Croke Car. 165, 79 E.R. 744.

<sup>3</sup> *daver fuit MS.*

**Buttolph v. Cole**  
(Ex. 1637-1641)

*That the period of the Statute of Limitations has expired must be affirmatively pleaded by the defendant.*

*The Statute of Limitations takes away a person's remedy, but not his right.*

Lincoln's Inn MS. Misc. 495, f. 26

Buttolph *et alii*, plaintiffs, in an action upon the case upon trover and conversion of goods against Cole. And, upon not guilty pleaded, it was found for the plaintiff. And it was moved in arrest of judgment that it appeared by the declaration that the conversion that is the cause of action was more than six years before the action [was] brought.

*Et adjornatur.*

Note: The said Statute, as it was said, is a general law, of which the judges are to take [judicial] notice. And, where it appears upon the declaration, it is a good cause to stay judgment. But, if it appears only upon the evidence, it is now said that the judges, for the reason aforesaid, must take notice of this law and that it must be found against the plaintiff.

And he cited to this purpose, the case of 7 Edw. IV etc. where the tenant brought [an action of] trespass against the lord and a verdict [was] found, yet the court would not give judgment because it is a general law, of which the court must take [judicial] notice, *scil.* that such an action does not lie by the tenant against the lord. *Non ideo puniatur dominus.*

Hil. 14 *Caroli* [1639], the case of Buttolph and Cole [was] argued at the bar again.

*Witherington* for the defendant [said] that, even though it appeared by the declaration that the cause of action, *scil.* the conversion, was six years before the action [was] brought, that by the Statute of 21 Jac., cap. 16,<sup>1</sup> judgment should not be given for the plaintiff and, on account of this, it could be moved in arrest of judgment though it was not pleaded:

---

<sup>1</sup> Stat. 21 Jac. I, c. 16 (SR, IV, 1222-1223).

(1) Because the Statute is a general law of which the judges are held to take notice. But it is otherwise of particular statutes, of which the judges nor the party are not held to take notice unless it be pleaded. And he cited to this purpose 43 Ass., pl. 29; 39 Edw. III, 7; Coke, li. 4, fo. 76, in Holland's case; 26 Hen. VIII, 7;<sup>1</sup> [in] the case of the General Pardon, the judges [are] held to take notice of it.

(2) Because this is a negative law because it is enacted that it will be sued within this time and not after. And for this, he cited 10 Edw. IV, 7;<sup>2</sup> where the Statute<sup>3</sup> is in the negative, *non ideo puniatur dominus*.

Eliz., Dyer, fo. 202, 202; and 4 Mar., Dyer 135.<sup>4</sup>

(3) Because this is a beneficial law for the ease of the subject, and, on account of this, it will be construed liberally, being to limit actions not grounded on specialties.

(4) Because the defendant could have pleaded no more than appears before in the declaration and, where it appears by the declaration, the defendant will have advantage of it without a plea. 13 Hen. IV, 17; 13 Edw. III, tit. *Office del Courte*, pl. 21.<sup>5</sup> And, where the court *ex officio* must abate the count. 15 Edw. IV, 25;<sup>6</sup> 1 Hen. IV, 45. But it could be objected that, here, there is a verdict found, and on account of this, now, judgment will be given. But, if the defendant had demurred, perhaps judgment will be given for the defendant because by the demurrer, the plaintiff is bound to the time in the declaration, but not upon the trial. And he answered where by the declaration

---

<sup>1</sup> YB 43 Edw. III, Lib. Ass., p. 274, pl. 29 (1369); *Rex v. Bishop of Chichester* (1365), YB Pas. 39 Edw. III, f. 7, pl. [3]; *Armiger v. Holland* (1597), 4 Coke Rep. 75, 76 E.R. 1047, also Moore K.B. 542, 72 E.R. 746, Croke Eliz. 601, 78 E.R. 844; YB Trin. 26 Hen. VIII, f. 7, pl. 34 (1534).

<sup>2</sup> YB Pas. 10 Edw. IV, f. 7, pl. 18 (1470).

<sup>3</sup> Stat. 52 Hen. III, c. 4 (SR, I, 20).

<sup>4</sup> *Poyner v. Chorleton* (1556), 2 Dyer 135, 73 E.R. 295.

<sup>5</sup> YB Hil. 13 Hen. IV, f. 17, pl. 13 (1412); YB Trin. 13 Edw. III, Rolls Ser. 31b, vol. 2, p. 310, pl. 12 (1339), Fitzherbert, Abr., *Office del Court*, pl. 21.

<sup>6</sup> YB Pas. 15 Edw. IV, f. 25, pl. 6 (1475).

that the plaintiff he did not have a cause of action, he will not have a judgment though he had a verdict. Coke, li. 8, 168; 10 Edw. IV, 7.<sup>1</sup>

Also, it could be objected that, here, there is a verdict found and the court could imply that the jury had evidence for a conversion within the time limited by the Statute and answered the court it could not infer another time than the party himself had declared. 12 Hen. VII, 6.

Also, it could be objected that there are exceptions in the Statute of [which] the plaintiff could have taken advantage if it had been pleaded by the defendant. And he answered see Statute of 32 Hen. VIII, cap. 2.<sup>2</sup>

*Arthur Turnour* [said] to the contrary, for the plaintiff, that the defendant must plead it, and he cannot move it in arrest of judgment. And the reasons that it will be pleaded and not moved in arrest of judgment have been stirred in this case and in other cases:

(1) Because there are exceptions in the Statute and it is not proper for the plaintiff to show the exceptions in his declaration because it would be to show matter against himself, *scil.* the body of the Statute, and also to avoid it in his declaration by the showing of the exception. And it would be inconvenient in point of pleading to force the plaintiff to enlarge his declaration and to put all this in his declaration.

(2) *Est necessitas formalis* that the defendant should plead it and the plaintiff is not held to put such a plea in his adversary's mouth or to instruct his adversary. But note the doubt is whether the court is not held to take notice of it.

(3) That the day is not material as is alleged in the declaration. 22 Hen. VI, 49; 21 Hen. VI, 16.<sup>3</sup> And that the time is not the material part, but convert or not convert is the material part. Pas. 6 Car. [1630]; an action [upon the] case for words laid and alleged to be spoken within the time limited, and upon not guilty pleaded, the jury found the words [were] spoken out of the time limited, yet judgment will be given for the plaintiff because the time

---

<sup>1</sup> *Stoughter's Case* (1610), 8 Coke Rep. 168, 77 E.R. 728; YB Pas. 10 Edw. IV, f. 7, pl. 18 (1470).

<sup>2</sup> Stat. 32 Hen. VIII, c. 2 (*SR*, III, 747-748).

<sup>3</sup> YB Pas. 22 Hen. VI, f. 49, pl. 10 (1444); YB Mich. 21 Hen. VI, f. 15, pl. 30 (1442).

was not in issue nor is it material. But the speaking of the said words or not speaking was the material part.

(4) That there will be many inconveniences if the plaintiff will be now by this Statute of 21 Jac. forced to alter his writ. Coke, li. 8, 65; Coke, li. 9, 36; 14 & 15 Eliz. Dyer 315.<sup>1</sup> But he answered that there is a difference between *brevia originalia* and *brevia formalia*; the first will not be altered. But this writ, which is a *brevia formalia*, can be altered by reason of this Statute of 21 Jac.

And note: It [was] said by *Sir John Bankes*, Attorney General, that the inconvenience is prevented by the order of the court in the King's Bench because, there, it is directed that the plaintiff can make it appear to the court that the plaintiff has done his duty within the time limited by the Statute and what is the cause why the plaintiff has not declared<sup>2</sup> sooner, *scil.* that the memorandum could be inserted, that the *latitat* or *quo minus* here was sued out [in] such a term, and that the defendant lurking and shifting into several counties, an *alias* and *pluries* was awarded and that the defendant could not be taken, nor had he appeared until the term. And this will prevent the inconvenience and particular prejudice which was said to be in this case. But note in this case, the action was attached and the *quo minus* carried a *teste* in Trinity term 10 Car. [1634], which is within the time limited by the king. But the declaration came in in Michaelmas term 10 Car. [1634], which is out of the time limited by the law. And, as I conceive, it is no delay in this case by the defendant because the defendant appeared and returned the first against him. And on account of this, I conceive that the plaintiff in this case was in fault that he had not taken out his first writ sooner that it might have been returnable within the time limited by the Statute of 21 Jac. But still, it was said at the bar that, the action being attached within the time limited by the Statute, it is sufficient and this cannot appear to the court but by a replication. And

---

<sup>1</sup> *Cowper v. Foster* (1608), 8 Coke Rep. 64, 77 E.R. 571, also 1 Brownlow & Goldesborough 169, 123 E.R. 734; *Bucknal's Case* (1600), 9 Coke Rep. 33, 36, 77 E.R. 780, 784; *Anonymous* (1572), 3 Dyer 315, 73 E.R. 714.

<sup>2</sup> I.e. sued.

the plaintiff cannot reply unless the defendant has pleaded to it. Coke, li. 6, 10:<sup>1</sup> that he cannot take advantage of journey's accounts but by replication.

And here, the plaintiff will be at the loss in law if he cannot reply and, if it will not be pleaded, he cannot reply.

And for authorities that a Statute that has an exception must be pleaded and thus, in this case, that this must be pleaded by the defendant was cited 27 Hen. VIII, 21; 10 Hen. VII, 9; and 20 Edw. IV, 8; and Staunford, f. 103.<sup>2</sup> But for authorities in this case, Pas. 4 Car. [1628], in the King's Bench, Austin and Morley's Case was cited; Pas. 11 Car. [1635], in the King's Bench, Hawkins and Bulhead's Case, and the same term, Wittingstall and Sir Myles Sands's Case; and Pas. 14 Car. [1638], in the King's Bench, Lea and Ham's Case, in this court, held that it could be moved in arrest of judgment. But the court of common bench have differed in opinion to this. But it was said that now in the common bench, it has been held that it can be given in evidence as well as it can be pleaded by the defendant but that it cannot be moved in arrest of judgment.

And *Lenthall* said that in 1 Car. [1625 x 1626] in the Exchequer, in Breame's and Perkins' case, it [was] held that it must be pleaded by the defendant.

Note that *Sir John Bankes*, Attorney General, [said] that he argued in another case of Uvedall and Pescott<sup>3</sup> for the defendant that it could be moved in arrest of judgment and that the time is material now by reason of the Statute of 21 Jac. in any transitory action though it was material before.

*Adjornatur.*

Note that, in another case in Michaelmas term 15 Car. [1639], Baron Henden said that an action of trover is within the Statute of 21 Jac., though, upon the words of the printed statute it seems to be doubtful. But upon a view of the roll and the statute, he thought an action of trover is in the same rank as an action of case.

---

<sup>1</sup> *Spencer v. Dalby* (1603), 6 Coke Rep. 9, 77 E.R. 267.

<sup>2</sup> YB Trin. 27 Hen. VIII, f. 21, pl. 12 (1537) (Stat. 21 Hen. VIII, c. 13 (SR, III, 292-296)); YB Mich. 10 Hen. VII, f. 9, pl. 20 (1494); YB Trin. 20 Edw. IV, ff. 6, 8, pl. 9 (1480); W. Stanford, *Les Plees del Coron* (1557), f. 103 (pardons).

<sup>3</sup> *Uvedall v. Pescott* (1639-1640), see below, Case No. 212.

Buttolph and Cole's case, an action upon the case for trover and conversion of goods, now, this term, Pas. 17 Car. [1641] was argued at the bench.

Baron HENDEN [held] for the plaintiff. In Hilary term 10 Car. [1635], the declaration came in, and the plaintiff declared of a conversion in a time beyond the time of limitation mentioned in the Statute of 21 Jac. The defendant pleaded not guilty, and a verdict was found for the plaintiff so that it appeared by the declaration that the trover and conversion which was the cause of action was in a time beyond the time limited in the Statute of 21 Jac. And this doubt is upon the Statute of 21 Jac. And it is *magnum in parvo* in respect of the quiet of the subject and the certainty of the law.

(1) He observed that this action of trover etc. is mentioned in the beginning of the Statute but not afterward, and yet he held it within the law, and thus it has been held by three judges in the King's Bench against Justice Whitelocke.

(2) He agreed that the said Statute of 21 Jac. is a general law though it concerns only particular actions. But yet it is a general law because it is general for all persons. And he cited Holland's case, Co., li. 4.<sup>1</sup> But though it is a general law, yet it must be pleaded in bar or else no benefit can be taken of it. And so he held that, by or upon a general demurrer or in evidence, it is not to be taken advantage of but must be pleaded.

(2)<sup>2</sup> In this case also, it must be pleaded because this action here is by bill and not by writ.

(3) This Statute of 21 Jac. does not extend to the customary actions to take them away.

(4) The benefit of the said Statute can be waived by the defendant, and, on account of this, he must plead it if he would take advantage of it.

(5) The time in the declaration is not material.

(6) This Statute of 21 Jac. is to be taken literally and strictly.

(1)<sup>3</sup> That the said Statute is to be pleaded because [ . . . ] is to be pleaded in bar. And he took a difference between a declaration and a bar. And here, it is to be pleaded in bar because the common law is that it can be brought

---

<sup>1</sup> *Armiger v. Holland* (1597), 4 Coke Rep. 75, 76 E.R. 1047, also Moore K.B. 542, 72 E.R. 746, Cro. Eliz. 601, 78 E.R. 844.

<sup>2</sup> Sic in MS.

<sup>3</sup> Sic in MS.



at any time. The said Statute limits it. And for authorities, he cited 38 Hen. VIII, Dyer, fo. 27b;<sup>1</sup> he who will take advantage of the statute (and it was a general statute there) must plead it. But note it is doubtful there whether a general law must be pleaded. 34 Hen. VI, 36.<sup>2</sup> It is upon a general law. 1 Ma., Di. 194, and Coke, li. 8, 23;<sup>3</sup> this [was] upon the Statute of 11 Edw. III, for the dukedom of Cornwall, which was agreed to be a general law. 3 Hen. VI, 48;<sup>4</sup> upon the Statute of 5 Hen. IV, ca. 8;<sup>5</sup> that this Statute must be pleaded in bar and examination is not sufficient. Where it must be pleaded in bar, it must make mention of the Statute. Lord Zouch's case in Plowden, *Commentaries*,<sup>6</sup> upon the recovery in a writ of right, which is final by the common law, this law must be pleaded. 8 Ric. II, tit. *Continuall clayme*, pl. 13.<sup>7</sup> In an action of debt upon an obligation, if one will take advantage of the Statute of Usury, one must plead the Statute, and this is common experience. Coke, li. 5, 2, Elmer's case;<sup>8</sup> there, it is put that the Statute of 1 Eliz.,<sup>9</sup> which is a general law, must be pleaded and the reason. Thus, his reason is because this Statute goes in bar, and, on account of this, it is to be pleaded in bar with reference to the Statute; thus, it is barred. And as it is a bar, thus, it is a bar only to the action; the right is not gone away because it is but a bar to the action by the Statute, not to the right. Thus, the action is gone, but the right remains.

But then, it will be objected that a remediless right will not make a remitter because one will not have a remitter without an action. But yet there

---

<sup>1</sup> *Abbot of Westminster v. Executors of Clerke* (1537), 1 Dyer 26, 27, 73 E.R. 59, 61.

<sup>2</sup> YB Pas. 34 Hen. VI, f. 36, pl. 7 (1456).

<sup>3</sup> *Chasyn v. Lord Sturton* (1553), 1 Dyer 94, 73 E.R. 205; *The Prince's Case* (1606), 8 Coke Rep. 1, 23, 77 E.R. 481, 509.

<sup>4</sup> YB Trin. 3 Hen. VI, f. 48, pl. 5 (1425).

<sup>5</sup> Stat. 5 Hen. IV, c. 8 (*SR*, II, 145).

<sup>6</sup> *Stowel v. Lord Zouch* (1562), 1 Plowden 353, 75 E.R. 536.

<sup>7</sup> *Okoure v. Stathum* (1384), YB Mich. 8 Ric. II, Ames Found., vol. 4, p. 141, Fitzherbert, Abr., *Continuall claim*, pl. 13.

<sup>8</sup> *Elmer v. Gale* (1588), 5 Coke Rep. 2, 77 E.R. 49, also Moore K.B. 253, 72 E.R. 563.

<sup>9</sup> Stat. 1 Eliz. I, c. 19, s. 4 (*SR*, IV, 381-382).

can be a right remaining, though no action for it. 1 Hen. IV, 2;<sup>1</sup> there can be a good reservation of rent and yet [there is] no remedy for it by distress nor action.

And he cited a case to be Sir Thomas Thynne's<sup>2</sup> case, and it [was] thus. He was given in tail a manor with an advowson, and the donee suffered a usurpation; thus, he was remediless; the church became void again. And the donee presented. The usurper brought [an action of] *quare impedit*. He did not recover, and yet he said there was no remitter. See the Marquess of Winchester's case, Coke, li. 2, and Bevill's case, Coke, li. 4.<sup>3</sup>

Also, he held that it must be the rather pleaded in bar because, if the defendant does not plead it, yet he has a remedy to recover damages for this unjust suit because the Statute of 21 Jac. is in the negative, that one will not be sued after the time. And on account of this, if an action is brought after the time and the defendant has not pleaded the Statute of 21 Jac. by which the plaintiff recovers, yet the defendant will have an action upon the Statute of 21 Jac. for his unjust vexation. And he cited Coke, li. 8, fo. 60;<sup>4</sup> this case proves both points: (1) that it must be pleaded in bar; (2) that if it is not pleaded, there, the defendant can have an action upon the Statute by reason of the negative words in it. And he cited Coke, li. 11, 75,<sup>5</sup> and Fitzherbert, *Natura Brevium*, 160.

But, for the manner of pleading this Statute of 21 Jac., he said that it [was] held that the defendant should not plead the statute at large or in particular because it would be dangerous and against the intent of the Statute and it would but enlarge books for the benefit of clerks and it is dangerous to

---

<sup>1</sup> *T.R. v. Blage* (1399), YB Mich. 1 Hen. IV, ff. 1, 2, pl. 3.

<sup>2</sup> Perhaps *Thynne v. Cary* (1639), W. Jones 416, 82 E.R. 218.

<sup>3</sup> *Parker v. Francis (Bevil's Case)* (1575-1583), 4 Coke Rep. 6, 76 E.R. 860, also 1 Anderson 57, 123 E.R. 352.

<sup>4</sup> *Beecher v. Shirley* (1608), 8 Coke Rep. 58, 60, 77 E.R. 559, 564-565, also Croke Jac. 211, 79 E.R. 183, Jenkins 283, 145 E.R. 204, Noy 38, 74 E.R. 1008.

<sup>5</sup> *Warren v. Smith* (1615), 11 Coke Rep. 66, 75, 77 E.R. 1235, 1248, also 1 Rolle Rep. 151, 81 E.R. 394, 2 Bulstrode 146, 80 E.R. 1021, Croke Jac. 364, 79 E.R. 312.

the defendant; on account of this, issue can be taken upon several things thus alleged mentioned in the statute. And he cited 1 Ric. III, 10.<sup>1</sup>

But it will be pleaded in this manner only to make the time material, as in an action [upon the] case upon *assumpsit*, the defendant can plead *non assumpsit infra spatium sex annorum etc.*, and thus in other actions, to make the time of limitation material.

And he said this manner of pleading was invented after the current opinion in the bench that the Statute of 21 Jac. must be pleaded.

Then he answered the objections:

(1) That Wimbish and Talbois' case in Plowden's *Commentaries*<sup>2</sup> [is] against him. But he answered that it is upon a general law in which there is no exception, and it is [ . . . ] general law, as the Statute of Fines.<sup>3</sup> And it has been objected 13 Edw. III, tit. *Office de courte*, pl. 21, and Dier 119,<sup>4</sup> which case he agreed to be [good] law. Thus it is a bar, but in bar of the action, not of the right. This remains. And the said Statute is to be pleaded in this manner, not precisely.

(2) Another reason that it must be pleaded [is] because the time alleged in the declaration of the conversion is not material. Littleton. In [an action of] trespass, if the defendant pleads not guilty, the time alleged in the declaration of the trespass is not material if the trespass was done before the action [was] brought because this is solely material; thus in an action of case. Lo. 5 Edw. IV, 13; 21 Edw. IV, 66.<sup>5</sup>

(3) There is a difference between suits by original writ and by bill, and the Statute intended principally to extend in original writs because, in an original writ, the time appears by the *teste* of the original. But [in] the one which is by bill, the time is not so certain.

---

<sup>1</sup> YB Mich. 1 Ric. III, f. 1, pl. 1 (1483).

<sup>2</sup> *Wimbish v. Tailbois* (1550), 1 Plowden 38, 75 E.R. 63.

<sup>3</sup> Stat. 27 Edw. I, stat. 1 (*SR*, I, 126-130); Stat. 4 Hen. VII, c. 24 (*SR*, II, 547-548).

<sup>4</sup> YB Trin. 13 Edw. III, Rolls Ser. 31b, vol. 2, p. 310, pl. 12 (1339), Fitzherbert, Abr., *Office del Court*, pl. 21; *Thrower v. Whetstone* (1555), 2 Dyer 118, 119, 73 E.R. 260, 261.

<sup>5</sup> YB Pas. 5 Edw. IV, Long Quinto, f. 13 (1465); YB Mich. 21 Edw. IV, f. 66, pl. 46 (1481).

(4) The Statute of 21 Jac. does not extend to customary actions and is not a bar to such actions because this general law does not take away these customary actions.

(5) Because the defendant can renounce or waive the benefit of this Statute and thus, where he does not plead it, he waives the benefit of this Statute. 33 Hen. VIII, Di. 48; Coke, li. 8, in Drurie's case,<sup>1</sup> upon the Statute of Wills,<sup>2</sup> [was] cited.

(6) The Statute of 21 Jac. is to be taken strictly because it is the first statute which limits personal actions. And it can be a good reason at common law that the plaintiff will not be restrained as to time because the defendant could absent himself during this time. And the judges were forced to say that this is not within the law because *inutilis labor* etc.<sup>3</sup> to sue a man who is absent.

If a lease is made by an indenture rendering rent and the lessor, after the lease ended and after the time limited, brought an action of debt for the rent, as it was not within the words, it is not an exception, yet it is so construed.

And he said that, Walter, chief baron of this court, gave this reason in this court in Perkins's case that, upon other statutes of limitations he had examined and found it always pleaded and never found it not pleaded. And on account of this, he held that it must be pleaded.

Baron WESTON agreed [and held] for the plaintiff. He had delivered his opinion before in another case. And [he] thought in the case of the law to preserve the right of the plaintiff. And he cited this case. If in truth, the six years are not passed and yet the plaintiff had declared of a time passed and beyond the six years, yet, by the Statute, the plaintiff will not be barred from his action.

Note by me: This can be the reason that he did not take advantage of it by way of a demurrer.

---

<sup>1</sup> *Earl of Bridgewater's Case* (1541), 1 Dyer 48, 73 E.R. 107; *Bray v. Drury* (1610), 8 Coke Rep. 139, 144, 77 E.R. 685, 692.

<sup>2</sup> Stat. 34 & 35 Hen. VIII, c. 5, s. 7 (SR, III, 903).

<sup>3</sup> *Inutilis labor et sine fructu non est effectus legis*. E. Coke, *First Institute* (1628), f. 127.

Baron TREVOR and Chief Baron DAVENPORT agreed [and held] for the plaintiff, and thus all concurred that it must have been pleaded by the defendant.

And TREVOR cited 10 Hen. VII, 9;<sup>1</sup> 2 Hen. VIII, 21, where the Statute must be pleaded, and he gave these reasons:

(1) There is no inconvenience for the defendant to plead the Statute, but it could be to the plaintiff to declare and show the special matter.

(2) The defendant has waived the benefit of the Statute by the non-pleading of it.

(3) The Statute goes in bar of the action, not of the right.

And DAVENPORT observed the former statutes in real actions for the limitation of time, *scil.* the Statute of Marlebridge, ca. [ *blank* ]; Westminster I, ca. [ *blank* ]; Westminster II, ca. [ *blank* ]; 32 Hen. VIII, ca. [ *blank* ].<sup>2</sup> But none of these statutes extend to personal actions.

## Appleton's Case (Ex. 1638)

*The return of a seizure upon an outlawry must be certain.*

Lincoln's Inn MS. Misc. 495, f. 14v, pl. 1

In Sir Henry Appleton's case, he was outlawed and, upon process to enquire of what lands he was seised at the time of this outlawry, [upon an] inquisition, it was found that Sir Henry Appleton [at] such time was seised in his demesne as of fee *de manerio sive capitali messuagio vel domo de Jarvis Hall et de diversis terris etc.*, and an entire value [was] put upon all and a seizure [was] returned.

---

<sup>1</sup> YB Mich. 10 Hen. VII, f. 9, pl. 20 (1495).

<sup>2</sup> Stat. 52 Hen. III, c. 9 (SR, I, 21-22); Stat. 3 Edw. I, c. 39 (SR, I, 36); Stat. 13 Edw. I, c. 2 (SR, I, 72-73); Stat. 32 Hen. VIII, c. 2 (SR, III, 747-748).

And *Lenthall* moved that this inquisition, for the uncertainty, will be quashed or process upon it stayed, *quod fuit concessa* by this court.

But *Edwards*, the counsel with the prosecutor, cited one Mathews' Case in 17 *Jacobi* [1619 x 1620] in this court, that, upon an outlawry of him, an inquisition was found that the said party outlawed was possessed *de uno messuagio sive tenemento* in the occupation of such a man lying in Da. in the county of etc. for a certain term of years and the seizure of this term [was] returned and that it was then held by the court that the said inquisition is sufficient in the case of an outlawry.

Chief Baron DAVENPORT: The reason of this case could be because the lease for years was forfeited and was in the king by the outlawry, and the inquisition there for the goods and chattels of the person outlawed was but an inquisition of instruction.<sup>1</sup> But this is for his freehold land etc.

**Attorney General v. Middleton**  
(Ex. 1631 x 1645)

*A book that is not a public record, not sworn to, and not made by a person sworn to keep it will not be admitted into evidence.*

Lincoln's Inn MS. Misc. 495, f. 16v

Note: In the case of the information by the Attorney General against Sir Thomas Middleton, Sir Edward Lloyd, and others for the undue obtaining of a patent of the manors of Arustley and Kevillocke in the County of Montgomery, at the hearing, there was produced by the king's counsel a book kept by Mr. Vernon, which was a book, in which he, as one of the clerks to the lords commissioners for the sale of the king's lands, had written the memorial of the offers and other proceedings before the said lords. And this book was rejected and not allowed for evidence:

(1) Because he was not a clerk sworn to this purpose.

---

<sup>1</sup> Sic in MS.

(2) This book is no record to which the defendants could have resorted to see it.

(3) It was not sworn that all contained in this book is true.

(4) The defendants were no parties to this commission.

And in this case, Chief Baron DAVENPORT said that, in 3 Eliz. [1560 x 1561], it was adjudged that a man being sick declared what his will was and another man not known to the testator and without his direction put it into writing, and the testator died; this was no will in writing to pass lands of inheritance within the Statute of 32 Hen. VIII.<sup>1</sup> Note 6 Edw. VI, 72.<sup>2</sup>

[Order of 19 July 1641: Public Record Office E.125/28, f. 330v.]

209

### **Puliston v. Prichard**

(Ex. 1638)

*In this case, the issue was whether a layman can have tithes in pernancy by prescription.*

Lincoln's Inn MS. Misc. 495, f. 17

*Bridgeman* argued for the defendant. The case briefly is that an owner of a house and land within a parish prescribed that he and all those whose estate he had in the said house and land from the time of which etc. have paid to the parson of the said parish for the time being a certain pension annually for the maintenance of the divine service etc. in contentation of all tithes growing within the said parish. And he prescribed further that he and all those whose estate he had in the said house and land from the time of which etc. have used in respect of the said pension so paid to the parson to have all of the tithes growing within the same parish etc. And he argued that this prescription for

---

<sup>1</sup> Stat. 32 Hen. VIII, c. 1 (SR, III, 744-746).

<sup>2</sup> *Brown v. Sackville* (1552), 1 Dyer 72, 73 E.R. 152.

matter and the manner of it is bad and not good. See Coke, lib. 2, 45,<sup>1</sup> that a prescription by the lord of a manor in another case is good. And first he examined what things can be appendant to another. And he cited [a case] in the time of Edward III in Kelway, fo. 147,<sup>2</sup> by Scrope; to the church, another thing cannot be appendant except great tithes and that franchises cannot be appendant. But to the manor that is of the dowry of the church, franchises can well be appendant. And 10 Edw. III, 5,<sup>3</sup> [is] that a leet or franchise, which is temporal, cannot be appendant to the church or chapel, which is ecclesiastical. And 13 Edw. III, tit. *Leete*, pl. 7;<sup>4</sup> that a leet can be appendant to the manor. And Coke, li. 4, 34;<sup>5</sup> it is there shown that it can be appendant to the other. And Coke, Inst., fo. 121.<sup>6</sup> Then he cited one Dr. Cotton's case,<sup>7</sup> in Michaelmas term 38 & 39 Eliz. [1596], in which case, the counsel put a case, *viz.* that the owner of a house within a parish prescribed to pay a pension to the parson of this parish in discharge of all tithes growing within this parish, so that the payment of a pension by the owner of a particular house to the parson discharges of tithes to all of the parish. This case was only put by counsel. And there, it came in discharge of the whole parish, but our case is in respect of this pension to have all of the tithes of the parish in pernancy and thus [it] could differ from our case.

Then, he examined whether a layman were originally capable of tithes in pernancy in other men's lands. Coke, li. 2, fo. 45,<sup>8</sup> that a layman generally

---

<sup>1</sup> *Wright v. Wright* (1596), 2 Coke Rep. 38, 45, 76 E.R. 501, 518, also Moore K.B. 425, 72 E.R. 672, Croke Eliz. 475, 511, 78 E.R. 726, 760, 1 Gwillim 167, 1 Eagle & Younge 119.

<sup>2</sup> Case 21, Keilwey 147, 72 E.R. 319.

<sup>3</sup> YB Hil. 10 Edw. III, f. 4, pl. 11 (1336).

<sup>4</sup> YB Pas. 13 Edw. III, Rolls Ser. 31b, vol. 2, p. 214, pl. 22 (1339), Fitzherbert, Abr., *Leete et Hundred*, pl. 7.

<sup>5</sup> *Futter v. Bozoun* (1584), 4 Coke Rep. 34, 76 E.R. 970, also Godbolt 35, 78 E.R. 22, 1 Eagle & Younge 86.

<sup>6</sup> E. Coke, *First Institute* (1628), f. 121.

<sup>7</sup> Perhaps *Somerton v. Cotton* (1597), Croke Eliz. 587, 78 E.R. 830, 1 Gwillim 199, 1 Eagle & Younge 141.

<sup>8</sup> *Wright v. Wright* (1596), *ut supra*.



was not capable of tithes by the common law in pendency, but upon special matter he can have them.

Then, the question in our case [is] whether, in respect of this special matter, *scil.* of the pension paid to the parson, whether this layman cannot prescribe to have these tithes in pendency. And he held not.

And he said that the parson does not have a remedy for this sum, neither as an annuity, rent, or pension, and, if he does not have a remedy for this sum, it is not reasonable that then, in respect of it, he will lose the tithes.

Coke, li. 5, 41,<sup>1</sup> at which *pensio*, *annuitas*, or *annualis redditus* are the same; and principally as it is alleged to be issuing out of a thing.

Johnson and Boles' case in [the court of] common bench, about Michaelmas 12 Car. [1636], there, it was the opinion that it was a good prescription in our case here. But Justice Hutton was against, that it was not good.

Hil. 9 Car. [1634], in [the court of] King's Bench in Price's Case, there, it was the opinion that it was not good.

Also the prescription of the payment of this pension to the parson is for the maintenance of divine service in the chapel etc.

*Hutchins* [argued] for the plaintiff to the contrary and that it is a good prescription. It has been agreed that the prescription in the case of the lord of a manor upon such special matter is good, according to Coke, li. 2, 45. And the reason in that case will extend to this case. And accordingly in Michaelmas [term] 13 *Caroli* [1637], Christian and Brett's case, it was agreed that the prescription for the lord of the manor was good.

(1) Every prescription presumes a grant or composition originally. 8 Edw. IV, 14;<sup>2</sup> that a layman can by prescription upon consideration have tithes. But note this case is in discharge, that a layman can be discharged of them by consideration, *scil.* by a *modus*.

(2) Coke, li. 2, 45; that, by long usage, tithes can be appurtenant to a manor upon such special matter shown and as well as they can [be] to a manor, so to land. 8 Hen. VI, 16;<sup>3</sup> *dominus villae* can prescribe.

---

<sup>1</sup> *Dormer's Case* (1593), 5 Coke Rep. 40, 77 E.R. 115, also Jenkins 257, 145 E.R. 183, *sub nom.* *Croker v. Dormer*, Popham 22, 79 E.R. 1143.

<sup>2</sup> YB Mich. 8 Edw. IV, f. 13, pl. 13 (1468).

<sup>3</sup> YB Mich. 8 Hen. VI, f. 16, pl. 43 (1429).

That the lord of a manor can at common law sue in an ecclesiastical court for tithes upon such special matter, as is said in Coke, li. 2, 45, and as well he can enter. And by the Statute of 32 Hen. VIII,<sup>1</sup> after the Dissolution of the monasteries, power [was] given to other lay persons who had appropriations to sue for tithes in the ecclesiastical courts.

210

**Anonymous**  
(Ex. 1639)

*The issue in this case was whether Gravesend was within the Port of London for the purposes of a seizure upon a penal statute.*

Lincoln's Inn MS. Misc. 495, f. 33, pl. 9

An information upon the seizure of £1500 in gold forfeited because it was shipped to be transported beyond the sea was exhibited by a deputy to Watkins, searcher of the Port of London. And the information prayed that the moiety be allowed to him. And this seizure was made at Gravesend, which, as it is alleged by the searcher of London, is within the Port of London.

And note that a searcher of Gravesend who alleged that this place, as to the office of searcher, is distinct from the Port of London. And on account of this, he prayed that the searcher of London could bring this gold in[to] court because he alleged that none of it belongs to the searcher of London, being seized within Gravesend.

Note: In this case, [it was] said that, upon an information of seizure of common right, the thing seized must be brought in[to] court because, upon the information, the informer prays that the moiety be allowed to him as given to him by statute for the seizure.

See the Statute of 3 Hen. VIII, ca. 1,<sup>2</sup> which gives a forfeiture of the double value and gives a moiety to him who seizes it. 7 Edw. VI, 62. See the

---

<sup>1</sup> Stat. 32 Hen. VIII, c. 7 (SR, III, 751-752).

<sup>2</sup> Stat. 3 Hen. VIII, c. 1 (SR, III, 23).

case of the Dutchmen of an information in the [court of] star chamber for the transporting of money, that this is an offense against the common law. Hobart's *Reports*, fo. 378, 270.<sup>1</sup>

211  
**Davie v. Alpe**

(Ex. 1639)

*A plea of the statute of limitations must allege the time when the plaintiff's alleged cause of action accrued.*

*If a malicious prosecution be brought by an unlawful means and not by due course of the law and the plaintiff be injured by it, an action lies; but, if there is no injury, though there is damage, no action lies.*

Lincoln's Inn MS. Misc. 495, f. 29

This was an action upon the case brought for malicious vexation in the prosecution upon a bond satisfied.<sup>2</sup> And the defendant pleaded the Statute of 21 Jac., for limitation of actions.<sup>3</sup> And he pleaded that the cause of action was beyond the time limited by this Statute for this action without showing when the cause of action began.

[It was said] by Baron HENDEN that this plea is bad because no action could be taken upon it because when the defendant pleads in bar that the cause of action was beyond the time limited by this Statute, if issue had been joined upon it, it had been utterly uncertain because neither the jury nor the court is not held to enquire of the time, when the time of the cause of action began. But the defendant should have pleaded *quod causa actionis primo incepta* was at such a time etc. or to show what was the *causa actionis*

---

<sup>1</sup> *Attorney General v. Courteen*, Hobart 270, 80 E.R. 416.

<sup>2</sup> *Alpe v. Davy*, Public Record Office E.125/18, f. 241 (16 Oct. 1635); E.125/23, f. 463 (14 Feb. 1639).

<sup>3</sup> Stat. 21 Jac. I, c. 16 (SR, IV, 1222-1223).

and the time when this *causa actionis primo incepta fuit* and then the plaintiff can traverse<sup>1</sup> it.

And note, in this case, there were divers things alleged in the declaration so that it was uncertain what was the cause of action. And it was a principal question in the case, what was the cause of action.

Note: In this case of Davie and Alpe, Baron WESTON said, and so held, that the entire cause of the action must be within the time limited by the said Statute of 21 Jac., for limitations of actions. But he said, if a man digs a trench in his own land but he digs it is so near a wall of mine that my wall falls six years afterwards, I will have six years after the fall of my wall to bring my action. Thus, if A. promise to B., if B. will marry the daughter of A., that he will pay to B. £100 and B. marries the daughter of A. seven years after, there, B. will have six years after the marriage to bring his action.

Chief Baron DAVENPORT said that, where that which is the damage is done outside the time limited by the said Statute, it is within the Statute and the action is gone because the damage must be done within the time limited by the Statute to bring the action. And also, if a writ of trespass is brought for several trespasses, as it can if one is within the time limited by the Statute and the other beyond, yet if there are several trespasses and independent the one from the other nor the one increase the damages for the other, then the plaintiff can proceed for that which is within the time limited and it will be a bar for the other, so that what is but the inducement to the action can be done beyond the time limited by the Statute, yet, if that which is the cause of action is done within the time limited by the Statute the action well lies. Thus, if that which is the injury is done within the time limited, the action well lies.

Baron HENDEN [said] for a wrongful vexation where the plaintiff had probable cause generally, an action does not lie, and he [cited] the case of the Lady Waterhouse against Meredith Moodie, Pas. 6 Jac. [1608] in the King's Bench;<sup>2</sup> she brought an action upon the case because the defendant had libelled against the plaintiff for tithe wood which was discharged of tithes

---

<sup>1</sup> reverse *MS.*

<sup>2</sup> *Lady Waterhouse v. Moodie* (1606), cited in *Waterer v. Freeman* (1617), Hobart 205, 206, 80 E.R. 352; note also *Lady Waterhouse v. Baude* (1606), Croke Jac. 133, 79 E.R. 116, 1 Gwillim 227, 1 Eagle & Younge 164.

by the Statute, being *sylva caedua*,<sup>1</sup> and [it was] agreed that, where a suit is there for a thing of which the court had this wood not within the Statute of actions as the plaintiff could conceive by an indictment though he knew it to be false. And, where an action [upon the] case for conspiracy will lie against two, there, an action upon the case will lie against one. See Coke, *Liber Entrationum*, f. 42;<sup>2</sup> an action upon the case for an outlawry unduly obtained and pursued. See 9 Edw. II, Fitz., tit. *Deceit*, pl. 52, and Bulwer's case, Coke Li. 7.<sup>3</sup>

Chief Baron DAVENPORT said, if the malicious prosecution be by an unlawful means and not by due course of the law and the party [be] injured by it, there, an action can lie. If by malicious prosecution, there is no injury though there is damage, no action lies.

27 Hen. VIII, 11;<sup>4</sup> the action [upon the] case [was] brought for the indictment.

Baron HENDEN said, in this case, that, if a man is satisfied his debt and afterwards [proceeds] upon execution notwithstanding, that an action upon the case lies, and, here, he procured an execution for procuring the seizure of the bond and extent upon it, and an action will lie against the procurer. And he said that, if the obligor pays the money and the obligee promises him to deliver up the bond and afterward will not but sues for it, an action [upon the] case lies because, though he is not held to deliver it by the law, yet, if, upon the payment of the money by which he is eased of the suit, he promised to deliver it, it is good consideration.

In this case of Davy and Alpe, the court was divided so that no judgment was given because barons HENDEN and WESTON were for the plaintiff, that the declaration was good. But TREVOR and Chief Baron DAVENPORT were for the defendant, that judgment should be given *quod querens nil capiat per billam* and that the declaration was not good and the plea of the defendant in

---

<sup>1</sup> Stat. 45 Edw. III, c. 3 (*SR*, I, 393).

<sup>2</sup> *Sharpeigh v. Hawkesworth* (1609), E. Coke, *A Booke of Entries* (1614), f. 42, pl. 34.

<sup>3</sup> *Peytevyn v. St. Osyth* (1316), YB Hil. 9 Edw. II, Selden Soc., vol. 45, p. 93, pl. 5, Fitzherbert, Abr., *Disceit*, pl. 52; *Bulwer v. Smith* (1584), 7 Coke Rep. 1, 77 E.R. 411, also 4 Leonard 52, 74 E.R. 724.

<sup>4</sup> YB Pas. 27 Hen. VIII, f. 11, pl. 27 (1535).

substance good and, though it was not, yet the declaration not being good, no judgment will be given for the plaintiff.

212

**Uvedall v. Pescott**  
(Ex. 1639-1640)

*That an action was not brought within the period of the Statute of Limitations must be affirmatively pleaded by the defendant.*

Lincoln's Inn MS. Misc. 495, f. 29v

Uvedall, plaintiff, against Pescott in an action upon the case for *assumpsit*. And upon *non assumpsit* pleaded by the defendant, a verdict was found for the plaintiff. And it was moved in arrest of judgment that it appeared by the declaration that the cause of action was beyond the time limited by the Statute of 21 Jac.<sup>1</sup>

*Holborne*, for the plaintiff, argued for it must have been pleaded by the defendant and, inasmuch as he had not pleaded it, he comes now too late to move it in arrest of judgment for these reasons.

(1) Admitting the court may see and take notice that within the body of the Act of 21 Jac., the plaintiff after limited in the said body of the act cannot have his action yet because there are exceptions within the Statute, the court will not conclude the plaintiff who is not within the exceptions. And for this, he cited 4 Hen. VII, 8; 7 Edw. IV, 8; and Plowden, *Commentaries*, Earl of Leicester's case,<sup>2</sup> that where there are exceptions in a statute, the statute must be pleaded and otherwise taken that the party is not within the exceptions. And so here, the defendant must plead the Statute and aver that the plaintiff

---

<sup>1</sup> Stat. 21 Jac. I, c. 16 (SR, IV, 1222-1223).

<sup>2</sup> YB Pas. 4 Hen. VII, f. 8, pl. 9 (1489); *Lord Say v. Lord of Nottingham* (1473), YB Pas. 13 Edw. IV, f. 8, pl. 4; *Earl of Leicester v. Heydon* (1571), 1 Plowden 384, 75 E.R. 582.

is not within the exceptions, though perhaps the plaintiff is not within the exceptions.

(2) But he said that the court in this case cannot see and take notice upon the declaration that the plaintiff is within the body of the said Statute because it does not appear to the court when the suit begins because it does not appear by the declaration because the declaration is not to be taken as the beginning of the suit. It is to be agreed that, upon an original [writ], the suit commences upon the original writ [being] taken out. This is upon proceedings in the [court of] common bench. But it is to be agreed that, upon suits in the court by *quo minus* or in the [court of] King's Bench by *latitat*, it would not appear by the declaration when the suit begins. And upon the said Statute in a clause within it that a tender of amends in trespass before an action [was] brought, there, if the tender is by the defendant after the *latitat* [is] taken out or after the *quo minus* [is] taken out, the tender is too late. Thus, it could be that this action was begun within the time limited by the Statute for aught will appear by the declaration.

And he said that, though it is to be agreed that it will hardly appear in this court and in the King's Bench at what time the suit began, yet it is true that, upon evidence or examination, it can appear. And, if the plaintiff will be forced to show it in his declaration, *scil.* to show when he took out the first process and all the proceeding, it will make large the declaration, and the pleading of it by the defendant will prevent tedious, needless books and charge.

The King's Bench holds that it must be pleaded by the defendant. But the common bench is not of the same opinion.

And now this term, this case was argued at the bench by the two puisne barons.

Baron HENDEN [held] for the defendant that judgment will be given *quod querens nil capiat per billam*. But he did not speak to this point upon the Statute of 21 Jac., for limitation of actions, but that the declaration was insufficient.

Baron WESTON: He delivered his judgment upon the question upon the Statute of 21 Jac., *viz.* that the defendant must plead it. And he said there are two ways to bring the question on the Statute of 21 Jac., of limitations of actions, to judgment.

(1) One way is by demurrer by the defendant upon the declaration where it appears in it.

(2) The other is by the defendant's pleading of the Statute.

But after a verdict, for the defendant to move it in arrest of judgment, he held that the defendant cannot because there will be a diversity between a demurrer upon the declaration and where a verdict is passed because after a verdict is passed in the office of the judge to support it if he could.

Note the said Statute of 21 Jac., for limitation of actions, extends to all of the courts. The word 'writ' extends it to the common bench; the word 'bill' extends it to the King's Bench and this court. And the declaration in the King's Bench is *in custodia mareschalli*, and the *latitat* in the bench is their original [writ]. But yet it is no part of the record. And the bill in this court is *presenti in curia* and the *quo minus* or process [is] not part of the record. It is otherwise in the common bench. Also, to force the plaintiff to show in his declaration all of the matter for the taking out of process by him and the proceeding therein will be inconvenient and make long declarations. But if the defendant pleads it, the plaintiff can easily reply in few words. Thus he concluded that, after a verdict, one cannot take advantage of it. But the defendant should have demurred upon the declaration or have pleaded it in bar. Thus he concluded for the plaintiff.

Baron HENDEN [held] for the defendant and that the declaration is insufficient for several causes.

(1) Where *assumpsit* is made upon mutual and reciprocal promises between the plaintiff and the defendant, there, the plaintiff in an action brought by him need not allege performance of it when his part is to be performed. But, where it is upon an executory consideration, there, one must aver performance. Pas. 44 Eliz. in the bench between Ley and Eggersley,<sup>1</sup> in consideration that the plaintiff should surrender a term, the defendant promised to pay £100 and the plaintiff alleged in his declaration that he had tendered a surrender etc. [It was] resolved in this case (1) that the consideration was not performed by the tender even though it is a good plea upon an obligation to this purpose; (2) that the defendant [could] take advantage of it after a verdict because an executory consideration as it should be alleged to be performed in the declaration. And he cited Reneger and Fogasse, Plowden,

---

<sup>1</sup> *Lea v. Exelby* (1602), Croke Eliz. 888, 78 E.R. 1112.



*Com.*,<sup>1</sup> to this purpose. Thus here, the declaration was in consideration that he venture in such a ship, or *Turpin's Grace*, and he had alleged that he had ventured in this ship and did not say with *Turpin's Grace*. And if he varies the person or the ship, it is not a good performance and the person with whom the venture will be is the more material.

(2) The promise of the defendant was *quod haberet et gauderet* the furniture of such ship. And the plaintiff for breach said *non deliberavit*. And he said that this is not a breach, but the plaintiff should have said that he did not enjoy it but that he was disturbed etc. Thus a disturbance must be alleged. And on account of this, where the promise is *quod haberet et gauderet, non deliberavit* is no breach because this is not the issue. And he cited Mich. 40 Eliz. [1597 x 1598] in the bench, rot. 97, Baptista and Revera's case;<sup>2</sup> two foreigners, there, the delivery was part of the promise, and, there, issue can be taken upon the delivery, but otherwise not. 17 Edw. IV, 2;<sup>3</sup> there, the condition was that they must permit and allow and it is pleaded that *avomus* allowed him etc., and [it was] good because allowance is not an act. 17 Edw. IV, 3;<sup>4</sup> a condition to deliver a testament of the testator or letters patent, and he pleaded the delivery of the letters testamentary or of exemplification of the patent, and it was good because it was performed in substance.

But note that Baron WESTON thought it was a good plea, this *non deliberavit*, because, without a delivery, he could not have or enjoy it.

(3) The request here alleged is of two things where, for one of them, the plaintiff did not have a cause for a request. And he said that where a man requests two things where he had cause to require but one of them, it is good for nothing, *quod fuit concessa*.

Also, [it was] said by barons WESTON and HENDEN, if a man is to perform two [things] upon request and the request is but to perform but one of them, it is not good. And he cited Coke, li. 5, Saviour's case.<sup>5</sup> Also, it was objected in this case that they were nonsensical words in the declaration, *viz.*

---

<sup>1</sup> *Reniger, qui tam v. Fogossa* (1550), 1 Plowden 1, 75 E.R. 1.

<sup>2</sup> *Revera v. Baptista* (1597), Moore K.B. 470, 72 E.R. 703.

<sup>3</sup> *Cooke's Case* (1477), YB Pas. 17 Edw. IV, f. 2, pl. 3.

<sup>4</sup> YB Pas. 17 Edw. IV, f. 3, pl. 6 (1477).

<sup>5</sup> *Attorney General v. Harvey* (1613), 10 Coke Rep. 66, 77 E.R. 1025.

that such a ship took a prize where it should have been that the men in the ship took a prize, and as in *lex loquendi*, so in *lex placitandi*, and that though tropes and figures can be used in common parlance and letters, yet they are not to be used in declarations. But he answered it is a *modus loquendi* and it is to be taken *secundum subjectam materiam*. And it means that the men in the ship took it. And there are phrases used in such cases [that are] not proper and, notwithstanding this, the declaration [is] good.

Baron WESTON [held] for the plaintiff that judgment should be given for the plaintiff that though the cause of action is not within the time limited, yet inasmuch as the defendant has not pleaded it, he cannot take advantage of it now after the verdict. And he held the declaration [is] good.

[In] Hilary term, 15 Car. [1640], this case was argued by Baron Trevor and Chief Baron Davenport.

Baron TREVOR [held] for the plaintiff:

[1] That the declaration was good at common law notwithstanding the exceptions taken to the defects in it;

(2) That the defendant [may] not take advantage upon the Statute of 21 Jac., for limitation of actions, after a verdict inasmuch as he had not pleaded it because the cause of action is a matter in fact and a verdict being found for the plaintiff, and he will have judgment. It is true that in this court where an action is begun by *quo minus* or subpoena and in the King's Bench where an action is begun by a *latitat*, the time of the suing out of this process does not appear.

Chief Baron DAVENPORT [held] for the defendant:

(1) That the declaration in this case is bad and defective at common law because, here, a good cause of action is not alleged in it. 16 Eliz., Dy. 328, Mountford's case.<sup>1</sup>

(2) The second question is whether the Statute of 21 Jac. had taken this action. And the question rested upon this Statute. And he held that the defendant upon this Statute can take advantage notwithstanding he has not pleaded it. Heydon's case, Coke, li. 3, fo. 7,<sup>2</sup> is a good rule for construction

---

<sup>1</sup> *Mountford v. Catesby* (1573), 3 Dyer 328, 73 E.R. 741.

<sup>2</sup> *Heydon's Case* (1584), 3 Coke Rep. 7, 76 E.R. 637, also Moore K.B. 128, 72 E.R. 485, Savile 66, 123 E.R. 1016, 1 Leonard 4, 74 E.R. 4, 4 Leonard 117, 74 E.R. 767.

of the Statute. And what the common law was before the making of this Statute of 21 Jac. is evident in this case, this action upon the case being a transitory and personal action because it is in a *placito transgressus*, which was not limited at common law. The statutes for limitations of actions before the Statute of 21 Jac. were Westminster I, ca. 39; the Statute of Merton, ca. 13; these extend to real actions; and the Statute of 32 Hen. VIII, ca. 3; this added replevins and avowries.<sup>1</sup> And in the third provision within the Statute of 21 Jac., 16, is this action upon the case there named and limited as to time, *scil.* six years next after the cause of such actions or suits and not after. Thus, the time in this Statute to bring this action refers to the cause of action, and the cause of the action, at what time it was, is to be tried by the declaration. And the cause of action here is at the time when the promise was to be performed because the time of the promise he does not take for the cause of the action but at the time when the promise was to be performed and then by non performance is the breach and cause of action. And this appears by this declaration to be beyond the six years. And in this Statute of 21 Jac. is an affirmative provision that the action will be brought within six years. And there are negative words also in the Statute, 'and not after'. Now, he held that, by reason of these negative words, this court did not have consuance or jurisdiction of the cause or case being out of the six years.

Also [it was held] by him the plaintiff is to make it appear to the court that the action was brought within the time limited by the Statute because the limitation appointed by the Statute of 21 Jac. is to the plaintiff who is to bring the action and the defendant has nothing to do but to see that the action be brought according to the said Statute. And the exceptions in the Statute of 21 Jac. are not for the benefit of the defendant which he must plead and whether the cause of action is laid in the declaration to be within the time limited. And the evidence at the trial proves this out of the time, and this, as I conceive, is found by the verdict, as it must be. The plaintiff will not have judgment. And he cited 13 Edw. III, Fitz., tit. *Office del Courte*, pl. 21;<sup>2</sup> in a writ of right and acknowledgment of seisin in the time of Henry I. And,

---

<sup>1</sup> Stat. 3 Edw. I, c. 39 (*SR*, I, 36); Stat. 20 Hen. III, c. 8 (*SR*, I, 3); Stat. 32 Hen. VIII, c. 2 (*SR*, III, 747-748).

<sup>2</sup> YB Trin. 13 Edw. III, Rolls Ser. 31b, vol. 2, p. 310, pl. 12 (1339), Fitzherbert, *Abr.*, *Office del Court*, pl. 21.

because the count was before the time of limitation, the defendant will not have judgment. And Fitz., tit. *Discontinue*, pl. 15;<sup>1</sup> 31 Hen. VI; where *primo ut [ . . . ] curiae*.

Thus note, in this case, two of the barons, *scil.* TREVOR and WESTON, were of opinion that the defendant must have pleaded it and, after a verdict, cannot take advantage of it in arrest of judgment. And it was said that Baron HENDEN was of the same opinion.

But Chief Baron DAVENPORT was to the contrary, as appears before. And, in his argument, he cited a case to be Lord Pagett's case in this court resolved upon a point of pleading where it was pleaded that A. was seised in fee *de manerio de Da.* and that, so being seised, enfeoffed J.S. without saying that, *scil.* he did not say *de manerio habendo* to him and his heirs *virtute cuius* J.S. was seised in fee *de manerio de Da. praedicto*, yet this plea [was] bad notwithstanding the *virtute cuius etc.* which was but the conclusion was *de manerio* because he had not alleged it in the premises that A. had enfeoffed J.S. *de manerio* and the conclusion did not make it good, *quod nota*.

[This case is cited in *Buttolph v. Cole* (1637-1641), see above, Case No. 206.]

213|

**Tidd v. Lady Lake**  
(Ex. 1639 x 1644)

*A curate who is neither a parson nor a vicar cannot claim an inheritance in a house by prescription, but he can have a portion of the tithes as curate by usage.*

Lincoln's Inn MS. Misc. 495, f. 41v, pl. 1

Note: In the case of Tidd, curate of Stanmore Parva in the County of Middlesex, against the Lady Lake, Baron HENDEN said that a curate who is neither a parson nor a vicar cannot claim an inheritance in a house by prescription, but he can have a portion of the tithes as curate by usage. And thus

---

<sup>1</sup> YB 38 Edw. III, Lib. Ass., p. 222, pl. 6 (1364), Fitzherbert, Abr., *Discontinuance divers*, pl. 15.

he said it was resolved in a Yorkshire case, *quod fuit concessa per curiam*, that a curate being neither a parson nor a vicar cannot make a title to the house [which] belongs to the curacy because he cannot prescribe.

Note that this term, Mr. Attorney General did begin to exhibit English informations in his name in the behalf of vicars and parsons.

Note: In this case [it was] said by *Bankes*, Attorney General, that it is frequent in Chancery that in such places where there is a rectory impropriate and no endowed vicarage but he who has the rectory is to find one to serve the cure that he will, on behalf of the king, in his regal power as supreme ordinary, exhibit an information to have a convenient allowance to be made to the curate.

But Chief Baron DAVENPORT said and declared that where there is an endowable vicarage and the impropriation comes to the king by the Statute of 31 Hen. VIII, of monasteries,<sup>1</sup> that now the rectory being turned in[to] another nature and being become a lay fee, that the power of the bishop to enlarge the vicarage is gone.

214

## **Braughton's Case** (Ex. 1640)

*The issue in this case was whether a person fined in another court can object to the fine or to the jurisdiction of that court in the Court of Exchequer when the fine is sent to the Exchequer for collection.*

Lincoln's Inn MS. Misc. 495, f. 45v

One Braughton was fined in the High Commission court, and this fine [was] estreated into this court. And a [writ of] extent against his body, land, and goods and chattels [was] awarded and his body was taken.

And *Lenthall* and *Bagshaw* moved that the defendant can plead to this estreat and that he can be bailed because this is the first process against him.

---

<sup>1</sup> Stat. 31 Hen. VIII, c. 13 (SR, III, 733-739).

But it was objected that this is a [writ of] execution awarded and, being taken in execution, he cannot be bailed, as a judgment in debt in other courts is given against any man. And this judgment is assigned in this court to the king or seized into the hands of the king and an extent against the body of the defendant [was] awarded and he was taken. Now he cannot plead here to this judgment because the matter has been examined in the other court before the judgment [was] given nor, by consequence, he cannot be bailed, being in execution. But afterwards by the consent of the Attorney General, the defendant, upon a recognizance entered into to stand to the order of this court had his liberty.

Note: Justice Croke has said this term in the [Court of] King's Bench<sup>1</sup> that the high commission court does not have the power to set a fine. And it seems to me it is mischievous that fines set in the High Commission Court will be estreated into this court so short without any cause shown for which the same was set because, by this means, they can impose a fine in a cause where they do not have conusance of the cause. And this being estreated here so short without the cause, no answer here can be made to it. Second, whether it cannot be said that he could have moved for [a writ of] prohibition if they did not have conusance of the cause. And query whether the party in his plea here can show the cause, which it seems he cannot.

215

**Executor of Burt v. Jenner**  
(Ex. 1640)

*In this case, a verdict was set aside because the defendant did not have notice of the date of the trial.*

Lincoln's Inn MS. Misc. 495, f. 46, pl. 1

The executor of one Burt, which Burt was a Messenger of the Chamber, brought an action of debt in the *detinet* against Jenner *alias* Jennings for fees

---

<sup>1</sup> Perhaps *Torle's Case* (1640), Croke Car. 582, 79 E.R. 1100.

due to the testator and declared that the Messenger of the Chamber was an ancient office used to be appointed by the kings and queens of this realm for the time being for the life of such Messenger to execute the precepts of the king and of his privy council and that they have used to have such fees, *viz.* for every mile they are sent to summon any man 4d. and for the summoning of him 6s. 8d. and for every mile in the return that they brought the party summoned to the king or his privy council 4d. and, if the party be committed to his custody, for every day he remains in his custody 6s. 8d. and then produces and sets forth his warrant dated at Hampton Court such a day and year signed by six privy councilors to attach the defendant and bring him before the lords and that, by virtue thereof, he went to the dwelling place of the defendant, being so many miles distant, and brought him in his custody to the lords of the council at such a place, being so many miles, and, there, he was by the lords of the council committed to the custody of the testator and remained so many days in his custody and then committed to the Fleet [Prison], whereby the fees due to the testator for so much a mile for his attaching him and for the time he remained in his custody came to £43 etc., which the defendant detained and still detains.

The defendant pleaded *non detinet*, and there was a trial at the bar of this court this term, and the defendant made a default. And the inquest was taken by default, and a verdict [was] given for the plaintiff upon the testimony of witnesses, some of whom were messengers, that such fees have used to be taken. And a decree that had been made in the Exchequer chamber which concerned the fees of messengers was read in evidence.

But afterwards, *Hackwell*, for the defendant, moved upon an affidavit that the defendant did not have notice of this trial, that judgment should be stayed, and that there should be a new trial. And thus [it was] ordered if cause not be shown to the contrary. And nothing was shown this term. And it seemed the barons liked not that the said fees will have the countenance of a verdict in this court.

**Hobbs v. Prichard**  
(Ex. 1641-1642)

*An action of debt lies against a sheriff who allowed a prisoner in execution for a debt to escape.*

*Such an action survives the death of the judgment creditor.*

Lincoln's Inn MS. Misc. 495, f. 50

Lloyd had a judgment in an action of debt against Mansell, and, upon a *capias ad satisfaciendum* awarded against Mansell upon the said judgment, Mansell was taken in execution and escaped. And then Lloyd, who had the judgment, died, making his executor, and his executor brought an action of debt by *quo minus*, being *debitor domini regis* in the right of the testator, against Prichard, the sheriff who allowed this escape.

*Jenkins* argued for the defendant that debt does not lie by the executor against the sheriff upon this escape.

(1) Because this escape being allowed by the sheriff in the lifetime of the testator is but a personal tort to the testator which *moritur cum persona*. And the executor will not have an action for it.

(2) By allowing this escape, it is but a tort and not a debt because on account of this it was not a debt in the sheriff, but it was a tort. The Statute of Westminster II, ca. 12, made 13 Edw. III,<sup>1</sup> [is] that if he who was found in arrearages upon his account before the auditors and he was committed to prison by the auditors, as they can, if he is allowed to escape, that the one at whose suit *habuit recuperare* by a writ *de debito* etc. The Statute 1 Ric. II, ca. 12,<sup>2</sup> against the warden of the Fleet [Prison is], if he allows him who commands to him by a judgment in the courts of the king to go at large etc. and, if he do, the plaintiffs will have a recovery against him by a writ of debt.

---

<sup>1</sup> Statute of Westminster II, Stat. 13 Edw. I, c. 11 (SR, I, 80-81).

<sup>2</sup> Stat. 1 Ric. II, c. 12 (SR, II, 4).



14 Edw. IV, 3,<sup>1</sup> by Fairfax; at common law, there was no action of debt against the jailer upon such an escape (that was of one committed in execution for a debt) in an action upon the case.

15 Edw. IV, 20,<sup>2</sup> by Choke; before the Statute of Westminster II, afore-said, *de servientibus et ballivis*, if a bailiff had been found in arrearages before the auditors assigned, he would have been committed to wardship<sup>3</sup> if the warden had allowed him to escape, then the lord to have a writ of trespass upon his case. And now, by the Statute, he is given a writ of debt against the wardens. And by the equity of the same Statute, if any man who is condemned and in prison for this condemnation if he escape, a writ of debt lies against the wardens. And this is not to recover the first duty, but it is good to recover a penalty, which is given by the Statute.

15 Edw. IV, 19,<sup>4</sup> by Hody; by the Statute of Westminster II, a writ of debt lies against the wardens in a case that a bailiff be found in arrearages before the auditors assigned and committed to prison and his warden lets him to go at large. And by the equity of this Statute, a writ of debt is given against every warden in a case that he allows his prisoner to go at large.

34 Edw. I, tit. *Debt*, pl. 162;<sup>5</sup> debt against a warden of a prison who lets one to go at large, who was condemned. This [was] by the equity taken upon the Statute of Westminster, 15 Edw. IV, 19,<sup>6</sup> by Hody, if a man [was] adjudged to account and afterwards the plaintiff sued a *capias ad computandum* directed to the sheriff and he was taken and [was] in prison by force of the said *capias* and afterwards the sheriff allowed him to go at large, in this case, the plaintiff will have a writ upon his case and he cannot have a writ of debt because he was not guarded for any duty.

Note by me this was where he was taken upon a *capias ad respondendum* and allowed to escape. Debt does not lie, but an action upon the case.

---

<sup>1</sup> *Stoker's Case* (1474), YB Pas. 14 Edw. IV, f. 3, pl. 1.

<sup>2</sup> *Stoker v. Colins* (1476), YB Hil. 15 Edw. IV, ff. 18, 20, pl. 8.

<sup>3</sup> al gard *MS*.

<sup>4</sup> *Stoker v. Colins* (1476), YB Hil. 15 Edw. IV, ff. 18, 19, pl. 8.

<sup>5</sup> YB Mich. 34 Edw. I (1306), Fitzherbert, Abr., *Debt*, pl. 162.

<sup>6</sup> *Stoker v. Colins* (1476), YB Hil. 15 Edw. IV, ff. 18, 19, pl. 8.

Coke, li. 9, fo. 87;<sup>1</sup> if a jailer allows one in execution to escape, the plaintiff can have an action upon the case at common law against the jailer. But after the death of the jailer, no action lies against his executors because it was founded upon a tort which *moritur cum persona*.

9 Hen. VI, 19,<sup>2</sup> this action of debt is conceived [to be] by cause of the Statute, and it is a new action given for the offense against the Statute.

If the sheriff be removed, the party will have an action against the former sheriff.

A release made to him who was thus escaped is not a plea in an action against the warden who allowed the escape because it is a new action given for the offense against the Statute.

Thus he said that this is a personal tort for which he, *scil.* the party, recovers his damages by a writ of debt by the Statute of Westminster II. And it is but a tort and no debt to the sheriff and, on account of this, it *moritur cum persona* of the party, the escape being in the lifetime of the testator.

(2) That the executor will not have this action, the words of the Statute of Westminster II are that he to whom the suit *habuit recuperare per breve de debito quod respondeat domino de damnis*.

The Statute of 4 Edw. III, ca. 7,<sup>3</sup> gives an action of trespass *de bonis testatoris in vita sua* taken to his executor. And before this Statute, the executor did not have this action, as appears by the words of this Statute, and yet it was a better cause.

And as is said in Coke, li. 9, 87, no action lies against the executors of the jailer because it was founded upon a tort; for the same reason, no action lies for the executor of the party against the jailer.

15 El., Dyer 322;<sup>4</sup> that [an action of] debt does not lie against an executor of the warden of the Fleet for such an escape of a man in execution allowed by the testator unless the warden himself in his lifetime be convicted and adjudged of the escape because the offense is only a tort by negligence,

---

<sup>1</sup> *Pinchon v. Legate* (1611), 9 Coke Rep. 86, 77 E.R. 859, also Croke Jac. 294, 79 E.R. 252, 2 Brownlow & Goldesborough 137, 123 E.R. 859, Jenkins 290, 145 E.R. 210.

<sup>2</sup> YB Trin. 9 Hen. VI, f. 19, pl. 13 (1431).

<sup>3</sup> Stat. 4 Edw. III, c. 7 (*SR*, I, 263).

<sup>4</sup> *Whitakers v. Onsley* (1573), 3 Dyer 322, 73 E.R. 729.

and, at common law, no writ of debt lies, but an action on the case. See 10 Eliz., Dyer 271,<sup>1</sup> another case.

(3) It was said that in truth in our case, the action is brought by the executor of the executor of the party at whose suit the one who escaped was committed and that this action does not lie for the executor of the executor of the party etc. because he is more remote.

The Statute of Westminster II, ca. 24,<sup>2</sup> gives a writ of account to the executor. And yet by 7 Edw. III, fo. 62,<sup>3</sup> in the new print[ing], there, [it was] resolved that the executor of the executor will not have this action. And on account of this, a new statute was made, 25 Edw. III, ca. 5,<sup>4</sup> that executors of executors shall have actions of debt, account, and of goods carried away of the first testator etc. But this does not extend to this case.

And thus, he concluded against the plaintiff. And he said that, here, there is no mischief because a new *capias ad satisfaciendum* will lie.

*Harewell*, for the plaintiff, [argued] that the action well lies.

(1) The party himself at whose suit the person who escaped was committed can have an action upon the case, because it lies by the common law, or an action of debt, which is given by the Statute. 34 Edw. I, tit. *Debt*, pl. 162, cited before, and 11 Edw. II, 2, tit. *Debt*, 172, there, an action of debt was brought by the party, and [in] accord [is] 33 Hen. VI, 1, and 7 Hen. IV, 4, and see Fitzherbert, *Natura Brevia*, fo. 93a and b,<sup>5</sup> where an action upon the case or debt lies, and Register, fo. 98, and Slade's Case, Coke, li. 4, fo. 95;<sup>6</sup> action of debt or action upon the case lies.

(2) That the executor of the party will have an action of debt against the sheriff or warden, Fitzherbert, *Natura Brevium*, fo. 121. If a man condemned

---

<sup>1</sup> *Anonymous* (1568), 3 Dyer 271, 73 E.R. 602.

<sup>2</sup> Stat. 13 Edw. I, c. 23 (*SR*, I, 83).

<sup>3</sup> YB Mich. 7 Edw. III, f. 62, pl. 54 (1333).

<sup>4</sup> Stat. 25 Edw. III, stat. 5, c. 5 (*SR*, I, 321).

<sup>5</sup> *Thorpe v. Godchepe* (1318), YB Mich. 11 Edw. II, Selden Soc., vol. 61, p. 265, pl. 1, Fitzherbert, *Abr.*, *Dette*, pl. 172.

<sup>6</sup> *Slade v. Morley* (1602), 4 Coke Rep. 91, 76 E.R. 1072, also Moore K.B. 433, 667, 72 E.R. 677, 827, Yelverton 20, 80 E.R. 15, J. H. Baker, 'New Light on Slade's Case', in *The Legal Profession and the Common Law* (1986), pp. 393-432.

in debt or damages is committed to prison upon it and is let at large or he escapes, the jailer will be charged by a writ of debt to him at whose suit he was condemned etc. and to his executors.

(Note it is offered for an answer to this book that the executor will have this writ if the escape is allowed after the death of the testator, but not where the escape was in the lifetime of the testator. And he cited Mason and Dixon's Case<sup>1</sup> in the King's Bench and this is entered Trin. 2 Car., rot. 365, that [an action of] debt was brought by the executor, and, in this case, [it was] adjudged that it lies, which [is] in point. But the counsel of the defendant said that the court was divided, but the roll will decide it.)

17 Edw. III, pl. 106;<sup>2</sup> executors replevied an ox taken in the lifetime of their testator and recovered the beast, and it [was] by the common law because the ownership remained at all times in him.

21 Hen. VI, 1b, by Markham;<sup>3</sup> executors will have replevin of goods taken out of the possession of their testator. And this proves that the ownership that was in the testator vests in them.

But [it was said] by *Newton* this case of replevin is not [good] law his executors will have a writ of trespass, and this [is] by the Statute.

7 Hen. IV, 6b;<sup>4</sup> *ejectio firmæ* brought by executors upon an ouster of the testator and, by Hankford, if a tenant by *elegit* be ousted and die, his executors will have an action for it. Thus here.

7 Hen. IV, 2;<sup>5</sup> an executor will have a writ of ravishment of ward for a ravishment in the lifetime of the testator. See 11 Hen. IV, 54,<sup>6</sup> upon this.

---

<sup>1</sup> *Mason v. Dixon* (1626), Noy 87, 74 E.R. 1053, W. Jones 173, 82 E.R. 92, Latch 167, 82 E.R. 328, Benloe 200, 73 E.R. 1057, Popham 189, 79 E.R. 1282, Paynell K.B. 268.

<sup>2</sup> YB Mich. 17 Edw. III, f. 72, pl. 102 (1343).

<sup>3</sup> YB Mich. 21 Hen. VI, f. 1, pl. 1 (1442).

<sup>4</sup> YB Hil. 7 Hen. IV, f. 6, pl. 1 (1406).

<sup>5</sup> YB Mich. 7 Hen. IV, f. 2, pl. 14 (1405).

<sup>6</sup> YB Hil. 11 Hen. IV, f. 54, pl. 36 (1410).

Russell's case, Coke, li. 5, 27,<sup>1</sup> and action of case [was] brought by an executor for a loss by the testator and trover and conversion. Note, there, the conversion can be after the death of the testator.

The executor brought an action for the taking of the goods of the testator in his lifetime and conversion of it in the time of the executor, [it was] adjudged the plaintiff will recover costs upon the Statute because the Statute is general.

Coke, li. 6, fo. 80, in Phitton's case,<sup>2</sup> divers statutes [are] mentioned which speak only of the party and not of his executors, yet the executors will have the action or the administrator. The Statute of 27 Eliz.,<sup>3</sup> for reforming errors in the [Court of King's] Bench, the words of the Statute are that the party, plaintiff or defendant, will have [a writ of] error, yet the executor or administrator of the party can have [a writ of] error within the intent of the Statute because they represent the person of the testator.

(3) And that an executor of an executor will have this action by the equity of the Statute of 25 Edw. III, ca. 5, [see] Plowden, Com., fo. 35, in Plat's case;<sup>4</sup> there, a bill of debt [was] brought by the administrator for an escape after the death of the intestate.

The executor recovered in the King's Bench a £100 debt, and the defendant [was] taken in execution and escaped and the executor brought an action of debt in the *debet et detinet* against the marshall, and he had judgment. Fo. 371 in Hobart's Reports; Coke, li. 5, 31,<sup>5</sup> cited Hitchcock's case of 36 Eliz.<sup>6</sup> to the contrary.

---

<sup>1</sup> *Russel v. Prat* (1584), 5 Coke Rep. 27, 77 E.R. 91, also Moore K.B. 146, 72 E.R. 496, 1 Leonard 193, 74 E.R. 178, 1 Anderson 177, 123 E.R. 417.

<sup>2</sup> *Phitton's Case* (1607), 6 Coke Rep. 79, 77 E.R. 374.

<sup>3</sup> Stat. 27 Eliz. I, c. 8 (SR, IV, 714).

<sup>4</sup> Stat. 25 Edw. III, stat. 5, c. 5 (SR, I, 321); *Platt v. Lock and Ayliff* (1550), 1 Plowden 35, 75 E.R. 57.

<sup>5</sup> *Lancastell v. Sidly*, Hobart 264, 272, 80 E.R. 410, 418, reversed *sub nom. Reynell v. Langcastle*, Croke Jac. 545, 79 E.R. 467, Jenkins 300, 145 E.R. 218; *Body 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.

<sup>6</sup> *Hitchcock v. Skinner* (1594), Croke Eliz. 327, 78 E.R. 577.

[In] Hilary term 17 *Caroli Regis*, this case [was] adjudged by three barons, *scil.* HENDEN, TREVOR, and WESTON, Chief Baron Davenport being absent. And the said three barons concurred for the plaintiff that the action lies.

HENDEN [held] for the plaintiff that the action lies for these reasons.

(1) He said and thus he held that, by the common law without the aid of any statute that for this voluntary escape allowed by the sheriff of a man in execution for a debt, that an action of debt lies and that the executor of him who recovered and at the suit of which he was in execution also will have an action of debt. There is no authority, he said, against this and he conceived there is authority for it.

And his reason was because, when the sheriff allows one in execution for debt voluntarily to escape, the sheriff is now become debtor to the party at common law and this is by the contract of the law and the law makes the contract. Thus, the sheriff is a debtor, and it is a debt at common law. And thus, as well as the party, thus his executor will have an action of debt. In *Statham*, tit. *Debt*, 9, it is said that an action of debt lies against the warden by the common law. And there, he said that he thought that it lies against his executors.

But note, if the escape is of one committed upon mesne process before judgment, [an action of] debt does not lie.

An action of debt does not lie against the executor upon an escape made by the warden upon the Statute of Westminster II; Coke 2 Inst., fo. 91.<sup>1</sup>

(2) Because it was a voluntary escape because the declaration is *quod permisit ipse<sup>2</sup> ire ad largum*, and this is a voluntary escape. Coke, li. 9, 96, Sir George Reynell's case, and Coke, li. 3, 52, in *Ridgeway's case*,<sup>3</sup> there was a difference taken between a voluntary escape and a negligent [one]. 3 Edw. VI, Di. 66; Bro., tit. *Escape*, 43.<sup>4</sup>

---

<sup>1</sup> E. Coke, *Second Institute* (1642), p. 382.

<sup>2</sup> *ipsum MS.*

<sup>3</sup> *Reynel's Case* (1612), 9 Coke Rep. 95, 77 E.R. 871; *Grils v. Rigeway* (1594), 3 Coke Rep. 52, 76 E.R. 753, also Moore K.B. 660, 72 E.R. 822, Popham 41, 79 E.R. 1159, Croke Eliz. 318, 439, 78 E.R. 568, 579, Goulesborough 180, 75 E.R. 1078.

<sup>4</sup> *Mynours v. Turke* (1549), 1 Dyer 66, 73 E.R. 139; YB Mich. 9 Hen. IV, f. 24, pl. 3 (1408), Brooke, Abr., *Escape*, pl. 43.

And he said that he marvelled at the opinion there, that [an action of debt did not lie, and authority, if it is to be taken for [good] law, it is to be intended for this there he was negligent so that, for a negligent escape, debt does not lie at common law against the sheriff.

(3) The Statute of 1 Ric. II [ *blank* ]; by this Statute, [an action of] debt lies. And [it was held] by him this Statute extends to executors because it gives an action of debt to the testator.

The statute that gives [ . . . ]<sup>1</sup> to the party, yet if it concerns an inheritance, if he dies, his heir will have [it], and, if it concerns personalty, his executor will have [it].

(4) The Statute of 4 Edw. III [ *blank* ] gives this action to the executor if he could not have [it] by the common law.

And he held that this action is within this Statute and that it lies by the executor by this Statute.

The common ground was that *actio personalis moritur cum persona* and, for any trespasses, the executor will not have an action by this Statute. Trespass for breaking the close of the testator, *scil. clausum fregit*, is not within this law and the executor will not have an action for it.

18 Edw. IV, 15, 16.<sup>2</sup> The Statute gives an action to executors *de bonis asportatis in vita testatoris* where at common law they did not have any remedy. But, by this Statute, they will not have an action for trees cut down in the lifetime of the testator.

Thus, the Statute of Marlbridge<sup>3</sup> is *habeant successores* being an action *de bonis ecclesiae*. And see for what trespasses a successor will have an action.

And he said, for a continuing trespass, the executor will have an action within this statute. And for this, he cited a case in 32 Eliz.,<sup>4</sup> that the grantee of the next avoidance of the church presented, the church being void, and he was disturbed and died, his executor will have [an action of] *quare impedit* because, though it was a personal thing, yet the executor will have the action because the tort continues. Thus, in ravishment of ward etc.

---

<sup>1</sup> attaine *MS*.

<sup>2</sup> YB Mich. 18 Edw. IV, f. 15, pl. 17 (1478).

<sup>3</sup> Stat. 52 Hen. III, c. 28 (*SR*, I, 25).

<sup>4</sup> *Smallwood v. Bishop of Coventry* (1590), Croke Eliz. 207, 78 E.R. 463.

It is true that for trespass *de bonis asportatis in vita testatoris* that it is personal, the testator can have his action, but not the executor except for the Statute of 4 Edw. III.

Baron WESTON agreed for the plaintiff, and TREVOR agreed.

217

### Sands' Case (Ex. 1642)

*Where a person is alleged to be the owner of a life estate, it must also be alleged that he is alive.*

Lincoln's Inn MS Misc. 495, f. 15, pl. 1

Mr. Sands' case; this was [that] he dealt in waterworks in the County of Warwick. The said Mr. Sands did become bound to the king in 14 Car. [1638 x 1639] in a bond of £6000. And, upon this bond, process of extent was awarded against the said Mr. Sands. And by an inquisition upon this, it was found that the said Mr. Sands, at the time of the entering into the said bond to the king and afterwards, was seised *in domenicio suo ut de libero tenemento pro termino vitae suae de et in manerio de Flatbury in Comitatu Wigorniae*, and it [was] valued and seized.

Mr. Walker, for Mr. Spencer, the terre tenant of that manor and a purchaser, moved to quash this inquisition because, by this inquisition, it is found that Mr. Sands at the day past, *scil.* in 14 Car. and afterwards, was seised for [the] term of his life, and it did not find that he is still alive. It was said, if it had been found that *adhuc seisitus est*, it had been a good finding or averment of his life, but, here, it is *seisitus fuit* at a day and some years past.

The court inclined that even though a particular estate, *scil.* an estate for life, was found, the office should have found the continuance of it, *scil.* that he is alive, and gave a day to the prosecutor to maintain the inquisition.

See in such a case, before [in] 12 [Car., 1636 x 1637], the court upon a motion would not quash the inquisition but put the defendant to demur so that, in the mean time, a better inquisition could be found.



Note Trin. 33 Eliz. [1591], in the King's Bench, liber P, fo. 100, in Allen's Case,<sup>1</sup> the jury found that a tenant for life made a lease for years and did not find the life nor the death of the tenant for life; in this case, his life will be implied.

218

**Attorney General, *ex rel.* Wade v. Vandecount**  
(Ex. 1642)

*In this case, certain leather goods that were about to be exported illegally were forfeited to the crown.*

Lincoln's Inn MS. Misc. 495, f. 52v

Wade exhibited an information upon a seizure of a certain quantity of tanned leather of the goods of an unknown merchant as forfeited because these goods were such a place put aboard at London at Gravesend with intent to transport them beyond the sea *contra formam statuti* and that he did demise these goods in the hands of one Abraham Vandecount, and, upon this, he prayed that these could be adjudged forfeited and that the said Abraham Vandecount could answer this.

The defendant pleaded *non dimisit modo et forma etc.*

And this came this term to the bar of this court. And two things were resolved by the three barons, *scil.* WESTON, TREVOR, and Chief Baron DAVENPORT, Henden being absent, that upon this issue of *non dimisit modo et forma*, it must be proved for the king and the information not only the demise of such goods in the hands of the defendant or that the goods came to the hands of the defendant but that these goods were forfeited by the king because the issue of *non dimisit modo et forma* takes into the issue the whole matter of the information. And now, this question now being moved and the clerks of the court advised with, it was now resolved that, by the course of

---

<sup>1</sup> *Allen v. Hill* (1591), Croke Eliz. 238, 78 E.R. 493.

this court, upon such issue of *non dimisit modo et forma*, as well the forfeiture as the coming of these goods to the hands of the defendant must be proved.

And on account of this, the counsel of the king, *scil.* the Attorney General, Sir Edward Herbert, and Serjeant Whitfield, after they have proved that such goods came to the hands of the defendant, they proceeded to prove the forfeiture. And on account of this, the case was thus. This leather was sent from London to Dover by wagon with other goods by the defendant and directed to his factor at Dover and there put into a warehouse and direction [was] given by the defendant to his factor to have these shipped and transported and were seized by the informer in the warehouse or upon the unloading [of] them out of the wagon and were never shipped or put on the water.

[It was] resolved still that this is within the Statute of 18 Eliz., ca. [ *blank* ]<sup>1</sup> by the said three barons, and so they gave direction to the jury, which found a general verdict for the king against the defendant.

**Farren, *qui tam* v. Stonehouse**  
(Ex. 1642-1645)

*The seizure of a debt-creating instrument is the seizure of the debt itself.*

*The king can assign a chose in action.*

*A debt of record can be levied upon in any county.*

Lincoln's Inn MS. Misc. 495, f. 55v

The case was thus. One Cope entered into a recognizance in Chancery of £600 to pay £300 to Farren, which was not paid. And Farren being a debtor to the king, process to enquire of the estate of Farren issued. And upon this, by the inquisition taken in the return made by the sheriffs of London of the seizure of the defendant to enquire of the estate of Cope liable to the recognizance and an inquisition upon it, [it was] found that the said Cope was seised of the rectory impropriate of Bishop's Ichington in the County of

---

<sup>1</sup> Stat. 18 Eliz. I, c. 9 (SR, IV, 619-620).

Warwick for the lives of A., B., and C. and that Cope, until such time, did take the profits thereof and that, afterwards, Sir James Stonehouse did take the profits thereof. And it was found that the *cestuis que vie* were fully alive. And this rectory was extended, and a seizure of it [was] returned by the sheriff of the County of Warwick. And upon this, Sir James Stonehouse came in as terre tenant, who thought he had purchased the estate from Cope after this recognizance [was] entered and demanded oyer of both writs. And inquisitions upon them [were] found and returned. And he demurred in law. And the Attorney General for the king joined in the demurrer.

And it was argued by *Proctor* and *Turnour* for the defendant and against the king for these reasons that these writs and inquisitions are not sufficient to charge this rectory for the king with the debt due by this recognizance:

(1) Because in the writ of extent against Cope upon this recognizance so seized is not contained in the inquisition nor is it found that the £600 is owing and not paid. And on account of this, it will be presumed to be paid. And he resembled it to the declaration at common law upon a bond for a debt [where] the plaintiff declares that the debt rests unpaid.

(2) That the debt by this recognizance was not well seized into the hands of the king; the seizure is not good; on account of this, the recognizance only was seized into the hands of the king and not the debt due for it. And he said that a recognizance is like a bond recorded. And if it be found that J.S. was indebted by an obligation to the debtor of the king in such sums, *quam quidem* the obligation the sheriff returns to have seized into the hands of the king as a good seizure. But he should have returned that he had seized the debt into the hands of the king that is due by it.

(3) That here, there should have been awarded a [writ of] *scire facias* against Cope etc. and not the present [writ of] extent. And he cited Coke, li. 3, Herbert's case.<sup>1</sup> The reason of a *scire facias* is to give notice to the party. Otherwise, here, there is an execution by the first writ. And the reason insisted on was that the party will have notice.

(4) That this recognizance acknowledged in the Chancery, which is in the County of Middlesex, and is recorded there. It cannot be seized by the

---

<sup>1</sup> *Herbert's Case* (1584), 3 Coke Rep. 11, 76 E.R. 647, also Moore K.B. 169, 72 E.R. 510.

sheriffs of London in London. And he cited 20 Hen. VII, 3,<sup>1</sup> that an action of debt upon a record must be brought in the county where the record is. And he said that the sheriffs of London cannot seize a thing in Middlesex. And the recognizance was the thing returned to be seized, which was in Middlesex. And on account of this, the sheriffs of London cannot seize it.

(5) The inquisition that found the estate of Cope has found that Cope was seised for the lives of others. And it has found that the *cestuis que vie* were alive, but it has not found any place where they were alive. And because no place was found where they were alive, the inquisition is insufficient because it is an issuable thing and there is no place at which the venue will be.

(6) It was said, but I conceive it was not within the record, that, here, there is an occupant in the case because Cope was seised for other lives because he will not be charged with this recognizance; on account of this, he is in in the post. And he cited 27 Hen. VI., tit. *Recognizance*; 19 Hen. VI, 42; 13 Eliz., Dyer 199.<sup>2</sup>

And I was of counsel with Farren, *pro rege* and himself, and answered the objections suddenly. But now, this Hilary term 20 Car. [1645], it was argued at the bench and by three barons, *scil.* Henden, Weston, and Trevor, the chief baron, being absent. Judgment [was] given for the king.

HENDEN, puisne baron, answered all of the objection and maintained that the writ and inquisition were sufficient to charge this rectory with this debt:

(1) As to that which should be contained in the writ that the £600 was not paid, he answered, in debt upon a bond, it is true it is the usage in the declaration. But here, he is seized of a debt by inquisition thus found to be due and there is no writ here in this court that will be upon this inquisition that has or must have such a suggestion and no color, cause, nor reason to form a new writ and, by me, the debt is found by the inquisition. And the process for the king is to enquire of the estate of the debtor liable to this debt, and, on account of this, it is not to be resembled to the declaration in [an action of] debt.

---

<sup>1</sup> YB Mich. 20 Hen. VII, f. 3, pl. 9 (1504).

<sup>2</sup> YB Pas. 7 Hen. VI, f. 26, pl. 17 (1429), Fitzherbert, Abr., *Reconisauns*, pl. 1; YB Mich. 19 Hen. VI, ff. 41, 42, pl. 85 (1440); *Anonymous* (1571), 3 Dyer 299, 73 E.R. 671.

(2) As to that which has been said that this debt was not well seized into the hands of the king because the recognizance solely was seized and not the debt and the recognizance is but testimony and the debt is the thing that should have been seized, he answered that the seizure of the recognizance is sufficient and the sheriff has returned it so. The recognizance is that which testifies to the debt, and it is this that makes the debt. If the king had granted the recognizance, it had been sufficient, but there is another clause in such grants for the grantee to bring an action. And he cited the causes of grants. 25 Hen. VIII, Dier 5, by Fitzherbert,<sup>1</sup> by the gift of *omnia bona et catalla*, the obligations pass though not the debt. Thus, by a grant of the obligation, it passes. 6 Hen. VIII, Kelway fo. 168.<sup>2</sup> The king can give a chose in action, as a recognizance. And the grantee [may] elect to have [a writ of] debt or *scire facias* in his own name. And there, he cited a case in the time of Henry VI, that the king granted the suit will be in the name of the king *tantum* because it came to the king by a mesne and not immediate as the recognizance. 28 Hen. VIII, Dier 30;<sup>3</sup> there, the king granted obligations forfeited to him by the attainder of the grantee of the king of the obligations to sue in her own name. And [it was] said the king solely can grant a chose in action. And by the same reason that he grants the obligations, which are the substance and original of the actions, the law will imply that the grantee will use the means to come to the thing granted. Thus, the seizure of the obligation or recognizance is sufficient. See a clause in the Statute of 33 Hen. VIII, ca. 39,<sup>4</sup> where any debt accrues to the king by gift or forfeiture by attainder, outlawry etc. 'it shall be sufficient in the law to show and allege generally in the [said] suit that the party to whom the [said] debt was . . . did give . . . was attainted [or] outlawed' etc. without showing other circumstances. And he cited *Vet. Liber of Entry*, fo. 192 and 198, that the showing of the recognizance is sufficient. And thus, he held that the seizure of the recognizance is good and sufficient.

[3] To the third [point], it passed the title, but he thought that the king will not be bound by a *scire facias* to give notice, but, by me, the course of

---

<sup>1</sup> Note (1533), 1 Dyer 5, 73 E.R. 12, 13.

<sup>2</sup> *Prior of Sheen v. Prior of Little Malvern* (1514), Keilwey 168, 72 E.R. 343, 116 Selden Soc. 638.

<sup>3</sup> *Breverton's Case* (1537), 1 Dyer 30, 73 E.R. 67.

<sup>4</sup> Stat. 33 Hen. VIII, c. 39, s. 50 (SR, III, 891).

the court rules this question, for to say positively a *scire facias* must first be awarded against the king's debtor, this I deny absolutely, but this is a matter of discretion in the court. And for the case of 12 Hen. VII, 19,<sup>1</sup> cited, that where the common person is put to the action, the king is put to a *scire facias*, he answered this is in the realty to recover land and the possession of it. But the remedy for the king for his debts is speedier and the writ of extent that issues out of this court to extend and seize the land of the debtor, this does not remove the possession but appoints solely a seizure that is seen in the nature of a summons. And I conceive that the party can come in and plead either to the debt or to the seizure. Thus, it is not execution, as it was called, nor is the party at any mischief by it.

(4) As to that which has been said that the sheriffs of London cannot find a debt of record by a recognizance in the Chancery, which was said to be in Middlesex, and, on account of this, this recognizance cannot be seized in London, he answered that it is not expressed in the inquisition that the Chancery was in Middlesex and thus the inquisition in itself is good. Also, there is a difference between personal and real things, transitory and local things. And he cited 5 Hen. V, 2.<sup>2</sup> The older times did use to have personal actions in the proper county. See by the Statute of 6 Ric. II, ca. 2.<sup>3</sup> He thought thus that, before this Statute, that the original writ and declaration can vary in the county. But by this Statute, [it was] enacted that in debts, accounts, and other actions, if [a] contract vary in the declaration with the original writ, the writ abates. Coke, li. 5, Knight's case;<sup>4</sup> where the jury can find a thing in a foreign county and, where an action can be brought in any county, it can be seized in any county. Thus, he held that the seizure by the sheriffs of London was good.

(5) As to this that there is no place found where the *cestuis que vie* are alive, but it was found that they are alive and, by this defect, there cannot be a trial. And this is a substantial part of the title of the king and, on account of

---

<sup>1</sup> YB Trin. 12 Hen. VII, f. 19, pl. 1 (1497).

<sup>2</sup> YB Hil. 5 Hen. V, f. 2, pl. 5 (1418).

<sup>3</sup> Stat. 6 Ric. II, stat. 1, c. 2 (SR, II, 27).

<sup>4</sup> *Knight v. Breech* (1588), 5 Coke Rep. 54, 77 E.R. 137, also 1 Anderson 173, 123 E.R. 414, 3 Leonard 124, 74 E.R. 582, Moore K.B. 199, 72 E.R. 530, Gouldsborough 15, 75 E.R. 965.

this, for this defect, the inquisition is insufficient, he answered that it is true, if there cannot be a trial of this which is substantial to the title of the king, the inquisition is bad. But this is not in this case, and the inquisition is good notwithstanding this for three reasons. And he said that he took it to be good in pleading. (1) The words of the writ are fully satisfied. And, where it is fully answered, the inquisition is good, though it is imperfect in another thing, and sufficient to entitle the king. And for more than answering the writ, it is but form and no substance. 15 Edw. IV, 10;<sup>1</sup> Coke, li. 5, Knight's case, where the inquisition is good in substance to entitle the king, it will not be avoided for form. (2) That here, there can be a trial because, if the party pleads that they are dead and traverse *absque hoc quod* they are alive at such a place and it is good and in good time, there is a variety in the books who should show the life or death. 6 Hen. VII, 7,<sup>2</sup> is a good case to this purpose. Here, the rejoinder to the traverse could show the place and is time enough in pleading and *multo fortiori* in an office it is good though the place is omitted. And he cited 39 Hen. VI, fo. 49; 19 Hen. VI, 40; 34 Edw. III, Bro., tit. *Replicacon*, pl. 24.<sup>3</sup> But in an office, it is otherwise because, if the party traverse the life, then, in the replication, he can show the place. (3) It is good though no place either in the office or in the pleading is shown and yet there can be a trial because, no place being shown, thus, it will be tried where the land is and lies, and it will be intended to be there and, on account of this, it is good though there is no place of the life shown. And he cited 45 Ass., pl. 6; 44 Edw. III; and 2 Hen. IV, 7.<sup>4</sup>

(6) For the matter in law whether land can be seized for the king in the hands of the occupant by him, if a tenant *pur auter vie* becomes indebted to the king and dies and an occupant enters, the land will be charged in the hands of the occupant. 26 Hen. VII, 6, Statham; where an occupant will not be charged. 31 Edw. II, 1; a person who comes in as an occupant has the same estate. He is called an occupant, but he is a tenant *pur auter vie*. That an occupant has the same estate: Hil. 4 Jac., rot. 143. A lessee for years of the tenant *pur auter*

---

<sup>1</sup> YB Mich. 15 Edw. IV, f. 9, pl. 14 (1475).

<sup>2</sup> YB Mich. 6 Hen. VII, f. 6, pl. 1 (1490).

<sup>3</sup> YB Hil. 39 Hen. VI, f. 49, pl. 12 (1461); YB Mich. 19 Hen. VI, f. 39, pl. 82 (1440); Brooke, Abr., *Replication & reionder*, pl. 24.

<sup>4</sup> YB 45 Edw. III, Lib. Ass., p. 298, pl. 6 (1371); *Horne's Case* (1400), YB Mich. 2 Hen. IV, ff. 6, 7, pl. 25.

*vie* will be an occupant. But query whether his term be extinct. But a lessor cannot be an occupant. Coke, li. 6, the Bishop of Bath, Dean and Chapter of Worcester's Case;<sup>1</sup> an occupant will be punished in waste. And he concluded that he will be an occupant against the king. 38 Hen. VI, 27; 13 El., Dyer, fo. 328,<sup>2</sup> by Justice Whiddon. A tenant *pur auter vie* made a lease for years rendering rent and died; [the question was] whether he will be paid. And he held that though the estate is changed, the contract remains, and by consequence, the rent remains. But he thought it is to the special occupant for this reason. The reason in law of the occupant was to have a tenant [?] to the *praecipe*. Bracton, fo. 84. On account of this, in that time, a trial in a personal action was not used.

Baron TREVOR agreed with Henden, and thus he said that Baron Weston, who was present at the argument at the bar, upon consultation between themselves, was of the same opinion. And thus the said three puisne barons agreed:

(1) That the seizure of the recognizance was good.

(2) That [a writ of] *scire facias* was not necessary but is in the discretion of the court.

(3) That, notwithstanding the omission of the place where the *cestuis que vie* were alive, the inquisition was good.

(4) That there is no occupant against the king.

And judgment [was] entered for the king that the said rectory [is] to remain in the hands of the king to satisfy the debt.

And Sir James Stonehouse brought a writ of error.

**Rookes v. Slared**  
(Ex. 1644)

---

<sup>1</sup> *Bellamy v. Fish* (1605), 6 Coke Rep. 34, 77 E.R. 303, also Croke Jac. 71, 79 E.R. 61; *Dean and Chapter of Worcester's Case* (1605), 6 Coke Rep. 37, 77 E.R. 307.

<sup>2</sup> YB Pas. 38 Hen. VI, f. 27, pl. 9 (1460); *Anonymous* (1573), 3 Dyer 328, 73 E.R. 742.



*The issue in this case was whether an offense against a penal law must be tried in the county where the offense occurred.*

British Library MS. Hargrave 30, f. 277v, pl. 2  
(Turnour's reports)

Rookes, searcher of Sandwich, had preferred an information against Slared for the shipping of butter to be transported against the Statute of 1 & 2 Phil. & Mar., ca. 5.<sup>1</sup> And upon the general issue pleaded, a verdict was found against the defendant in Michaelmas term 19 Car. [1643]. And among other things, it was moved in arrest of judgment that this information must be begun in the county where the offense was, and not at Westminster, by the Statute of 21 Jac., ca. 4,<sup>2</sup> because there is a clause in the Statute of 1 & 2 Phil. & Mar., ca. 5, that gives power to the justices of the peace to enquire of offenses against this Statute and, where the justices of the peace had power before the said Statute of 21 Jac. to enquire of offenses against a penal law, now by the aforesaid Statute of 21 Jac., the suit will be in the county and not elsewhere.

It was said by the counsel of the informer that an information cannot be exhibited before a justice of the peace.

But Baron Trevor only was in court, and he gave no response to this.

*Ideo quaere.* The case was compounded.

An information upon the Statute of 5 Eliz., for using a trade etc., whether it could be here. See book B, f. 83.

221

### **Smart v. Cheney** (Ex. 1645)

*The issue in this case was whether special notice must be given of the performance of a contract before the obligee can sue upon it.*

---

<sup>1</sup> Stat. 1 & 2 Phil. & Mar., c. 5 (SR, IV, 243-244).

<sup>2</sup> Stat. 21 Jac. I, c. 4 (SR, IV, 1214-1215).

Lincoln's Inn MS. Misc. 495, f. 55

Cheney, in consideration of £60 paid to him by Smart and his wife, by an indenture between him of one part and Smart and his wife of the other part, did covenant with Smart and his wife to pay to one Alice, daughter to the said wife of Smart, by a former husband within one month after the marriage of the said Alice or within one month after her age of twenty-one years which shall first happen, she marrying with the consent of the said Cheney and the said wife of Smart or one of them, the sum of etc. The said Alice married one Bull.

And now, an action of covenant was brought by Smart and his wife in the office of pleas of this court against Cheney. And they declared of the marriage by Alice with Bull by the consent of the wife of Smart *et, licet saepius requisitus fuit* to pay the money, he had not paid *ad damnum* of the plaintiffs. The defendant demurred, and the plaintiffs joined.

And now this term, the case was argued at the bar by *Proctor* for the defendant. The cause of the demurrer was:

(1) Because the plaintiff has not declared that notice was given to the defendant of this consent to the marriage because, by him, notice must be alleged in the declaration<sup>1</sup> to be given by the plaintiff to the defendant of the consent by the wife of Smart to the marriage before the plaintiff is entitled to his action. And he did not have a cause of action until notice [be] given.

(2) He said that the plaintiff cannot declare that the non payment was *ad damnum* of him because the money was to be paid to another.

*Hale*, for the plaintiff, [argued] that no notice is to be given. And he cited one Beresford's Case in the King's Bench, Michaelmas [term] 14 Jac. [1616],<sup>2</sup> that Beresford was bound to J.S. with a condition to pay to J.H. £100 within one month after J.S. should marry with one Jane, niece of the said obligor. And J.S. brought an action upon this bond against Beresford and declared of the marriage etc., and nothing [was] shown of the notice given, and yet [it was] adjudged for the plaintiff because the defendant is to provide notice.

---

<sup>1</sup> Consideration *MS*.

<sup>2</sup> *Beresford v. Gooderidge* (1616), 3 Bulstrode 235, 81 E.R. 198, 1 Rolle Rep. 355, 433, 81 E.R. 530, 588.

**Singleton v. Jacob**  
(Ex. 1646)

*Where a defendant garnishes a third party, he need not plead to the merits.*

*Where a plaintiff must plead a special request for a redelivery, he must plead the place where the request was made.*

Lincoln's Inn MS. Misc. 495, f. 53v

Thomas Singleton, plaintiff, in [an action of] detinue against Sir John Jacob, declared that he had delivered to the defendant an obligation to redeliver to him upon request *et, licet saepius requisitus*, the defendant had not delivered it to the plaintiff. The defendant made no defense but pleaded that the obligation was delivered to him by the plaintiff and one William Singleton to redeliver to them upon condition and prayed a garnishment against the said William Singleton that he can be a garnishee etc. The plaintiff demurred upon this plea. And the particular cause of the demurrer was because the defendant had made no defense in this action. And the defendant has joined in the demurrer. And now this term, it was argued at the bench by the two barons, and, by both, judgment [was] given for the defendant and against the plaintiff.

ATKYNs, puisne baron, [held]:

(1) That the omission and want of a defense in this case is not material and thus no cause for a demurrer. And [it was said] by him there are two sorts of defenses: (1) a full defense which goes in bar to the action and, thereafter, one cannot plead further. And he cited 21 Edw. III, 42 or 44,<sup>1</sup> where Thorpe said that the defendant had made a full defense, *ideo* he could not plead after in disability of the plaintiff. 7 Hen. VI, 22 or 23,<sup>2</sup> [is] to this purpose; and 39 Edw. III, 29, and 35 Hen. VI, 12.<sup>3</sup> (2) The other is but a defense of the course, and yet it is material and must be made in

---

<sup>1</sup> YB Mich. 21 Edw. III, f. 41, pl. 47 (1347).

<sup>2</sup> YB Pas. 7 Hen. VI, ff. 22, 23, pl. 6 (1429).

<sup>3</sup> YB Mich. 35 Hen. VI, f. 12, pl. 19 (or pl. 21) (1456).

any case. But in this case, the defendant did not make a defense for it in effect here by the praying of garnishment of William, the defendant [ . . . ] and puts his plea in the mouth of the said garnishee. And on account of this, the defendant will not make a defense. And he cited 9 Hen. VI, tit. *Garnishment*; 21 Hen. VI, 35; 27 Hen. VI, 4.<sup>1</sup> And he took a difference, and this is between the praying of interpleader where two men sue a man for the same cause, there, the defendant still remains a party to the suit and, on account of this, he will make a defense. But where the defendant prays a garnishment whether he will not remain a party, and, on account of this, it is not necessary for him to make a defense.

(2) But here, if the plea had not been good, yet the declaration is bad and insufficient because the plaintiff has not shown a good cause of action, and thus the plaintiff will not have judgment and this was because the plaintiff has declared that he delivered the obligation to the defendant to redeliver to him upon request, which must have been a special request and a thing issuable and for he must have shown the place where it was made and the *licet saepius requisitus* is not sufficient, and thus, for the defect of it, the plaintiff has not entitled himself to his action. And he took the diversity where a special request is requisite and where the general *licet saepius requisitus* is sufficient.

And thus for both of these reasons, judgment [was] given for the defendant, and Baron TREVOR agreed.

## Town of Kingston's Case (Ex. 1646)

*The issue in this case was whether a municipal corporation can prohibit a person from following a trade therein.*

---

<sup>1</sup> YB Mich. 9 Hen. VI, f. 38, pl. 13, Brooke, Abr., *Garnishe & garnishment, etc.*, pl. 8 (1430); YB Pas. 21 Hen. VI, f. 35, pl. 2 (1443); perhaps YB Mich. 27 Hen. VI, f. 4, pl. 27 (1448).

The Town of Kingston was incorporated by the now king [Charles I] or King James, his father, by charter under the Great Seal, and, by this charter, power was granted to the corporation to make ordinances or by-laws.

*Walker* of the Inner Temple argued for the plaintiff:

(1) That the charter or grant of the king did not give authority to the corporation to make this ordinance or by-law because the charter did not give to them absolute authority to make ordinances, but gave limited authority to make ordinances to particular purposes, *scil.* as for the good government of the town but not to make an ordinance for a man not to use his trade, and he concluded it that authority that is given by a charter or commission must be pursued strictly.

(2) That this ordinance (if the charter had given authority to make it) still this ordinance is void because authority to make such an ordinance cannot be given by a charter or patent. And he cited Clerke's case, Co., lib. 5, 64,<sup>1</sup> the case of the corporation of St. Albans, which was incorporated in the time of Edward VI, and they had power by the charter to make ordinances; it was resolved that an ordinance that inflicted imprisonment is against the Statute of Magna Carta. But by ordinance in the said case, they could in the said case inflict a reasonable penalty to be levied by distress or action of debt. And Coke, li. 5, 62, Chamberlain of London's case.<sup>2</sup> An ordinance that inflicts a reasonable penalty *pro bono publico* is good. And Coke, li. 5, 67, Jefferie's case;<sup>3</sup> an assessment for the reparation of a church. But the case upon which he relied and upon the difference taken there is the case of Coke, li. 8, 125, the case of the City of London;<sup>4</sup> the custom of London, that no person not being free of London shall use any trade there and that constitution or ordinance made by the common council that such forfeiture of £5 is a good

---

<sup>1</sup> *Clark v. Gape* (1596), 5 Coke Rep. 64, 77 E.R. 152, also *sub nom. Bab v. Clerk*, Moore K.B. 411, 72 E.R. 663.

<sup>2</sup> *Chamberlain of London's Case* (1590), 5 Coke Rep. 62, 77 E.R. 150, also 3 Leonard 264, 74 E.R. 674.

<sup>3</sup> *Jeffrey v. Kenshley* (1589), 5 Coke Rep. 66, 77 E.R. 155.

<sup>4</sup> *Case of the City of London* (1610), 8 Coke Rep. 121, 77 E.R. 658, also *sub nom. Waggoner v. Fish*, 2 Brownlow & Goldesborough 278, 284, 123 E.R. 941, 944.

custom and constitution, but [it was] resolved there is a diversity between such custom and a charter granted to such effect because it is good by way of custom but not by grant. And on account of this, no corporation [which] was within time of memory could have such a privilege unless it be by act of Parliament. 10 El. Dyer 279;<sup>1</sup> a prescription of foreign wares sold and foreign purchases in the City of York to be forfeit and seizable by the mayor etc. And in Coke, li. 8, 175,<sup>2</sup> are the said cases cited *quod potentior est vulgaris consuetudo quam regalis concessio*. And Coke 2 Inst., fo. 47;<sup>3</sup> note he said that an ordinance against law, against the liberty of the subject, is similar to such a grant which is void. See Coke, lib. 11, the Case of the Tailors of Ipswich.<sup>4</sup> And he cited Coke, lib. 11, the case of Monopolies.<sup>5</sup> And he said that this ordinance makes a monopoly for it takes off the trade there from those that had served an apprenticeship etc. It has all the badges of a monopoly.

(3) That the plaintiff has not offended nor will he be said an offender against this by-law because a man will not be an offender against a private law without notice, and notice is either implied or expressed, and here there is not implied notice because, in the record, the defendants say that the plaintiff is not a freeman of this Town and, on account of this, it is not to be intended that he had notice. And in this case, the plaintiff will not be an offender without actual and express notice, and it does not appear in this record that the plaintiff, who will be charged, had notice of this law, as he must. And that notice must be given by a by-law before a man will be an offender against it. And for this, he cited 4 Eliz., Dier 210,<sup>6</sup> where notice is to be given to the

---

<sup>1</sup> *Anonymous* (1568), 3 Dyer 279, 73 E.R. 627.

<sup>2</sup> *The Case of the City of London* (1610), 8 Coke Rep. 121, 125, 77 E.R. 658, 663.

<sup>3</sup> E. Coke, *Second Institute* (1642), p. 47.

<sup>4</sup> *Ipswich Taylors' Case* (1614), 11 Coke Rep. 53, 77 E.R. 1218, also Godbolt 252, 78 E.R. 147, 1 Rolle Rep. 4, 81 E.R. 285.

<sup>5</sup> *Darcy v. Allen* (1602), 11 Coke Rep. 84, 77 E.R. 1260, also Noy 173, 74 E.R. 1131, Moore K.B. 671, 72 E.R. 830, British Library MS. Add. 25203, f. 678, J. I. Corré, 'The Argument, Decision, and Reports of *Darcy v. Allen*,' 45 *Emory Law Journal* 1261 (1996).

<sup>6</sup> *Regina v. Grasseley* (1562), 2 Dyer 210, 73 E.R. 464.

justice of the peace of a riot. And Coke, li. 5, fo. 5, 113, in Mallorie's Case;<sup>1</sup> that a bargain of a reversion does not take advantage of a condition without notice. And Coke, li. 8, 92, Fraunces' Case.<sup>2</sup>

(4) That the defendant did not have good authority to take this distress because he derived his authority from a corporation and it must be by warrant in writing under seal.

*Hatton*, of the Middle Temple, recorder of the said Town of Kingston, [said] for the defendants that the distress was well taken. And he inverted the order of the questions or objections made by the counsel of the plaintiff. And he will speak last to the second objection because it is the principal or sole question.

(1) To the first, he said the charter had sufficient words to give authority to make such by-laws or ordinances, but this is not greatly material if such authority cannot be given by a charter etc.

(3) To the third, for a notice, he said that notice is not to be given to intruders into the town, but this by-law is *lex loci* of which he takes notice. And he cited the said case of Coke, li. 8, 125, of the City of London; there, no notice is to be given.

(4) To the fourth, he said that this distress was not taken by virtue of an authority from a corporation but by force of a by-law.

(2) But to the second, which is the principal question, he said that this ordinance or by-law is consonant [?] with the law and not against the law and for the maintenance of it. He insisted that the maintenance of corporations and *pro bono publico* more than the maintenance of stragglers. And he cited the Statute of 1 & 2 Phil. & Mar., ca. 7,<sup>3</sup> the language of this Statute, to show how necessary corporations are. And Coke 3 Inst. 185.<sup>4</sup> This Statute gives a privilege to incorporated towns. Corporations are the nurseries of trade, and to support trade and traffic is to support corporations, and they cannot be supported without keeping out strangers from coming into them. He agreed that an ordinance to restrain trade totally is void, but [if it] restrains one

---

<sup>1</sup> *Mallory v. Payn* (1601), 5 Coke Rep. 111, 113, 77 E.R. 228, 231, also Croke Eliz. 805, 832, 78 E.R. 1033, 1058.

<sup>2</sup> *Milner v. Fraunces* (1609), 8 Coke Rep. 89, 77 E.R. 609.

<sup>3</sup> Stat. 1 & 2 Phil. & Mar., c. 7, s. 1 (*SR*, IV, 244-245).

<sup>4</sup> E. Coke, *Third Institute* (1644), p. 185.

from such a place. it is not against the law. And he observed the Statute of 28 Hen. VIII, ca. 5.<sup>1</sup> And he answered to the authorities objected against him, *viz.* Coke, li. 11, 53, the Case of the Tailors of Ipswich, this opinion there delivered against him is no part of the case adjudged. And thus he answered to the case of Coke, li. 8, of the City of London, the opinion there against him is an extra-judicial opinion not part of the judgment. And as to the case in Hobart's reports, fo. 293, of the Weavers of Newbury,<sup>2</sup> there, the judgment was for gross faults in pleading; thus, it is not against him in matter.

And he said that this by-law was for the maintenance of trade and not against the law. Also, he cited 49 Edw. III, 3,<sup>3</sup> that a custom thus against the law is not good. See Davies reports, fo. 30,<sup>4</sup> that they are particular customs, customs against the rule of the common law that yet are good.

224

**Tenant of Sandhurst's Case**  
(Ex. 1647)

*The crown is not liable to pay a rent service.*

*When a rent service is extinguished, it cannot be revived.*

Lincoln's Inn MS. Misc. 495, f. 60v

The manor of Sandhurst, part of the possessions of the Abbey of Chertsey was held where it was held of the manor of Sunning, part of the possessions of the bishop of Salisbury, by a certain annual rent and other services. The manor of Sandhurst came to the king by the Statute of 31 Hen. VIII<sup>5</sup> upon the Dissolution of this monastery. And the king granted the inheritance

---

<sup>1</sup> Stat. 28 Hen. VIII, c. 5 (SR, III, 654).

<sup>2</sup> *Anonymous* (1615), Moore K.B. 869, 72 E.R. 962.

<sup>3</sup> YB Hil. 49 Edw. III, f. 3, pl. 7 (1375).

<sup>4</sup> *The Case of Tanistry* (1608), Davis 28, 30, 80 E.R. 516, 518.

<sup>5</sup> Stat. 31 Hen. VIII, c. 13 (SR, III, 733-739).



of this manor to Sir John Mason and his heirs. Afterwards, the said manor of Sunning came to the king by exchange of other land for it with the bishop of Salisbury.

And now, a super was set upon the tenant of the manor of Sandhurst for the arrearages of the said annual rent as belonging to the king in right of his manor of Sunning.

[It was] resolved by Baron TREVOR and Baron ATKYNS, the direction of whom the solicitor general had desired:

(1) That by the coming to the king of the manor of Sandhurst by the dissolution of the said monastery and the Statute of 31 Hen. VIII, the said rent, which was a rent service due out of the said manor to the said manor of Sunning, was extinct and not saved by the Statute of 31 Hen. VIII because the king will hold of no one and, by the grant of this manor by the king to Sir John Mason, it will not be revived;

(2) That by the coming of the manor of Sunning to the king, the said rent will not be revived.

And the difference between the proviso or saving in the Statute of 31 Hen. VIII for lands that come to the king by this Statute and the proviso or saving in the Statute of 1 Edw. VI, for chantries,<sup>1</sup> and the lands that come to the king by this Statute was observed in the different drafting of them.

See in Hobart's reports, ff. 63 and 64, in Fleetwood's Case,<sup>2</sup> where the chief baron thought that the usage of the Exchequer in such a case varies from the ordinary rule of the law.

**Hope v. Roberts**  
(Ex. 1648)

*A sheriff's return must state in which county the goods were found.*

Lincoln's Inn MS. Misc. 495, f. 16

---

<sup>1</sup> Stat. 1 Edw. VI, c. 14 (SR, IV, 24-33).

<sup>2</sup> *Fleetwood v. Aston*, Hobart 45, 80 E.R. 195.

The case of Sir Walter Roberts, who was outlawed at the suit of Sir Alexander Hope. And an inquisition before the sheriff of Kent upon a process of inquiry or extent directed to him found that Sir Walter Roberts was seised in his demesne as of fee of thirteen certain lands and named a town of such an annual value. And it did not say *in comitatu praedicto*. And on account of this, for so much (because there were other lands found in the county), the inquisition was quashed because it had not found the county.

And still, Mr. Solicitor [General] objected that the County of Kent will be inferred because the writ was directed to the sheriff of Kent and he had returned *quod virtute brevis* it was found as before, etc.

226

### **Note**

(Ex. temp. Car. I)

*A person may challenge an estreat in the Court of Exchequer.*

British Library MS. Hargrave 30, f. 250, pl. 2

(Turnour's reports)

Note: It seems it has been the usage in the Exchequer upon estreats which come into the Exchequer, if the party wishes to plead to it, to move the court, if the charge is not perfect, in order to have a good charge made to which to plead and sometimes to have a [writ of] *certiorari* to remove up the entire record.

See Stamford, *Pleas of the Crown*, f. 194,<sup>1</sup> how an estreat in the Exchequer will be traversed.

---

<sup>1</sup> W. Stanford, *Les Plees del Coron* (1557), f. 194.

**Woodcock's Case**  
(Ex. temp. Car. I)

*The finding upon an inquisition must be positive and absolute, as a verdict must be.*

Lincoln's Inn MS. Misc. 495, f. 14, pl. 2

Upon [a writ of] extent against Woodcocke, debtor to the king, an inquisition found that one Richard Langford *tempore captionis inquisitionis* was indebted to the said Woodcocke in £29 10s. *legalis monetae Angliae prout juratores super captionem huius inquisitionis in evidentiis ostensus est* is a bad inquisition because the debt was not absolutely found nor is this inquisition positive.

And see Liber P, fo. 81 and 87. An inquisition found that A. was seised of land *ut informamur* or *ut asseritur* is not good. Plowden, *Commentaries*, fo. 398,<sup>1</sup> this *prout* in the verdict refers the debt to the evidence and the debt was not absolutely affirmed. And an inquisition must be positive and absolute [so] that the party can have a traverse.

And a day [was] given by the court to show cause why this inquisition will not be quashed. And so no process afterwards issued.

---

<sup>1</sup> *Earl of Leicester v. Heydon* (1571), 1 Plowden 384, 398, 75 E.R. 582, 603.

## INDEX OF NAMES

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

- Acton, John, 201  
Allen, Edward, 145  
Allen, John, 8, 145  
Amcotts, Alexander, 149  
Amcotts, Matthew, 149  
Amcotts, Susan, 149  
Anger, Francis, 8  
Appleton, Sir Henry, 197, 207  
Arustley, Montgomery, 208  
Ashton, Peter, 202  
Astley, Thomas, 5  
Bateman, Daniel, 184  
Bateman, Katherine, 184  
Beckett, Robert, 56  
Beddoe, Thomas, 85  
Benerston, Glos., 122  
Bestow, Sir Henry, 39  
Billingsley, Martin, 44  
Bird, Giles, 193  
Bird, William, 193  
Bishop's Ichington, Warwick, 219  
Bluet, Colan, 142  
Bodley, Denbigh, 150  
Boodulph, Francis, 5  
Bowen, Anthony, 4  
Brochas, Sir Pexall, 105  
Bromley, Robert, 132  
Brooke, Edward, 5  
Brooke, John, 5  
Brooke, Richard, 5  
Bull, Alice, 221  
Burlimak, Philip, 167  
Bust, Margaret, 184  
Campbell, Sir Thomas, 96  
Carey, Sir John, 141  
Carnarvon, 125

Caron, Sir Nowell, 167  
 Carr, Robert, earl of  
     Somerset, 29, 144  
 Cecil, Robert, 39  
 Chamberlayne, Robert, 5  
 Chew, Somerset, 192  
 Childe, William, 5  
 Cirencester, Glos., 43  
 Clerkenwell, Mdx., 143  
 Cocke, Henry, 142  
 Cocke, Matthew, 142  
 Cocke, Michael, 142  
 Cocke, Sir William, 142  
 Cornwall, 180  
 Dacombe, Sir John, 144  
 Darcy, Sir Robert, 102  
 de Banck, Thomas, 136  
 Delaware, Lord, 80  
 Devonshire, 180  
 Dormer, John, 5  
 Dormer, Robert, 5  
 Dorsetshire, 158  
 Doyley, Robert, 66  
 Dublin, Ireland, 146  
 Duckett, John, 193  
 Dudley, John, Viscount Lisle, 157  
 Duncombe, Thomas, 181  
 Duncombe, William, 181  
 Dundry, Somerset, 192  
 Edington, Wilts., 71  
 Eggesfield, John, 192  
 Elborowe, John, 184  
 Essex, 196  
 Fabian, John, 192  
 Flatbury, Worcs., 217  
 Fleetwood, Sir William, 156  
 Fludd, Sir Thomas, 188  
 Ford, Thomas, 5  
 Fowey, Cornwall, 14  
 Fulmerston, Cambs., 54  
 Gardiner, Thomas, 44  
 Gargrave, Sir Richard, 37  
 Gifford, Humfry, 5  
 Gifford, Roger, 5  
 Gifford, Walter, 5  
 Goddard, Julian, 66  
 Gravesend, Kent, 51, 210, 218  
 Grene, Abraham, 98  
 Grobham, Sir Richard, 91  
 Hammond, Alexander, 138  
 Hammond, Rafe, 138  
 Hammond, Thomas, 138  
 Hammond, William, 138  
 Harding, William, 193  
 Harrison, Thomas, 109  
 Harvey, Thomas, 33, 98  
 Hawkins, John, 152  
 Hayns, Edward, 143  
 Hayns, John, 143  
 Henry, Allen, 198  
 Herbert, Sir William, 123  
 Heron, Sir Edward, 189  
 Hertfordshire, 31  
 Hicks, Sir Gilbert, 122  
 Hilary, Walter, 110  
 Holden, Jane, 181  
 Holdsworth, Michael, 202  
 Hoorde, Thomas, 5  
 Hope, Sir Alexander, 225  
 Hopton, William, 193

- Hullens, Margaret, 157  
Jacob, Sir John, 222  
Jenny, Edward, 142  
Jenny, Elizabeth, 142  
Johnson, Henry, 138  
Jolles, Sir John, 97  
Kent, 11  
Kentish Town, Mdx., 184  
Kevelioc, Montgomery, 208  
Knowles, Thomas, 43  
Kynaston, Andrew, 150  
Kynaston, John, 150  
Kynaston, Margaret, 150  
Lancashire, 162  
Langford, Richard, 227  
Lewis, Leonard, 66  
Lewisham, Kent, 131  
Lewknor, Sir Robert, 138  
Lewson, William, 44  
Liverpool, Lancs., 160  
Lloyd, Sir Edward, 208  
Lloyd, Margaret, 150  
Lloyd, Thomas, 150  
Lock, Henry, 142  
Lock, Jane, 142  
Lock, John, 142  
Lock, Matthew, 142  
Lock, Michael, 142  
Lock, Thomas, 142  
Lock, Sir William, 142  
Londham, Suffolk, 70  
London, City of  
    Aldermanbury, 44  
    Bow Lane, 142  
    Bucklersbury, 142  
    Cheapside, 142  
    Clerkenwell, 187  
    Counter Prison, 113  
    Cripplegate, 44  
    Dowgate, 142  
    Fleet Prison, 115, 148, 189, 215  
    Gatehouse Prison, 115  
    Guildhall, 95, 172  
    London Bridge, 51  
    Paul's Wharf, 44  
    Port of, 20, 210  
    Poultry, The, 142  
    Queenhithe, 44  
    St. Buttolph's without  
    Aldgate Parish, 144a  
    St. John's Parish, 140  
    St. Peter's Parish, 44, 142  
    Swan, The, 140  
    Temple Bar, 7  
    Tithes, 144a  
Longe, George, 171  
Malapert, Isaac, 139  
Marshall, John, 98  
Marylebone Park, Mdx., 184  
Mason, Sir John, 224  
Middleton, Sir Thomas, 208  
Monmouth, Wales, 126  
Morris, Sir William, 133  
Mounteagle, Lord, 49  
Mountjoy, Lord, 42  
Mundylees, Essex, 112  
Murrey, Sir Patrick, 10  
Muschamp, Margaret, 142  
Muschamp, Thomas, 142  
Newton Valence, Northants., 71

Nicholls, Samuel, 54  
 Norfolk, 55  
 Oliver, Walrum, 93  
 Ormshow, Charles, 130  
 Ostenhanger, Lancs., 199  
 Oxford, Diana, Countess of, 172  
 Oxfordshire, 61  
 Pancras, Mdx., 184  
 Penchard, Co. Durham, 149  
 Potter, Simon, 79  
 Poynes, Sir John, 122  
 Pynchyn, Sir Edward, 136  
 Raleigh, Sir Walter, 29  
 Ratcliffe, Sir John, 185  
 Reade, Sir William, 27  
 Remington, Sir Thomas, 74  
 Rich, Thomas, 43  
 Richard, Peter, 139  
 Roberts, Sir Walter, 225  
 Rudd, Anthony, 141  
 Saffoyle, Ireland, 97  
 St. Clement's, Mdx., 7  
 Salt Marsh, Holland, Lincs., 202  
 Sampson, Michael, 142  
 Sandwich, Kent, 93, 220  
 Scudamore, Philip, 5  
 Shaborne, Wilts., 1  
 Shelbury, John, 29  
 Sheldon, Edward, 5  
 Sheldon, Ralph, 5  
 Sheldon, William, 197  
 Shropshire, 125, 150  
 Sidley, Sir Isaac, 127, 166  
 Singleton, Thomas, 222  
 Singleton, William, 222  
 Skidmore, Sir John, 40  
 Smart, Alice, 221  
 Smith, John, 135  
 Smith, Sir Thomas, 25  
 Southampton, Town of, 120  
 Southwark, Surrey, 98  
 Spiller, Sir Henry, 186  
 Stanmore Parva, Mdx., 213  
 Stoddard, Sir Nicholas, 83  
 Stonehouse, Sir James, 219  
 Surrey, 10, 62  
 Sutton, Holland, Lincs., 202  
 Tewksbury, Glos., 43  
 Thomas, Evan, 9  
 Thunderidge, Herts., 78  
 Tottenham, Mdx., 142, 184  
 Twine, Christopher, 8  
 Twine, Thomas, 8  
 Tyting, Henry, 140  
 Vandebrooke, James, 167  
 Vandecount, Abraham, 218  
 Vanderputt, Giles, 197  
 Vanlore, Sir Peter, 152  
 Vanlore, Sir Walter, 152  
 Vaughan, Thomas, 9  
 Vermuyden, Sir Cornelius, 202  
 Walker, George, 140  
 Ware, Herts., 78  
 Warwickshire, 217  
 Web, Erasmus, 1  
 Wellow, Worcs., 157  
 Wendman, Sir Richard, 4  
 Wilde, William, 202

Willett, Ralph, 193

Williams, Lord, 90

Wiltshire, 103

Wimbledon, Surrey, 142

Winchcombe, Benedict, 147

Winchcombe, John, 147

Winter, Richard, 64

Winter, Robert, 64

Worcester, Worcs., 64

Wye, Essex, 194

York, George, 8

York, Mary, 8





# SUBJECT INDEX

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

- Accounts Performed, 166
- Administrators, *See* Decedent's Estates
- Admiralty, Court of, 51
- Agents, 44
- Annuities, 79
- Apprenticeships, 7
- Assignments
  - Bills of exchange, 159
  - Crown, by, 8, 219
  - Crown, to, 12, 24, 53, 89, 96, 99, 101, 104, 111, 167
  - Debt, of, 33
  - Husbands, by, 111
  - Leases, 108
  - Lessees, 80
- Assumpsit*, Actions of, 212
- Attainders, 144
- Attorneys, Notice to, 110
- Attorneys General, 119, 174
- Bastards, 2
- Beer, 62
- Bequests, *See* Devises
- Boats, *See* Vessels
- Brewers, 7, 62, 187
- Butchers, 190
- Butter Exported, 220
- Calves, 190
- Cambridge, Trinity College, 78
- Case, Actions of, 8, 24, 25, 28, 44, 87, 100, 133, 211
- Castles, 81
- Cattle, 114
- Charities, *See* Churches, Schools
- Children, *See* Infants
- Churches
  - Advowsons, 9, 112, 136

Concealments, 78  
 Curates, 213  
 First fruits, 54, 177, 191  
 Houses of, 183, 213, 144a  
 Inductions to, 54  
 Lapses, 54  
 Leases of, 1  
 Leases of land, 29, 138  
 Lessees of, 184  
 Merger of estates, 70  
*Modus decimandi*, 184  
 Prescription, 209  
 Presentations to, 177  
 Rectors, 112  
 Rectories, 1, 70, 71, 78, 98,  
 141, 184, 219  
 Sequestrations, 54, 199  
 Simony, 3, 54  
 Taxes, 158  
 Tithes, 9, 19a, 71, 144a, 182,  
 209, 213  
 Vicarages, 70, 191  
 Cinque Ports, 128  
 Clerk of the Statutes, 46, 90  
 Cloth, 16, 30, 52  
 Clothiers, 52  
 Codicils, *See* Devises  
 Companies  
     Creation of, 60  
     Goldsmiths' Company, 82  
     Salters' Company, 47  
 Consortium, Loss of, 66  
 Contracts  
     *See also* Conveyances  
     Actions upon, 90, 221  
     Counterparts, 90  
     Defective, 127  
     Performance, 221  
     Rent for, 164  
     Usury, 93, 147, 152, 153  
 Conveyances  
     Assignments, 80  
     Confirmations of, 118  
     Construed, 98, 141  
     Defective, 118  
     Description, by, 82  
     Entails, 150  
     Felon's goods, 103  
     Fraudulent, 5, 13, 29  
     Intent of parties, 124  
     Metes and bounds, by, 82  
     Mistakes in, 154  
     Patents by Crown, 98, 208  
     Post fines, 86  
     Recoveries, 92  
     Rectories, of, 71  
     Springing interests, 155  
     Trusts of, 154  
 Corn, 35, 59, 63  
 Corporations, *See* Companies  
 Covenant, Actions of, 127, 221  
 Creditor's Rights  
     Accounts, 132  
     Assignments, 159  
     Bail bonds, 58, 137  
     Bills of exchange, 24, 159  
     Bonds, 172, 203  
     *Caveat emptor*, 9  
     Condition performed, 166  
     Confessed judgments, 119  
     Co-obligees, 104  
     Crown as creditor, 145

- Crown debts, 5
- Crown executions, 193
- Debts, 219
- Debts assigned, 8
- Debts discharged, 99
- Debts of administrator, 181
- Debts to crown, 34,  
75, 148, 159, 189
- Debtors of debtors, 193, 200
- Debtor's heirs, 198
- Defaults, 203
- Escape of debtor, 216
- Extents, 46, 99, 117, 156,  
157, 181, 200, 203, 217, 227
- Forfeited land, 39
- Forfeitures, 4
- Fraudulent conveyances, 5
- Imprisonment of debtor, 137
- Indemnity bonds, 175
- Joint tenants, 99a
- Judgment debtors, 200, 216
- Judgment liens, 89
- Levy of debt, 219
- Levy quashed, 181
- Liens discharged, 39
- Marginal releases, 191
- Pardons, 99a
- Penalties, 172
- Prerogative of crown, 145
- Priorities, 123, 156, 167
- Priority of Crown, 34, 99a
- Recognizances, 5, 58, 101,  
123, 156, 193, 219
- Seizures, 219
- Statutes, 46, 90, 122, 123
- Sureties, 166
- Usury, 93, 147, 152, 153
- Wards of crown, 122
- Warranties, 9
- Criminal Fines Vacated, 45
- Crown
  - See also* Parliament
  - Accounts to, 166
  - Advowsons, 112
  - Alnage, 30
  - Assignments by, 8, 219
  - Assignments to, 12, 24,  
89, 96, 99, 101, 104,  
111, 159, 167, 203
  - Bonds, 172
  - Concealments, 71, 78
  - Confessed judgments, 119
  - Customs, 18, 73, 97, 101,  
116, 119, 120, 139, 146, 160
  - Debts to, 75
  - Debtors to, 5, 148
  - Debtors of debtors, 193
  - Debtor's heirs, 198
  - Denization, 11
  - Diem clausit extremum*, 200
  - Duties, 84
  - Escheats, 2
  - Executions by, 193
  - Felon's goods, 103
  - Felon's land, 94
  - Fifteenths, 158
  - Fines, 84, 118
  - First fruits, 54, 177, 191
  - Forests, 165, 178, 179
  - Forfeitures to, 4, 17, 22,  
39, 44, 64, 67, 76, 101,  
139, 144, 180, 210, 218

Grants by, 98, 103  
 Importations, 22  
 Indemnity bonds, 175  
 Informations, 119  
 Informers, 18, 160  
 Inquisition *post mortem*, 126  
 Intrusions upon, 21, 31, 32, 50, 72, 76, 98, 131, 180, 194, 196, 197, 202  
 Issues forfeited, 163  
 Joint creditor, 145  
 Lands of, 208  
 Lease avoided, 83  
 Lessee of, 173  
*Licet nos tangat*, 23  
 Monopolies, 169  
 Pardons, 99a, 163  
 Patents, 83  
 Penalties, 107  
 Pleading generally, 180  
 Post fines, 86  
 Prerogative of, 145, 146  
 Prescription against, 14, 165, 178  
 Priority of, 34, 99a, 117, 156, 167  
 Prisaige, 14, 20  
 Privileges, 23  
 Protections, 23  
 Recusant's debts, 107  
 Recusant's lands, 41, 56  
 Rent due to, 49  
 Rent service, 224  
 Repairs to castles, 81  
 Revenue of, 173  
 Royal manors, 55  
 Seizures, 22, 51, 73, 75, 109, 117, 119, 120, 160, 175  
 Subsidies, 42, 44, 162  
 Taxes, 158  
 Tithes, 19a  
 Usage, 146  
 Wager of law none, 40  
 Wards of, 122, 162  
 Waste, 74  
 Customs, 18, 73, 97, 101, 116, 119, 120, 139, 146, 160  
 Debt, Actions of, 40, 58, 90, 120, 121, 185, 215, 216  
 Debts, *See* Creditor's Rights, Crown  
 Decedent's Estates  
     Debts, 111, 167  
     Debts of administrator, 181  
     Debts to crown, 75  
     Debtor's heirs, 198  
     Husband of executrix, 111  
     Judgment debtors, 58  
     Payment by, 191  
     Waste, 74  
 Deceit, Actions of, 9  
 Defamation, 25, 28, 43, 100, 133, 171  
 Delegates, Court of, 54  
 Denizens, 11  
 Detinue, Actions of, 58, 222  
 Devises  
     Ademptions, 2  
     Advowsons, 136  
     Choses in action, 136  
     Conditions, 142  
     Denizens, by, 11  
     Fraudulent conveyances, 29

- Land, 140
- Leases, of, 138
- Life estates, 142
- Profits of land, 1
- Diem Clausit Extremum*, 200
- Duties, 84
- Dyers, 129
- Ecclesiastical Courts, 3,  
105, 106, 170, 214
- Ejectment, Actions of, 1, 61,  
85, 91, 108, 124, 138,  
140, 141, 142, 150, 205
- Engrossing, 19, 35, 77
- Escapes, 58, 113, 216
- Evidence
  - Books, 208
  - Commissioners to hear, 17
  - Criminal conviction, 10
  - Crown, against, 18
  - Custom of manor, 65
  - Defendant's employees, 129
  - Examinations in court, 25
  - Foreign depositions, 116
  - Informers, by, 18
  - Newly discovered, 72
  - Witness ill, 25
- Exchequer, Court of
  - Accountants to Crown, 87
  - Apprenticeships, 7
  - Bail in, 161
  - Clerks of, 161
  - Criminal fine vacated, 45
  - Crown debtor, 49
  - Estreats, 45, 105, 106,  
170, 214, 226
  - Final judgments, 26
  - Imprests, 81
  - Imprisonment, 115
  - Jurisdiction, personal, 87
  - Marshall, 68
  - Pipe Office, 175
  - Powers of, 36
  - Prisoners of, 68
  - Privilege of suit, 40, 49, 161
  - Res judicata*, 26
  - Sheriffs, 87
  - Tithes in London, 144a
- Executors, *See* Devises
- Fish, 97
- Flax, 160
- Fleet Prison, Warden of, 130
- Forests, 165, 178, 179
- Forfeitures, 6, 17, 44, 64, 67,  
101, 165, 178, 179, 180
- Fraud, 13, 187
- Fruit, 19
- Garnishment, 222
- Glass, 22
- Gold, 84, 210
- Goldsmiths' Company, 82
- High Commission, Court of,  
105, 106, 170, 214
- Imprisonment, False, 66
- Infants
  - Answers, 29
  - Crown wards, 122, 162
  - Leases by, 205
  - Wardships, 69
- Informers, 160
- Justices of the Peace, 190
- King, *See* Crown
- Lancaster, Duchy of, 86, 163

## Land

*See also* Conveyances

Annuities, 79  
Boundaries, 82  
Commons, 165, 178, 179  
Copyholds, 6, 55, 85  
Crown wardship, 162  
Disseisin, 102  
Distraint, 158  
Dower, 149  
Entails, 92, 149, 150  
Erosion of, 121  
Fee simple, 85  
Forests, 165, 178, 179  
Forfeitures, 6, 17, 64,  
165, 178, 179, 180  
Intrusion into, 11, 21, 31,  
50, 72, 76, 98, 131, 180,  
194, 196, 197, 202  
Joint tenants, 99a  
Manors, 2, 6, 65, 208, 224  
Marshes, 196, 202  
Merger, 29, 64, 70  
Pernancy of profits, 102  
Perpetuities, 92  
Possession of, 180  
Prescription, 178  
Priority of rights, 69  
Profits, 1  
Rectories, 1  
Rent, 96, 121  
Rent charges, 5  
Rent service, 224  
Riparian rights, 135, 202  
Roman Catholics,  
13, 38, 41, 56

Royal leases, 83

Royal manors, 55

Seizures, 41, 117

Springing interests, 155

Subsidies for, 162

Terre tenants, 188

Timber, 55

Tithes, 9, 19a, 71,

182, 209, 213

Wardships, 69

Wasteland, 76

Lawyers, Defamation of, 43

## Leases

Assignments, 80

Boundaries, 82

Church land, 1

Construction of, 124

Copyholds, 6

Date of term, 108

Devises of, 138

Ejectments, 91

Goods, of, 109

Infants, by, 205

Rectories, of, 141

Rent, 121, 164

Rent not paid, 83

Rent reserved, 205

Revived, 64

Roman Catholics, 107

Royal land, 83

School lands, 60

Tithes, 19a, 144a

Waste, 74

Will, at, 91

Leather, 218

Legacies, *See* Devises

- Limitations, Statute of, 206, 211, 212
- London, City of
  - Freeholders, 47
  - Goldsmiths' Company, 82
  - Jurors, 47
  - Market overt, 16
  - Port of London, 210
  - Salters' Company, 47
  - Searchers, 210
  - Tithes of houses, 144a
  - Weavers, 169
- Malicious Prosecution, 211
- Marginal Releases, 191
- Merchants
  - Bankrupt, 28
  - Bills of exchange, 24
  - Defamation, 28
  - Engrossers, 35
  - Generally, 44, 97
- Messenger of the Chamber, 215
- Municipalities, 223
- Office Found, 4
- Pardons, 99a, 163
- Parliament
  - Petitions to, 171
  - Statutes, 77
- Parties
  - Death of, 216
  - Incapacitated, 185
  - Incompetent, 168
  - Infants, 29
  - Informers, 84
  - Misjoinder of, 184
  - Misnomer, 185
  - Partners, 62
  - Relators, 32
  - Unknown, 73
- Partnerships, 62
- Paupers, 187
- Perjury, 100, 133
- Pillory, 195
- Pipe Office, 175
- Pleading
  - Amendments, 48
  - Answers, 29
  - Appeals, 113
  - Co-defendants, 114
  - Condition performed, 166
  - Crown, by, 180
  - Damages, of, 113
  - Defective, 143
  - Demurrers, 182
  - Discharge, 99
  - Garnishment, upon, 222
  - General issue, 180, 182
  - Generally, 180
  - Habeas corpus*, 113
  - Imprisonment, false, 66
  - Infants, 29
  - Insufficient, 61, 66, 134, 188
  - Life estate, of, 217
  - Limitations, 206, 211, 212
  - Mis-pleading, 31
  - Nil debet*, 58, 120
  - Oath, under, 29
  - Occupation of goods, 109
  - Payment, 191
  - Place where, 222
  - Possession, of, 180
  - Puis darrein continuance*, 61
  - Special, 196, 197



Special pleas, 182  
 Venue, 61  
 Post fines, 86  
 Procedure  
   *See also*, Parties, Pleading  
   Abatement, 142  
   Affidavits, 162, 180, 215  
   Appeals, 1, 7, 15, 54  
   Appearances, 168  
   Arrest of judgment, 7, 9, 20,  
   95, 113, 114, 120, 133, 134,  
   143, 171, 186, 200, 212  
   *Audita querela*, 58, 189  
   Bad faith, 15  
   Bail, 58  
   *Capias*, 189  
   *Capias ad satisfaciendum*,  
   66, 137, 216  
   *Certiorari*, 45, 170, 204, 226  
   Challenges, principal, 88  
   Commissions, 50  
   Contempts of court, 130  
   Continuances, 131  
   Court costs, 15, 16, 160, 176  
   Damages, 50  
   Damages not found, 63  
   Damages tried, 32  
   Death of party, 216  
   Default, 32, 73, 99, 119  
   Discontinuances, 66, 176  
   Distress, 79, 81, 186  
   *Duplex querela*, 54  
   Errors cured, 20  
   Errors raised, 200  
   Executions, 33, 53, 89, 105  
   Extents, 8, 46, 79, 80, 99, 99a,  
   117, 122, 123, 156, 157, 173,  
   181, 188, 200, 203, 217, 227  
   Fines, 214  
   Garnishment, 87, 108, 222  
   *Habeas corpus*, 128, 130  
   *Habendo*, 204  
   Imparlances, 168  
   Incompetent parties, 168  
   Injunctions, 21, 194  
   Inquisitions, 227  
   Judgment liens, 89  
   Judgment several, 21  
   Juries, 95, 120, 125,  
   131, 132, 174  
   Jurors, 76, 88  
   Jurors, London, 47  
   Jurors withdrawn, 27  
   *Levari facias*, 173  
   Levies, 219  
   *Liberate*, 117  
   *Licet nos tangat*, 23  
   Misjoinder, 184  
   Misnomer, 185  
   Misleading, 31  
   Mistrials, 27  
   *Mittimus*, 45  
   Mixed juries, 95  
   Motions to quash levy, 181  
   New trials, 27, 63  
   *Nisi prius*, 120  
   Nonsuits, 160  
   Notice of trial, 110, 215  
   Notice to unknown party, 73  
   Outlawry, 8, 99, 99a, 207, 225  
   Pernancy of profits, 102

- Postea*, 174  
*Procedendo*, 204  
Process forged, 37  
Prohibitions, 3, 51  
Protections, 23  
*Quo minus*, 40  
*Rege inconsulto*, 183  
Relators, 32  
Removal of case, 128  
*Res judicata*, 26  
Returns, 87, 151, 207, 225  
Returns amended, 186  
*Scire facias*, 15, 57, 58, 66,  
73, 87, 90, 99, 108, 137,  
167, 191, 198, 219  
Seizures, 207  
Sequestrations, 54  
Service of process, 73  
Settlements, 84  
Stays of trial, 110  
Subpoenas, 73  
Survivorship, 216  
Talesmen, 95, 174  
Trials, 61  
Trials adjourned, 131  
Under sheriffs, 37  
*Venire facias*, 20, 61  
*Venire facias de novo*, 63  
Venue, 44, 61, 126, 182, 220  
Verdicts, 1, 4, 16, 20,  
44, 63, 132, 138  
*Voir dire*, 88  
Wager of law, 40  
Process, Abuse of, 115  
*Quo Warranto*, Actions of, 88  
Real Property, *See* Land  
Replevin, Actions of, 204  
*Rege Inconsulto*, 183  
Requests, Court of, 53  
Roman Catholics, 5, 10, 13,  
17, 38, 41, 56, 67, 79,  
107, 134, 168, 185  
Sales  
  Advowsons, 9  
  *Caveat emptor*, 9  
  Victuals, 9  
  Warranties, 9  
Salt, 64  
Salters' Company, 47  
School, Brentwood, 60  
Sheriffs  
  Accounts of, 166  
  Escapes, 58, 113, 216  
  False returns, 87  
  Generally, 216  
  Returns, 225  
  Under sheriffs, 37, 87  
Ships, *See* Vessels  
Silk, 116  
Simony, 3, 54  
Star Chamber, Court of, 100  
Tailors, 40  
Taxes, *See* Crown  
Timber, 55, 201  
Tithes, 9, 19a, 71, 144a,  
182, 209, 213  
Tobacco, 73  
Trades, 223  
Treason, 10, 29, 39, 64, 76  
Trespass, Actions of, 30, 44, 66,  
91, 142, 149, 168, 183, 186  
Trinity College, Cambridge, 78

Trover, Actions of, 16,  
22, 59, 182, 206

Trusts

- Beneficiaries, 1, 2
- Declarations of, 2
- Forfeited, 144
- Fraudulent, 13, 29
- Profits of land, 1
- Roman Catholics, 13
- Survivors, to, 154

Usury, 93, 147, 152, 153

Venue, 44, 61, 126, 182, 220

Vessels

- Distress, in, 139
- Dolphin*, 44
- Wrecks, 135

Vintners, 195

Wardships, 69

Waste, 74

Waterworks, 217

Weavers, 169

Welsh Language, 133

Wills, *See* Devises

Wine, 120, 195

Women

- Capias ad satisfaciendum*, 66
- Dower, 149
- Husband of executrix, 111
- Imprisonment false, 66

Wood, *see* Timber

Wreck, Right of, 135



