The Reports

OF

SIR EDWARD COKE, KNT.

IN THIRTEEN PARTS.

A NEW EDITION,

WITH ADDITIONAL NOTES AND REFERENCES,
AND WITH ABSTRACTS OF THE PRINCIPAL POINTS:

THE FIRST THREE PARTS AND THE FOURTH TO FOL. 38 a.
BY JOHN HENRY THOMAS, ESQ.

THE REST OF THE FOURTH AND THE REMAINING NINE PARTS
BY JOHN FARQUHAR FRASER, ESQ.
OF LINCOLN'S INN, BARRISTER AT LAW.

IN SIX VOLUMES.
VOL. III.
PARTS V—VI.

LONDON:
JOSEPH BUTTERWORTH AND SON, 43, FLEET-STREET;
AND J. COOKE, ORMOND QUAY, DUBLIN.
1826.

Chief Justice of England, Fleming, Chief Baron, and all the other Justices at Serjeant's-Inn in Fleet Street. But notwithstanding a writ of error was brought on this judgment in the King's Bench, where the Judges for the reasons and causes aforesaid affirmed the judgment.

[For the computation of time, as days, months, &c. see Bract. 264. 344. 359. Britton 209. Fleta *lib.* 6. c. 11. Stat. *de anno Bissext.* 21 H. 3. Dyer 345. Salk. 624 to 627. N.B. Pryn's Ed. 1. p. 1220, &c.] *Note to former edition.*

SIR MOYLE FINCH'S CASE.

Mich. 4 Jacobi 1.

In Communi Banco.

AVERY v. CRAT. Part VI.–63 a.

In replevin on the pleadings the case was, M. was seised for her life of the manor of B., remainder to F. in fee; F. took husband, S. S. and F. and one D. levied a fine of all the demesnes to T. and his heirs, who granted and rendered to D. for 50 years reserving rent, the reversion to S. and F. and the heirs of F. By indentures made before the fine, it was agreed that S. and F. should have free ingress and egress to hold the Court Baron. And it was averred, that the said demesnes with the services from the time of the levying the fine during the life of F. were known by the name of the manor of B. S. and F. levied a fine of all the manors, lands, &c. of F. in the same county, with the exception of the manor of B. to the use of F. for life, remainder to M. F. in tail, remainder over, and in the fine as many acres were contained as were sufficient to pass the said demesnes. D. being possessed of the said term, made his son, then being three years old, his executor, and died; and administration *durante minoritate* was committed to R. Afterwards S. and F. levied a fine of the manor of B. and of several acres sufficient to pass all the demesnes, to the use of S. and F. and the heirs of F. till S. with the assent of his wife F. by writing, &c. should declare other uses, and then to those uses; R. demised the tenements to P. for 10 years; M. died, and P. entered. S. with consent of F. limited the uses to H. and L. and their heirs, who ejected P. and enfeoffed G. and L. and their heirs to the use of F. for life, remainder to H. F. and his wife and the heirs of their bodies. P. re-entered, F. died, and the defendant as bailiff to H. F. distrained for arrears of the rent, reserved upon the lease to D. and judgment was given for the defendant: and resolved,

1. The demesnes of the manor of B. being once by the act of the party absolutely severed in fee-simple from the services of the manor, the manor is destroyed for ever.

Where the severance is by act of law, they may by law be united again.

A man by his own act cannot at this day create a manor.
2. The exception of the manor of B. in the second fine is sufficient to except the demesnes and services, notwithstanding the manor is destroyed.
A grant may be made to a bastard by the name of his reputed father, if he be known by such name.
So a remainder may be limited to R. the son of R. W. although he be a bastard, if he be known by such name, &c.
*Rent common, &c. cannot be claimed by usuage, but must be prescribed for; but to make a thing *in esse* pass by a name, there needs not time whereof, &c. but such convenient time that it may be known by such name.*
The name of a manor, land, or other local thing, is to be tried where it lies.
If a man marries with a woman precontracted, and has issue by her, this issue bears the sirname of the father, but if after, the husband and wife be divorced for precontract, the issue loses its sirname, yet this is a good ground for reputation subsequent.
And so in many other cases the name by repute is sufficient.
And vulgar reputation is allowed in writs amicable, which are had by agreement and consent of parties, but not in adversary writs.
If a man bargains and sells so many acres of wood, it shall be measured according to the usage of the country.
3. The lease made by the administrator *durante minoritate*, is good.
Where the administration *ratione minoris ætatis* is granted specially *ad opus, &c. executoris durante minore ætatis et non aliter*, such special administrator cannot make such lease; otherwise, where the administration is committed generally, *ratione minoris ætatis*.
4. By the regress of the second lessee those in reversion by force of the feoffment shall avow for the rent.
Be the eviction of the lessee by entry or action, the reversion remains in the feoffee, and he shall avow; per Coke, C. J.
If he in reversion disseises the donee, and makes a feoffment in fee, and the donee re-enters, he leaves the reversion in the feoffee.
If the disseisee disseises the heir of the disseisor, and makes a feoffment in fee to another, he extinguishes his ancient right.
But if a man makes a gift in tail, or a lease for life, rendering rent, and disseises the tenant in tail, or for life, and makes a feoffment in fee, and the donee or lessee re-enters, he revives the rent as incident to the reversion. Vid. the entry, Co. Ent. 591. nu. 10.

In a replevin between Avery and Daniel Crat, which began *in Communi Banco, Pasch.* 1 *Jacobi, Rot.* 1610. upon long and intricate pleading, the case was such: Catharine Lady Moyle was seised of the manor of Beamston in the county of Kent, for the term of her life, the remainder to Catharine Lady Finch in fee: and afterwards the lady Finch took to husband Nicholas Seintleger, Hil. 10 El. Seintleger and his said wife, and one Anthony Deal, levied a fine of all the demesnes of the said manor (by certain quantity of acres which included all the demesnes of the manor, to T. Finch, and his heirs, who granted and rendered the demesnes of the said manor to the said Deal for fifty years, from the feast of St. Michael then last past, rendering 5*l.*

rent, and granted the reversion to Seintleger, and the Lady Finch, and to the heirs of the Lady Finch), which fine was levied according to certain indentures before made between the parties, whereby, among other covenants, it was agreed, that the said Nicholas Seintleger, and the Lady Finch, &c. should have free ingress and egress, in and out of the said manor, for them, their steward, servants, and tenants, to hold the court-baron, in and upon the said demesnes: and it was averred that the said demesnes, together with the services, were *a tempore levationis finis, durante totâ vitâ* of the said Catharine Lady Finch, at Eastwell, *et alibi* in the county of Kent, *communiter, cognita, habita, reputata et nuncupata per nomen manerii de Beamston.* And afterwards by indenture tripartite, *anno* 16 Eliz. between Sir Thomas Heneage and Anne his wife, of the first part, Seintleger, and his said wife of the second part, and Sir M. Finch of the third part, it was covenanted and agreed, that Seintleger and
[* 63 b.] the said Catharine his wife, should levy a fine of the manors *of Eastwell, Potbury, Setons, Willington, Ucking and Ulley, in the county of Kent, and of all other lands, tenements and hereditaments of the said Catharine in the said county of K. except the manor of Beamston in the said county, to the use of Catharine Lady Finch for life, and afterwards to the use of the said Sir Moyle Finch in tail, with divers remainders over, which fine was levied accordingly, in which as many acres were contained, as were sufficient to pass the said demesnes. Anthony Deal being possessed of the said interest of the term as aforesaid, made his will in writing, and thereof made Moyle Deal his son his executor, and *anno* 19 Eliz. died, the said Moyle then being of the age of 3 years: and immediately after his death, administration of the goods of the said Anthony, *ratione minoris ætatis* of the said Moyle Deal, was committed to one Robert Thomas, and afterwards, *anno* 23 Eliz., Seintleger and Catharine his wife, levied a fine of the manor of Beamston, and of divers acres sufficient to pass all the demesnes, to the use of Seintleger and Catharine his wife, and to the heirs of the said Catharine until the said Seintleger, with the assent of the said Catharine his wife, in writing, signed and sealed by him, should declare to what other uses, and then to the same uses. Robert Thomas, the administrator, demised the tenement aforesaid, to Paul Lofty for 10 years, and afterwards the said Catharine Lady Moyle, *anno* 26 Eliz. died; Paul Lofty entered, *anno* 27 Eliz. Seintleger, with the consent of his said wife, according to the said limitation declared the uses of the tenement aforesaid to be to Hancock and Sturges, and their heirs, who ejected Paul Lofty and did thereof enfeoff Glanvile and Sturges, and their heirs, to the use of Catharine Lady Finch for her life, and after to the use of Heneage Finch, her younger son, and Ursula his wife, and the heirs of their two bodies. Paul Lofty the lessee of the said administrator, re-entered, Catharine Lady Finch died, the rent reserved by the said fine, *de anno* 10. was arrear for 13 years ended 44 Eliz. and for the said arrearages the defendant, as Bailiff to Heneage Finch, distrained, and the plaintiff, lessee of Sir Moyle Finch, brought a replevin. And in this case four points were moved, and argued as well at the bar, as this term, by Da-

niel, Warberton, Walmsley, and Coke, Chief Justice at the bench. The first point was, Whether by the fine of 10 Eliz. in which was such a grant and render, as is aforesaid, the manor was destroyed for ever, and that was called the destroying point. 2. Admitting the manor was for ever destroyed, whether the exception in the said indenture of 16 Eliz. by the name of the manor of Beamston, be sufficient to except, and save the manor out of the fine of 16 Eliz. levied to the use of the said indentures; and that was called the saving point. 3. Whether the lease made by the administrator *ratione minoris ætatis*, for 10 years, be good or not, and that was called the making point. The fourth and last point was, whether there needed any attornment, or that the regress of Paul Lofty the lessee for part of the term, *scil.* for 10 years, should amount to an attornment; and that was called the perfecting *point. As to the first, it was resolved *per totam curiam*, that although at one instant the demesnes were granted and rendered to Seintleger and Catharine Lady Finch, and to the heirs of Catharine, so that there was not any transmutation of any possession, yet the demesnes being once by the act of the party absolutely severed in fee-simple from the services of the manor, the manor is destroyed for ever (A).

[* 64 a.]

1. The demesnes of the manor, being once by the act of the party absolutely severed in fee-simple from the services of the manor, the manor is destroyed for ever. Pollexf. 414. 2 Co. 17. 5 Co. 6. a. Co. Cop. 61. &c. Co. Lit. 310, 311. 27 E. 3. 79. a. per Skipwith.

And a difference was taken between the act of the parties and the act of the law: for if there be two coparceners of a manor, and on a (*a*) partition the demesnes are allotted to one, and the services to the other, in that case, although there is an absolute severance, yet if one dies without issue, and the demesnes descend to her who hath the services, the manor is revived again; because on the partition they were *in* by act of law, and the demesnes and services were united again by act of law. And so was the clear opinion of Thorpe and the other Justices in the time of E. 3. as Thirning, Chief Justice of *C. B.* reports in (*b*) 12 H. 4. 25. b. And the case intended was the case of Hugh Audley E. of Gloucester, which began 17 E. 3. 72. a. b. but there was not resolved. *Vide* 18 H. 6. 26. a. acc. So if on a partition an advowson appendant is allotted to one, and the manor to the other, and afterwards one dies without issue, whereby the law unites them again, in that case the advowson which was once severed, is now appendant again (B). Also it is agreed in 26 H. 8. 4. a. that if a (*c*) partition be made of a manor betwixt two coparceners, and on the partition each hath parcel of the demesnes and parcel of the services, because each of them is *in* by act of law, each of them has a manor (C). But if a man has a manor, and he grants part of the demesnes, and part of the

Difference where the severance is by act of law and where by act of the party.

(*a*) 18 H. 6. 26. a. 2 Roll. 122.

(*b*) Br. Extinguishment 13. Fitz. Extinguishment 5.

(*c*) 2 Roll. 122. Davis 61. b. Br. Manor 1.

(A) Acc. *Lemon* v. *Blackwell*, Skinn. 191. *Rex* v. *Bishop of Chester*, Skinn. 661. *Rex* v. *Staverton*, 190. *Long* v. *Hemming*, 1 Anders. 257. But although by the severance it ceases to be a legal manor, yet it may continue a manor by reputation, so as to sustain minor prescriptive rights. *Soane* v. *Ireland*, 10 East, 259.

(B) Acc. *Reynolds* v. *Blake*, 3 Salk. 25. 40. S. C. 1 L. Raym. 198. *Thetford & Thetford's case*, 1 Leon. 204.

(C) So it has been held that a tenant in dower of a third part of a manor has a manor, and may hold courts and grant copyholds. *Bragg's case*, Godb. 135.

A man by his own act cannot at this day create a manor.

services to another, he shall not have a manor (D) for a man by his own act cannot create a manor at this day; and so it appears, that (a) *fortior et potentior est dispositio legis quam hominis.* As to the second point, it was objected, that forasmuch as in *anno* 10 El. the manor was destroyed, it could not be excepted by the name of the manor in *anno* 16 El. and that for three reasons. 1. The time of five or six years is not a (b) sufficient time to gain reputation, but it was urged it ought to be *a tempore cujus, &c.* As when land passeth as appertaining to a house, it ought to be averred to be usually occupied with the house *a tempore cujus, &c.* as appears in Hill and Gr. case, Plow. Com. 170. b. 2. The averment that from the time of levying the fine, during the life of the lady Finch, it was known and reputed for a manor was impossible, for it could not be reputed and known immediately after the fine levied, but time ought to give a name and reputation, *et eo potius* because the said fine was levied of the reversion; for the lady Moyle had the whole for the term of her life, and such reputation and knowledge could not be of a reversion expectant on an estate for life, as it might be of a possession. 3. Although the (c) reputation of a vulgar name will serve in grants or conveyances, yet it will not serve in judicial proceedings of the law, which are framed by learned men; and therefore by the said fine of 23 El. which is a judicial proceeding of law, that shall not pass by the name of a (d) manor, which in truth and in law is not a manor. But it was *resolved, that the exception as this case is, is sufficient to except the demesnes and services by the name of the manor, notwithstanding the manor was destroyed (E). It was the (e) good and true intent of the parties: for the lady Finch, and the others who were parties to the fine and indentures of 10 El. did not think of any dismembering or destroying of the manor: for in the same indenture provision was made to have ingress and egress to hold the courts of the manor. Also the parties to the indenture of 16 El. thought that it was a manor (of whom Sir Moyle Finch was one), for by the express words it is excepted by the name of a manor, and in the fine of 16 El. divers manors are named, but no mention of the manor of Beamston, for that was intended to be excepted; but it is by the express name of the manor of Beamston mentioned in the fine of 23 El. so that the true intention of all the parties appears, that it should be excluded out of the fine of 16. and included in the fine of 23. And it is well

(a) Postea 69. b. 8 Co. 152. a. 2 Roll. 315. Hutton 18. 2 Sid. 59. 10 Co. 67. b. Co. Lit. 338. a.

(b) 2 Roll. Rep. 317.

(c) 3 Lev. 27.

(d) 2 Roll. Rep. 76.

[*64 b.]

2. The exception of the manor in the second fine, is sufficient to except the demesnes, and services, notwithstanding the manor is destroyed.

(e) Yelv. 191. Cr. El. 524. 707, 708. Palm. 376. 2 Roll. Rep. 67.

(D) "If I grant away the moiety of my "manor, we shall both keep courts; so if I be "disseised of a moiety or a moiety be in execution by *elegit;*" per Walmesley, J. *Smith* v. *Bonsall,* Gouldsb. 117. And in *Harris* v. *Nicholls,* Cro. Eliz. 19. it was held by Meade & Windham, justices, that if a man hath a manor which doth extend into two towns, and he grants the demesnes and services in one town, the grantee hath a manor in that, and he may keep court, and so hath the grantor a manor in the other town, and may keep court there. Vid. also acc. with *Harris* v. *Nicholls. Morris* v. *Smith,* Cro. Eliz. 38. Vid. *Sir Anthony Deny's case,* 2 Leon. 190.

(E) So freehold bought in and occupied with a manor, and reputed as part of the manor, may pass by a mortgage made *two years* after such purchase, by the words "All "the lands thereto appertaining or reputed "part of the same manor." *Symonds* v. *Green,* Cro. Car. 308. Reputation of appurtenancy, &c. does not depend upon any definite period of time but upon circumstances. *Loftes* v. *Barker,* Palm. 376. Vid. Vin. Ab. Grants E. 2 Foubl. Equity 426.

said in Hill and Grange's case, Plow. Com. 170. b. It is the (*a*) office of Judges to take and expound the words which the common people use to express their meaning, according to their intents, and not according to the very definition. And Bracton saith, *nihil tam conveniens est naturali æquitati, quam voluntat' dom' volentis rem suam in alium transferre ratam habere.* And although *generalis regula generaliter* (*b*) *est intelligenda*, yet the said (*c*) rules are principally to be observed in wills, and also in cases of uses which were but (*d*) trusts and confidences between man and man. And to that purpose Shelley's case in the First Part of my Reports, and (*e*) Carter and Ringstead's case there vouched were cited and applied to that purpose (F). 2. Forasmuch as the true intent and meaning of the parties appears, why should not we as judges adjudge it good? It has been objected, that the thing excepted is not well named: for in law Beamston is not a manor, for it was destroyed by the fine of 10 El. and for that destruction the exception of it by the name of a manor shall be void. In the argument of which point it was said, that the law doth not favour advantages of misnomer more than the strict rule of law requires, neither in writs which may be abated, and new purchased, nor (especially) in grants or other conveyances, in which case the party has not remedy to have new. And therefore, if two be joined in one writ, the one shall not plead (*f*) misnomer of the other, as it is agreed in 14 H. 6. 8. b. In an action against (*g*) husband and wife, although they are one person in law, yet the one shall not plead misnomer of the other, 33 E. 3. *Maintenance de bre'* 63. In trespass in Holderness *apud* W. the defendant pleaded (in respect of some misnomer) that there was no such town, hamlet, or place known, &c. The plaintiff replied there was, without shewing in certain, either that it was a town, hamlet, or place known, and *all this in detestation of nice and dilatory exceptions. And it was also observed, that till this generation of late times it was never read in any of our books, that any body politic or corporate endeavoured or attempted, by any suit, to avoid any of their leases, grants, conveyances, or other of their own deeds, for the misnomer of their true name of corporation (*h*); but after that a window was opened to give them light to avoid their own grants for the misnomer of themselves, what suits and troubles thence ensued, every body knows: but it was said, for every curious or nice misnomer, God forbid, that their leases or grants, &c. should be defeated: for there will be a sound difference between writs and grants, and in all cases this is true, *quod* (*i*) *apices juris non sunt jura.* But it was resolved, that as this case is, there was a sufficient name in law to make the exception good. For *nomen discitur a noscendo, quia notitiam facit;* and in this case it is averred, *quod cognitum fuit per nomen, &c.* So that it is not only *notum*, but *cognitum*, which is more; and by true etymology and sense, *cognomen majorum est ex sanguine tractum, hoc intrinsec' est, agnomen extrinsec' ab eventu;* and yet

Office of judges to expound words according to their intent.

(*a*) Wing. Max. 23.
(*b*) 1 Co. 100. a. Co. Lit. 36. a.
(*c*) Co. Lit. 313. a. Moor 138. 1 Co. 95. b. Cr. El. 208.
(*d*) 1 Co. 121. b. 127. a. 2 Co. 58. b. Bacon's Lect. 5, 6, 7, 8. &c.
(*e*) Cr. El. 208. 2 Leon. 47. 8 Co. 118. b. 1 And. 245. Owen 84.

If two be joined in one writ, the one shall not plead the misnomer of the other.

(*f*) Br. Misnomer 69. 8 Co. 159. b. See 30 E. 3. 13. b. 29 Ass. 70.
[* 65 a.]
21 H. 6. 27. b. 22 E. 4. 71. b. 21 E. 4. 44, 45. Lutw. 3. 36.
(*g*) Doct. pl. 244. 33 H. 6. 22. b. Fitz. misnosm. 4.
(*h*) 10 Co. 125. b. 6 Taunt. 467.

(*i*) Co. Lit. 283. a. b. 304. b. Noy. 30. 10 Co. 126. a. Skinn. 186.

(F) Vid. note (K 3) *Shelley's case*, vol. 1. p. 246.

A grant may be made to a bastard by the name of his reputed father, if he be known by such name. So a remainder may be limited to R. the son of R. W. although he be a bastard, if he be known by such name, &c. &c. Touch. 237.

the law doth not regard this precise propriety of words. For if a grant be made to a bastard by the sirname of him who (as is supposed) begot him, it is good, if he be known by such name. So if a remainder be limited Rich. *filio* Rich. Marwood, it is good, although he be a (*a*) bastard, if in vulgar reputation and knowledge he be known by such name (G), as the book is in 39 E. 3. 11. a. and yet in truth and in law he is *nullius fil'*, for of a bastard it is said:

Cui pater est populus, pater est sibi nullus, & omnis;
Cui pater est populus, non habeat ille patrem.

(*a*) 41 E. 3. 19. a. 1 Roll. 359. Co. Lit. 3. b. Br. Grant 17. Hob. 32. Swinb. 52. 310. Cr. El. 509, 510. 2 Roll. 43, 44. Moor 430. Post. 67. a. Noy. 35.

In 41 E. 3. 19. a. there is a notable case (*b*). Richard Thomson had issue by one Johan, before marriage, Agnes, and afterwards married Johan, and made a feoffment in fee, and took back an estate to himself for life, *remanere inde Agnetæ fil', præd' Richardi & Johann'*, and agreed that it is a good remainder, without any averment that she was known to be their daughter, as it was in the said case of 39 (*c*) E. 3. but there it was objected, that a bastard is not their daughter in law, and therefore the remainder void: but there Fincheden gave the rule, and said, it is found that the daughter was born before the marriage, so that by their marriage after, she was their daughter. In which it is to be observed, that although by the common law she was not their daughter, yet because she had colour by the ecclesiastical law, which saith (*d*), *quod subsequens matrimonium tollit peccatum præcedens*, this colour is sufficient, in case of a conveyance, to make the remainder good. And so note a difference between a descent and a purchase; and therewith expressly agreeth 35 Ass. 13.

(*b*) Swinb. 310. 2 Roll. 43.

(*c*) 39 E. 3. 11. a. Antea.

(*d*) Swinb. 310.

In 27 E. 3. 85. a. b. W. Abbot of Worcest. by the (*e*) name of W. Abbot of W. by his deed, with the consent of his convent, granted to the Burgesses of W. common of pasture *in certain lands, and although his christian name was mistaken, yet forasmuch as there was a sufficient (*f*) certainty to ascertain the name of the grantor, *sc.* Abbot of W. for that reason the grant was adjudged good; for in this lease it is true (*g*), *nihil facit error nominis cùm de corp. constat*, but otherwise it is of a writ: for there if the Abbot be named by a false christian name, the writ (*h*) shall abate, because he may purchase a new writ, and therewith agree 18 E. 4. 8. b. 15 H. 7. 1. b. and 22 H. 6, &c. As to the second objection which has been made, that in this case there

(*e*) Hob. 32. Co. Lit. 3. a. 9 Co. 48. a.

[* 65 b.]

11 Co. 21. a.

(*f*) Co. Lit. 3. a.

(*g*) 13 Co. 21. a. See 8 E. 3. 19. b. per Herle.

(*h*) 5 Co. 121. a. 9 Co. 48. a. 10 Co. 126. a. 11 Co. 21. b.

(G) If an illegitimate child *en ventre sa mere* is described, so as to ascertain the object intended to be pointed out, it may take under that description. *Gordon* v. *Gordon*, 1 Meriv. 153. And illegitimate children may acquire the reputation of children so as to take under a will, by the description of the children of their reputed father. *Lord Woodhouselee* v. *Dalrymple*, 2 Meriv. 419.; and vid. *Baker* v. *Baker*, 2 Ves. sen. 167. *Rex* v. *Bishop of Chester*, 1 L. Raym. 304.

In an indictment against a woman of the name of Clark, for the murder of her bastard child; the child was described in the indictment as "George LakemanClarke, a male bastard child, about three weeks old"; but it appeared by the evidence that the child was christened George Lakeman, being the name of the reputed father, and that it was called George Lakeman, and not by any other name known to the witnesses, and that the mother called it George Lakeman; there was no evidence that it had obtained or was called by its mother's name of Clark. The reputed father had not taken to it, but had left the mother and child to the care and charge of the parish. The prisoner was convicted, but on the case being submitted to the judges they held the conviction could not be supported. *Rex* v. *Clark*, Russ. & Ry. C. C. R. 358.

was not a sufficient time to make the reputation of a manor, and that time out of mind is requisite in this case; it was answered and resolved, that there is a difference between a title to a thing to be created and claimed by prescription of time, and the name of a thing *in esse* to make it pass in a conveyance, for no man can claim rent, common, or other profit of inheritance by usage, but he ought to claim it by prescription *a temp. cujus memor', &c.* for such time is requisite by the law; but to make a thing *in esse* pass by a name, there needs not time whereof, &c. but such convenient time that it may be known by such name. And if it be asked to what places ought such knowledge to extend? Answ. To all England. Or to all the county in which the land lies. Or if to what place? To that it was answered and resolved, that it extends only in law *ad vicinetum* of the town where the land lies, for there the knowledge ought to be, where it ought to be tried, and that is *in vicineto* of the place where the land lies.

Rent, common, &c. cannot be claimed by usage, but must be prescribed for; but to make a thing in esse pass by a name, there needs not time whereof, &c. but such convenient time that it may be known by such name.

For the name of a manor or land, or other local thing is to be tried where it lies, because it is local; as the name of the person is to be tried where the writ is brought, because it is transitory; and therefore it was agreed, that the house in the Strand now of late called Exeter-house, and the house in Fleet-street, now called Dorset-house, have within these three years gained sufficient names among all their neighbours to know it by such name, and thereby to distinguish the same house from other houses. In 41 E. 3. *Maintenance de Bre'* 49, the case was, that in truth there was a manor called Asplegise, and it was also known by the name of Asple only, and there in a *Præcipe* brought of the manor by the name of the manor of Asple without addition the tenant after the view, demanded judgment of the writ, because the manor put in view was the manor of Asplegise; to which the demandant said, that the manor put in view is known by the name of Asple, and thereupon issue was taken. In which it was observed; 1. That the plea for the maintenance of the writ was, that the manor is known in the present tense, which is intended the day of the writ purchased without any prescription. 2. That although a manor cannot begin within time of memory, yet a manor may acquire a name to be demanded in a *Præcipe* within convenient time. And, 3. That such name acquired by knowledge of the country is sufficient without the true and proper name. *Vide* 8 H. 6. 32. b. for in that sense it is true, *de nom' propr' non est *curandum, dum in substantia non erretur, quia* (*a*) *nomina mutabil' sunt, res autem immobiles.* In (*b*) 45 E. 3. 6. a. in a *Quare impedit* of the church of B. the defendant pleaded, that there was no such church in the county where the writ is brought; afterwards issue was joined that there was a church in the same county known by the name of B. for Finchden who gave the rule there said, if any church in the county be known by such name, it is sufficient to maintain the writ, which agreeth with the book of (*c*) 41 E. 3. In 21 H. 6. 4. a. b. *In Tresp. versus Johann' Arderne Abbatem S. Johannis Baptist' de Colchest.* The Abbot pleaded, that he was founded by the name of the Abbot of the church and monastery of St. John Baptist &c. The plaintiff said, that this Abbot was known by the one name and

The name of a manor, land, or other local thing, is to be tried where it lies.

(*a*) Stile 391.
(*b*) Br. Quare imp.

The plea in maintenance of the writ, was that the manor is known; this is to be intended the day of the writ purchased.

A manor [* 66 a.] may acquire a name to be demanded in a præcipe within convenient time.—Such name acquired by knowledge of the country is sufficient.

(*c*) 41 E. 3. Maintenance de brief 49. Antea 65. b.

the other, and so to issue; in which it was observed, that it is sufficient to say, that this Abbot (without saying "and his predecessor") was known by such name. *Ergo*, there needs not time whereof, &c. 47 E. 3. 5. a. there it appears, if a chapel be in the time of H. 3. and when it became void, King H. 3. presented to it as to a church, and so did E. 1. and E. 2. and afterwards E. 3. being disturbed, brought a *Quare imp.* as to a church, and there Cavendish, Chief Justice, said, that after the said presentments had been received, to the same chapel as to a church, "I say it is not now a chapel but a church." By which it appears, that the said rule is true, that *nomina sunt mutabilia, res autem immobiles.* And therewith agreeth 11 H. 6. 18. b. where the case was, that a Parson had an annuity by prescription of a vicar, and afterwards E. 3. when the vicar died, presented one I. as Parson, and so were all his successors presented as Parsons, and the Parson made a special prescription, *sc.* that A. was Vicar, and that he and all his predecessors, Vicars, &c. And that after the death of A. the King presented as to a Parsonage, and so that he and his successors Parsons had paid, &c. and charged the defendant as Parson in a writ of annuity, and there it appears that by the said presentment the name of vicarage was changed into a parsonage.

There is not any impossibility or repugnancy in the averment, that from the time of levying the fine it was known, &c.

As to the second objection, that the averment was impossible and repugnant, that from the time of the levying of the fine it was known, reputed, &c. To that it was answered and resolved, that there was not any impossibility or repugnancy, for in the averment there are four words, *cognit. habit. reputat. & nuncupat.* and they were true before 10 El. for then, and time whereof, &c. it was *revera* a manor, so that the knowledge, reputation or appellation did not begin from the fine in 10 Eliz. but this averment continues that which was in truth before the fine a manor, from the time of the fine, to be known, reputed, and called a manor. And always the reputation is better, when it hath a ground and is founded on truth. And therefore if a man marries with a woman (*a*) precontracted, and has issue by her, this issue in law and truth bears the sirname of his father. But if after the husband and wife be divorced (H) for the precontract, *now the issue has lost his sirname; for, as it has been said, *cognomen majorum est ex sanguine tractum*, and now the issue is bastard *& nullius filius*; and yet because he once had a lawful sirname, it is a good ground of reputation subsequent. So if I have a park by the King's licence and grant, and it is commonly known by the name of a park, and afterwards I surrender my patent to the King, whereby in law it is no park, yet having once the name of a park in truth, it is a good ground for reputation, and continuance of the name of a park after; and the avowant might have prescribed as this case is, that the said demesnes and services had *a tempore cujus, &c.* been known by the name of the manor; for before the fine it was known in truth, and after the fine in reputation; so that it is not a creation of a new name, but a continuance of the old name. *Vide* 7 Eliz. Dyer 233 (*b*). The

If a man marries with a woman pre-con- [* 66 b.] tracted, and has issue by her, this issue bears the sirname of the father, but if after, the husband and wife be divorced for pre-contract, the issue loses its sirname; yet this is a good ground for reputation subsequent.

So in many other cases, quod vide in the text, the name by repute is sufficient.

(*a*) 2 Inst. 684. Co. Lit. 3. b. 29 E. 3. 11. 41 E. 3. 19. (*b*) Dyer 233. pl. 10, 11.

(H) Vid. 1 Black. Com. p. 435.

King seised of a manor, whereof all the demesnes are leased for life by the lease of an Abbot, rendering rent, in that case the King has not a manor in possession, nor can hold court; and yet if the King leases the manor to another for years, as a manor in possession, the lessee shall have the (*a*) reversion and the rent: for although it is not a manor *in esse*, yet it is well known that it was intended to be demised. And to that purpose is the case in 20 El. Dyer 362. where the case was, that (*b*) Edw. 6. was seised of the manor of Clevery, of which a wood containing 300 acres, was parcel, Ed. 6. by his letters patent granted the said wood in fee, and afterwards the said wood escheated to him for treason. Afterwards the Queen granted the said wood in fee, the grantee regranted it to Queen Elizabeth, who by her letters patent granted the said manor, *& omnes boscos modo vel antehac cognit. vel reputat. ut pars, membrum, vel parcell' ejusdem manerii* to the Earl of Leicester in fee: and although *in rei veritate*, before the severance made of the wood by King E. 6., it was always parcel of the manor yet in good propriety of speech it was then, *cognit. ut pars & membrum dicti manerii*; for although *ut* is a word of similitude, and not of identity, yet truth is the most sure foundation of knowledge and reputation, and therefore it was there adjudged that the wood did pass. As to the third objection, that a manor in (*c*) reputation and not in truth, shall not pass by fine, which is a legal proceeding drawn by men learned in the law, and therefore vulgar reputation will not serve in it: to that it was answered and resolved, that the rule which Stonor gave in 9 Edw. 3. 38. in the like case, was true, that the process of this court shall not be maintained by usage in *pais*; but there is a difference (*d*) *inter brevia adversaria, sc.* brought as an adversary to recover the land, &c. *& brevia amicabilia, sc.* brought by consent and agreement amongst friends; for it is true in **brevibus adversariis*, the process of this court shall not follow the custom or reputation of the country, as in 6 E. 3. 11. The demandant in a writ of entry demanded the manor of C. the tenant said that the tenements put in view, are a house and a carue of land, called, &c. and not a manor, &c. By which it appears, that if it were not in truth a manor, although it were in appellation, the writ shall abate: but it was adjudged in Sir John Bruyn's case, in the beginning of the reign of Queen Elizabeth, that in a common recovery, which is had by agreement and consent of the parties, of acres of land, they shall be accounted according to the customary and usual measure of the country, and not according to the stat. *De terris mensurand'*, made *anno* 33 E. 1. So it is agreed in 47 E. 3. 18. a. that if a man bargains and sells so many acres of wood, it shall be measured according to the usage of the country, *sc.* according to 20 foot to the rod, and not according to the said act, for (*e*) *consuetudo loci est observanda* (1). And it appears by the book

(*a*) Ant. 55. a. b. 56. a. Co. Lit. 324. b. 4 Co. 26. a. 5 Co. 124. b. 8 Co. 56. a. 10 Co. 107. a. b. Cr. Car. 400. Dy. 125. pl. 45. 233. pl. 10, 11. Plowd. 155. a. 159. a. 30 E. 1. Grant 86. 7 E. 4. 20. Fitz. Feoffment 22. Fitz. Grant 97. 35 H. 8. Br. Grant. 50. 2 Roll. Rep. 180. 277, 278. Lane 3, 7. Lit. Rep. 18. B.N.C. 267. Hob. 224.

Vulgar reputation is allowed in writs amicable, which are had by agreement and consent of parties, but not in adversary suits.

(*b*) Dyer 362. pl. 17. Cr. Car. [*67 a.] 169. 2 Roll. 186. Moor 190, 191. 1 Leon. 15.

(*c*) 2 Roll. Rep. 67. Noy 7. Moor 190.

(*d*) 5 Co. 38. b. 45. b. 2 Sid. 68.

(*e*) 10 Co. 140. a. 4 Co. 28. b. 7 Co. 5. a.

If a man bargains and sells so many acres of wood, it shall be measured according to the usage of the country.

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(1) That lands, parcel of a manor by reputation, will pass by a common recovery of the manor with its appurtenances; vid. *Thinne* v. *Thinne*, 1 Sid. 190. That in fines and common recoveries, which are had by agreement and consent of parties, the acres of land

(a) 1 Roll. 359. 41 E. 3. 19. a. Co. Lit. 3. b. Br. Grant 27. Hob. 32. Antea 65. a. Swinb. 310. Cr. El. 509, 510. Moor 430. Noy 35. 1 Roll. 48, 44. (b) 2 Roll. 45. 712.

in 39 E. 3. 11. a, that a remainder limited to a (a) bastard, by the name of son of R. Marwood, whereas in truth he was *nullius fil'*, was good, because he was known and reputed as his son. And M. 22 & 23 El. in the King's Bench, *in Ejectione firmæ* between Vines and (b) Durham, a lease was pleaded of a manor, &c. whereof the tenements in which, &c. were parcel, and issue was joined, *quòd non demisit manerium*; and on that issue the jurors gave a special verdict, *sc.* that there were not any freeholders, but divers copyholders of the said manor, and that it was known by the name of a manor, and after good consideration, it was adjudged by Sir Chr. Wray, Chief Justice, *& totam curiam*, that although it was not a (c) manor in law for want of freeholders; and although it was in pleading, which is always drawn by learned men, and that it was in an action adversary, and not amicable; yet that forasmuch as an issue is triable by laymen, and that in truth the tenements, in which did pass by the lease, and therefore not like to a writ, it was adjudged for him who pleaded the demise of the manor. Hil. 25 Eliz. in this court Carter's case was, that where it is required by the stat. of 1 H. 5. c. 5. that in every writ, original, &c. in which an *Exigent* shall be awarded, that additions shall be given to the defendants of their estates and degrees, or of their trade, &c. and the case was, that one was (d) yeoman by his birth, and yet commonly called gent. in that case, in such writ brought against him, he may have the addition of gent. although in truth he is not a gent. but only by vulgar reputation; but forasmuch as the intent of the act is to have such a name, by which he may be known, it is sufficient to satisfy the act of Parliament. Another reason was added, that in this case there was, at the time of

(c) Doct. pl. 180. 4 E. 4. 10. 5 E. 4. 32, 33.

(d) 2 Inst. 668.

A yeoman by birth, but commonly called gentleman, may in a writ have the addition of gentleman.

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are according to the customary and usual measure of the country; vid. *Waddy* v. *Newton*, 8 Mod. 276. *Floyd* v. *Bethell*, 1 Roll. Rep. 420. pl. 8.; and vid. *Trewallen* v. *Penhules*, 2 Roll. Rep. 66. So an advowson may pass in a grant by the name of an advowson appendant, if it be appendant in reputation, although in truth the appendancy is destroyed. *Rex* v. *Bishop of Chester*, 3 Salk. 40. But in *Mallet* v. *Mallet*, Cro. Eliz. 524. 707. it was said by the court, that a manor in reputation, which is not in truth a manor, will not pass by the name of a manor in a fine or common recovery, but will pass by a conveyance. Vid. also *Norris* v. *Le Neve*, 3 Atk. 82. *Stukeley* v. *Butler*, Hob. 170. That in adversary writs the number of acres are accounted according to the statute measure; vid. *Andrew's case*, cited in *Ewer* v. *Hayden*, Cro. Eliz. 476.

Lord Kenyon in *Noble* v. *Durrell*, 3 T. R. 274. seems to have thought it impossible to contend that a custom should prevail that a less space of ground than an acre should be called an acre; vid. *Wing* v. *Earle*, Cro. Eliz. 267. *Morgan* v. *Tedcastle*, Rep. 55.; and vid. *Hockin* v. *Cooke*, 4 T. R. 314. That a bushel taken by itself, and without reference to any custom or particular agreement, meant a statute bushel; vid. also *Master of St. Cross* v. *Lord Howard de Warden*, 3 T. R. 338. and note (D) *Gregory's case*, ante. p. 296.

The statute *de terris mensurandis* was formerly holden to be only an ordinance. *Stowe's case*, Cro. Jac. 603. But it has since been held to be a statute. *Rex* v. *Everard*, 1 L. Raym. 638.

By stat. 5 Geo. 4. cap. 74. § 15. and 6 Geo. 4. c. 12. § 1. from and after the 31st day of December, 1825, all contracts, bargains, sales, and dealings, which shall be made or had within any part of the United Kingdom of Great Britain and Ireland for any work to be done, or for any goods, wares, merchandize, or other thing, to be sold, delivered, done, or agreed for by weight or measure, where no special agreement shall be made to the contrary, shall be deemed, taken, and construed to be made and had according to the standard weights and measures ascertained by this act; and in all cases where any special agreement shall be made with reference to any weight or measure established by local custom, the ratio or proportion which every such local weight or measure shall bear to any of the said standard weights or measures shall be expressed, declared, and specified in such agreement, or otherwise such agreement shall be null and void.

the making of the indentures in *anno* 16 Eliz. a manor in truth, *scil.* in the Lady Moyle for the term of her life, which was sufficient to support the name *of the manor, and to make the demesnes and services pass by the name of it: wherefore it was concluded, that by the name of the manor of Beamston, the said demesnes and services, late parcel of the manor, were excepted by the indenture *de anno* 16 El. As to the third point it was resolved, that the lease made by the administrator *ratione minoris ætatis* was good: although it was not necessary that the lease should be made; for the Lady Moyle was then alive; so that that lease enured as an *interesse termini* to begin after the death of the Lady Moyle. But this difference was taken, that when a man makes an (*a*) executor of such tender years (as in this case of three years), that he cannot execute the will, then if the administration (*b*) *ratione minoris ætatis* be granted specially, as it was M. 41 & 42 El. in Prince's case, *administr' omnium bonorum, ad opus, commodum, & utilitatem executor' durante minore ætate, & non alit', nec alio modo committimus, &c.* there such special administrator cannot make such lease, as in the case at bar: but when the administration is committed generally *ratione minoris ætatis*, without any restraint or limitation, there such lease made, as in the case at bar is good. For by the ecclesiastical law, *minor* 17 *annis non admittitur forè executorem*; and such general administrator, *ratione minoris ætatis*, shall not only have an action to recover debts and duties for the interest of the actions is in him, and also shall be liable to all actions (for during that time the testator died *quasi intestatus*); but also he may make leases or demises and they shall be good, wherefore the lease in the case at bar was good; and *eo potius*, in the case at bar, because no entry is pleaded by the executor, and he who pleads the demise is a stranger to it, and therefore he cannot know what rent is reserved; and therefore when he pleads *demisit*, if it was for any cause void, he might take issue *quòd non demisit*, or shew the special matter, but it shall be intended *primâ facie*, that the lease is good, and without question it is good till the executor attains to 17 years, and also till he enters, as some said (x). As to the last point, 1. It was resolved, that forasmuch as Paul Lofty had but an *interesse termini* during the life of the Lady Moyle, therefore as to the said interest upon the fine *de anno* 23 Eliz. (which was levied in the life of the Lady Moyle) no attornment could be. 2. When after the death of the Lady Moyle the lessee entered, he made the reversion in *Seintleger*, and the Lady Catharine his wife, and when they made declaration of uses to Hancock and Sudget, those uses arose out of the fine, to which fine no attornment could be made by him who had a future interest, as is aforesaid; for when attornment is not requisite to a fine, which is the root, no attornment is requisite to the declaration of the uses, which are but the *branches.

[* 67 b.]

(*a*) 2 Inst. 397.

3. The lease made by the administrator durante minoritate is good.

Where the administration ratione minoris ætatis is granted specially ad opus, &c. excæteris durante minoris ætatis et non aliter, such special administration cannot make such lease. Otherwise where the administration is committed generally ratione minoris ætatis.

(*b*) 5 Co. 29. b. Cr. El. 678, 679. 718, 719. 2 And. 132. Raym. 484. Swinb. 288. 3 Leon. 278. 8 Co. 135. b. 2 Inst. 398. March 158. Owen 35. Dall. 85.

No attornment was necessary.

[* 68 a.]

(x) Since 38 Geo. 3. c. 87. § 6. such lease would be good till the infant executor attains the age of 21 years.

[Nota. In the great case between Lord Byron and Weldon, it was said by Maynard, that if such an administrator lose a term by feint pleading, &c. the infant shall not be bound; but if he lose it upon full defence made, that in such case the infant shall be bound; to which all the King's counsel agreed; and Bridgman, Chief Justice, and Hales, Chief Baron, were assistants to the Lord Chancellor, and I (Sir Francis Winington) was of counsel for Weldon.] *Note to former edition.*

5. It was resolved, that if a man be seised of a manor, part of which is in lease for life, and part in lease for years, and he levies a fine to A. to the use of B. in tail, with divers remainders over, in that case B. shall avow for the rent, or have an action of (a) waste without any (b) attornment, for when a reversion is settled in any one in judgment of law, and he has no possible means to compel the tenant to attorn, and no laches or default is in him, there he shall avow, and shall have an action of waste without attornment, for the rule is, *quod remedio destituitur ipsâ re valet si culpa absit*, as in (c) 20 E. 3. *contra form' collat'* because the founder cannot have *contra form' collat'* of an advowson, he shall present without any suit, so 7 E. 3. & 3 H. 7. A man shall be tenant by the (d) curtesy of a rent or advowson (L), although the wife dies before the day incurs, or the presentment falls; so the lord in mortmain, or of a villain, claims a reversion, by the (e) claim, the law vests the reversion in him, and he has no means to compel the tenant to attorn (M), and therefore he shall avow and shall have an action of waste, without attornment: the same law of letters patent, and of a devise of a reversion, as appears in 34 H. 6. for in all the said cases *culpa abest.* But it was objected, that in the said case of the fine there was default and laches in the conusee, for he might have made mention of the leases in the fine, and then he might have brought a *Quid juris clamat*, and compelled the lessees to attorn, and so he had means to have compelled them to attorn, wherefore in regard he had omitted it, there was a default in him, and by consequence he shall neither have an action of waste, nor avow without attornment no more than if one levies a fine to another of land, which is in lease for life, he is without remedy for rent or waste without attornment. To which it was answered and resolved, that in the said case the conusee could by no possibility have a *Quid juris clamat*, for although he had recited the particular estates in the fine, yet he could not have a *Quid juris clamat*, for after the conusance or concord, and before the fine engrossed, he ought to sue the *Quid juris clamat*, and immediately by the conusance or concord, the reversion passed to the conusee. *Vide* F. N. B. (f) 147. a. and 22 Hen. 6. 57. and *eo instante* it is executed by the statute of (g) 27 H. 8. of Uses; so that it is not possible for him to have a *Quid juris clamat*, nor any remedy to compel the tenants to attorn. And forasmuch as by the act of parliament, which is an act in law, *scil.* by the execution of the possession to the use, the benefit of the conusee to have a *Quid juris clamat* is tolled, it is reasonable in regard of every subject, *scil.* the conusor, conusee, particular tenants, and all others, who are parties or privies to the act of parliament, that it should not turn to the prejudice of any, for (h) *im-*

(a) 2 Jones 3.
(b) 4 Co. 70. b. Co. Lit. 309. b. 321. b. Cr. El. 285. Raym. 91. Cr. Jac. 193. Vaugh. 50.
(c) 20 E. 3. Fitz. contra form' collat' 6.

A man shall be tenant by the curtesy of a rent or advowson, although the wife dies before the day incurs, or the presentment falls.

(d) 1 Co. 97. b. Fitz. Bar. 293. Co. Lit. 15. b. 29. a. 7 E. 3. 66. a. b. 3 H. 7. 5. a. F.N.B. 149. d. 121. n. Fitz. Discent. 3. Br. Tenant per le Curtesie 5. Perk. sect. 468, 469. Dr. & Stud. 84. a.
(e) Co. Lit. 119. a. Lit. sect. 179. 34 H. 6. 7.

(f) 5 Co. 39. a. b.
(g) Co. Lit. 309. b. Cr. El. 285.
(h) 1 Co 98. Co. Lit. 29. a. Hard. 387. 4 Co. 11. a. 5 Co. 22. a. 6 Co. 21. b. 9 Co. 73. a. 10 Co. 139. b.

(L) "According to Perkins the husband "shall have curtesy in an advowson, though "he suffers the ordinary to present by lapse "on an avoidance in his wife's life-time, Perk. "§ 468. But such a case is not within Lord "Coke's reason, for allowing curtesy of an "advowson without seisin in deed; nor do I "find any authority to support the doctrine "besides Mr. Perkins's name." Hargrave's note 5. Co. Litt. 29. a.

(M) Now all grants and conveyances by fine or otherwise are good without attornment. 4 Ann. c. 16. § 9. Vid. Co. Litt. 309. b. note (T) *Tooker's case*, ante. vol. 1. p. 609.

pocentia excusat legem, and an act in law shall prejudice no man. It was adjudged in the King's Bench, *Pasch.* 41 Eliz. between (*a*) Heston and Ruddleston. 1. At common law, a man by a conviction of felony, although *he has his clergy, shall forfeit all his goods which he had at the time of the conviction, or which he shall acquire after, and shall remain disabled to acquire goods to his own use, till he has made his purgation. 2. That where by the statute of (*b*) 18 El. c. 7. it is enacted, that after clergy allowed, he shall not be delivered to the ordinary, as before was used, to make his purgation, but shall be burnt in the hand, and delivered; which act has taken away his means to enable himself again; and therefore it was adjudged, that after he is delivered by force of the act, he shall be enabled in the same manner as if he had made his purgation. And it is in effect all one with a bargain and sale by deed indented and enrolled, for there the use passeth from the party, and the statute executes the possession, and the party has no remedy, nor is there any default in him, and therefore the reversion shall be in him without attornment. So in the said case of the fine, the limitation of the use is declared by the conusor, and *Cestuy que use* has the use by him, and that is executed by the statute; and B. in the said case supposeth the gift to be made by the conusor, as it is adjudged in (*c*) 7 E. 6. Br. Form. 46. And for the same reason it was resolved, that in the case at bar, where Seintleger and his wife levied the fine in 16 Eliz. and by enumeration of acres and towns, all the demesnes of Beamston did pass, and the law (forasmuch as they were excepted out of the uses in the indentures in 16 El.) did create and vest the use in Seintleger and his wife again, as it was before, that they should have an action of (*d*) waste, as they might have before the fine levied, or otherwise there would be great mischief in innumerable such cases: so, be the use limited on the fine to a stranger, or to himself, created by act in law, or limited by declaration of the party, it is all one. But (*e*) Owsey's case, Mich. 36 and 37 El. reported by me in my Fifth Part of Reports in Mallory's case, where the (*f*) conusee of a reversion by fine disseises the lessee for life, and makes a feoffment in fee, the lessee re-enters, that is no attornment, for he cannot (*g*) *plus juris in alium transferre quàm ipse habet.* So in Knottisford's case there cited, if such conusee of a reversion before attornment (*h*) bargains and sells the reversion by deed indented and inrolled that such bargainee shall not avow, or have an action of waste without attornment *causâ quâ suprâ.* And Walmsley said, that the case of limitation of a use on a fine had been adjudged in this court, according to this resolution. Note, a good resolution for all conveyances on consideration of marriage or otherwise, upon limitation of uses on fines levied, or recoveries, &c. And observe, by this resolution there is great facility and safety for them to whom uses are levied; which is also good for the benefit of the commonwealth, that particular estates should not be dispunishable of waste, nor those in the reversion barred from recovering their rents, which in all equity and reason are due to them, and no inconvenience to the particular tenants. For upon execution of estates by the stat. of 27 H. 8. of Uses (as upon covenants in

At common [* 68 b.] law, a man by a conviction of felony, although allowed his clergy, shall forfeit his goods.

(*a*) 5 Co. 110. a. 3 Inst. 11. Raym. 370. 380. Hob. 292.

(*b*) Cr. Jac. 430, 431. 2 Roll. 222. 5 Co. 50. b. 110. a. b. Hob. 294.

(*c*) 7 E. 6. Br. Formedon 46.

(*d*) Vaugh. 43.

(*e*) 5 Co. 113. a. Cr. El. 264. 354. Owen 23. 2 Anders. 15.

(*f*) Co. Lit. 309. b. 321. b.

(*g*) Co. Lit. 300. b. 4 Co. 24. b. 6 Co. 57. b. 8 Co. 63. b. 5 Co. 113. a.

(*h*) 5 Co. 113. a.

Note.

[* 69 a.] consideration of blood, or upon (*a*) bargain and sale by *deed indented and inrolled, and the like) there needs no attornment.

4. By the regress of the second lessee, those in reversion by force of the feoffment shall avow for the rent.

4. It was resolved, that although there was not any privity between them in the reversion, and Paul Lofty, for he had but a particular term for 10 years out of the said lease of 50 years, and if the reversion had been granted over, that he could never have attorned; yet when those in reversion ejected the second lessee, and enfeoffed Glanvile and Sturges, &c. that by the regress of the second lessee, those in reversion by force of the feoffment should avow for the rent, and that for divers reasons: 1. Because that re-entry is not in all respects to be resembled to an express attornment, for to an express attornment (*b*) notice is inseparably incident, as appears in Tooker's case, but he who re-enters may be ignorant of the feoffment. 2. Those who claim by the feoffment have the reversion in them, and have not means to compel the particular tenant to attorn, as hath been said before: but when a man makes a feoffment of a manor, there the (*c*) services do not pass till attornment, but remain till attornment in the feoffor, as Litt. holds: and so it was adjudged in the Common Pleas, 15 El. in (*d*) Bracebridge's case. But in pleading of a feoffment of a manor, he need not alledge (*e*) attornment of the tenants of the manor, but that shall come in on the other part. And so the books 21 E. 3. 19 E. 3. the Bishop of Canterbury's case, 30 E. 3. *de Droit de Gard*, 8 H. 4. 1. 9 E. 4. 33. 42 Ass. 6. 20 H. 6. 7. 37 H. 6. 24. 1 H. 7. 3. 13 H. 7. 14. 34 E. 3. Double Plea 24. 43 Ass. 20. *temp.* E. 1. tit. Attornment, are well reconciled 3. By the (*f*) regress of the second lessee, it revests all interests, and settles a reversion, which act subjects not only the second lessee to distress, but the first lessee to waste, and after the second term ended, to distress also: for the first lessee hath put this act, *scil.* to make re-entry, in the power of the second lessee, and therefore his re-entry, which is the act which makes a reversion, shall bind both: and the re-entry of one may subject himself to a distress, and an action of waste, who of himself could not attorn; and therefore it is held in 32 E. 3. Age 80. that a man (*g*) *non compos mentis*, cannot attorn, for he who is *amens* (without a mind) cannot make an attornment which is an agreement; and yet if a man, *non compos mentis*, be lessee for years rendering rent, and the lessor ejects him, and makes a feoffment, and afterward the lessee, *non compos mentis*, re-enters, this act of re-entry subjects himself to distress, and an action of waste, although he could not make an express attornment. So in the case at bar, although the second lessee could not make an express attornment, yet his re-entry revesting all interests and estates which were divested by the act and wrong of the feoffor, shall subject both the lessees to distress, &c. And as the second lessee might assent, that he in reversion should make a feoffment, and livery and seisin thereupon, and that should bind the first lessee, forasmuch as [* 69 b.] he had given him the possession; *so in the case at bar, the first lessee having made a lease to the second lessee, he hath thereby given him power of re-entry, which act subjects both to distress, &c. 4. The law is grounded on great reason and equity in this point, for perhaps the feoffee being a purchaser,

Lit. sect. 576, 577.
(*a*) 5 Co. 113. a. b. Co. Lit. 309. b. 2 Co. 36. a. 8 Co. 94. a.
(*b*) 2 Co. 67. b. 68. b. 5 Co. 113. b. Palm. 207. Dyer 302. pl. 43. Co. Lit. 309. b.
(*c*) 1 Roll. 293. Cr. El. 401. Co. Lit. 310. b.
(*d*) Co. Lit. 317. b. 318. a. 1 Roll. 293. 1 Leon. 5. 264. 1 Anders. 113. 1 Co. 133. b. Moor 99.
(*e*) Cr. El. 401. Co. Lit. 303. b. 310. b. Yelv. 135. 8 Co. 42. b.
(*f*) Co. Lit. 318. b. 319. a.
(*g*) 1 Roll. 296.

and a stranger, knew nothing of the lease, or knew of it, and thought that it was void, or defeated; God forbid, if after the lessee hath evicted, or lawfully taken the possession from him, which he thought to have enjoyed, † *quod afflictio adderet afflicto, sc.* to lose the possession and also to be without remedy, either for the rent reserved (which the lessee enjoying the land in conscience ought to pay), or for waste (which the lessee is by law prohibited to commit). And (*a*) Coke, Chief Justice, said, that be the eviction by the lessee by entry or action, that the reversion remains in the feoffee, and he shall avow, and have an action of waste, against the opinion of Ashton, in (*b*) 34 H. 6. 6. b. according to the opinion of Thorpe, Justice, in 41 E. 3. 18. b. who said, that if he in reversion disseises the tenant for life, and aliens in fee, although the tenant recovers the freehold, yet the reversion is not restored; so said Seton, in 18 E. 3. 48 b. that if I disseise my tenant for life, and make a feoffment to another in fee, although my tenant for life recovers afterwards by assise, the reversion remains in the feoffee. 5. (*c*) *Fort' & æquior est dispositio legis quam hominis*; and therefore he who has a future interest, cannot surrender it by any express surrender, but by taking a new lease (which is an act, and amounts to a (*d*) surrender in law) it may be surrendered and determined, as it is held in 37 (*e*) H. 6. &c. So if the (*f*) father be enfeoffed in fee, and the feoffor warrants the land to him and his heirs, now his assignee shall not vouch; but if the father enfeoffs his son and heir apparent with warranty, and dies, in that case the heir being in truth assignee, shall vouch: for the law which has determined the warranty of the father to the son, will give the son the benefit of the first warranty, as it is adjudged in (*g*) 43 E. 3. 5. by which it appears, that the act of law is stronger, and more equal than any act which the party could have done. So in the case at bar, the entry of the lessee (by which, the act and judgment of law, all interests and estates are settled according to the law) is stronger than an express attornment, for that the second lessee could not make; and more equal, for inasmuch as the possession is evicted by the second lessee, and thereby the interest of the first lessee revested, and a reversion settled in the feoffee, equity requireth that the feoffee, who hath lost the possession shall not be without remedy to recover the rent, and to punish waste, 18 E. 3. 47. a. b. Audley, Earl of Gloucester's case (*h*), the lessor disseises his lessee for life, and makes a lease for life to another, the first lessee re-enters, he leaves the reversion in the second lessee for life, and he shall have the rent reserved, 46 E. 3. 30. b (*i*). If he in the reversion ousts tenant by statute-merchant, and makes a feoffment in fee, and the tenant by statute-merchant re-enters, that makes the reversion in the feoffee, yet there is not any attendance. *Vid.* *44 Ass. p. 11. Bassingborn Assise, 2 H. 5. 5 H. 5. 12. 9 H. 6. 16. and 34 H. 6 6. *Vide* (*k*) 9 H. 7. 25. a. where the case is misprinted; for the true case is, as I have seen it in the manuscript; that if he in reversion disseises the donee, and makes a feoffment in fee, and the donee re-enters, he leaves the reversion

† 10 Co. 83. a.

(*a*) Co. Lit. 319. b.

(*b*) 2 Co. 68. b.

Be the eviction of the lessee by entry or action, the reversion remains in the feoffee, and he shall avow.—Per Coke, C.J.

(*c*) 8 Co. 162. a. Co. Lit. 338. a. 2 Roll. Rep. 315. Hutt. 18. 2 Sid. 59. 10 Co. 67. b. 6 Co. 64. a.

(*d*) Co. Lit. 218. b. 338. a. 2 Roll. 496. 5 Co. 11. b. 54. b. Cr. El. 264. 522. 605. 873, 874. Poph. 8, 9. 10 Co. 52. b. 53. a. 67. b. 2 Leon. 188. 3 Leon. 247. Dall. 74. 4 Leon. 30. Moor 196. 358. 636, 657. 2 And. 52. 192. Dyer 46. pl. 9. 112. pl. 49. 140 pl. 43. 177. 35. 200. pl. 62. 280. pl. 13. 349. pl. 15. Perk. sect. 617 14 H. 8. 15. a. Br. Lease 14. 2 Roll. Rep. 171, 406. Lane 7. Lit. Rep. 273. 282. 37 H. 8. 18. a. Plowd. 107. b. 194. b. Br. Surrender 14. 35. 2 Co. 17. b. 7 Co. 38. a. Raym. 248. O. Bent. 57. Kelw. 70. b. 22 H. 7. 5. a. b.

[* 70 a.]

Br. Estoppel. 210. 2 Sid. 138.

If he in reversion disseises the donee and

makes a feoffment in fee, and the donee re-enters, he leaves the reversion in the feoffee.

(*e*) 37 H. 6. 17. b. 18. a. (*f*) 1 Co. 98. a. 11 Co. 81. a. 1 Roll. Rep. 180. 2 Roll. 742. Co. Lit. 384. b. (*g*) 43 E. 3. 23. b. (*h*) Co. Lit. 318. b. 319. a. (*i*) Co. Lit. 318. b. (*k*) Co. Lit. 277. a. 266. a.

in the feoffee: but if the donee be disseised, and the donor disseises the disseisor, and makes a feoffment in fee, and the donee doth make regress, the feoffee shall not have the reversion but the disseisor (N): for the difference between an estate and a right, an estate may well pass to the feoffee by the feoffment; as where he in reversion disseises the donee, or the lessee for life; but where the donee or lessee is disseised, now he in reversion hath but a right, which he cannot transfer to another, and therefore when he disseises the disseisor, and makes a feoffment *that* passes the estate which he gained by disseisin, and extinguishes his ancient right, which he could not transfer to another; and then the first disseisor hath the first possession, and better right than the feoffee of him in reversion, for he comes in under him who disseised the first disseisor, and the ancient right is extinct. So if the disseisee disseises the heir of the disseisor, now he hath gained an estate by disseisin, and hath an ancient right, if he makes a feoffment in fee to another, he thereby passes the estate which he gained by disseisin, and extinguishes his ancient right, which he could not transfer to another: for there is such an extreme and natural enmity between the estate by wrong gained by disseisin and the ancient right, that the right cannot incorporate itself in the estate by wrong and pass with it, but in such case rather suffers extinguishment than to pass with it; so that when the heir re-enters, he shall hold the land for ever, as well against the feoffor as the feoffee: so if lord and tenant be by fealty and rent, and the lord disseises the tenant of the land, and makes a feoffment in fee, the seigniory is thereby extinguished: but if a (*a*) man makes a gift in tail, or a lease for life, &c. rendering rent, and disseises the tenant in tail, or for life, &c. and makes a feoffment in fee, there the estate passes to the feoffee; and when the donee or lessee re-enters, he revives the rent as incident to the reversion. The same law of a lease for years in the case at bar. So there is a difference between a reversion with (*b*) rent incident to it, and a right, or seigniory, or rent in fee, 28 H. 8. (*c*) Dy. 33. b. 4. Eliz. (*d*) Dy. 212. the case of the Greyhound. And judgment was given for the defendant, who made conusance

(*a*) Co. Lit. 319. a.

If the disseisee disseises the heir of the disseisor, and makes a feoffment in fee to another, he extinguishes his ancient right.

(*b*) Dyer 31. pl. 212.
(*c*) Dy. 33. 16.
(*d*) Dyer 212. pl. 37, 38.

But if a man makes a gift in tail, or a lease for life, rendering rent and disseises the tenant in tail or for life, and makes a feoffment in fee, and the donee or lessee re-enters, he revives the rent as incident to the reversion.

(N) "The reason is that where the stranger "disseised the donee he gained by wrong "both the tail and the reversion, and then "had in him one entire estate in fee; now "when the donor disseiseth him he gains the "estate which the disseisor had which was "entire, and so his disseisin cannot divide the "estate as they were, for his whole estate is "by the wrong in the first disseisor, none "having right of entry but the donee; then "when he makes his feoffment over, that gives "no estate but that wrongful one; but it "gives away his right also, not by granting, "but by drowning and dying in the land. "So then when the donee re-enters he can "have no more than his own, and must by his "entry restore the reversion; the feoffee can-"not hold the reversion, because the estate "he had was no other than that was wrong-"fully gotten by the donor from the first "disseisor and given to him; wherein there "was in effect the tail of the donee and the "reversion of the disseisor; and now when "the donee re-enters he cannot restore the "reversion to the feoffee in respect of the "right, because it is utterly annihilated by "the feoffment, which cannot give, but doth "extinguish it." Hob. 279. *Earl of Clanricard's case.* Vid. 3 Prest. Conv. 408. et seq. 1 Prest. Conv. 303.; and vid. *Goodright* v. *Forrester*, 8 East, 552. and the authorities cited there, that a right of entry is not assignable nor devisable. Dub. whether devisable, per Mansfield, C. J. *Goodright* v. *Forrester*, 1 Taunt. 578.

in the right of Henry Finch; and this was the first matter in law, that Coke, Chief Justice, argued in the Common Pleas after he was Chief Justice.

THE LORD DARCY'S CASE.

Hil. 4 Jacobi 1.

In the Common Pleas.

THE guardian in chivalry shall have the single value of the heir without any tender of marriage. LORD DARCY v. PAGE. Part VI.—70 b.

At common law the full age of the female was fourteen years. Cro. Jac. 151. S. C.

2 Inst. 91, 93. Co. Lit. 82. a.

THOMAS Lord Darcy of Chichester, brought a writ *de Valore maritagii* (A) against Stephen Page, brother and heir of Brian Page, *Quare cum maritagium ipsius Stephani ad ipsum Tho. Dominum Darcy pertineat, pro eo quod prædict' Brianus terram suam de eo tenuit per servitium militare, & idem Tho. Dominus Darcy præfat' Stephan' dum fuit infra ætatem & in custodiâ suâ, competens maritagium absque disparagatione, juxta formam statuti de communi concilio regni domini Regis Angliæ inde provis. sæpiùs obtulerit, idem Stephanus maritagium illud renuens, præfat' Tho. Domino Darcy de maritagio suo non satisfacto, se in terras & tenement' illa intrusit & de maritagio suo eidem Tho. Domino Darcy satisfacere contradicit, &c.* And counted that the said Brian held twenty-five acres of land in Peldon in the county of Essex, of the plaintiff, as of his manor of Newhall in Peldon aforesaid, by knight's service, &c. and afterwards the said Brian died in his homage without issue, the defendant being his brother and heir, and of the age of twenty years and six months; and that the plaintiff tendered to him, being then within age, a competent marriage, *sc.* Mary Mannock, daughter of Anthony Mannock, gentleman, then of the age of eighteen years, without disparagement, and that the

(A) By the stat. 12 Car. 2. c. 24. tenure in knight's service, whether of the King or of a common person, together with all its oppressive fruits and consequences, as also that of socage *in capite* is wholly taken away, and every such tenure converted into free and common socage.