

The reading of the famous and learned Robert Callis, Esq.; upon the statute of 23 H. 8 cap. 5. of sewers: as it was delivered by him at Gray's Inn, in August, 1622 / [Robert Callis].

Contributors

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Gray's Inn.

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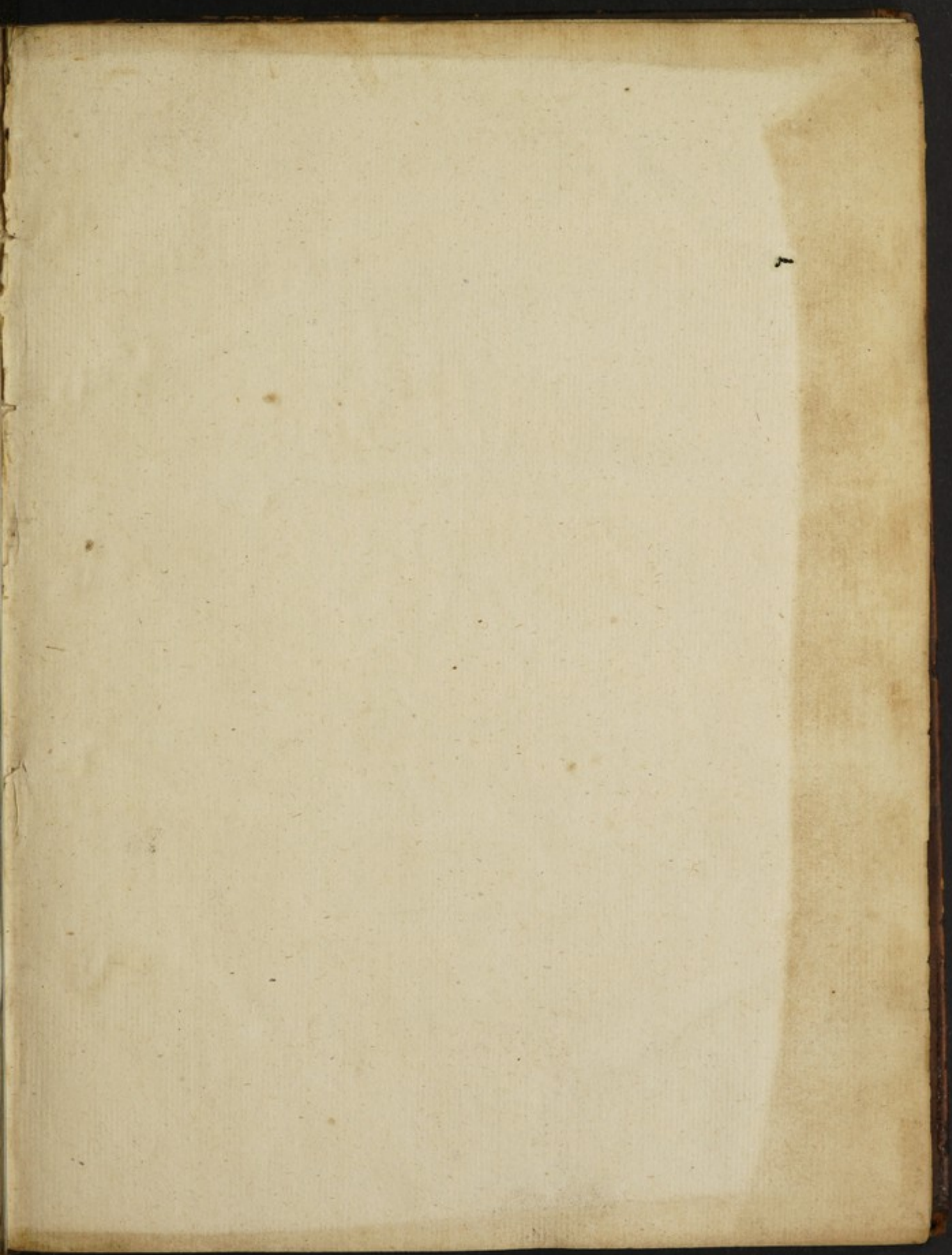
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OF
SEWER

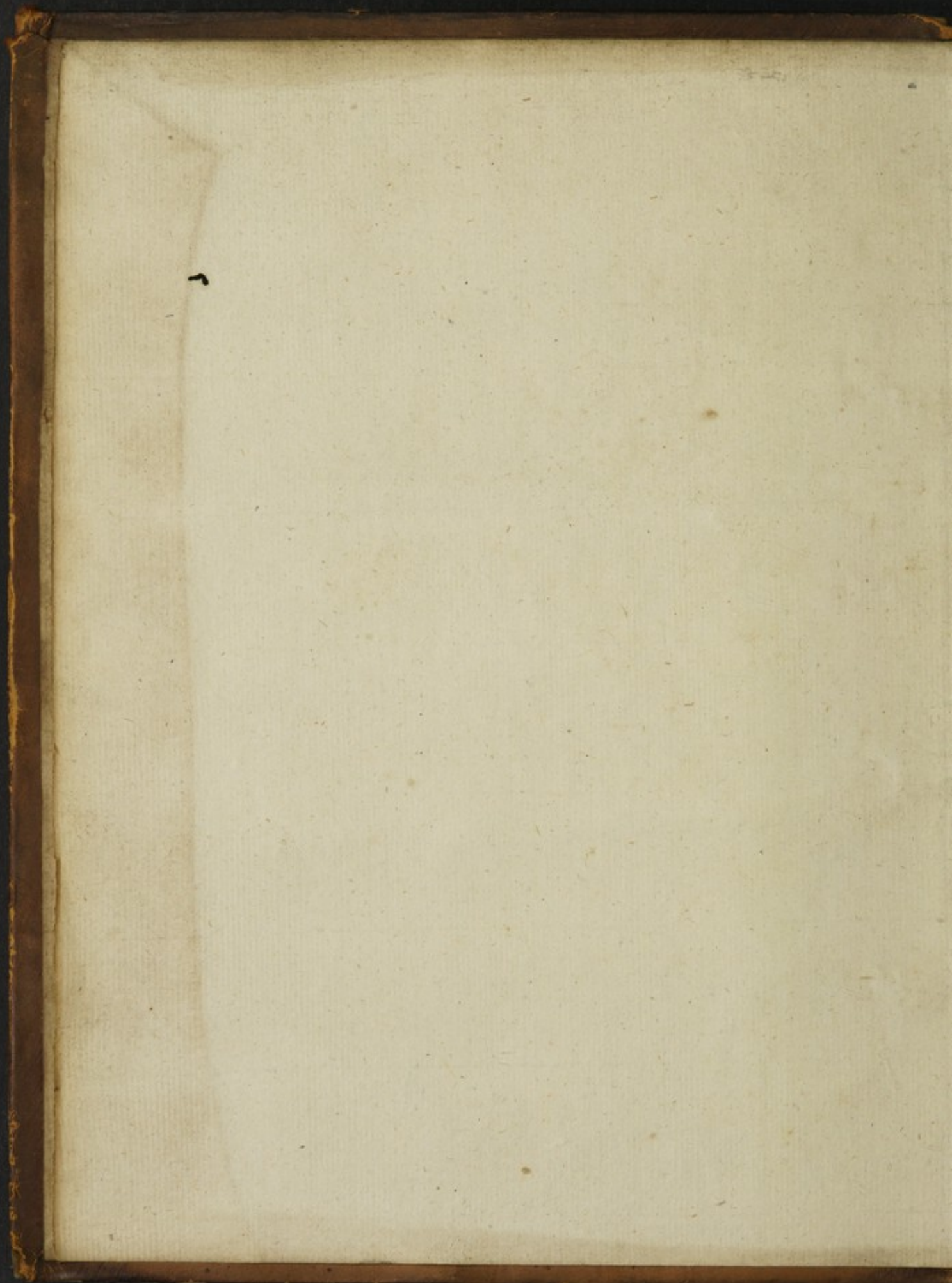


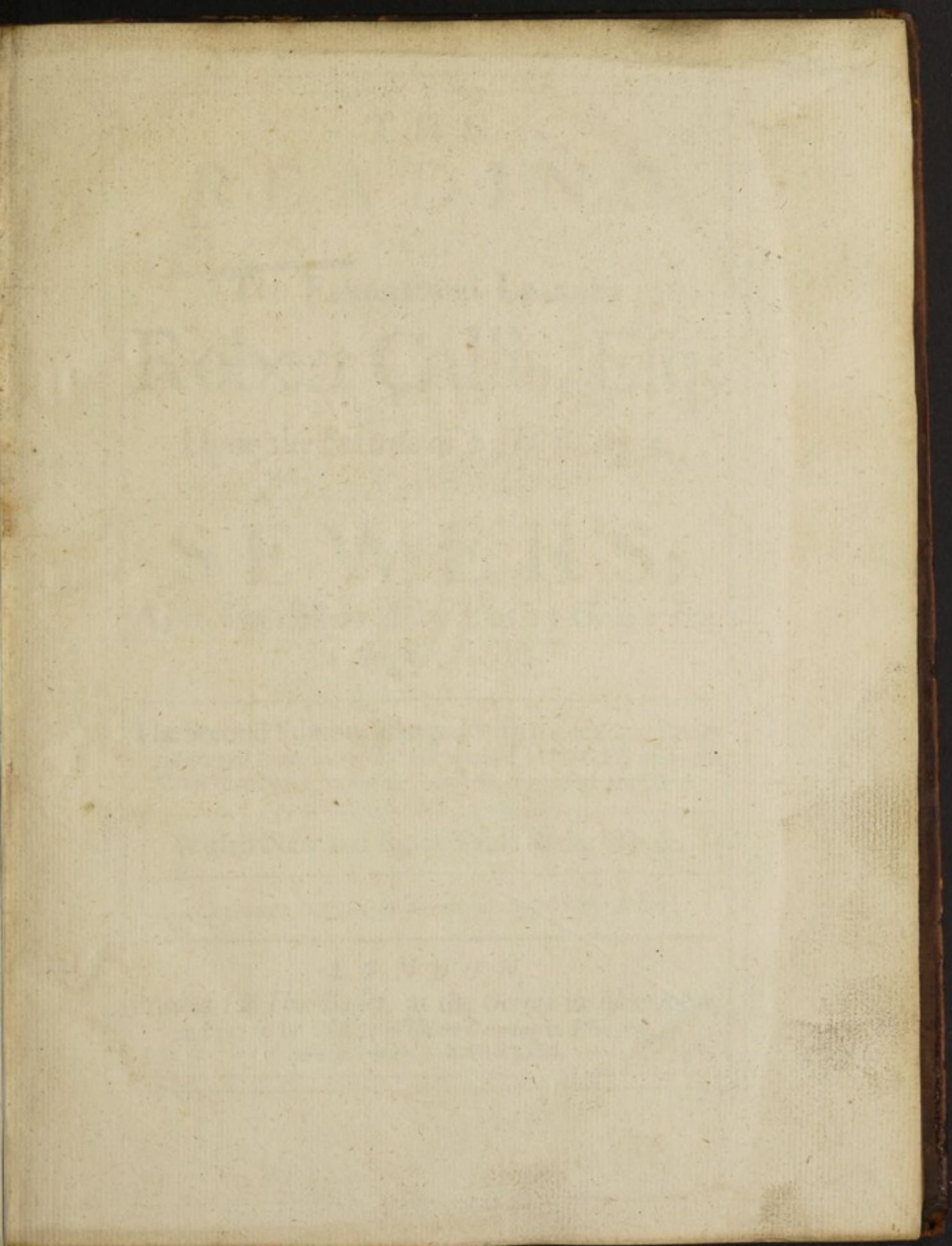




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THE
FIFTH

Robert C. ...

SEE PAGE

The second ...

What ...

The ...

Printed ...

THE
 READING
 OF
~~Reynolds~~
 The FAMOUS and LEARNED
 Robert Callis, Esq;
 Upon the Statute of 23 H. 8. cap. 5.
 OF
 SEWERS:
 As it was delivered by him at *Gray's Inn*,
 in *August*, 1622.

The Second Edition, enlarged with the several Judgments and Resolutions of the Reverend JUDGES upon the Laws of Sewers, and other Remarks not before published.

With a New and Exact Table to the Whole.

Qui omnes tangit ab omnibus supportari debet.

L O N D O N,
 Printed for *Tho. Basset*, at the *George* in *Fleet-street*,
 and are to be sold by *William Canning* in *Vine Court*,
Middle-Temple. MDCLXXXVI.

THE READING

OF
THE FAMOUS AND LEARNED

Robert College Esq;



Thomas Thoroton of the
Middle Temple Esq^r 1703

With a New and Enlarged Table to the Whole.

Qui curat tangit ab omnibus supportum debet.

LONDON.

Printed for the Author, at the George in Fleet-Street,
and also to be sold by William Canning in Vine Court,
Middle-Temple. MDCCLXXVI.



T O T H E
R E A D E R.

THIS learned piece is so Well known, and hath already found so kind entertainment, that there will be little need to recommend it: The Laws of Sewers whereof it treats are of general concernment, as well to inland Counties through which Rivers run, as to maritime, and their use and importance is such, as without the due execution of them, we should be exposed to the rage and violence of that merciless Element which surrounds us, Rivers would by Impediments and Annoyances be obstructed in their courses; Bridges, Calceys, Havens and Ports would fall to decay; in a word, the Gates which now open and let in commerce, and the Ways that convey and lead it through the Kingdom would fail us.

The Authour was a Gentleman of excellent parts, both natural and acquired, and had attained to great knowledge in the Laws of this Realm, which were his Profession; And being for many years a Commissioner of Sewers in his native Countrey of Lincolnshire, which abounds in vast Fens and Marishes, he particularly applied himself to the study of these

To the Reader.

Laws of Sewers, and made choice to read upon the Statute of 23 H. 8. cap. 5. whereon that Commission is principally grounded.

Wherein how far he hath outgone all others who have written of that subject, with what judgment and politeness he hath handled as well several points at the Common-law, as the several branches of this Statute, and how he hath rendred the most dark, difficult and knotty parts thereof plain and intelligible, will easily appear to the discerning Reader.

That which is added in a larger letter, will it's hoped prove not unacceptable; Here and there is a touch upon some points controverted by our Authour; and the rest gives you the Judgments and Resolutions of the Reverend Judges upon the Laws of Sewers, some of them before his time, but not then made publick, and others since wherein care hath been taken that nothing should be omitted that could be found pertinent to this subject.

However our Authour hath this right done him, that nothing is imposed on him but what was his own, the Additions being sufficiently distinguished by the Character.

ERRATA.

PAge 57. l. 9. for *H. 8.* read *H. 4.* Margent *ibid.* p. 76. l. 24. for *Ports,* r. *Parts.* p. 93. l. 22. for *reparie,* r. *riparia.* p. 94. l. 30. for *contagious,* r. *outragious.* p. 104. l. 10. for *c. 14. c. 18.* l. 21. for *Calis,* r. *Callis.* p. 110. l. 23. for *is,* r. *if.* p. 116. l. 14. r. *ought to be.* p. 172. l. 7. for *decreed,* r. *denied.*

The

*A general Act concerning Commissions of Sewers
to be directed in all parts within this Realm.*

OUR Sovereign Lord the King, like a vertuous and most gracious Prince, nothing Earthly so highly wey-
ing as the advancing of the common profit, wealth
and commodity of this his Realm, considering the daily
great damages and losses which have happened in many and
divers parts of this his said Realm, as well by the reason of
the outrageous flowing surges and course of the Sea, in and
upon marsh grounds and other low places heretofore through
politick wisdom won and made profitable for the great
Common-wealth of this Realm, as also by occasion of Land-
waters and other outrageous Springs, in and upon Meadows,
Pastures and other low Grounds adjoyning to Rivers, Flouds,
and other Water-courses. And over that, by and through
Mills, Mill-dams, Weres, Fishgarths, Kedels, Gores, Gotes,
Floudgates, Locks and other impediments, in and upon
the same Rivers and other Water-courses, to the inestimable
damages of the Common-wealth of this Realm, which daily
is likely more and more to encrease, unless speedy redress and
remedy be in this behalf shortly provided: wherein albeit
that divers and many provisions have been before this time
made and ordained, yet none of them are sufficient re-
medy for reformation of the Premisses: hath therefore
by deliberate advice and assent of his Lords Spi-
ritual and Temporal, and also his loving Com-
mons in this present Parliament assembled, ordai-
ned, established and enacted, that Commissions of
Sewers, and other the premisses shall be directed in
all parts within this Realm from time to time, where
and when need shall require according to the manner,
form, tenor and effect hereafter ensuing, to such sub-
stantial

stantial and indifferent persons as shall be named by the Lord Chancellor and Lord Treasurer of England, and the two chief Justices for the time being, or by three of them, whereof the Lord Chancellor to be one.

The form of
The Commission of
Sewers.

The several
causes of a-
warding the
Commission
of Sewers.

What things
the Commis-
sioners of
Sewers are
authorised to
doe.

Henry the Eighth, &c. Know ye, that forasmuch as the Walls, Ditches, Banks, Gutters, Sewers, Gotes, Calcies, Bridges, Streams, and other defences by the coasts of the Sea, and marsh ground being and lying within the limits of A, B or C. in the County or Counties of or in the borders or confines of the same, by rage of the Sea, flowing and reflowing, and by mean of the trenches of fresh waters descending and having course by divers ways to the Sea, be so dirupt, lacerate and broken, and also the common passages of Ships, Balengers and Boats in the Rivers, Streams, and other Flouds within the limits of A, B or C, in the County or Counties of or in the borders or confines of the same by mean of setting up, erecting and making of Streams, Mills, Bridges, Ponds, Fishgarths, Mill-dams, Locks, Hebbing-wears, Hecks and Floudgates, or other like lets, impediments, or annoyances, be letted or interrupted, so that great and inestimable damage for default of reparation of the said Walls, Ditches, Banks, Fences, Sewers, Gotes, Gutters, Calcies, Bridges and Streams. And also by mean of setting up, erecting, making and enlarging of the said Fishgarths, Mill-dams, Locks, Hebbing-wears, Hecks, Floudgates and other like annoyances in time past, hath happened, and yet is to be feared, that far greater hurt, loss and damage is like to insue, unless that speedy remedy be provided in that behalf.

We therefore for that by reason of our dignity and prerogative royal we be bound to provide for the safety and preservation of our Realm of England, willing that speedy remedy be had in the Premisses, have assigned you and six of you, of the which we will that A, B and C shall be three to be our Justices to survey the said Walls, Streams, Ditches, Banks, Gutters, Sewers, Gotes, Calcies, Bridges, Trenches, Mills, Mill-dams, Floudgates, Ponds,

Ponds, Locks, Hebbing-wears, and other impediments, lets and annoyances afore said, and the same cause to be made, corrected, repaired, amended, put down or reformed, as case shall require after your wisdoms and discretions, and therein as well ordain and doe after the form, tenor and effect of all and singular the Statutes and Ordinances made before the first day of March, in the three and twentieth year of our Reign, touching the premisses, or any of them, as also to enquire by the oaths of the honest and lawfull men of the said Shire or Shires, place or places, where such defaults or annoyances be, as well within the Liberties as without (by whom the truth may the rather be known) through whose default the said hurts and damages have happened, and who hath or holdeth, any Lands or Tenements, or common of pasture, or profit of fishing, or hath or may have any hurt, loss or disadvantage, by any manner of means in the said places, as well near to the said dangers, lets and impediments, as inhabiting or dwelling thereabouts by the said Walls, Ditches, Banks, Gutters, Gotes, Sewers, Trenches and other the said Impediments and Annoyances. And all those persons, and every of them to tax, assess, charge, distrain and punish, as well within the metes, limits and bounds of old time accustomed or otherwise, as elsewhere within our Realm of England, after the quantity of their Lands, Tenements and Rents, by the number of Acres and Pearches, after the rate of every Persons Portion, Tenure or Profit, or after the quantity of their common of pasture, or profit of fishing, or other commodities there, by such ways and means, and in such manner and form, as to you or six of you, whereof the said A, B and C to be three, shall seem most convenient to be ordained and done for redress and reformation to be had in the premisses: and also to reform, repair and amend the said Walls, Ditches, Banks, Gutters, Sewers, Gotes, Calcies, Bridges, Streams, and other the premisses, in all places needfull: and the same as often, and where need shall be to make new, and to cleanse and purge the Trenches, Sewers

Inquiry by
whose de-
faults the an-
noyances
come.

Assessing the
persons to be
contributo-
ry to the
charge.

Appointing
of Bailiffs,
Collectors,
Surveyors,
and other in-
ferior Offi-
cers.

Distraining
for the ar-
rearages of
the money
assessed.

Taking of
Labourers,
Workmen,
Carriages,
Timber, and
other neces-
saries.

To make
Statutes and
Ordinances.

and ditches in all places necessary. And farther, to reform, amend, prostrate and overthrow all such Mills, Streams, Ponds, Locks, Fishgarths, Hebbing-wears, and other impediments and annoyances aforesaid, as shall be found by inquisition, or by your surveying and discretions to be excessive or hurtfull. And also to depute and assign diligent, faithfull and true Keepers, Bailiffs, Surveyors, Collectors, Expenditors, and other Ministers, and Officers for the safety, conservation, reparation, reformation and making of the premisses, and every of them, and to hear the account of the Collectors and other Ministers, of, and for the receipt and laying out of the money that shall be levied and paid, in and about the making, repairing, reforming and amending of the said Walls, Ditches, Banks, Gutters, Gotes, Sewers, Calcies, Bridges, Streams, Trenches, Mills, Ponds, Locks, Fishgarthes, Floudgates, and other impediments and annoyances aforesaid. And to distrain for the arrearages of every such collection, tax or assess, as often as shall be expedient, or otherwise to punish the debtors and deteinors of the same, by fines, amerciaments, pains, or other like means after your good discretions. And also to arrest and take as many Carts, Horses, Oxen, Beasts, and other instruments necessary, and as many Workmen and Labourers, as for the said works and reparation shall suffice, paying for the same competent wages, salary and stipend in that behalf: and also to take such and as many Trees, Woods, Under-woods and Timber, and other necessities, as for the same works and reparations shall be sufficient at a reasonable price by you or six of you, of the which we will that A, B and C shall be three to be assessed or limited as well within the limits and bounds aforesaid, as in any other place within the said County or Counties near unto the said places: and to make and ordain Statutes, Ordinances, and provisions from time to time, as the case shall require, for the safeguard, conservation, redress, correction and reformation of the premisses, and of every of them, and the parts lying to the same necessary and behoovefull, after the laws and customs of

of Romney-marsh, in the County of Kent, or otherwise, by any ways or means after your own wisdoms and discretions. And to hear and determine all and singular the premisses, as well at our sute, as at the sute of any other whatsoever, complaining before you or six of you, whereof A, B and C shall be three after the laws and customs aforesaid, or otherwise by any other ways and means after your discretions. And also to make and direct all writs, precepts, warrants, or other commandments by virtue of these presents, to all Sheriffs, Bailiffs, and all other Ministers, officers, and other persons, as well within liberties as without, before you or six of you, whereof the said A, B and C to be three, at certain days, terms, and places to be prefixed, to be returned and received. And farther to continue the process of the same, and finally to doe all and every thing and things, as shall be requisite for the due execution of the premisses, by all ways and means after your discretions. And therefore we command you that at certain days and places, when and where you, or six of you, whereof the said A, B and C to be three, shall think expedient, ye do survey the said walls, fences, ditches, banks, gutters, gotes, sewers, calcies, ponds, bridges, rivers, streams, water-courses, mills, locks, trenches, fishgarths, floudgates, and other the lets, impediments, and annoyances aforesaid, and accomplish, fulfill, hear and determine all and singular the premisses in due form, and to the effect aforesaid, after your good discretions: and all such as ye shall find negligent, gainsaying, or rebelling in the said works, reparations or reformation of the premisses, or negligent in the due execution of this our commission, that ye do compell them by distress, fines and amerciaments, or by other punishments, ways or means, which to you or six of you, whereof the said A, B and C shall be three, shall seem most expedient for the speedy remedy, redress and reformation of the premisses, and due execution of the same. And all such things as by you shall be made and ordained in this behalf, as well within liberties as without, that ye do cause the same firmly to be observed, doing

Awarding of
Writs and
Precepts to
Sheriffs, Bai-
liffs, and o-
thers.

To compell
others to o-
bey their or-
ders.

doing therein as to our Justices appertaineth, after the Laws and Statutes of this our Realm, and according to your wisdoms and discretions. Saved always to us such fines and amerciaments as to us thereof shall belong. And we also command our Sheriff or Sheriffs of our said County or Counties of that they shall cause to come before you or six of you, of the which A, B and C shall be three, at such days and places as ye shall appoint to them, such and as many honest men of his or their Bayliwick, as well within the liberties as without, by whom the truth may best be known, to inquire of the premisses; Commanding

A commandment to the Sheriffs to return before the Commissioners such Jurors as shall be expedient for inquiry.

All other Officers shall be attendant unto the Commissioners.

also all other Ministers and Officers, as well within Liberties as without, that they and every of them shall be attendant to you in and about the due execution of this our Commission. In witness whereof we have caused these our Letters patents to be made. Witness our self at Westminster the day of in the year of our Reign.

The Commissioners shall take an oath.

And it is also enacted, that every such person as shall be named Commissioner in the said Commission, after he hath knowledge thereof, shall effectually put his diligence and attendance in and about the execution of the said Commission. And before he shall take upon him the execution of the said Commission, he shall take a corporal oath before the Lord Chancellor, or before such to whom the said Lord Chancellor shall direct the King's Writ of Dedimus potestatem, to take the same, or before the Justices of the Peace in the quarter Sessions holden in the Shire where such Commission shall be directed: the tenor of which oath hereafter ensueth.

The Oath of the Commissioners for Sewers.

¶ Ye shall swear that you to your cunning, wit and power shall truly and indifferently execute the authority to you given by this Commission of Sewers, without any favour, affection, corruption, dread or malice to be born to any manner of person or persons: and as the case shall require, ye shall consent and endeavor your self for your part to the best of your knowledge and power to the making of such wholesome, just, equal and indifferent laws and ordinances,

dinances, as shall be made and devised by the most discreet and indifferent number of your fellows being in Commission with you for the due redress, reformation, and amendment of all and every such things, as are contained and specified in the said Commission: and the same laws and ordinances to your cunning, wit and power cause to be put in due execution, without favour, meed, dread, malice or affection, as God you help and all Saints.

And it is also enacted by the authority aforesaid, that all and every Statute, Act and Ordinance heretofore made concerning the premises, or any of them, as well in the time of our Sovereign Lord the King, that now is, as in the time of any of his progenitors Kings of this Realm of England, not being contrary to this present Act, nor heretofore repelled, from henceforth shall stand and be good and effectual for ever, and to be put in due execution according to the true meaning and purport of the same.

A confirmation
of other
Statutes.

And over that be it enacted, that the Commissioners hereafter to be named in any of the said Commissions according to the purport and effect of the same Commissions, have full power and authority to make, constitute, and ordain laws, ordinances and decrees, and farther to doe all and every thing mentioned in the said Commission according to the purport, effect, words and true meaning of the same: and the same Laws and Ordinances so made, to reform, repell and amend, and make new from time to time, as the cases necessary shall require in that behalf.

The authority
of the
Commissioners.

Provided always, and it is enacted, that if any person or persons being assessed or taxed to any lot or charge, for any Lands, Tenements or Hereditaments, within the limits of any Commission hereafter to be directed, do not pay the said lot and charge according to the Ordinance and assignment of the Commissioners, having power of the execution of the said Commission: by reason whereof it shall happen the said Commissioners

The power
of the Com-
missioners in
case of refu-
sal to pay.

having

Decree.

having power of execution of such Commission, for lack of payment of such lot and charge to decree and ordain the same Lands, Tenements and Hereditaments from the owner or owners thereof, and their Heirs, and the Heirs of every of them, to any person or persons for term of years, term of life, in fee simple or in tail for payment of the same lot and charge, that then every such Decree and Ordinance so by them made and ingrossed in parchment, and certified under their Seals into the King's Court of Chancery, with the King's royal assent had to the same, shall bind all and every person and persons, that at the making of the same Decree had any interest in such Lands, Tenements or Hereditaments in use, possession, reversion or remainder, their Heirs and Feoffees, and every of them, and not to be in any wise reformed, unless it be by authority of Parliament hereafter to be summoned and holden within this Realm.

The Commissioners
Decree shall
bind the
King's, and
all other
mens Lands.

And also it is provided by authority aforesaid, that the same Laws, Ordinances and Decrees to be made and ordained by the said Commissioners or six of them by authority of the said Commission shall bind as well the lands, tenements and hereditaments of the King our Sovereign Lord, as all and every other person and persons and their heirs for such their interest as they shall fortune to have, or may have in any Lands, Tenements or Hereditaments, or other casual profit, advantage or commodity whatsoever they be, whereunto the said Laws, Ordinances and Decrees shall in any wise extend, according to the true purport, meaning and intent of the same Laws.

No man may
sit being un-
sworn.

And it is furthermore by the authority aforesaid established and enacted, that if any manner of person or persons of what estate or degree soever he or they be of, that from henceforth doth take upon him or them to sit by virtue of any of the said Commissions, not being before sworn in form as is aforesaid, and according to the tenor of the oath before specified. Or if any person so
named

named and sworn do sit, as is aforesaid, not having
 Lands and Tenements, or other hereditaments in fee
 simple, fee tail or for term of life, to the clear yearly
 value of forty marks above all charges to his own use,
 except he be resiant and free of any City, Borough or
 Town Corporate, and have moveable substance of the
 clear value of one hundred pounds, or else be learned
 in the laws of this Realm in and concerning the same,
 that is to say, admitted in one of the four principal
 Inns of Court for an utter barrest, shall forfeit forty
 pounds for every time that he shall attempt so to doe;
 the one half thereof to be to our Sovereign Lord the
 King, and the other half thereof to the use of him or
 them that will sue therefore, by action of debt, bill,
 plaint or information in any of the King's Courts: in
 which action or sute no wager of law shall be admitted,
 nor any escoin or protection shall be allowed. And if
 any action of trespass or other suit shall happen to be at-
 tempted against any person or persons for taking of any
 distress, or any other Act doing by authority of the
 commission, or by authority of any Laws or Ordinances
 made by vertue of the said commission, the defen-
 dant or defendants in any such action shall and may make
 abowry, cognizance or justification for the taking of the
 same distress or other Act doing, touching the premisses,
 or any of them, alledging in such abowry, cognizance
 or justification, that the said distress, trespass or other
 Act, whereof the plaintiff complaineth, was done by au-
 thority of the commission of sewers for lot or tax asses-
 sed by the said commission, or for such other act or cause,
 as the said defendant did by authority of the same com-
 mission, and according to the tenor, purport and effect
 of this present Act made the xiii. year of the reign of
 our Sovereign Lord King Henry the eighth, without a-
 ny expressing or rehearsal of any other matter or circum-
 stance contained in this present Act, or any Commission,
 Laws, Statutes, or Ordinances thereupon to be made,
 where-

What Land
 each Com-
 missioner
 shall have.

Utter barrest.

Avowry, or
 justification
 of a distress
 taken by rea-
 son of the
 Commission
 of Sewers.

Issue.

Where the
Defendant
shall recover
damages,
with his
costs of suit.

Wages for
Commission-
ners, Clerks,
Collectors,
&c.

Commissions
within the
liberty of the
Duchy.

whereupon the plaintiff shall be admitted to reply, that the defendant did take the said distress or doe any other act or trespass supposed in his declaration of his own wrong, without any such cause alledged by the said Defendant, whereupon the issue in every such action shall be joynd to be tryed by verdict of twelve men, and not otherwise, as is accustomed in other personal actions. And upon the trial of that issue the whole matter to be given on both parties in evidence according to the very truth of the same. And after such issue tried for the Defendant or nonsuit of the Plaintiff after appearance, the same Defendant to recover treble damages by reason of his wrongfull vexation in that behalf, with his costs also in that part sustained, and that to be assessed by the same Jury or Court to inquire of damages, as the cause shall require.

And it is also enacted, that every of the said Commissioners shall have and perceive four shillings for every day that they shall take pains in the execution of this Commission of Sewers, and one Clerk by them to be assigned two shillings for every day, of the rates, taxes, lots and waines that shall be assessed or lost by authority of the said Commission, and to be levied and paid by their discretions. And that the said Commissioners, or six of them shall have power and authority to limit and assign of the same rates, taxes, lots and waines by their discretions such reasonable sums of money to the said Clerk for writing of books and procees concerning the premises, and to the collectors, expeditors, and such other as shall take pains in due execution of the said Commission, as by the discretions of the said Commissioners, or six of them, shall be thought reasonable.

Provided always, that whensoever, and as often as such Commission, as is afore limited, shall be made and directed to any person or persons for the reformation and amendment, of or in any of the premises specified in

in the said Commission, within the fees, liberty or possession of the duchy of Lancaster, that then such Com-
missioners as shall execute any such Commission shall be always named and appointed, by the discretion of the Lord Chancellor and Lord Treasurer of England, and the said two chief Justices of either Bench, and the Chancellor of the said duchy for the time being, or three of them, whereof the said Lord Chancellor and the Chancellor of the duchy to be two. And that in every such case two Commissions shall be awarded, and made according to the tenor of the Commission above expressed, one thereof under the great Seal of England, and the other under the Seal of the same duchy, as before time hath been accustomed, any thing aforesaid rehearsed in this present Act to the contrary hereof notwithstanding.

And it is further enacted, that the said Commissions from time to time, as the case shall require, shall be had and obtained without any money or other charge to be payed for the Seals or writing of the same, unless it be to the King two shillings six pence for the Seal of every Commission, as hath been accustomed, and for the writing and inrolling of any one Commission v. s. and not above.

And it is further enacted, that every Commission to be made by authority of this Act, shall indure and continue for the term of three years next after the Teste of the Commission. Nevertheless, after any Commission made and delivered out of the King's Court of Chancery, the King's highness shall always at his pleasure, by his writ of Superseas, out of his said Court of Chancery, at any time discharge as well every such Commission as every Commissioner that shall be made or named by authority of this Act.

After which discharge the said Commissioners shall have no power nor authority to proceed in the execution of their Commission, nor in any thing by authority of this Act.

How long
the Commis-
sioners De-
crees shall
stand good.

Provided always, that such Laws, Acts, Decrees, and Ordinances, as shall happen to be made by the said Commissioners according to the tenor of their Commission, or by authority of this Act, shall stand good and effectual, and be put in due execution so long time as their Commission endureth and no longer: except the said Laws and Ordinances be made and ingrossed in Parchment, and certified under the Seals of the said Commissioners into the King's Court of Chancery, and then the King's royal assent be had to the same: any thing contained in this present Act to the contrary hereof notwithstanding.

Commissions
into Wales,
or a County
Palatine.

Wales.
Chester.

Provided also, that whensoever, and as often as such Commission, as is afore limited, shall be made and directed to any person or persons for the reformation and amendment of or in any of the premises specified in the said Commission, within the fees, liberties and possessions of the principality of Wales, the County Palatine of Chester, or within the fees, liberties and possessions of any other place, where there is liberty and jurisdiction of County Palatine, that in every such case two Commissions shall be awarded, and made according to the tenor of the Commission above expressed, one thereof under the great Seal of England, and the other under the usual Seal of the County Palatine, in manner and form, as is above provided for the Duchy of Lancaster, any thing afore rehearsed in this present Act to the contrary notwithstanding.

The King's
Royal assent
shall be cer-
tified into
the Chance-
ry.

And it is provided and also enacted, that the royal assent limited to be had unto the Laws and Ordinances to be made by the said Commissioners, as is above said, shall be certified into the said Court of Chancery under the King's privy Seal: and that there shall not any sum of money be paid for the said privy Seal, but for the writing of the same Certificate under the said privy Seal shall be paid to the writer thereof ii. s. and not above, nor no other, nor greater sum for any thing touching

or concerning the same certificate under the same privy Seal.

Provided always, that the Chancellours, and such other as shall have the custody of the Seals of the said principality of Wales, or the County Palatine of Chester, or within the fees, liberties and possessions of any other place, where there is liberty and jurisdiction of County Palatine, upon reasonable request, and upon the sight of the Commission under the King's great Seal of his Chancery, shall without delay make out another Commission under the Seal of the said County Palatine according to the tenor of the King's Commission to them shewed under his great Seal. And to those Commissioners as shall be named by the Lord Chancellor, Lord Treasurer, and the two chief Justices, or by three of them, whereof the Lord Chancellor, to be one, except it be within the fees and liberties of the Duchy of Lancaster, within which fees and liberties the Commissioners shall be named, and Commissions made, as is afore ordained by this Act: any thing contained in the said Act, or in any proviso thereunto added and annexed to the contrary thereof notwithstanding. This Act to endure for twenty years. Stat. 3 E. 6. 8. made perpetual.

An Act concerning the Oath of Commissioners of Sewers.

25 H. 8. c. 10.

Callis.

Commissioners of Sewers dwelling in the same County.

BE it enacted by the authority of this present Parliament: That the Act late made for sewers, and the Commission therein recited, shall be extended, used, and put in execution in the Town and the Barches of Callis, according to the tenour of the same Commission in like effect as it is enacted to be put in execution within this Realm, and that no person shall be compelled to be sworn or otherwise bound to sit or travel in execution of any Commission of Sewers within this Realm, unless that he be dwelling within the County whereof he is or shall be assigned to be a Commissioner, and for Callis and the said Barches thereof, unless that he be dwelling within the same Town of Callis, or Barches.

The forfeiture of a Commissioner of Sewers who refuseth to take the Oath appointed by the Statute of 23 H. 8. 5.

¶ And because that divers persons heretofore assigned to be Commissioners have refused to be sworn, according to the said former Act, whereby divers Commissions heretofore made, remain hitherto without effectual execution: Be it therefore enacted, that if any person assigned or to be assigned, to be such Commissioner of Sewers, being required hereafter by such person or persons as have or shall have authority by the King's writ, or otherwise, to receive or accept the oath comprised in the said former Act, every person that so refuseth to take the same oath, or upon that request made, do not receive the same oath, and that refusal or contempt done in the Chancery, or returned into the Chancery with the said writ, shall loose and forfeit for the same contempt to the King our sovereign Lord, five marks, and so to loose from time to time five marks for every such contempt, as shall be done or returned into the said Chancery against any such persons, unless that he in the same

same Chancery do shew and alledge, in the said term, wherein such return shall be made against him, sufficient and reasonable matter and cause to be allowed by the Lord Chancellour for his excuse and discharge in that behalf.

¶ *An Act for the continuance of the Statute of Sewers.*

WHere in the Parliament holden at Westminster, by prorogation the fifteenth day of *Jannary*, in the three and twentieth year of the most victorious reign of our late Sovereign Lord King *Henry* the VIII. among other things, one general Act concerning Commissions of Sewers, to be directed into all parts within this Realm, was enacted and made to continue and endure for twenty years then next following, as by the same Act more at large it doth and may appear: and for as much as the same Act is thought good and beneficial for the Commonwealth of this Realm, Be it therefore enacted and ordained by the King our Sovereign Lord, with the assent of the Lords spiritual and temporal, and the Commons in this present Parliament assembled, and by the authority of the same, that the said Act, and all clauses, articles, and provisions, in the same contained, shall continue and endure in their force and strength, and to be observed and kept for ever, in such manner and form, as shall and may stand with the sequels and additions hereafter mentioned.

And be it further enacted and established by the authority aforesaid, that all scots, lots, and sums of money hereafter to be rated, and taxed, by vertue of such Commission of Sewers, upon any the Lands, Tenements, or hereditaments of our Sovereign Lord

3 & 4 Ed. 6.
cap. 8.

The Statute
of 23 H. 8. 5.
touching the
Commission
of Sewers
made perpetual.

All sums of
money taxed
by force of
the Commission
of Sewers upon any
of the King's
the

Lands shall
be leviabie
by distress.

What fees
shall be paid
for the Com-
mission of
Sewers sued
out under
the Seal of
the Duchy.

How long
the Commis-
sion of Sew-
ers shall en-
dure.

the King, his Heirs or Successors, for any manner of thing or things, concerning the Articles of the said Commission of Sewers, shall be gathered and levied by distress, or otherwise, in like manner and form as shall or may be done in the Lands, Tenements and Hereditaments of any other person or persons, and that all bills of acquittance, signed with the hand or hands of such Collector or Receiver, as shall have the collection thereof by the appointment of the said Commissioners, or six of them, shall be as well a sufficient discharge, to the Tenants, Farmers, and Occupiers of the same Grounds, so to be charged for the said sum, wherewith their Grounds shall be so charged, as also a sufficient warrant to all and every the receivers, auditors, and other whatsoever officer or officers of our said Sovereign Lord the King, his Heirs and Successors, for the allowance to such Tenant, Farmer, or Occupier for the same: Adding moreover unto this Act, by the authority of this present Parliament, that such, and like fees, and none other, nor more, shall be at any time paid or demanded, for any commission, or commissions, or writs of Dedimus potestatem, hereafter to be sued out, or obtained under the seal of the Duchy, but onely such, and like fees as be mentioned in the said former Act, to be paid in the Chancery, for Commissions and Writs of Dedimus potestatem, to be obtained from the same Court of Chancery. Adding moreover thereunto by the authority aforesaid that every Commission and Commissions, hereafter to be awarded for Sewers, shall continue and endure for term of five years, next after the Teste of such Commission, unless the same Commission and Commissions, shall be otherwise discharged, within the same by Superedeas, any thing or things mentioned or contained in the said former Act, contrary to the additions before mentioned, or any of them, in any wise notwithstanding.

¶ *An Act for the Commission of Sewers.*

FOrasmuch as no Commission of Sewers, by the Sta-^{13 Eliz. c. 9.}
 tutes heretofore made, may have continuance above
 the space of five years: Be it therefore enacted by the
 Queen's most excellent Majesty, with the assent of the
 Lords spiritual and temporal, and the Commons in
 this present Parliament assembled, and by the autho-
 rity of the same, that from henceforth all and every
 Commission and Commissions of Sewers, now stan-
 ding in force, or that hereafter shall be granted and
 made, shall stand and continue in force for the term of
 ten years, next ensuing the date of every such Commis-
 sion, unless the same Commission or Commissions be, or
 hereafter shall be repealed, or determined, by reason of any
 new Commission in that behalf made, or by superseas:
 and that all such Laws, Ordinances and Constitutions
 as be, or shall be duly made by force of any such Com-
 mission, according to the tenour and effect limited in
 any former Statute heretofore made, touching Com-
 mission or Commissions of Sewers, and being writ-
 ten in Parchment indented, and under the Seals of
 the said Commissioners, or six of them, whereof the
 one part shall remain with the Clerk appointed, and
 to be appointed for the Commission of Sewers for the
 time being, and the other part in such place as the same
 Commissioners, or six of them, shall order and ap-
 point: shall without any Certificate thereof to be made
 into the Court of Chancery, and without the Royal as-
 sent to the same had, stand and continue in full force
 and effect, notwithstanding any determination of any
 such commission by superseas, untill such time as the
 same Laws, Constitutions and Ordinances shall be al-
 tered, repealed, or made void, by the Commissioners
 after to be assigned and appointed for Sewers, in those

A Commis-
 sion of Sew-
 ers shall con-
 tinue ten
 years.

The Orders
 of Commis-
 sioners of
 Sewers shall
 be of force
 without the
 Certificate of
 them, or the
 Royal As-
 sent.

parts, where the same Laws, Ordinances and Constitutions were made, ordained and constituted, or by six of them.

The Commissioners of Sewers Orders shall continue, though the Commission do expire.

The Justices of Peace may for one year execute the Commission of Sewers, unless a new Commission be granted.

And be it farther enacted by the authority aforesaid, that at all times from and after the end and expiration of the term of ten years, next ensuing the date or teste of any commission of Sewers hereafter to be made, all such Laws, Ordinances and Constitutions, as were made by virtue of any such Commission, and written in parchment, indented and sealed, as is above-mentioned, without certificate thereof, or the assent royal to the same had as is aforesaid, shall notwithstanding the determination of any such Commission by the expiration of the term of ten years next ensuing the date of any such Commission of Sewers, likewise continue in force, for and by the space of one whole year then next ensuing: and that the Justices of Peace of the Shire and Shires where the same Laws, Ordinances and Constitutions are to be executed within their several commissions and limits, or six of them, whereof two to be of the Quorum, shall have power and authority, by the space of one whole year next after the expiration of every such Commission, to execute the same Laws, Ordinances and Constitutions, and every of them, as fully, and in as ample manner and form, as the Commissioners or any of them named and appointed in every or any Commission so expired might or should have done, to all intents and purposes, as if the said Commission or Commissions had continued in force.

Provided always, and be it nevertheless enacted, that if any new Commission of Sewers shall be made within the said year, that then immediately from and after such Commission newly made and published, the power of the said Justices of the Peace, and every of them, in any-wise concerning the execution of any such Laws, Ordinances, and Constitutions of Sewers, shall utterly cease: Any thing or things in this Act to the

the contrary expressed in any wise notwithstanding.

And be it farther enacted, that no Farmer or Farmers, for term of years, of any Manors, Lands, or Tenements, lying or being within the Precincts or Limits of any such Commission of Sewers, which be, or hereafter may be ordered and chargeable by any Laws, Ordinances, or Constitutions, made or to be made by virtue of any such Commission, wherein he or they shall be named or appointed Commissioner or Commissioners, not having Estate of Freehold within the Realm of England, of, or in Manors, Lands, or Tenements, of the yearly value of forty pounds, shall at any time hereafter, have power to sit, or in any wise intermeddle with the execution of such Commission or Commissions, during the time he or they shall continue, or be such Farmer or Farmers of any such Manors, Lands or Tenements, and shall not have Estate of Freehold, as is aforesaid: but that every such Commission, as having respect onely to every such person or persons, for such and so long time as he or they shall so be and continue Farmer or Farmers of any such Manors, Lands or Tenements, shall be deemed and adjudged in Law to be void, and of none effect: Any thing in the same Commission, or any Statute or Law heretofore made to the contrary notwithstanding.

A Farmer of Lands chargeable shall not be Commissioner within the same Precinct.

And be it farther enacted by the Authority aforesaid, that from henceforth the said Commissioners, nor any of them, shall not be compelled, nor compellable to make any Certificate or return of the said Commissions, or any of them, or of any their Ordinances, Laws or doings, by the authority of any the said Commissions, nor shall not have any fine, pain, or amendment set upon them, or any of them, or any ways to be molested in Body, Lands, or Goods, for that cause.

There shall be no Certificate or return of the Commission.

And yet nevertheless, to the intent the Queen's Majesty our Sovereign Lady, her Heirs and Successours, may be at all times hereafter truly answered of all such Issues,

The Fines
and Amer-
ciaments
shall be e-
streated into
the Exche-
quer.

Fines, and Amerciaments, as shall happen, grow, or be forfeited by virtue of any such Commission, or by the execution thereof: Be it also enacted, that the Clerk and Clerks appointed, and hereafter to be appointed, for and in any such Commission, or Commissions of Sewers, shall yearly truly estreat all the said Issues, Fines, Penalties, Forfeitures and Amerciaments, that shall be due and answerable to her Highness, her Heirs and Successours, and the same Estreats shall yearly deliver into the Court of the Exchequer, at such time and times, and in such manner and form, as Justices assigned to and for the conservation of the Peace in any wise should or ought to doe by virtue of their Commission, upon pain to forfeit to our Sovereign Lady the Queen, her Heirs and Successours, for every default in that behalf made, five pounds.

In what case
a Farmer of
Lands
chargeable
may be a
Commissioner.

Provided always, that it shall be lawfull for any Commissioner, being also a Farmer, and not having Lands and Tenements, to the clear yearly value of forty pounds of Freehold, to sit by virtue of the said Commission, and have his voice and full authority with others to make and establish Ordinances for Sewers, according to the tenour of the Commission touching and concerning all Lands and Tenements within the precinct of every such Commission, other than such Lands and Tenements as he or they, for the time being, hold and enjoy as Farmer, as he or they might have done before the making of this Statute: Any thing therein contained to the contrary notwithstanding.

Lectura Prima.

MY most worthy Fellows and Companions of this noble and renowned Society, the Hourglass of my puiſne time is run, and I am now come to take poſſeſſion of your Reader's place; wherein I muſt hazard to your cenſures the fortunes of my inability: Theſe twenty and fix years compleat I have had continuance here, and in that time I have onely taken the meaſure and length of your Hall: And herein I acknowledge *Grays-Inn* to be the Patron of my beſt fortunes, and your ſelves the beſt Companions of my forepaſt and preſent life. I made a queſtion, when it came to my turn to reade, whether I ſhould turn therefrom or not, being then troubled about Two things, *Charge* and *Care*, both which I put into a pair of Scales, wherein I thought *Charge* weighed heavy and ſolid (for *ibi ponebantur ſolidi*) *Care* notwithstanding had his equal weight with the other, and poiſed the Scales even: Yet I conſidered the ſmall Subſtance I had got came by my Profeſſion, I therefore took my ſelf both in Credit and Conſcience bound to undertake this burthenſome place, for the maintenance and preſervation of the honour of this Houſe; and with that I put *Charge* and *Care* in one Scale, and *Reſolution* in the other, which ſcaled them both up. Twenty years likewise of my laſt paſt time, I have in the practice of my Profeſſion ſpent, but, I hope, little conſumed thereof; In which time I lanced forth my Ship (*In profundum Maris*) for a Voyage to the Sea, and now ſhe is returned to your Shores, furniſh'd and balliſt with Merchandize of ſeveral eſtimates: By my Ship I mean my Statute which I reade on, which be the Laws of Shewers;

Sewers ; the Merchandize be the weighty matters therein contained : By the Governours and Rulers of this Ship, I mean the grave and prudent Commissioners who are put in charge and trust with the execution of these Laws : By the Mariners, I intend the Officers of this Law ; the Merchants place I reserve unto my self : The Wares brought home be of divers sorts, some onely fit for the Imperial Majesty of a King, and these be Royal Prerogatives, shewing forth their splendour like the *Flower de Luce* in the Crown ; others belong to high Nobility, and some be usefull for the homely Commonalty ; the rest which shall remain, I have cast under Hatches for my last days Mart, when I mean to make chaffer on them all. But though I seem to make these Markets of my Legal Merchandize, yet I do not mean to set such Rates upon them as Merchants use to do, which be all for (*utile dulce*) for I onely set one price upon all, which is your kind acceptance. Marvell not, I pray you, at these my Sea-like salutations, for this day I am become God Neptune's Oratour, and I mean to display the power of his Empire ; for my Statute, my Cases, and my Argument, will all depend upon the Element of Water, over which, as Poets feign, Neptune hath chief predominance. Well, now my Ship is at shore, and I have cast Anchor there, and to my great comfort I see many Chapmen attending the Market, and therefore now presently I will unlock, and set open the Closet of my Store, which be contained in the fair Volumns of the Law, and especially in that Law made and enacted in the Parliament held in the 23^d year of Hen. the 8th, cap. 5. which is *A general Act concerning the Commissioners of Sewers for all the Realm of England.*

The causes wherefore I made choice to reade upon this Law, be five in number ; *Viz.*

- i. *First,* For the Antiquity of these Laws of Sewers, though this Statute bear date but 23 H. 8.

Secondly,

Lectura Prima.

23

Secondly, For the largity and extent thereof, which appears in the style of this Statute, and there termed, *A general Act for all the Realm of England.*

2.

Thirdly, For the necessary use thereof, which continual practice and daily experience teacheth us.

3.

Fourthly, I have had a more desire to reade upon these Laws, because never any Reader did heretofore undertake the same; and upon perusal of this Statute, and upon due consideration taken of others, I thought I could not make my choice of a more fitting, and more necessary Law, nor more profitable for my Native Countrey of *Lincolnshire*, and other Maritime Places of this Kingdom, than this is.

4.

And *Fifthly*, His Majesty's general care, which these Laws require at his hands, and his special care, by the which his Highness of late hath taken these Laws into his gracious and provident protection.

5.

And upon due consideration taken of all these Cases, I resolved to proceed in the exposition of this Statute, being made perpetual by the Statute of 3 *Ed. 6. cap. 8.*

And to speak something of the three first causes, I am of opinion for the Reasons and Authorities ensuing, That the Laws of Sewers have been, and be of great antiquity, and have told over as much time, and as many years as any other Laws of this Realm have done: For as Mr. *Cambden* in his *Britannia* saith, *Quod insula Britannia avida in mare omni ex parte se projecit*; Therefore this Realm adjoining on every side upon the Sea, could not be safe without those provident Laws made and used for the defence thereof.

Antiquity of these Laws.

Cambden.

And although it is said in Scripture, That Almighty God hath bound the Seas by the word of his Commandment, and had shut up the Deep, and sealed it with his terrible and glorious Name; yet God, who bestowed wisdom on man, it was his pleasure he should providently use it over the rest of the Creatures, not giving way that he

In *Manasses*.
Prayer King
of *Judah.*

he should be remiss or presumptuous in any thing, which by his foresight or judgment might be prevented, helped and relieved.

Genesis, c. 7. It is true, that at the Floud, *Cum cataraëta Cœli fuerint aperta*, when the Windows of Heaven were by God's determinate will set open, and that the Seas did *Suum excedere modum*, no power of man's hand could stay the swallowing and devouring surges of the Seas and Waters; yet then notwithstanding had God appointed that his Servant *Noah* and his Children, and such Creatures as he appointed, should be preserved by the Ark, which was a work of their own hands; Therefore the Laws of God and Nature have appointed man to make provision for the necessary defence and safety of himself, and of his Countrey; And the Laws of this Realm, most of which have received their *primam essentiam* from the Divine Laws of the Almighty, and have fetched their Pedigree from the Law of Nature, have à *principio* been so predominant in this Kingdom of *England*, that they have never been wanting at any time to provide for the safety thereof.

And if the Register be so ancient a Book as Sir *Eward Cook* in one of his Epistles hath there declared it to be, then it may give satisfaction in this kind, that these Laws of Sewers were in those times of great eminency and authority; For there I find two several Writs or Commissions of that nature, The one authorizing certain Persons to survey the defences in the Parts of *Holland* in the County of *Lincoln*; The other for the viewing and surveying of the surrounded Grounds lying between the two Rivers *Humber* and *Auckholin* in the said County of *Lincoln*; And the first of the said Commissions is set down *verbatim* in *Fitz. nat. bre. fol. 113.* Yet the first Statute which appears to us in print, wherein the frame of a Commission of Sewers is set down, is the Statute of 6 *H. 6. cap. 5.* Yet I make no question but the said Commissions expressed in the Register, and *Fitz. na. bre.* were in their forms long before *Henry* the Sixth's time; and that the Statute of *Henry* the Sixth

Register in
Oyer and Ter-
miner.

Fitz. nat.

bre. fol. 113.

6 H. 6. c. 5.

Sixth adds some more power and strength thereto than was before, having backt them with the power of the Parliament; and it is something additional in matter, as it was in power, as by both the Commissions compared together is apparent.

I do likewise find in the 38th of Edward the Third, ^{38 Ed. 3. lib. Aff. pl. 15.} That a Commission was awarded to inquire of Bridges, and of the repairs thereof, which is a branch of these Laws: And Sir Edward Cook in his 10th Report in the Case of the Isle of Ely, saith, That the Kings of this Realm, before the making of any Statute of Sewers, might grant Commissions for the surveying and repairing of Walls, Banks and Rivers, and other Defences. And of the same opinion is the Book of Sir John Davies in his ^{Sir John Davies Reports,} Irish Reports, in the Case of the Royal Piscary of the Banne. And Sir Edward Cook hath in his first Case set the first Statute of Sewers to be in time the 9th of Henry the Third, ^{9 H. 3.} which is in Magna Charta the First Volume of Statutes, and the most ancient that be extant in our Laws.

By all which is manifest, that these Laws have been received into the Government of this Realm, in time as ancient as any other were; And I am the rather herein confirmed, for that in the ancient Commission expressed in the Register aforesaid, there be these words, That the King *Ratione dignitatis sue regie ad providendum salvationi regni sui circumquaque fuit astrictus.* Wherein it is hereby made plain, That the King by the Tenure and Prerogative of His Crown, was bound to see and foresee the safety of this Realm; and so this Law is a Prerogative Law, and seems to be as ancient as any Laws of this Realm, and all Prerogatives be without limitations of time; Neither can it be presumed, that all or any Kings till the time of Henry the Sixth were so improvident as to want these Laws, without the which the Realm could not be defended from the violence of that unmercifull Enemy the Sea; wherein I do conclude, That these Laws of Sewers be as ancient as any other Laws of this Kingdom be.

The extent of this Law.

Stradling
and Morgan.

23 Eliz.]

For the extent of this Law, the Title of this Statute shews it, viz. *A general Act for granting Commissions of Sewers within the Realm*, without any word of Restraint, other than these (*where need should require.*) And although Expounders of the Laws be not tied to make the Title their Text, either for the body or the bounds of it, yet it may serve to give some direction in the Exposition thereof: But to make the Title to be the ground in the material Exposition of the Law, may lead the Expofitor many times into error: For in *Stradling and Morgan's Case in Plo. Com.* the Title of the Statute was, *For the true answering for the Revenues of the King*, and the words in the body did extend the same to the Receivers of Subjects; but there the Judges and Expounders of that Law went with the Title in a Statute made in the 23^d of *Elizabeth*, the Title of the Statute was *For Politick Constitutions for the Navy*; and in that Statute there was a new Fish-day provided, which no man would have looked for under such a Title.

And *Lucian* an ancient Greek Poet compiled a Book, and in the Frontispiece thereof Intituled the same *A Book of True Reports*; where looking into it, there was not any thing true therein: So it appears though in Acts and Books the Titles and Styles may give help in the Exposition, and may serve as an Index or Table to find out the matter, yet it is not fit to rely upon them, but that they may be used or refused as occasion shall serve.

Howsoever there is better concord betwixt the Title and the Body of my Statute, for the *Corps* of the Act perform as much as the Title promised, whereby the Inland Countries of *Nottingham, Northampton, Huntington, Bedford* and the like, may have the use of this Statute as well as the Maritime Countries of *Lincoln, York, Cambridge, Norfolk, Suffolk, Kent, Sussex, Hampshire, Devon, Cornwall, Gloucester, Chester* and *Lancashire*, if not in all, yet in part, as hereafter I shall make it appear in my second Lecture upon this Law.

And

And although both the Statute of 6 H. 8. and the Register, and *Fitz. Nat. Brev.* make all of them mention in those Commissions of the County of *Lincoln*, and of no other County; yet doubtless the Law-makers and Judges of this Realm, and the Expositours did intend then, and did extend them to all the Parts and Counties of the Realm. And yet I take it, that the first Original and the chief use of these Laws, was in the said Maritime Countries, which stood in most need thereof, and especially *Lincolnshire*, where be the huge great and vast Fens and Marishes: but yet notwithstanding they may serve generally for all the Realm of *England*, as the extent of this Statute I reade on hath bounded them.

So herein my conclusion is, that the extent of this Statute is as large as the Realm of *England*.

The necessary use of it.

From the Title I am now come to the Preamble of this Statute, where the words be very solid and weighty; that is, *That the King nothing earthly so highly weighing as the advancing the common Profit, Wealth and Commodity of this Realm*: By the which it may appear, That the making of this Law was of all other thought to be most necessary, and of greatest consequence, when the King preferred the same before any earthly thing: And the King's care herein became his Royal Person very worthily, because by this Statute Safety was brought to the Realm, and Wealth and Profit to the People thereof; greater and better fruits than which, no humane Law can produce: And the chief execution of this Law was most aptly left to the King, *Ratione regie dignitatis sue*, whose Office doth, as the Philosopher truly saith, contain in it great Vertue, high Understanding, and Divine Wisdom, to whose high Government, as well our Persons as our Laws be committed, and the defence thereof is applied to his grave foresight.

And truly I have taken upon me to reade on those Laws of Sewers, as *Mr. Marrow* did in former times take upon

him to expound in his reading the Laws of the Juſtices of Peace, hoping this work of mine may prove as acceptable to the Commiſſioners of Sewers, as that of his was beneficial to the Juſtices of Peace; the uſe whereof being no leſs commodious to the Commonwealth than that of the Peace, being both general Laws of great uſe and eſteem, and my ſelf being for many years paſt a Commiſſioner in the County of *Lincoln*, I found that theſe Laws were dark and intricate, and came not uſually within the reach and underſtanding of ſuch as were not well ſeen and ſtudied in the Laws.

And becauſe I found the uſe of them to be wondrous neceſſary, I did intend, when occaſion ſerved me, to break the Ice, and enter ſeriously into the expoſition of them. And therefore ſeeing theſe Laws being in time moſt ancient, in extent moſt large, and for the uſe moſt neceſſary, I have, with your kind favour, made choice of them to frame my Reading upon; wherein, if upon your peruſal you find any ſcapes or errours, which may ſoon fall from Opinion, *hæc amicè corrige*, and ſuch of them as you ſhall beſtow your liking upon, *hiis utere mecum*; and this ſhall ſuffice touching my choice made of this Statute.

And as I have formerly declared and delivered the cauſes which ſtirred me up, and the reaſons which confirmed me to reade upon this Statute; Now I do intend to break it up, and I do divide it into theſe ſeveral branches or parts:

1. *First*, To make proviſion to reſiſt the overflowing of the Sea upon the large Marſh-grounds lying in the Maritime Countries, which commonly be the ſureſt for ſoundneſs, the greateſt for compaſs, and the beſt for profit of all the Sheep-walks and Commons of this Realm, which take prejudice and loſs onely by the rage of the Sea.
2. *Secondly*, To provide alſo that the great freſh Rivers and Streams may have their paſſages made clear, and that their Walls, Banks, and other Defences be repaired, kept and maintained, whereby the fair, delightfull, pleaſant and fruitfull

fruitfull Meadows and Pasture-grounds which lie in the greatest abundance upon or near the Rivers, Brooks and Streams may be preserved from the inundation of fresh Waters, which many times annoy them, to the great and inestimable damage of His Majesty's Subjects, which be Owners and Farmers thereof.

Thirdly, Whereas Navigation, both for the Exporting of our Homebred Commodities, and for the Importing of Foreign Merchandizes is the chief enriching of this Nation, therefore Ports, Havens, Rivers, and other Navigable Streams and their dependencies, be put within the defence of this Law, being *Ostia & janua Regni*, for that by the maintenance of these the Wealth of this Realm is increased, and the Inland Cities, Boroughs and Towns are made partakers with ease and small cost of the Sea's Commodities.

Fourthly, likewise this Law giveth redress and remedy for the removing of such lets and impediments as are either hinderances to Navigation, or stops whereby the abundant Waters cannot have their free passage to the Sea.

And Fifthly, Because in the surrounded Grounds there be most commonly the greatest use of Bridges, Calceys, Passages and Ways, therefore this Statute hath taken order for them also, whereby His Majesty's People may in those places for their persons and their goods have both *Salvum & securum conductum*.

In these five parts be all the whole materials of this great and worthy Law contained; and therefore according to the said division I have framed a Case for the first Lecture upon this Law.

The first Case.

A. Leaseth to *B.* a Manor on the Sea Coasts for years, which hath *incrementum & decrementum Maris* by prescription in the County of *Chester*, and the City there, (where a Commission of Sewers is) remainder to *C.* in Fee, Livery is given and taken by Attornies at full Sea within

within the view; the Sea then leaves one hundred Acres of Land with the Shore divided in part from the continent by a Navigable Haven; The Lease expired, C. enters, the Prince ejects him, and the King seizeth this Relinquished Ground.

My Opinion is, That the King hath a part, the Prince a part, and the Subject a part of this Ground; and that it is all within this Statute, but no part thereof within this Commission.

Points of the Common-law.

The Points of this Case be three at the Common-law, and five by this Statute.

1. *First*, Whether Livery of Lands may be made within the view in another County, or not?
2. *Secondly*, Whether Livery by the view may be given or taken by Attornies, or not?
3. *Thirdly*, Whether in this case Livery and Seisin may be made by Attornies, or that of necessity it must be made to the Lessee for years, and who must join in making of the Letter of Attorney to take the Livery? All which Points I must maintain affirmatively, else C. the Subject cannot have any Lands at all.

Points on this Statute.

1. *First*, Whether the English Seas be within this Realm of England, and what interest the King hath there, and what interest a Subject may have therein by custome and prescription, and what is meant by the said words, *incrementum & decrementum Maris*?
2. *Secondly*, Whose these new Islands be which arise there, and whether they be said to be within the Realm, and what Laws govern the same; for that it appears in my Case, that the Ground left between the Sea and the Haven is an Island?
3. *Thirdly*, Whether the King shall have all the Grounds by His Prerogative, or the Subject by the said Prescription, or the Prince as participating of both? or whether every one shall have a part thereof, according to my Conclusion?

Fourthly,

Fourthly, Whether the Grounds left by the Sea be within this Statute and Commission, both or either of them, or neither of them?

4.

Fifthly, What a Haven, a Shore, and the Coasts be in definition, and the several properties thereof?

5.

The Reader's Argument.

And as it comes to my turn, I intend to maintain the conclusion of my Case : And first of the first Point.

Livery and *Seisin* is one of the most ancient approved Ceremonies of the Law which hath been used for conveying of Lands; and the Law hath a more respect thereto than to any other : And it cannot be denied, but that it is the most perfect form of any, by the which the freehold and Inheritance of Lands is transferred from one to another, and all Subjects may give and take Lands by this Ceremony; but the King onely is excepted, whose Prerogative, is such That as Lands cannot be taken from him, as King, but by Record; so Lands cannot be given or granted to him, as King, but by Record: And in the same degree is a Count Palatine in his County, because he hath there *Jura Regalia* : And this *Livery* and *Seisin* may be actually and really done and performed, or else it may be done within the view of the Lands intended to be conveyed.

And as touching *Livery* and *Seisin* to be actually effected, if the Feoffment contain Lands in two several Counties, and *Livery* and *Seisin* be made in one County in name of both, this will not pass the Lands in another county, because the Land passeth by the *Livery*, which is local, and not by the Deed.

But in an exchange of Land in two several Counties by Deed, the same is good, for there the Land passeth by the Deed.

But if one make a Feoffment of a Manor lying in Demesne in the County of *L.* and in services in the County of *M.* these services, and so Rents, will pass by attornment of the Tenants, though they lie in a foreign County; and so

so

so of an Advowson appendant, and such like, because those rents and services pass not by the local Ceremony of *Livery* and *Seisin*, but by the Ceremony of Attornment, which is personal; and depends upon the person which is transitory; wherein I take this difference, That if a Feoffment be made of a Manor by Parol, the Advowson appendant, Villains Regardant, and Rents and Services by Attornment of Tenants, will not pass to the Feoffee, till the demesns and Lands be first conveyed.

But if the Feoffment be by Deed, then the Rents and Services will pass by Attornment of the Tenants, and delivery of the Deeds, before *Livery* and *Seisin* be made to pass the demesns.

Then seeing that Land in one County will not pass by Feoffment by express *Livery* made in another County; if then the same may be passed and conveyed by *Livery* within the view, is the question of our Case: And in my opinion they may, because it is a Ceremony performed by the eye, which is a member or instrument which hath his operation by aspect, *Tam procùl quam propé*.

But express *Livery* and *Seisin*, which is done by the hand, cannot in reason be extended to another place than where the body is: And although the eye be fixed in the head, annexed to the body, yet like the Sun, his beams are carried afar off.

And this *Livery* by the view, is not a *Livery* in the County where the body is, but properly in the County where the Land lay, which was the object of the eye; and in this case it is said to be *Livery* onely, and not *Livery* and *Seisin*, because the *Seisin* is properly when the party enters, and the entry of the party is that which perfects the work, which is in *proprio comitatu*. And for authority in the point, 28 Ed. 3. fo. 11. there is a Case according to my opinion, where the Husband at the Church door, when he was to take one to wife, he made a Deed of Feoffment of Lands lying in another County to the said woman, and then delivered the Deed to her, and shewed her the Land, then

then they married, and he entred in claiming to her use; and these Lands were thereby well conveyed to the said woman by this Livery within the view, in another County.

And of the same opinion (that livery may be given of Lands in another County within the view) is *Coke*, 1 Inst. 48. b.

Now it is fit to be declared, what view is sufficient, for there be two manner of views, The one general, the other special: In the special view, every particular piece of ground is to be seen; but in the general view it sufficeth to take notice of the grounds by the place they lie in: and in my opinion, The general view in my Case will suffice. For if one make a Feoffment in Fee of a whole Island, or of a whole Manor or Town, and make Livery thereof within the view, this is good; and yet it is not possible to view every particular piece of ground at once, for Trees, Houses and Hills might so be interposed, that the view could not be taken of some part thereof, yet notwithstanding view of the rest will pass.

Also if Lands be covered with Water, Ice or Snow, these will pass well in a Feoffment or Livery in the view.

In *Brook Title View plac. 101.* the Case there may give *Brook 101.* the rule to our Case; for there it is said in a Writ of view, It is not necessary that all particulars in *Specie* should be put in view, but to see the fields where the grounds lie promiscuously it will suffice, and is a good and perfect view.

Sed est un auter diversitie concernant veuve Carst un fait Feoffment de B. acre que gist del auter parte dum Mountaine tout hors del veuve, la livery de ceo nest bone sans expres veuve tamen tout voile passer per veuve de parte & sic in mon case on part gist south le floud del mere ceo non obstant passe ut parcel del mannor.

Ascuns aver teneus & ceo Knightley pur un in 28 H. 8. in 28 H. 8. Dier que Livery deins le veuve doit tous foits este fait in cases de necessity ceo urging in respect del chose ou del person, del chose
F *quia*

quia le terre gist del furdur side dun grand ewe ou in le ewe ou ne puit este facile accesse del person, quia que le Feoffor ou Feoffee soit lame ou infirme, & detraher ceo in question Jeo aye mist mon case quia le Feoffment & Linerey fuit ad plenitudinem maris tamen Jeo sue de opinion que Linerey deins le veuve puit este fait sans ascun matter de necessity ceo urging & ceo Jeo collect per le liuer de 42 Ed. 3. Fitz. Feoffments 54. when the Son did give back the Lands to his Father as freely as his Father had formerly given the same to him; and this was within the view: and it doth not appear that either this Livery or the other made to the said woman in 28 Edward 3. were made of any necessity urging the same.

And there be some persons which can neither give nor take by Livery within the view, and that is where the Feoffor or Feoffee is blind: So a Major and Commonalty, Dean and Chapter, or other corporate and politique capacities cannot give or take within the view. Some have held a difference that a Parson of a Church might not take by Livery within the view to him and his Successors, because that came to him in his politique capacity, which had no Eyes; but if he were seized in the right of his Church, that he might infeoff I. S. thereof by Livery within the view, because this was a wrong to the Church, and therefore was in the power of his natural capacity, which had Eyes.

But the main Point in my Case is, Whether Livery within the view may be given and taken by Attorneys; and whether the view is so incident to the person, that it cannot be imparted to another.

It is true, that the personal view cannot be lent to another, or divided from the person, no more can the personal touch or act of my hand be imparted to another; and yet express Livery, which is the Deed and act of the hand, may be done *per auter maine*.

7: Reports,
Englefield's
Case.

Sir Francis Englefield's Case in the seventh Report of Sir Edward Cook, gives us a pretty difference, where the act to be done

done is inseparably tied to ones person, and where not; as in the Case of *Thomas Duke of Norfolk*, where upon conveyance of divers Manors to *Philip Earl of Arrundel* his Son, there was a Proviso, That the Duke might revoke the same upon signifying of his mind under his own proper hand in writing, &c. This power of Revocation was not transferred to the Queen by the Attainder of the Duke, because it was inseparably tied to his own proper hand: But the principal Case there of *Englefield*, where the Lands were settled upon his Kinsman, with power, That upon tender of a Ring by him he might revoke the uses, and this was forfeit by his Attainder, and the Queen by a Letter of Attorney made to two, did tender the Ring; for this was not precisely or literally tied to *Englefield's* person, no more than payment of Money, or such like. Canc. in
Comb's Case.

And so in our Case, though by the Law I take it that Livery within the view must be in the view of both the Parties, yet this may be done by Attornies; for as my own hand is not precisely tied by the Law to an express livery, no more is my own eye expressly tied to this view.

And we see in views in an Affize, the Under-sheriff, or the Sheriff's Bailiffs, by his direction, may make the view; and yet the Writ is directed to the Sheriff to doe the same; and in those Cases an intellectual view will serve, as if the Jurours know the Land; but such an intellectual view will not serve in a Feoffment, but there the view must be actual. 36 H. 8.
Dyer
Morse and
Pennington's
Case.

Yet I take this difference, that if a Letter of Attorney be directed to *A. B.* to make Livery and Seisin, he cannot doe the same within the view, for therein he doth not pursue his Warrant; but if the Letter of Attorney be special, to give or take Livery within the view, I am of opinion, then the Livery may in such a case be given and taken by Attornies within the view, as well as in *Combe's Case* in *Sir Edward Cook's 9th Report*, where it is affirmed that a surrender of a Copihold may be given and taken by Attor-

nies, which is as personal as this is in the taking part, because Fealty ought to be made.

Some things may in this Case be farther alledged in this third point, which I now have in hand, that is, Who must make the Letter of Attorney on the Feoffee's part, whether the Lessee for years, or he in the remainder, or both of them: For Lessee for years, it is to be noted, that his Estate hath not any perfection thereby, and he seems himself but a Deputy, and if so, then a Deputy cannot make a Deputy; but yet he is not merely a Deputy, for if there be two Lessees, the remainder in fee to J. S. one of the Lessees may take the *Livery* and *Seisin*; yet if a Letter of Attorney be made to two jointly, one of them cannot take it; and if in our case the Lessee had died before entry, the *Livery* might have been made to his Executours, and powers and authorities cannot be apportioned and come to Executours in such manner; *Ergo*, It is more than a power of a Letter of Attorney for the reasons aforesaid, and for these ensuing: For the Lessee for years cannot be prohibited from taking his *Livery* by the Lessor, but a Letter of Attorney may be countermanded; yet the Lessee alone cannot make this Letter of Attorney, neither can he in the remainder make the same, because he could not himself accept of the present *Livery*, neither can he meddle with the present possession which a *Livery* and *Seisin* yields.

But I am of opinion, That Lessee for years, and he in remainder, must join in the Letter of Attorney for these Reasons:

1. *First*, They were both one party to the Deed, so ought they to be to the Letter of Attorney, which is to give life thereunto.

2. *Secondly*, They be but in Law one Tenant.

3. *Thirdly*, They should join in Advowry.

And in many Cases the Lessee shall have aid of him in remainder for the privity between their Estates; and although the Lessee gets no Estate by the *Livery*, yet he assists

sists himself thereby with the aid and strength of him in the remainder, and the Livery goes through his Estate, and so passeth into the remainder.

Therefore my Conclusion is, that they shall join in this Letter of Attorny; and hereby I suppose I have conveyed a good Estate in the Manor to J. S. in the remainder, to maintain my position for him in the end of my Case, and here I end my Three Common-law Points, and now am come to the Statute.

Notwithstanding what is here affirmed for Law, it seems doubtfull whether this Livery within the view was well given: For,

1. My Lord *Coke* 1 Inst. 49. b. puts this very Case, viz. A man makes a lease for years to A. the remainder in fee to B. and makes livery within the view; and he concludes that such livery is void: For it must be presupposed (as my Lord *Coke* doth) that the livery is made to the Lessee for years, as by Law it ought to be; for the livery could not be made to him in remainder, because the Possession belonged to the Lessee for years. And though the livery be not necessary in this case for the Lessee himself, yet 'tis for the benefit of him in remainder. Now supposing it to be made to A. Lessee for years, such livery is void, if made onely within the view, because no man can take by force of a livery within the view, but he that taketh the Freehold himself, which A. doth not.

And as for the giving of livery in this case within the view to B. to whom the remainder in fee
is

is limited, as well as to the Lessee for years. It is confessed here that he in the remainder cannot accept of the present livery, (though it shall enure to his benefit) so that the joining him in the Letter of Attorney with the Lessee for years, cannot make the livery within the view good; seeing he is incapable of taking it, for that he hath not the Possession.

2. If livery to A. Lessee for years, given to him personally within the view were good, yet it seems doubtfull whether an Attorney can give or take such livery within the view, though the Letter of Attorney be special to that purpose: for if the Law allows not of any such livery by an Attorney within the view, as my Lord Coke, 1 Inst. 52. b. seems to be of opinion, where he saith, that the Warrant is intendable in Law of an actual and expresse livery, and not of a livery in Law, and cites for it *Tarham's Case*, 3 Eliz. then without question the special direction of the Party to give livery within the view, cannot make it good, no more than where a Letter of Attorney is to deliver livery of seisin after the death of the Feoffor; for no such special appointment can controll a rule in Law to the contrary.

*Tarham's
Case, 3 Eliz.*

The

The Reader's Argument upon the Statute
and Commission.

The Sea within the Realm of England.

First, touching our *Mare Anglicum*, in whom the interest therein is, and by what Law the Government thereof is, is a fit question, and worth the handling. And in my Argument therein, I hope to make it manifest by many proofs and precedents of great worth and esteem, that the King hath therein these powers and properties, *videlicet*.

1. *Imperium Regale.*
2. *Potestatem legalem.*
3. *Proprietatem tam soli quam aquæ.*
4. *Possessionem & Proficuum tam Reale quam Personale.*

And all these he hath by the Common Laws of England: in the 6th of Richard the Second, *Fitz. Prot. 46.* it is said, ^{6 R. 2.} That the Sea is within the Legiance of the King, as of his Crown of England; This proves that on the Seas the King hath *Dominationem & Imperium ut Rex Angliæ*, and this by the Common-law of England.

The Charter of the Admiral of England hath these words ^{Admiral's Charter.} in it, *Quod habeat potestatem in causis maritimis ac omnia bona waviata Flotsan Ietsan & Lagan ac omnia bona Mercimonia & catalla in mare deperdita seu extra mare projecta ac omnia & singula casualia tam in vel super mare vel littora crecas vel costeras maris quam in vel super aquas dulces portus flumina rivos aut alios locos superinundatos quoscunque inter Fluxum & refluxum maris seu aquæ ad plenitudinem à quibuscunque primis pontibus versus Mare per totum Regnum Angliæ.*

Imprimis, This Charter is under the great Seal of England, *quod est Lex Angliæ.* 11.

The

2. The King grants to the Admiral thereby power in Maritime Causes, which proves the King's legal power and jurisdiction on the Seas.

3. He grants to him *bona in mare deperdita super mare emergentia & extra mare projecta*, which be profits arising on the Sea.

4. And all these are said to be *per totum Regnum Angliæ*; Ergo, the Seas be *infra Regnum Angliæ*.

Prærogativa
Regis, c. 11.

In the Eleventh Chapter *de Prærogativa Regis*, it is declared, *Quod Rex habebit wreccum Maris per totum Regnum & Balenas & Sturgiones captos in Mari vel alibi infra Regnum Angliæ*: and this was by the Common Laws before ever this Statute was made; for as the King was and is the most Excellent Creature within his Realm, so the most Excellent things which Land and Sea afford are appropriate unto him. And this Statute also proves the Sea to be *infra Regnum Angliæ*, and that the profits therein, and thereon arising belong to the King by the temporal Laws of England.

Sir Henry
Constable's
Case.

In the Case of Sir Henry Constable in the Fifth Report of Sir E. Cook, it is said, That *Flotsan, Jetsan and Lagan* are goods on or in the Sea, and that they belong to the King, and the King by his Charter granted them to the Admiral.

Stat. 18 E. 3.
28 H. 8.

The Statute of the 18th of Edward the Third; *Let the Sea be open to all Strangers*: and the Statute of 28 H. 8. Chap. 15. *If any Treason, Murther, or other Felony be done on the Sea-coast, the Offenders shall be tried in such County as the King shall appoint by Commission to be directed to the Admiral and others, to try the same per Sacramentum duodecim*, which is by Jury.

31 H. 6.

And the Statute 31 H. 6. Chap. 4. there is a Restraint, That no Subject do attach any Stranger in amity within this Realm on the Sea.

Here the Statute-laws are in force on the Seas, as appears by the examples; but these seem to tie the Person only.

And

And in the *Irish Reports* of Sir John Davies, in the Case of the Royal Piscary of the Banne, it is said, *That the Sea is the King's proper Inheritance.* Sir John Davies.

And Mr. Bracton, lib. 2. cap. 12. in his Title *de acquirendo rerum dominio*, setteth forth a prescription in these words, *Quod J. S. & antecessores sui fuerunt quiet' de Theolonio & aliis consuetudinibus dandis per totum Regnum Angliæ tam per terram quam per mare*: and many times in that Chapter he reiterates the same words; which is a strong proof that the Sea is *infra Regnum Angliæ*, and that the King governs there by his Common Laws of England; for that prescription is a main and material point of the Common Law: And the like is alledg'd in Sir Henry Constable's Case by way of Custome in the Citizens, as of Bristol, to have Flotsan on the Seas between the high-water and the low-water Marks. Bracton. l. 2. cap. 12.

For the Prerogative and Interest that the King of England hath in the Seas of England, and the Antiquity of the Court of Admiralty; See the Record in Co. 4 Inst. 142.

So I take it I have proved the King full Lord and Owner of the Seas, and that the Seas be within the Realm of England; and that I have also proved it by Ancient Books and Authorities of the Laws, and by Charters, Statutes, Customs and Prescriptions, that the Government therein is by the Common Laws of this Realm.

One Case and one Statute seem to sway to the contrary, *Lacy's Case*, and that is *Lacy's Case*, where one was stricken on the Seas, and died on the Land, that the Common Law could not try this Murther: It is true, because that Trial was to be by Jury, which must come out of a proper County, which could not in this Case, because the Sea was not within County-ground, and so no Jury could be summoned there.

*Le Roll de
Oleron.*

*15 & 16 El.
Dyer.*

And I acknowledge that the King ruleth on the Sea by the Laws Imperial, as by the Roll of *Oleron* and other; but that is onely in the particular Case of Shipping, and for Merchants and Mariners: But the King hath neither the property of the Sea, nor the real and personal profits there arising, but by the Common Laws of *England*, and in proof thereof the Book 15 and 16 *Eliz. in Dyer*, where the Grounds gained from the Sea pertained to the Queen;

And in Sir *John Davis* his Reports, *Piscar. de Ban.* 56. That the King shall have the Land gained out of the Sea.

Which must needs be by the Common Law of *England*; for no Law gives the King any Soil, but onely the Common Laws of *England*; so this is sufficient proof for the real profits, and for the personal profit the Charter of the Admiralty and other Cases aforesaid make it manifest.

*13 R.2. Rast.
Admiralty.*

And there is a Statute made in 13 *R. 2. cap. 5.* which restrains the Admiral that he do not meddle with any thing done within the Realm, but on the Seas; by which it may be collected, that the Seas be not within the Realm of *England*: But in my opinion the intent of that Statute did rather limit the Admiral how far he should extend his Jurisdiction, than any way to set forth the bounds of this Realm: wherein my conclusion herein is, That my Statute hath his extent within all the Realm of *England*; and that English Seas being within the Realm, be within the bounds of my said Statute of Sewers, and that Statute-law is in full power on the Seas, as by the Cases and Statutes mentioned formerly doth appear.

Of Islands.

De Insulis.

BEcause in my Case in matter, though not in express words there is an Island, therefore it comes now fitly in turn to declare whose the same is in ownership, and what

what Laws the same is to be governed by : And first, of the definition thereof : *Justinian in Suis Institutionibus* Definitio Insulae. saith, that *Insula est locus undique circumdatus aquis*, p. 153. And with this agreeth *Britton*, in his Title of Purchase, *England* of it self is not *Insula*, because it is not *undique Anglia circumdatus aquis*. But *England* and *Scotland* be one in- Scotia. tire Island, and the most famous in the whole World; *England*, take it *per se est peninsula*, that is *penè Insula*, al- Peninsula. most an Island; for on all parts it joins to the Sea, but to- wards some parts of *Scotland*.

Gernsey and *Jernsey* be Islands on the Sea, but it seems Gernsey. by the Resolutions in *Calvin's Case*, the 7th Report, That Jernsey. they be not within the Realm, nor governed by these Laws, because the King hath them by his Title of *France*.

The Isle of *Man* was in times past a petty Kingdom, and Man. had a King, but he was onely as a Viceroy, and under the King of *England*, as by a Record.

Where *Artold*, King of *Man*, made suit to the King of *England* to come into *England*; but whether *Man* be within the Realm or not, seems to be put without question in *Sir Edward Cook's Case of Calvin*, and by *Kelway's Reports*, 11 H. 8. that it is not, for there an office found after the death of the Earl of *Darby* by a Writ out of the Chancery Kelway's R. of *England* was avoided, because as the said Books do affirm *Man* was not within the Realm of *England*; but under the favour of these Books, that is no necessary cause to avoid that Office; for in my opinion the said Office of the Earl of *Darby* was void, *quia in Man breve Domini regis non Currebat*, and so in the County Palatine of *Chester*, *breve Domini regis non Currit*, 161. *tamen Comitatus Cestriae est infra Regnum Angliae*. Mr. *Cambden* in his History Cambden. *de Insulis* is of opinion, that *Man* was a Member of the Realm of *England*: and therein he hath these words, That *Man* is an Island situate in the mid-way between *England* and *Ireland*. *Sed de qua utrique terrarum applicari de Jure debuerat ab antiquis non ambigebatur, demum in hunc modum lis ista quievit quoniam advectos periculi Causa venenosos hæc terra*

vermes admisit, ergo eam Britannis applicandum Censura Communis dictavit, by which it may appear, that the Isle of Man was within the Realm of England; or at the least a Member thereof.

Wight.

*Cambden,
fol. 707.*

But I do take the Isle of *Wight* originally to be parcel of England, and is a part of the County of *Hampshire*, and was as it were divorced from the Continent as was *Sicily* from *Italy*; the one, as Poets feign, was parted from the Continent or main Land by an Earthquake; the other, as is imagined, by the rage and violence of the Sea: *Insula Vectis inquit Cambdenus in suis insultis Britannicis, fol. 707. est pars Comitatus Hamtoniae & à Continente Britanniae avulsa est ut cohaesisse videbatur*, for many do imagine that it was torn from the main Land by the violence of Waters, as of late years parcel of the *Spurnhead* in *Yorkshire*, which before did adhere to the Continent, was torn therefrom by the Sea, and is now in the nature of an Island: Yet the same is within the Realm of England, and remains parcel of *Yorkshire*; and the like is said of the Island call'd *Silly*. Many other ancient Islands there be, which being in the English Seas be parcel of this Realm, which I will pass over to avoid prolixity.

Nova Insula.

Justinian.

Britton 86.

But in our Case a new Island is risen up in the English Seas, to whom the same in point of property and ownership shall belong, and what Laws the same shall be governed by, comes now justly to be disputed of. *Justinian* in his *Institutes, De rerum Divisione*, saith, *Quod insula in mari nata (ut Delos) est primi occupantis*. And *Britton*, one of our ancient Writers in his Book *Titulo Purchase, fol. 86.* saith, That if a new Island rise up in the Sea, *datur primo occupanti*, and agreeth fully with *Justinian* therein; but saith he, If it be taken or divorced from the Continent, then it continueth to the former Owner; but clearly our Law of England doth not agree with either of those Authors in the point of ownership. For, if, as I have formerly delivered it, the Sea in property, possession and profit, *tam in aqua quam in solo*, belongs to the King in the right of

of His Crown of *England*, as I take the Law clearly to be, then it followeth as a conſequent, That the Ground which was the King's when it was covered with waters, is His alſo when the waters have left it; For our Law admits not any thing, either real or perſonal to go *primo occupanti*; but when an Owner cannot be found, the Common Law gives it *Domino Regi*, as Waifs, Strays, Wreck of the Sea, Treafure found, Eſcheated-lands, and ſuch like; ſo that my opinion is conceived in this, that in point of ownership and property, the ſaid new Iſland is the King's.

But yet I am likewiſe of opinion, That a new Iſland riſen from the bottom of the Sea, although it be within the Realm, yet it is neither within County, Pariſh nor Town of this Realm, till the King by his Ediſt or Proclamation have ſo declared it.

There may be Iſlands alſo within the Land compaſſed about with freſh Rivers, as the Iſle of *Axholm* in the County of *Lincoln*, and *Sheppey* in the County of *Kent*, and divers others. But Mr. *Bracton* in his Book *de acquirendo rerum dominio*, doth very well deliver the Law concerning his new Iſlands which ariſe in great Rivers; his words be theſe, *Habet etiam locum eadem ſpecies acceſſionis Inſula nata in flumine quod ſi quidem mediam partem teneat Communis eſt eorum qui pro indiviſo ab utraque parte fluminis prope ripam prædia poſſident pro modo latitudinis cujuſcunque fundi que latitudo prope ripam ſit que ſi alteri parti proximior ſit, eorum eſt tanta qui ab ea parte prope ripam prædia poſſident: Si autem inſula in Mari nata ſit quod raro accidit occupantis ſit Domini Regis non tamen credas proprium alicujus agrum in formam inſulæ redactæ inſulam eſſe ut ecce flumen dividatur in ſuperiori parte & circuit agrum alicujus & demum infra in quo caſu ejus erit ager cujus prius fuerat: Cavendum quoque erit in metienda vicinitate inſularum quia poteſt quis in hoc de facili decipi ponatur igitur punctus quod in medio inter utrumque agrum & ſecundum hoc ſi inſula citra punctum ſit vel hujus tant' vel illius tant' erit ſi autem ſit & citra punctum & in ipſo puncto & ultra tunc pro indiviſo: Communis erit ut tan-*
Bracton, lib. 1.
cap. 2.
tam

tam mihi de ipso insula cedat qua continentur in medietate puncti usque ad agrum meum. Si autem insula rotunda inveniat, hoc observetur quod omne quod propinquius est mihi cedat, & ita vicino cedat quod ei vicinius erit.

But whether the Laws of this Realm be of force in the said new-sprung-up Sea Islands, or not, is a question: It appears in *Calvin's Case*, and in the *Case of the Tanistry* in the *Irish Reports*, That if the King conquer an Island or Nation, the same is no part of *England*, nor the Laws of *England* there in force, till the King shall so declare the same, but the own proper Laws seem to be in force there; but if the King conquer a Nation from an Infidel, there the ancient Laws of that Nation upon the conquest are extinct; but the Law is not so of another Christian Region, as *Callis*, *Guyen*, *Bulloign* and the like. And although *Ireland* was under the obeysance of the King, yet the Laws of *England* were not there in force, till the King so declared the same.

Callis.
Guyen.
Bulloign.
Ireland.

Wales.

And although *Wales* before the Reign of *E. 1.* was within the Fee of the King of *England*, yet was it not parcel thereof, till the Statute of 12 *E. 1.* so made it; and although that Statute so annexed *Wales* to *England*, yet being but by the word or figure *adjuncta*, the Laws of *England* were not totally in force there till the Statute 27 *H. 8.* so declared them, as is holden in *Rice Thomas's Case* in *Plo. Com.* but notwithstanding whether *Wales* be within my Statute, or not, is questionable, for these Reasons following: First, it is clear that a general Law unstinted and unbounded shall extend to *Wales* as well as to *England*; but our Law grants Commissions within the Realm of *England*, and so precisely prescribes it to bounds; and it may seem that the Parliament took it so in 1 *Mar. cap. 11.* where Commissioners of Sewers were authorized in the County of *Glamorgan*, which, as may be objected, need not, if *Wales* had been formerly comprised: and some new Statutes, as that of Alehouses in 1 *Jac. cap. 9.* and that of Rogues, 1 *Jac. cap. 7.* extend the same to the Realm of *England*

England and Dominion of *Wales*, as if *Wales* should not be contained in the words, (the Realm of *England*) yet notwithstanding in my opinion this Statute of 23 H. 8. extends to *Wales*; for although the Statute of the first of *Mary* gave power to Commissioners in *Glamorganshire*, that was for a special purpose, which, as was conceived, the Statute of 23 H. 8. did not in *England* extend thereunto, that as for the carrying away of the Sand which was thrown upon their Grounds; but in that Statute it may well be perceived, that the Statute of 23 H. 8. was of force there; and inserting the words, *Dominion of Wales*, in the said Statute of Poor and Rogues, was rather of superabundance to satisfy some which might *nodum in scirpo querere*, make a doubt where none was, than that they were there put for any necessity requiring the same: But I am of opinion, that in this new-sprung-up Island the Laws of *England* are there in force, because when it was Sea, the same was under the Government of these Laws; and although the nature and quality thereof be changed, *viz.* dry Land for full Sea, yet the same Laws and Government remain in force; so that I hold this new Island within the Statute, and that the property thereof is the King's.

Now occasion and time gives me fit opportunity to treat of Grounds which be newly gained from the Seas. If, as I have formerly declared, the Grounds be the King's when they be covered with Waters, it must needs be held an infallible ground, that they be also the King's when the Waters have left them dry; and when the Waters had their being on the same, the whole Profit there arising did appertain to the King; yet I have known in some Countries where the Frontagers have claimed those Grounds so left, by a pretended Custome of Frontagers, and some probable reason might be shewn, wherefore they should have the same; for as their Ground was nearest the Sea, and so next to the charge to repair the Defence, and next to the loss where any overflow happened, it might therefore seem reasonable, that as they were put to the greatest charge,

charge, and in peril of the loss of their Lands, that so if Lands were left by the Sea affront them, that these Lands might accrew unto them as a reciprocal consideration for their charge and loss; but I take it that of late the Law hath in these Cases been oftentimes ruled for the King against the Subject; for at *Croft* in the County of *Lincoln*, 1600 Acres were gained from the Sea, affront the Manor of *Sir Valentine Brown* there, yet he was put to obtain a grant from the King thereof: and one *Bushey* of *St. Kegneys* claimed Grounds left by the Sea, by the said pretended Custome of Frontage, but they were decreed against him in the Court of Wards, in 12 *Jac. R.* in which Case I was of Counsel: For it were inconvenient that the Subject should have Frontage, and yet no bounds prescribed thereto; so that ten thousand Acres might be left affront a Man's Manor, which were not fit a Subject should have this large Inheritance by pretence of such allowed Custome; and I suppose I may herein say in this Case, as *Mr. Plowden* doth of his Silver Mines, That it is inconvenient a Subject should have the Silver Mines in his Grounds, for so might he become richer than the King.

So it is not fitting that a Subject should have the Grounds left by the Sea, when so much may happen to be left as the King's own Lands in the Realm come to; and so because *nimum se exaltat in prerogativam Regis*, I am of opinion the new gained Grounds from the Sea appertain to the King as a Royal Escheat, and not to the Subject; but in my Case here is a prescription where the owner of the Manor hath *Incrementam & decrementum Maris*; of what force this is, is now to be argued; therefore I will now declare what interest a Subject can or may challenge in the Seas, in Grounds gained therefrom.

Personal profits arising on the Sea, Subjects may have and challenge by custome and prescription, as to have free Piscary on the Sea; and a Parson had Tythes of Fish gotten in the Sea by the Inhabitants of his Parish; and yet the Sea, nor any part thereof is not in any Parish, but it followed the person.

In

In Sir *Henry Conſtable's* Caſe, the Citizens of *Briſtol* claimed Flotſan (which be goods floating in the Sea) by cuſtome, in *Bracton*, cap. 12. one alledged to be diſcharged of Toll or Cuſtome on the ſeas by preſcription, in the Caſe of the Swans; in Sir *Edward Cook's* 7. Report, one preſcribed to have game of wild Swans at *Abbot-berry*, in a Creek of the Sea, which is a member or arm of the Sea: and in Sir *Henry Conſtable's* aforeſaid, it is taken and received for Law, that a Subject's Manor may extend to the low-water mark by preſcription.

*Sir Henry
Conſtable's
Caſe.
Bracton.*

*Caſe of
Swans.*

So it was reſolved and adjudged by all the Barons of the Exchequer, 16 *Car. 1.* in *Ca. ſcacc.* in a cauſe by Engliſh Bill between the King's Attorney, and Sir *Samuel Roll* and others. That the Soil whereupon the Sea flowes and reflowes, ſcil. between the High-water mark and Low-water mark, may be parcel of a Manor of a Subject. *Roll abr. Prerogative Le Roy, 170.*

*Sir Samuel
Roll's Caſe.*

And ſeeing all theſe a Subject may have in and on the Seas wherefore then ſhould he not have all the grounds left by the Sea by preſcription? To that I answer, That he cannot have claim in any thing by preſcription and cuſtome, but that which lieth in uſe, which is the life of them both; but Lands, and Grounds which have alwaies been Sea, could not be nor lie in uſe, and therefore they cannot be claimed, nor the ſame can be bounded out by preſcription or cuſtome; yet Lands between the high-water mark and low-water mark the bounds thereof may be preſcribed to belong to, or to be parcel of the Manor, becauſe in every 12 hours, or in every day they lie dry, and ſo a Subject all that time may have uſe of them, and ſo of all the reſt of the ſaid things, but in that which never lay in uſe, no cuſtome or preſcription could take hold on, inſomuch that in my Opinion, no preſcription nor cuſtome can fetch Lands farther than the low-water mark.

H

Grounds

Grounds left.

115. Eliz. Dyer
326.

43. E. 3.

BUT now what grounds shall be said a leaving by the Sea, is a point in my Case also, for it is certain that at spring-tides the Sea useth to overflow the *Marshes* in *Lincolnshire* and *Norfolk*, and returneth within a short space again; these being usual and annual, be not accounted grounds left or gained from the Sea; so because the *Marshes* in *Lincolnshire* and the *Sands* in *Lincolnshire* be overflowed every 12 hours, and then dry again, they are not accounted grounds left or gained from the Sea, because the Sea hath daily her recourse thereon: and therefore in 15 and 16 *Eliz.* in *Dyer* fo. 326 in the Case there was a quantity of ground was left by the Sea, and whether the King, or he whose grounds were adjoining should have them, was there made a question; but in that Case there is an excellent president set down, very apt for the handling of this point, put in 43 E. 3. *Contra Abbat' de Ramsey de quodam processu in Scaccario facto versus dict' Abbat' ad ostendendum quare Sexagint' acra marisci in manus dom' Regis non debent sesciri quas predict' Abbas appropriavit sibi & domui sue sine licentia Regis super quandam presentation' virtute cujusdam generalis Commission' de terris à Rege detentis & concelatis. Abbas respondit quod ipse tenet maner' de Brauncest quod situatum est juxta mare et quod est ibid. quidam mariscus qui aliquando per fluxum maris minoratur & aliquando per defluxum maris augetur absq; hoc quod appropriavit sibi prout per presentation' predic' supponebatur.* And the Attorney of the King maintained the contrary, and thereupon the King and the Abbat were at an issue; so by the Case I gather these matters:

First, That if by little the Sea sometimes decrease and leave some parcel to the Land, and some other times run over the same again, this ground belongs not to the King; for these be grounds whereto the Subject may have a property, as in the grounds of the shore, but otherwise it

is.

is where great quantity of ground which had always been drowned before is left, that belongs to the King.

Also by this president the Law was taken to be, that these grounds left by the Sea to the Land, were in the County of *Norfolk*, whereto they did adjoin, and in my opinion within that Parish whereto they lay; for there was a Presentment, which was by a Jury of *Norfolk*, and the Jury taken to try an Issue must be *de viceneto ejusdem comitatus*: but note there, the Presentment was by a Jury *de Corpore Comitatus*, in 22. *Lib. Affis. pl. 93.* The Case was, That *Lib. 22. Aff. pl. 93.* a River of water did run between two Lordships, and the soil of one side, together with the River of water, did wholly belong to one of the said Lordships, and the River by little and little did gather upon the soil of the other Lord, but so slowly, that if one had fixed his eye a whole day thereon together, it could not be perceived; by this petty and unperceivable increase, the increasment was got to the owner of the River; but if the River by a sudden and unusual flood had gained hastily a great parcel of the other Lords ground, he should not thereby have lost the same: and so of petty and unperceivable increasements from the Sea, the King gains no property, for *De minimis non Curat Rex*; but put the case the Sea overflow a field where divers mens grounds lie promiscuously, and there continueth so long, that the same is accounted parcel of the Sea, and then after many years the Sea goes back and leaves the same, but the grounds are so defaced, as the bounds thereof be clean extinct and grown out of knowledge, it may be the King shall have those grounds; yet in Histories I find that *Nilus* every year so overflows the grounds adjoining, that their bounds are defaced thereby; yet they are able to set them out by the Art of *Geometry*.

But if the bounds can be known, in such Case, if the Sea hath overflowed a man's Land for forty years, and then goes back, he shall have

his Land again, and not the King. *Mich. 7 Jac.*
Roll abr. 168. per Coke & Foster, Roll abr. Prerogative Le Roy.
 168.

The Prince
 Count Pala-
 tine of Che-
 ster.

Barkley's
 Case.

These grounds in my Case which are left by the Sea, and lie from the haven next to the shore, are as I have formerly delivered it within the County Palatine of *Chester*; and therefore whether the Prince or the King shall have them, is now my question: The Prince hath not onely *Jura Regalia*, but also *Escheta Regalia* within his said Palatinate, and so in my opinion is not onely owner of the County, but Lord of the Prerogatives there, and all Jurisdiction is to the Prince, onely a Writ of Error lieth in the King's Bench of a Judgment there, like an Appeal to *Cæsar*, then he is Lord of those Laws by which the Freehold and Inheritance of those lands be ruled, wherefore then should not these lands belong to his Grace? And first it is usual to have a Commission directed to enquire of these Lands *ut de terris concelatis*, and this inquiry shall be by Commission; if that Commission be to issue out of the County Palatine of *Chester*, then the Lands would questionless fall to the Prince, and the enquiry to be made of the Freeholders of the said County Palatine. The Case put in *Barkley's Case* in the *Comment. of Mr. Plowden, fo. 129.* doth force much against the princes Title; for there it is put, that the Bishop of *Durham* had Liberties and Privileges in *Terris suis inter Fluvios de Tyne & Tese*, and afterward purchased more Lands between these two Rivers, the said Liberties and Privileges shall not extend thereto; and so if one have a Warren in his Lands in *Dayle*, and he purchase other Lands there, his Warren cannot be extended upon these new purchased Lands, for saith the book, *Things or privileges confined to certain Precincts or Dominions, cannot be extended farther, though the Dominion be enlarged, and that they shall not be enlarged with the enlargement*; but the County Palatine vested in the Prince, is prescribed within no other bounds than the word County doth confine it; and therefore this falling to be within the County,

County, should be properly his, and as I am informed, the Prince hath special words therefore in his Charters, if it were granted that these grounds could be claimed by Charters; but I am clear of Opinion, That no increase of the new left grounds can possibly become within the County of the City of *Chester*; for the bounds thereof cannot extend over that circle which their Charter hath confined them to: and so for the causes and reasons formerly declared, I take it, That the said Island is the Kings, the ground left between the haven and the ancient shore, belongs to the Prince as Earl of *Chester*; and the shore because of the said prescription appertains to C. the Subject as parcel of the said Manor; and so according to my said conclusion of my Case, here the King hath a part, the Prince a part, and the Subject a part of the grounds left by the Sea.

My Tenets therefore be these:

First, that the Subject may have the grounds of the Sea to the low-water mark, and that no Custome can extend the ownership of a Subject farther.

That a Subject cannot have the grounds to the low-water mark, but by custome and prescription, and I take it that it is very disputable whether grounds before they be relinquished by the Sea, may be gained by Charter and grant from the Crown; I suppose they may.

That the words *incrementum & decrementum maris* are fully described by the said Record of 43 E. 3. of the *Abbat of Ramsay*: that is, That if the decrease of the Sea be by little and unperceivable means, and grown onely in long tract of time, whereby some addition is made to the Frontagers grounds, these by these words may appertain to the Subject; and herein the said words have no other operation, but Lands left to the shore by great quantities, and by a sudden occasion and perceivable means, accrew wholly to the King.

That

That the increase to the said County Palatine, for the causes aforesaid, doth appertain to the Prince as Earl of Chester.

The Shore.

Bracton.

Justinian.

Cicero.

Mat. 13. 2, 3.

BUT now I am arrived at the continent, and the first ground I set my foot on is the shore, which in *Latine* is called *Littus Maris*, it taketh the name wholly from the Sea, as partaking most with her nature, and so *Ex digniori parte appellatur*; yet it is not all one with the Sea, nor with the Land, but participates with them both: And Mr. Bracton in his second Book, Chap. 12. saith, That *Littora Maris accessoria*, what the shore is appears by Justinian the Emperour in his *Institutes*, lib. 2. pag. 141. and is there thus defined, *Littus Maris est quousque maximus Hibernicus, & jus fluctus eluderet & quousque fluctus Maris in estate longius exestuat*; and with this agreeth Cicero *Topicorum*, The shore is not counted for lands or grounds gained from the Sea, or left by it, because at every full Sea it is covered with the waters thereof. In the 13th Chapter of St. Matthew's Gospel, ver. 2, 3. it is said, That our Saviour Jesus went into a ship, and sat there, and the whole multitude stood on the shore, and he spake unto them: Hereby it appears, that the shore was the dry land, because they stood thereon; and it was a great quantity of ground, for thereon stood a multitude, and it was near the brink of the water, because they heard Jesus speak unto them out of the ship. In point of property and ownership it is the King's, as Lord of the Seas; but as Sir Henry Constable's Case is, a Subject may have the same, as belonging to his Manor by prescription. In the Imperial Law which the Civilians use, the Sea shore is held to be common to all, and that it is as lawfull for Diogenes the poor Cynick, as Cræsus the rich King, *Casam.* 161. *Ponere & retia siccare*; but our Commonlaw of England doth in reason much surpass either the Imperial Law or the Civil Law, in distinguishing upon these; for it is said, *Rex in ea habet proprietatem* sed

sed populus habet usum ibidem necessarium: so that as to the lading and unlading of Ships, and for drying of Nets there, and for other necessary busineses, the Subjects have these uses therein, but the soil and grounds thereof belong properly *dom' Regi*. And a Subject may have the same by prescription, and therefore such as hold the shore to be the extreme point both of Land and water be in a great error, for as *Justinian* saith in his *Institutes*, *Quod gemmae & lapilli preciosi inveniuntur*, which can be taken no otherwise *sed super terram aqua relictam*: so that this shall suffice to have said concerning the Sea shore.

Sea Coasts.

THE coasts of the Sea come next in order to be treated of: *Costera maris* be words well known, but their confined definition is hard to be found out; yet certainly they contain the shore and banks, for by the Statute of 27 *El. Chap.* 27 *Elix.* 24. an Act was made for the mending of the banks and Sea works on the Sea Coasts; but in the 7th. *Chap.* of *Maccabees* *Maccabees 7^e* Coasts have a larger extent, for there *Demetrius* Son of *Seleucus* departed from *Rome*, and came to a City of the Sea Coasts; here a whole City is set on the Sea Coasts: and in *Justine* treating of *Alexander* the great, it is reported of him, *Justines.* that he entred into *Lycia* and *Pamphilia*, and won and conquered all the Sea Coasts: this could be taken for no less than whole Countries; for *Alexander's* great mind and huge Army, could not march on a Mole-hill, or small tract of ground: In *St. Mark. Chap. 7.* it is thus written, *That Jesus departing from the Coasts of Tire and Sidon, came to Galilee*, so that it may thereby be gathered, That these Coasts were near the Sea, for our Saviour was no sooner out of the Coasts but he was on the Sea, which shews that Sea and Coasts be *contiguè Facientia*, yet no certain definition can I find of the words *Coasts of the Sea*, but by these and such like descriptions; yet this I gather and collect thereby, that in respect of the whole World, a whole Kingdom lying next may be said to be a Sea Coast,

Coast, and a whole County in respect of a Kingdom; and in my opinion the next Town and Territories thereof lying next to the Seas, be in our Law taken to be the Sea Coasts and no other; and therefore some do much err which take Coast to be the edge of Land next the water, and shore to be the brinks of the water next the Land *quasi duo opposita*.

And because Creeks, Havens and Ports be all of them within the charge of this Law, and this Statute was materially made in defence thereof, and as they differ in appellation, so they vary in definition, yet they do in some things agree in the material; I will therefore deliver my opinion of them.

Creeks.

Creeks of the Sea is an Inlet of Sea cornered into the main Land, shooting with a narrow passage into some Angle of the Land, and therein stretching it self more than ordinary into the Land, and so holdeth not even quarter with the Levant Sea; and such Creeks or Inlets we commonly term in the Law to be Arms of the Sea: for like as the Arme of a man shooteth out from the Body, so by a metaphor the inlet or corner of the Sea let into the Land, is called an Arm of the Sea; and although it go far into the land, yet the points of Land on both sides may well be discovered: and this appears in that great Arm of the Sea on *Humber*, where it runs betwixt *Lincolnshire* and *Yorkshire*, the points of either County may be seen at once, and seem to stand even over the one to the other.

Arm of the Sea.

AND an Arm of the Sea is said to extend into the Land so far as the flow and reflow goeth: In the Patent of the Admiral of *England* I find this word *Creek* used; for there the King granteth to him *omnia bona mercimonia & Cattalla in vel super Mare littora crecas & Costeras Maris*, but it differs

differs much both from the ſhore and coaſt; for a ſhore is ſometimes dry Land, and ſometimes water, a Coaſt is always dry Land, but the Creek is always Sea and new Land: In the Statute 28 H. 8. Chap. 15. *Raſtals* Piracy, A. It is that all felonies, &c. done upon the Sea, Haven or Creek, where the Admiral hath Jurisdiction, ſhall be tried in ſuch County which the King ſhall appoint; by the Statute it is manifeſt that the Creek is not all one with the Sea, nor the ſame that a Haven is, by the Statute made in the 4 H. 8. cap. 20. *Raſtal* 4 H. 8. c. 20. Merchants, 5. appoints that all Merchandizes entring in or going out of the Realm of *England*, ſhould be charged and diſcharged in great Ports, and not in Creeks or ſmall arrivals; by which Statute it is apparent that a Creek is not all one that a Port is: But yet here it ſeems to be an Inlet of the Sea where Ships may have their arrivals, as at *Foſdyke*, *Stow*, *Wainſlet*, and ſuch like; and I take it that a Bay and a Creek be all one, and that a Mere and a Fleet be alſo of that nature, and that all theſe rather vary in words than in matter.

28 H. 8. c. 15.

Diverſity between the Shore.

A Coaſt.

A Creek.

Creek.

Bay.

Fleet and Mere.

A Port.

A Port is a harbor and ſafe arrival for Ships, Boats, and Ballengers of burthen, to fraught and unfraught them at, as by the ſaid Statute of 4 H. 4. appeareth: In the *Iriſh Reports*, Fol. 56. Ports be ſaid to be *Oſtia & Januæ Regni*; I take a port to be ſome ſpecial place in ſome great Borough, where arrival of ſhips be, as the Cinque Ports, which be *Dover*, *Sandwich*, *Rye*, *Rumney* and *Wincheſey*; the moſt famous in this Realm, and theſe be places of great privileges: and *Boston*, *Hull*, *Lyn* and *Plymouth*, be alſo Ports and Port Towns, where there are ſpecial Offices and Officers belonging to them, touching Merchants and Merchandizes: And the ſaid Statute of 4 H. 4. directed that Merchants ſhould be charged and diſcharged at great Ports, was for that there were Officers for the King, deputed to receive His Highneſſ's Customs and profits thereupon ariſing; hereupon came that Officer called

Hollingshead. Cro. p. 120.6.

Cambd. 244. led Portgreve, which signifieth the Governour of the Port, as Mr. *Cambden* noteth page 244. the difference between a Creek, a Haven, and a Port, be these;

Diversity between a Creek, Haven and Port.

A Creek is a corner of the Sea let into the Land farther than ordinary, and more than the Sea is, but it is no usual or accustomed place of arrival for ships; and commonly it hath neither safe harbor nor legal privilege.

A Haven is properly a safe place of harbor for ships, but may be without any privilege at all, of which kind I know some.

And a Port is not onely a safe harbor for ships of the greatest burthen, but it is also always graced with legal privileges; and this appears so by the Statute of *Magna Charta*, cap. 9. *Quod omnes Communitates & Barones de quinq; portibus & omnes alii portus habeant omnes libertates & liberas Consuetudines*, which proveth my former definition of Ports to be true.

After all these definitions and distinctions, I have now prepared my Case ready to receive his censure upon the last conclusion; that is, That all the said grounds were within this Statute, but no part thereof within this Commission of Sewers: and therefore it is first to be noted, That these grounds were left by the Sea since the awarding of this Commission, and the words of the Preamble of this Statute speak of grounds heretofore won; which words (*Heretofore won*) seemeth to tie the Statute and Commission, both to grounds left or won before the said Statute, and not such as be won after, like to the Statute of *West. 2. de Donis conditionalibus quod ad dona prius facta non extenditur*, which excludeth out of that Statute all gifts made before. And the words (*Heretofore and hereafter*) are words of consequence in point of time; and wheresoever they are spoken, they come with an *Emphasis*, as if they required express obser-

observance; and so is the Statute of 32 H.8. cap. 28. of Leases, that Statute is of all Leases hereafter to be made by Tenant in tail, with such cautions and proviso's as be limited and set down in that Statute, should be good: But Leases formerly made, though all the proviso's in the said Statute were observed, were notwithstanding by reason of the said word *Hereafter* out of the relief of that Statute.

And so in the Statute of *Will's* 32 H. 8. which had these words in it, *All persons having Lands, or which hereafter should have, might devise*; this did not make good any devises of Lands made before: but if this should pass for current, then I should not perform my word in my conclusion, which puts it all within the Statute; and this exception, if it were material, would not put it onely out of the Commission, but the Statute also; yet notwithstanding though the construction made of all the said former Statutes, stand with Law, by reason of the said words (*Heretofore and hereafter*) yet in this Statute of Sewers, the same be not material, neither be the said words (*Heretofore won*) to be precisely observed, because they be placed in the Preamble of the Statute, and not in the enacting part of the Law, as in the said former Statute they were: And expositions are not tied to Titles and Preambles, which many times comes short of the parts of the Law, but to the Body and enacting part of the Statute, which is the matter and substance: And hereupon the Statute of 21 H.8. cap. 15. of Leases recites in the Preamble thereof, *That whereas divers Leases had aforetime been made for Incomes and great Fines, and yet after the Lessors did suffer Recoveries, if at this day a Lease be made, and that without Fine or Income, yet such a Lessee shall be received to falsifie the recovery had against his Lessor notwithstanding*: The Preamble of that Statute seems to remedie no Lessees, but such as made Fines and were made before that Statute, but the said words were not put in the Body or enacted part of the Statute: And so it is in our Statute; the words (*Heretofore won*) be onely put in the

preamble and not in the material part of the Law, and so the Exposition is not to be tied hereto; so notwithstanding this Exception, these grounds though gained since the Statute, are within the relief thereof.

The second cause wherefore these new grounds should not be within this Law, is, Because these Lands be increased beyond the bounds since the making of these Laws, and so it may be alledged that they cannot extend to the new enlargement: for Mr. Plow. in his *Com. fol. 129.* saith, *That Laws and privileges tied to a certain Place or Precinct, cannot be extended or enlarged beyond the ancient Bounds, although the Precinct be enlarged.* As the Case in 7 H. 6. fol. 32. where in a *Nativo habendo*, a Villain had remained a year and a day in *London*, which was ancient Demesne, and there was a privilege, that every Villain and Bondslave which had remained a day and a year in *London*, the Lord might not seize him; and the Villain pleaded that he had remained a year and a day there, and so took himself to be within that privilege; but because since the said liberty granted the Bounds of *London* were much increased, therefore it was there held, that the said liberty and privilege did not extend to the new enlargement. And the Case is also put in the said *Comment.* that the Bishop of *Durham* had divers liberties in his Lands lying between the two Rivers of *Tyne* and *Tese*, and after he purchased other Lands there, the said liberties did not extend to the said new purchased Lands; and the like Law is if one have a Warren in his Manor and Lands in *Dale*, after he purchase more grounds there, his Warren doth not extend unto them. And so where one had by Charter the Lands of persons forfeited for Treason, he could not have by the said ancient Charter, Lands forfeited for Treason by Tenants in Tail, because the Forfeiture of them was given by a late Statute since the Charter, but *his non obstantibus*, I am of Opinion, That this Statute I now treat on extendeth to these new gained grounds: and I take a difference between a special Law of Privileges, and Liberties which is stin-

ted or bounded either by Statute, Charter or Custome, the same can by no construction be made to exceed the Bounds; but the general Law of this Kingdom, as this Law of ours is, the Extents thereof be as large as the whole Realm is, and they be not tied to stinted Limits, as particular private Charters and Customes be; and so I conclude, That in point of Extent, this Statute of 23 H. 8. is tied to no other Bounds than to the Kingdom of England.

Diversity between Grounds gained and Grounds left.

THE third matter is that which I have grounded the conclusion of my Case upon, and that is, Whether the grounds in my Case newly left by the Sea to the shore, and the Shore be such Grounds as be within this Commission; And in my Opinion they be not: And therefore to maintain my Opinion herein, I take a difference between Grounds left by the Sea, and Grounds gained from the Sea; for Grounds left are of no value, and bring forth no Fruit or encrease at all, but the uppermost part thereof are Sand, which these Laws take no hold of; for the Commission extends onely to Grounds won and made profitable for the Commonwealth of this Realm, which *Terra relicta* yields not, for no profit at all thereof ariseth, till the Sand be inned and gained; and these Laws made the Commissioners *Sauers* and not *Gainers*, and therefore did extend the Commission but to the uttermost Banks and Walls, and left the Shore as Grounds possessed by the Sea, and so be put *pro indefenso* by this Law; and therefore I do make my Conclusion as followeth:

First, That the Seas, Creeks and Bays are all within this Statute in point of extent; but that they and the shores, and the relinquish'd Grounds, be all of them out of this Commission of Sewers to be dealt withall thereby.

Secondly,

2. Secondly, that Ports and Havens are totally, the Waters, as well as the Walls and Banks thereof, within the Commission of Sewers.
3. Thirdly, the shore and grounds left by the Sea when they are put as in Gainage, are then and not before within the power of the Commission of Sewers.
4. Fourthly, although the Grounds left by the Sea are not in point of defence within the Commission of Sewers, yet a Wall or Bank may be thereon raised for the aid and succor of the Countrey, but not for any cause where the defence extends but to themselves. And although Grounds have been gained from the Sea in the County of *Lincoln* and elsewhere in this Realm, yet that was done at the labor of private men, and not by the Commission of Sewers, which aims at the general good, and not at private Commodities.

So that *Super totam materiam*, I am of Opinion with the conclusion of my Case, that is, That the said new Island is the King's, the grounds left to the shore pertain to C. the subject; and that because they are all of them within the Realm of *England*, they are therefore within the extent of this Statute: But in regard they are Grounds left onely, and not gained nor made profitable for the Commonwealth of this Realm, they are not therefore within this Commission. And so I conclude my Argument as I did my Case: in which, I hope, I have neither injured the Subject in his private Inheritance, nor wronged Prerogative in any point.

Finis Primæ Lecturæ.

Initium

Initium Secundæ Lecturæ.

FOrasmuch as the first day I went perambulation about the Sea, and of all which belong to her Empire and Dominion; wherein I did survey her Bounds, her Qualities and her Government: Now I do intend to go a Progres through the Land, and to take a view of the fair goodly Rivers, which make their voyage to the Sea, for these my Statute hath taken into her protection. And this second day I purpose to call a Court of *Oyer and Terminer*: And I do intend, with your gentle patience, to examine all the particulars there arising. And because the said Statute of 23 *H. 8.* must be my chief guide to direct my fairest passage through these uncouth ways, I will pray aid thereon; and I will now proceed to declare what business on Land this Law hath undertaken to defend, and what offences it purposeth to reform: And accordingly the said Law doth distribute it self into these particular Branches:

First, { Into matters of defence
this Statute maintain-
eth, are these follow-
ing, *viz.*

1. Walls.
2. Banks.
3. Ditches.
4. Gutters.
5. Sewers.
6. Goats.
7. Calceys.
8. Bridges.

Secondly,

2.

Secondly,

Into matters of Offence
which this Statute termeth Lets, Impediments and Annoyances which are to be put down or reformed, as cause shall require;

1. Streams.
2. Mills.
3. Ponds.
4. Fishgarths.
5. Mildams.
6. Locks.
7. Hebbingweres.
8. Hecks.
9. Floudgates.
10. Other like Lets and Impediments.

And to the end I might fully examine this part of the Statute which produceth these matters, I have framed a Case, which doth give occasion in this days exercise to dispute of all them.

The Case for the Second Lecture.

Second Case.

A. Leaseth his Manor in the County of *Lincoln*, in which be Copyholds, to *B.* a younger Son for his life, upon Condition to have it for the life of *C.* upon Condition to have it to him and the heirs of the body of his Father. A Copyhold is forfeit, the first Condition is performed, the Commissioners of Sewers in that County upon view survey, and by their discretion decree a new bank where none was before to resist the Sea, and a new River to be cut to drain the superfluous waters in *S.* and an old Sewer in *D.* to be repaired; and by Inquisition assesses *B.* the Lessee for the Manor, the Copyholder for the Copyhold Land, and the Town of *S.* and also the Parson there for his Tythes, because they lie all in the Level; the second condition is performed, *B.* enters in the Copyhold.

My conclusion is, That this new Bank, new River, and old Sewer be well decreed, but the said Sess is void *in toto* & *in qualibet parte*.

Points

Lectura Secunda.

65.

Points at the Commonlaw.

The Points of this Case are three at the Commonlaw, and three upon the Statute; but all of them are so woven within another, that every one of them go hand in hand from the beginning to the end of the Case.

Imprimis, Whether the Duplicate Condition be good, or not? 1.

Secondly, what Estate *B.* the younger Son hath by the first Condition, and what Estate he hath got by the second? 2.

Thirdly, a Copyhold becomes forfeit to the Lord, and before the Lord take advantage of it his Estate is changed, Whether by the change of his Estate the benefit of the forfeiture be lost, or not? 3.

Points upon the Statute.

Imprimis, Whether Commissioners have power to decree a new Bank, a new Drain, and other new defences, or not? And herein the qualities and properties of Rivers, Streams and Banks, and their dependants, are to be treated of. 1.

Secondly, Whether they may decree the said new Defences by view and survey? And herein is to be handled, What Commissioners of Sewers may do by survey, and what they may do by their discretion, and what they may do by Jury. 2.

Thirdly, in what Cases Assesses and Taxes may be laid and imposed, and on what things, and in what manner they are to be imposed; and whether the Rates set upon the persons in any case be well done or not, and where the fault is if any be. 3.

Argumentum Lectoris.

Seeing it hath been the ancient order for the Reader of this place to maintain the Conclusions of his Case, I shall therefore endeavor my self to perform that order which Custom hath imposed upon me; and accordingly as I have concluded, so I take the Law to be.

And touching the first Point, it hath been challenged and drawn in question upon some Opinion delivered in the Re-

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ctor

Sir Ed. Cook's
1 Report. *Stor of Cheddington's Cafe in Sir Edward Cook's first Report;*
where it's ſaid, *That one contingent cannot depend upon another:*
But more ſtrictly it is called to an accompt in the Lord Staf-
ford's Cafe, in Sir Edward Cook's eighth Report; for there
it is held, *That one poſſibility cannot depend upon another poſ-
ſibility;* and this Cafe is there put, *That if A. let Lands to B.*
*for years upon Condition to have it for life, and upon Condi-
tion to have Fee, that the Fee ſimple can never increaſe by the*
ſecond Condition; but as he ſaith in another Cafe, *Amicus*
Plato, Amicus Socrates, ſed magis amica Veritas, his rule taken
in the firſt Cafe is very general, and the Lord Stafford's
Cafe admits diſtinctions, which in my Argument I ſhall ap-
ply my ſelf unto.

And ſome differences I ſhall take in this Point in queſti-
on; therefore I ſhall thus diſtinguiſh, That if upon per-
formance of the firſt Condition, the Original Eſtate be de-
termined upon which both the firſt and ſecond Condition
were built and grounded, the ſecond Condition and in-
creaſe thereupon is utterly void; but if the firſt Eſtate be
not deſtroyed nor confounded upon the firſt Condition per-
formed, the ſecond Condition and Eſtate thereof which
ſhall be gotten thereby, may then well grow upon the old
ſtock. To explain this by Example, If *A.* give Land to
B. in Fee ſimple, upon Condition to have the Land in Tail,
upon Condition to have for life; here becauſe the firſt E-
ſtate and Livery by the firſt Condition is not deſtroyed,
therefore the ſecond Condition ſhould well ſtand in force.
So I do make a Leaſe to *A.* for twenty years, upon Con-
dition to have the Land for forty years, upon Condition to
have Fee; this firſt Condition and ſecond Condition may
have both their full Operations: for by the performance of
the firſt Condition, the Leaſe of twenty years is not de-
ſtroyed, but ſtands on foot; and therefore the original E-
ſtate remaining unconfounded, the Fee ſimple may well in-
creaſe by the performance of the ſecond Condition: But if a
Leaſe be made to *A.* for his life, upon Condition to have in
Tail, upon Condition to have Fee; the ſecond Condition
here

here is utterly void, because by the performance of the first Condition, *A.* had an Estate in Tail, which drowned and destroyed his Estate for life; and so because every decreasing and increasing Estate is to depend upon the first Estate which receives the Livery, which is the life of all, therefore the Second Estate can never accrew in this Case: and this is the true reason, as I take it, of the said Case put in the Lord *Stafford's* Case; for there the lease for years was destroyed by the Lease for life, which came by the first Condition, and so the Fee simple there could never accrew by the second Condition. And in answer to the said general ground taken in the Rector of *Cheddington's* Case, *That one contingent or possibility cannot depend upon another*; under favour I take it, not that I am bound thereby, neither was it the meaning of Sir *Edward Cook*, as I take it, to extend the same so largely as they are there put, because I find many Authorities of great account which are against the said general position.

And first in the 38 H. 8. Br. *Feoffments*, pl. 71. a Feoffment was made to the use of *A.* and his heirs, untill *J. S.* paid him Ten pounds, and then to *J. S.* and his heirs, and so to the third person; and what is this but one condition, contingent and possibility to depend upon another, for these contingents there were held good, and were built upon a sure foundation.

And so in *Digge's* Case in Sir *Edward Cook's* Reports, where a Feoffment is made to the use of *A.* and his heirs, with power of Revocation, and after of new Limitation of Estates; these be also contingents and possibilities depending upon others, and many such double contingents may be put.

The Case of Sir *Edward Cook* put in the end of the Rector of *Cheddington's* Case out of 12 Lib. Aff. pl. 5. in my opinion doth not disallow the second Condition; for there the Case is, *That A. Leased to B. upon Condition, That if A. or his heirs pay to B. Ten pounds within a certain day, that they might re-enter; and if A. nor his heirs should not pay the Ten*

pounds within the time; Then if B. paid to A. Ten pounds at another day, that he should have Fee: Both A. and B. failed in payment, and A. entred, and being put out, brought an Assize, and nihil Cepit per breve; this doth not prove that one condition cannot depend upon another, neither can I see well what Exposition to make of so uncertain a Case, so that I take this Case to be no evidence against mine.

14 H. 8. f. 15. But in the 14 H. 8. fol. 15. there is a Case which in my opinion makes more against my double condition than any other, which is put by *Brudnel* Chief Justice; that is, If A. be bound in an Obligation to B. upon condition to infeoff J. S. before *Easter* ensuing, then the Obligation to be void; and if he do not infeoff him, then to pay Ten pounds at *Pentecost*, then the Obligation to be void; The Feoffment is not made before *Easter*, therefore *Brudnel* held the Obligation was forfeit, and that the second Condition was not good: But there is a (*Quere*) set upon that Case, and so it may well be, for I see it commonly done, that if a defesans be made of a Statute which is broken, and so the Statute becomes forfeit, yet a new defesans may defeat it; and so in my Opinion may the second Condition in this Case avoid the Obligation, if the first conclusion had not been in the Case.

A Conceit. I shall add this Case also as a conceit; that is, A. infeoffs B. upon condition, if A. go to *Lincoln* he shall have the Lands to him, and the heirs of his Body, and if he go to *Boston* he shall have it for Ten years: and he goes first to *Boston*.

I do here hold these Conditions being put promiscuously, without distinction of the times of the Conditions which shall be first performed, and which the second, that the Fee is decreased into an Estate for years, and can never increase into an Estate in tail by performing of the second Condition, because the Livery out of which it should grow was quite destroyed by the first decrease. So that my intent appears, that one Condition may depend upon another upon the said distinction; but whether by the performance of

of the first Condition in my Case there will an Estate come to *B.* or not, I meant it for a question: for *B.* had before an Estate for his own life; then is it not possible that his Estate can hereby be increased by having the Land also for the life of *C.* if it be admitted *argumenti gratia*, that *B.* shall or may have both these Estates stand in him both at one time: for if *C.* dyed first, then is *B.* never like to have any benefit thereof; And if *B.* himself should die before *C.* then also were it impossible for *B.* to make any use of this Estate for the life of *C.* unless it were in him to grant away to another, as in the Case of the Office in the 1 *H.* 7. where an Office is granted to the King, the King could not have the Office himself; and so in that point for the King to take by the grant, he could not, yet by that Book it was in him to grant over to another which might have it. And like to this is the Case where *J. S.* is Parson of the Church of *Dale*, and the Patron grants the next avoidance, this grant can he himself take no benefit by, unless he resign, yet if he die it shall come to his Executors.

1 *H.* 7. 29.
Croft's Case.

But I take the Law to be in my Case, that *B.* shall not by the first Condition have both the Estates in him at once, that is, for his own life, and after for the life of *C.* but that the Estate of *B.* by the first Condition, shall be decreased or changed from his own life into the life of *C.* and shall be melted and newly molded by this Condition; for an Estate may as well decrease as increase by a Condition: and yet the Lord *Stafford's* principal Case was; That *Queen Elizabeth* beth did grant the Manor to *Tindal* and the heirs of his body, upon Condition upon payment of Twenty Shillings to her by *Tindal*, that he should have the Reversion to him and his heirs; and there it is holden for Law, that by the payment of Twenty Shillings, the Reversion in Fee Simple shall increase to *Tindal*, and shall not alter or drown the Estate Tail, which is an excellent Case; but alter the putting of that Case, and then it may alter the Law also, that is, I give Land to *J. S.* and the heirs of his body, upon Condition if he pay me Twenty Shillings, that he shall have the said

A Conceit.

said Lands to him and his heirs: In my conceit by the performance of this Condition, the Estate Tail, is by increase changed into a Fee Simple; in which, note the difference between *Tindal's Case* and this, where upon payment of 20 s. the Reversion is granted to him and his heirs: and where the words be, *That upon payment of Twenty Shillings he shall have the Lands to him and his heirs*: In the first Case, the Fee Simple accrewing shall not alter the Estate Tail, but in the second Case, by the Fee increasing, the Estate Tail is determined and changed into a Fee Simple, *quod quære.*

*Littleton. E-
state-tail.
4 & 5 Ph.
& Mar. Dyer
156.*

Admitting the first Condition did increase the Estate of *B.* from his own life to the life of *C.* and the second condition is performed, by the which another Estate will accrew to *B.* as I take it will, because an Estate decreased, is parcel of the first Estate; than what Estate *B.* hath got by this new Limitation, is the question: And in my Opinion, he hath at the most but gotten an Estate again for his own life, and that the Limitation to the heirs of the body of his Father is utterly void, be his Father dead or alive; for if his Father be dead, his elder Brother is the heir of his body, within these words of Limitation, who cannot take the Lands by descent from *B.* his Brother, or from his Father; but as the Case is put in *Littleton's Title Tail*, and in the 4 and 5 *Ph.* and *Ma.* in *Dyer*, *Greswold's Case*, where Lands were given to the eldest Son, and the heirs of the body of his Father; this is a good Estate in Tail, being made to the eldest Son, because he is capable to take the Lands in both degrees.

(Although about the duration of such an Estate Tail, there hath been a question, *viz.* whether if the eldest Son die without Issue, his Brother shall inherit by force of this intail, or the Lands shall revert to the Donor. *Dyer supra. Leonard 2. Case 29. Rosse and Morrice's Case.*)

And

And in 2 E. 3. the Case is famous, and is known by the name of *Roberges's Case*, where Lands were given to her and to the heirs of the husband of her body begotten; and it was there held, That if her husband were then dead, and left any heir which he had by her, they might take jointly with her; for that it was not possible to take by descent from the said *Roberges*, because he which takes it must not be heir to her, but to the husband, who never held any Estate therein: And so to be short, I am of Opinion, That no Estate of inheritance be gained by *B.* by these words, *The heirs of the body of his Father.*

The Case upon the third Point is this, a Manor is granted to one for his life, upon condition to have it for the life of *C.* then a Copyhold is forfeit, and before the Lord seize, his Estate is altered or changed; if now he can take advantage of this forfeiture or not, wherein the altering of the Estate of one to another is of like force, as where it alters in the Partie's self, against which it may be said, *That if Tenant for life make Waste, and then he in the Reversion, grant over the Reversion, the Grantee shall not now punish this Waste.*

And it was resolved in the Case of *Chamberlin and Drake*, Mich. 1657. that the succeeding Lord of a Manor, shall not take advantage of waste done in the time of the preceding Lord. *Siderf. 2. 9.*

And so Mr. Perkins, fol. 20. *If a Tenant alien in Mortmain, and then the Lord grant away his Seigniorie, the Grantee shall not enter for this Mortmain:* so by Fitz. in his Nat. bre. in his admeasurement of Dower, *If a Guardian assign to a woman more dower than she ought to have, and then grant his Guardianship over, the Grantee cannot have an admeasurement of Dower against her:* and so *Bingham's Case* in Sir Edward Cook 2 Rep. where there was Tenant for life, remainder in Fee of a Tenancy holden by Knights service, and he in remainder died, his heirs within age, and then the Lord granted away his

2 E. 3.

Third Point.

Perkins, f. 20.

Fitz. Har.

Nat. bre.

Bingham's

Calc. Cook

2 Rep.

*Boltonham's
Case in Dyer.*

his Seigniory, and then Tenant for life died, by which the said heir was to have been in ward; yet because the Seigniory was granted away after the inception of the Wardship, before it was perfectly due, it was there held, that neither the grantor nor the grantee should have the same: So Lessee for life without impeachment of waste, remainder for his own life, the privilege is lost; but yet notwithstanding, I do hold that in this Case *B.* after he hath by the performance of the Condition altered his Estate which he had when the forfeiture was committed; yet shall he afterwards take advantage thereof well enough: As if there be Tenant for life, the Remainder for life to *J. S.* and the first Tenant for life commit waste or forfeiture, he in the reversion cannot punish this during the life of him in the Remainder for life, but after his death he may; also if one make a Lease for years, upon Condition to be void, and the Lessor grant away his reversion, the Grantee may enter for breach of this Condition by 11 *H. 7. 17.* and yet here the Estate in reversion is altered from one to another; and I doubt not, but if a Tenant for life, be the Remainder in Fee to another of a Manor, and a Copihold is forfeit, and then Tenant for life died, that he in Remainder may enter into this Copyhold; and yet this Estate is altered into a possession from a Remainder; and in the Case, although the Estate in *B.* be altered, yet it is by decreaser, and so thereby it is parcel of the old Estate he had before: and therefore it is like to a Case where the husband and wife were Tenants in special Tail, and they recovered by Assize, and then the husband died, and after his death without issue, the wife's Estate being altered from an Estate Tail, into an Estate of possibility of issue extinct, was again put out and disseised, and she brought a Writ of Redisseisin, which will not lie but on the first Estate, and against the first parties, and yet it was maintained, because it was parcel of her former Estate: And so in this Case, although the Estate of *B.* was altered from his own life into the life of *C.* yet I am of Opinion, That he might take
advan.

2 *H. 4. 17. 69*
26 *H. 6. title*
Aid, pl. 77.

advantage of this forfeiture, because the Customary Estate is utterly void thereby.

Points upon the Statute.

I am determined before I enter into the discourse of new defences in my Case, to deliver my Opinion touching the Walls, Banks and other ancient defences, which have had their being time out of memory, and in truth be the very materials and memorials of Antiquity: And because Banks and Walls be the first named in the Commission, they shall therefore have the first place in my argument, being the most ancient and approved defences, as well against the rage of the Seas, as against the violence of fresh Waters, that either Art or Nature have produced.

Bank.

THE Bank of the Sea is the utmost border of dry Land, and is of the same materials with the grounds wherein and whereon it standeth; it is sometimes natural, and in some places artificial: Natural, as Mountains raised higher than other grounds adjoining as it pleased the Creator, when the first huge *Chaos* was separated, divided and distributed; Artificial, when it is cast by man's hand. *Justinian* the Emperor treating of these in his *Institutes*, and his title *de rerum divisione* describeth them in this manner, *Riparum usus est publicus illar' verò domin' ad eos pertinet qui proximior prædiis domini sunt, itaque naves ad eas appellere, funes arboribus ibi natis Religare, onus aliquod in his Reponere cuilibet liberum est*, by which authority it appeareth, that the ownership and property of the Sea Bank and Banks of great Rivers, be to them whose grounds are next thereto adjoining, and the Trees, Grass and other things thereon growing, belong to the owner of the soil, but the use of the Banks is common to all the King's liege people, as to tie the ships and Boats to the Trees, and to tow them to and fro, and to lade and unlade their Merchandizes thereon, and for fishers to dry their Nets on. And as the owner of the soil

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and

Proprietas
Domino, usus
populo, potestas
Regi.

8 E. 4. 9.
27 H. 8. 27.
2 E. 4. 9.

and proprietor of the grounds, cannot justify the digging or casting of them down, whereby the people shall be hindred of their necessary use thereof, no more can the people which have but *necessarium usum*, fell up the Trees, or mow the Grass thereon growing, neither ought they to dig ballast there, but every one, as well owner as user, *Sic uti suo ut alienum non lædat*. I cannot more aptly compare a Bank of the Sea, or of a navigable River, than to a High-way, for that the property thereof is to him whose ground is next adjoyning, and the use thereof is common to all men, and the power thereof the King hath by His Laws, *Proprietas Domino, usus populo, potestas Regi*: where-
in for more clear Illustration of this matter, I put this Case, That J. S. doth cut the Sea Bank, or the Bank of a great River; and J. B. which hath occasion to pass thereby, falleth unawares into the cut, and is hurt in body or goods, the party which cutteth this Bank incurreth these mulcts: For first, the owner of the soil may have his Action of Trespas, *quare solum fodit*, and he which fell therein may have his Action upon the Case against the digger of that cut, for to recover his damage for his special hurt; and the offender may also be indicted at the King's suit for the general wrong done to the King's people: And the like Law is of a High-way.

A Wall doth differ in point of ownership from a Bank, first, in respect of the materials the same is made on, for a Bank is made *Ex solo & fundo quæ ex suis propriis naturis sunt eadem cum terra super qua edificatur*, but so is not a Wall, for it is an artificial edifice, not of the materials arising of the place where it standeth, but which be brought thither and built there, *ad propria onera & costagia partis*; so that the ownership and property of a Wall doth appertain to him who is bound to repair the same, though his ground lie not next thereto; but of a Bank the property and ownership is his whose grounds adjoin thereto: And this shall, I hope, suffice to have said of Banks and Walls, the two first defences nominated in the Commission of Sewers.

The

The letter of this Statute and Commission, seem to extend onely to Banks, Walls and other defences standing and being by the Coasts of the Sea and Marsh grounds there-to adjoyning; but whether the Banks and Walls of fresh Rivers which have their courses to the Sea be within this Statute or not, hath heretofore bred some question; but for my own part, I am clear of opinion that they be within the provision of these Laws, for there be two mischiefs recited in the Statute; the first is, for not maintaining the Walls and Banks against the Sea, by reason whereof great hurt hath happened thereby, by the overflowing thereof: and the other, by the inundation of fresh water-courses through Land-floods, which have done some damage to the grounds next adjoyning; and these Laws apply a remedy to both these grievances, that is, by repairing the Walls and Banks next the Sea, and by maintaining of the defences of the fresh Inland Rivers, to cause them to keep their Waters within their Channels. And I take it there be words in the Statute that will bear this construction, *viz.* That by the rage of the Sea, flowing and reflowing, and by means of the Trenches of fresh Waters descending, and having their courses to the Sea by divers ways the Walls, Ditches, Banks, &c. be so disrupt, lacerate and broken, &c. And also in the preamble of the Statute the words there be, that by reason of the outrageous flowing surges and course of the Sea in and upon Marsh grounds, and other low places heretofore through politique wisdom won and made profitable for the great Commonwealth of this Realm, as also by occasion of Lands, Waters, and other outrageous Springs, in and upon Meadows, Pastures and low-grounds adjoining to Rivers, Streams and Currents, wherein the Waters are to have their courses. And what keeps the fresh Waters within this Chancel but good and serviceable Walls and Banks, and what things doth this Law intend to be disrupt, lacerate and broken, but the Walls; Banks and other defences which pent up their Waters? and these Words extend more properly to the Walls and Banks of fresh Inland Rivers than to Sea Coasts. And I

Runney
Marsh.

do find some ancient Authority in the point out of the Charter of Runney Marsh, pag. where the Words be, *ad di-
striction' faciend' ad reparand' Wallia & watergaugia ejusdem
marisci contra maris impetum inundationem aliarum aquar' dul-
cium*; which last words can have no other construction or
interpretation, but to extend the same to the Banks and
Walls of navigable, and other fresh Rivers and Water-
gauges of fresh Streams. And the Statute of 1 H. 4. cap. 12.
makes the scruple clear wherein the words be, that the com-
mon passage of Ships and Boats in great Rivers of England,
were oftentimes disturbed by leaving of wears, &c. and
provided a remedy therein; so hereby it is manifest that fresh
navigable Streams are within these Laws.

Private Walls and Banks.

BUT all Banks and Walls wherein Waters be pent are not
within the provision of these Laws, but onely such as
belong to common and publique Rivers and Ditches, Sew-
ers and Streams: for Walls and Banks made and erected as
fences to mens private grounds, and there set or made to
Ditches, Gutters and Streams, for the draining and watering
of mens private grounds are not within these Laws, for
these Laws take cognisance and notice of none but of such
as tend to the good service of the Common-wealth, and
therefore whereas in the Ports of *Holland* in the County of
Lincoln, and in other parts of this Realm, divers private per-
sons have for inning and safety of their Marshes and Marsh
Grounds, cast great Banks for those private uses: these
Banks are not within the protection and defence of these
Laws to be maintained; but I am of opinion, That they
may be extirped if they be letting and a hinderance to
the common good of the Countrey where they be erec-
ted.

Forasmuch as I am now in hand with Walls and Banks,
the defences to Rivers, Sewers, Ditches and Gutters, I
therefore take it, that it will hold good correspondency here
in

in this place, to treat of them and of their dependences. A River therefore is a running Stream, pent in on either side with Walls and Banks, and beareth that name as well where the Waters flow and reflow, as where the Waters have their current one way, as is expressed in the Case of the Piscary of the Banne in Ireland: In the Statute of 4 H. 7. Chap. 15. ^{4 H. 7. 15.} Thames is termed a River: In 34 Lib. Ass. pl. 11. and in ^{34 L. Ass. pl. 11.} Plow. Com. fol. 129. Tyne and Tese be both named Rivers: ^{Pl. Com. 129.} and in 19 H. 7. Cap. 18. Severn is said to be a River; Trent, ^{19 H. 7. 18.} Humber, Boston Haven, Lyn Haven, and Tyber, Orontes, Euphrates and Aufidus, near which Hanibal the Carthaginian General struck the Battel of Canna, be all of them in Histories of great authority named Rivers.

Rennatus Choppinus in his Treatise de Dominio Francie, ^{Choppinus.} Lib. 1. Tit. 16. de fluminibus, saith, That Fluminum duo sunt genera, Regalia quedam, alia Bannalia sive privata, Regalia dicuntur ex quibus princeps Jure patrimoniali vectigal capit, in quibus modum & tempus piscationis constituit: and Sir John Davies in his Irish Reports in the said Case of Banne, saith, That so far as the Sea doth flow and reflow, it is a Royal Stream, and the fishings therein belong to the Crown; but where the same doth not flow and reflow, And in all Rivers not navigable the Tertenants of both sides, de Communi Jure, owe the River, and have the Piscary; yet a Subject may have the free fishing in the Royal Streams by Custome and prescription: And in the River of Thames tam aqua quam solum pertinuit Dom' Regi, and by Charter they were conveyed to the Lord Mayor of London, and Citizens of the same.

So the Soil of all other Rivers, as high as there is flux and reflux of the Sea, is in the King, if no other claim it by Prescription; ^{Siderfin 1. Siderf. 149.} 149.

In Lib. Intr. fol. 666. there is a president put in this manner, That an Action of Trespas was brought Quare le defend' piscat' est in sua separali piscaria & pisces inde, videlicet, ^{In veteri lib. Intr. fol. 666.}

cet, duos Salmones cepit; the Defendant justified, and said, That he was seised of the Manor of Dale, which doth extend it self *usque ad medium aquæ de V. quæ est eadem piscaria in qua supponitur piscationem predictæ fieri ex australi parte*, and that the Plaintiff *eodem tempore quo, fuit seistus de manerio de Dale quod se extendit usque ad medium fili aquæ predicæ ex boreali parte ejusdem aquæ & quod ipse defendens & omnes quorum statum ipse habet in predicæ manerio de Dale, à tempore quo non extat memoria hominum in contrario seistæ fuerant de predicæ australi parte de predicæ aquæ ut de separali piscaria sua*: in which pleading it appears, That the Lords on either side the River, owe the River by several moities, and the several moities and the several parts of the fishing as incident thereto.

Nat. br.
fo. 123.
P. C. 154.

It may also here, as I take it, be moved for an apt question, in whom the property of running Waters was; for in *Natura Brevium*, fol. 123. there is a *quod permittit habere liberam piscariam in aqua ipsius L.* whereby it appears, That the Plaintiff had property in those Waters; and in *Plo. Com.* 154. one granted *aquam suam in L.* and the Piscary passeth thereby, and so did the soil also in my opinion: for in 12 H. 7. fol. 4. a *precipe quod reddat* is brought *de una acra terre Cu' aqua Cooperta*. In my conceit the Civil Law makes prettier and neater distinctions of these than our Commonlaw doth; for there it is said, That *naturali ratione quedam sunt Communia ut Aer, aqua profluens, mare & litora maris*: I concur in opinion with them, that the Air is common to all; and I hold my former definitions touching the properties of the Sea and the Sea shores: But that there should be a property fixed in running Waters, I cannot be drawn to that Opinion, for the Civil Law saith farther, *quod aqua profluens non manet in certo loco sed procul fuit extra ditionem Ejus cujus flumen est ut ad mare tandem perveniat*; for in my opinion it should be strange that the Law of property should be fixed upon such uncertainties, as to be altered into *Meum, Tuum, Suum*, before these words can be spoken, and to be changed in every twinckling of an eye, and to be more

more uncertain in the proprietor, than a Camelion of his Colours. Our Commonlaw, which of all others is the moſt certain, did not ſet his property upon a Deer in Parks, Conneys or Hares in Warrens, nor on Fiſhes in running Streams; all which be more permanent than running Waters be: And therefore I am of Opinion, that taking this word *Aqua* for the bare running Water, there can be no property therein, but as the ſame is incident to the Soil, taking them two for one, it is drawn with the property thereof: and this difference is apparent by 12 Henry 7. afore ſaid; and Mr. *Linwood* puts a difference *inter Fluvium & flumen*; for ſaith he, *Eſt perennis decurfus aquar' ſed flumen eſt propria ipſa aqua.*

Let it not be held Queſtionable, whether Rivers of both kinds be within theſe Laws or not, though they be not put among the defences which this Statute ſpeaketh of; for that expreſſly thoſe things which are termed Lets and Impediments, are commanded by this Statute to be removed out of the Rivers and Streams for hindring the Waters; and Navigation being ſo carefully provided for cannot be ſupported, unleſs Rivers Navigable be maintained: and theſe Rivers are like the veins of a man's Body, by means whereof the increaſe of the Grounds near thereunto adjoining are abundantly multiplied, and the Waters which trouble the Level are conveyed away thereby: ſo that I am clear of Opinion, that Rivers and their Channels, Waters and Banks, are all of them fully within the defence of theſe Laws, howſoever ſome which would have no new Rivers caſt by the power of theſe Laws, would extend the words but to the repairs, and not to the River it ſelf.

Sewer.

Sewer.

A Sewer, whereupon these Laws took their name, hath been no great stranger to our Commonlaws of this Realm, being perfectly described, though not precisely defined in our Law; some mincing the word, compound it of two words, *Sea* and *were*, saying, that *nomina sunt consonantia rebus*; and there is some coherence between the name and the nature of the thing. Authorities in Law will best decide the question, and therefore 20 H. 6. f. 1. an action of waste is brought there against Tenant by the courtesie, for suffering a Sewer in part of the grounds to be unrepaired, by reason whereof his grounds in *L.* which the Defendant held by the courtesie of *England*, were surrounded; so that by this book it is made manifest, that the Sewer is a fresh Water trench compassed in on both sides with a Bank, and is a small current or little River. And in 12 H. 4. fol. 7. an Action of the Case was brought for stopping of a Sewer in *Dale*, by reason whereof the Waters did overflow the Banks, and drown the Plaintiff's Meadow Grounds: So these two Cases sufficiently declare what a Sewer is; and *Hollingshead* in his *Chronicle* termeth the Fleet Dike in *London* a Sewer; and I am of opinion, That it is a diminutive of a River, and by expresse words Sewers be within these Laws, & sic est in 39 H. 6. 31.

Gutter.

A Gutter is of a less size, and of a narrower passage and current than a Sewer is; and as I take it, a Gutter is the diminutive of a Sewer: and the difference between them is, That a Sewer is a common publick Stream, and a Gutter is a straight private running Water; and the use of a Sewer is common, and of a Gutter peculiar, and by expresse words also a Gutter is within these Laws, & ceo est sic mention 39 H. 6. 31.

Ditches.

Ditches.

A Ditch *Fossa* is also described in our Books, as in 12 H. 4. 12 H. 4. 7. 7. where an Action upon the Case was brought against the Mr. of S. Marks in *Bristol*, for that he was bound by the tenure of his Land to cleanse a Ditch there; he did neglect to doe the same, by means whereof the Waters therein were stopped, and did thereby surround the Plaintiff's Grounds; so that hereby it is apparent, That a Ditch is a kind of current of Waters in *infimo gradu*. And Mr. *Cambden* in *Sua Lincolniensi Historia* doth there describe *Fosdike* to be *Fossa incibus quam Henricus Primus per septem milliaria à Withania in Trentum perduxit ut Lincolniensibus ad subvehenda necessaria usui esset*; this Ditch is at this day a current and passage for Boats of small burthen in Winter, but in Summer none at all, though of late great sums of Money have been expended thereupon, *Sed tamen adhuc nihil inde boni venit*: at the best it is the worst in all that Countrey, and is of so slow a current *ut non videtur currere omnino*: It serves in many places for a fence to divide Lordships, and is a great trough to swallow up Waters thereabouts, which otherwise would lie upon the Level, and of it I shall say no more, but *Spero meliora & expecto*.

Other famous Ditches there be, as that in the North-east part of the City of *York*, which is in a manner a standing Water: And there is an old forlorn Dike on the Fen sides in the County of *Lincoln*, called *Caredike*, more ancient than profitable, for it doth, as many other of those unusual Ditches do, run cross to the ordinary currents of Waters in those parts: For where the Seas (for example) stand East from the main Land, and so the ordinary currents run all from West to East directly towards the Sea, this runs North and South, obviuous and cross to the natural current of the Waters, which is the true cause wherefore their currents be so slow, small or none at all. There is another of them on *Newmarket Heath* *quæ admiranda Fossa vocat'* the Devil's

M

Dike:

Dike: and in *Wiltshire* there is a Ditch famous, called *Wansdike*, or *Mercurii Fossa*, which serves for a division of Countreys, and so be *Fossa Limitania*, and are either altogether dry Dikes, or contain commonly no more Waters than those that fall into them: None of these Ditches be within these Laws, but such of them which have a kind of current, and which in some sort partake with the Rivers.

Pools.

A Pool is a mere standing Water, without any current at all, and hath seldom or never any issue to convey away the Waters; but a Ditch hath no constant standing, nor any apparent current: A Pool is properly the Inheritance of some private, but a Fosse or Ditch is in use common. Pools be not within this Law for two causes; the one, because both in property and use they be private and peculiar: The other is, because these Laws seem to extend to grounds casually, and not continually drowned & *ad ea quæ frequentius accidunt Jura adaptantur*; yet all Pools be not excluded from the helps of these Laws: for such as adjoin to great Rivers, and lie upon the sides thereof without division, they are in a manner part of the Rivers; and of their kind are the two famous Pools called *Brayford* and *Swanpool*, both near unto the City of *Lincoln*.

Ponds.

A Pond is a standing Ditch cast by labour of man's hand in his private Grounds for his private use, to serve his house and household with necessary Waters; but a Pool is a low plat of Ground by nature, and is not cast by man's hand. I find a Pond within my Law I read on in *expressis terminis*, not as a thing defended thereby, but as a Let and Impediment: And had I not found him therein named, I should not by any Exposition have here brought it in amongst the Water Instruments; for I much marvell what Impedi-

Impediment a Pond can be at all, unless by casting of Trenches from the River to the same, it shall be a means to take thereinto some of the Waters of the River, and may thereby hinder Navigation; but this is far fetcht.

Streams.

Streams be not any of these, for all these have their proper peculiar Banks, Bounds and Channels, and are put in amongst them; but a Stream is properly a current of Waters running over the Level at random, and be not kept in with Banks or Walls, and so *Linwood* saith, that *Flumen* which is a Stream *nihil aliud est quam ipsa aqua.*

Conduits.

A Conduit or ought thereto belonging is not within these Laws in any sort, whether it pertain to a private person, or to a Town or Corporation.

Springs.

Springs I find within this Statute, but coupled with such a word, that they thereby seem to be excluded and exiled quite from claiming any privilege of defence by these Laws; for the word (*Outragious*) being joined therewith, doth signifie the meaning of these Laws to take them to be hurtfull, and not helpfull; but all this cometh of the word *Outragious*, which being but a quality annexed upon accident, may upon just occasion be taken away. And the word *Springs* of it self is both in appellation and operation, very beneficial for the Commonwealth: for I may justly term them the vital Spirits of many the great and Royal Rivers of this Kingdom, as of *Thames*, *Trent*, and such like: And therefore I am willing to let such of them as be not outrageous and hurtfull, to take up a place of defence within these Laws; for the *Trent* at the head is derived from Springs,

as many other Rivers be: and I give both the effence and assistance to them, and so in my opinion they are worthy the protection of these Laws: and I doubt not but the Waters issuing and gushing from the outrageous Springs, may by the provident and discreet care of the Commissioners be so ordered, as the same may be applyed and employed to necessary uses.

So now I have run through, like a swift Stream, the qualities of these Rivers, Gutters, Sewers and Ditches, and of all their dependencies, and wherein they are to have aid and assistance of these Laws of Sewers, being in truth the very Materials of these Laws: yet for a little better explanation of their several natures and kinds, I shall therefore put these Cases;

First, If the Town of *A.* want Water by the driness of the season for the use of their Cattel, or for other household affairs, as for brewing, washing and such like; and in the Town of *B.* which doth adjoin thereto, there is plenty of Waters, more perhaps than is necessary for use there, the Commissioners of Sewers have no power by any of these Laws, for any of the said purposes, to make any order or decree to relieve the Town of *A.* with Waters from *B.* for this Statute makes but two uses of Rivers, Sewers and Streams, the one for draining, the other for sailing; and being for neither of these purposes, the Commissioners have no power to deal therein.

But if two Towns do adjoin, and in either of them there is a River Navigable, and by accident one of them is dried up, and the other aboundeth with Waters, more perhaps than there is necessary use of; I am, in that case, of Opinion, that the Commissioners of Sewers have power by the Commission to make a Law or Ordinance to relieve the River which wants Waters, out of the abundance of Waters which the other River hath, in help and supply of Navigation.

But:

But put the case that J. S. keeps Boats for his own necessary uses and occasions, and for no other purpose, the Commissioners have no Warrant by their Commission to relieve J. S. with Waters for this his own private use, for that their power is the Republike; Yet if J. S. hath used with his Boats to carry and recarry for the common use of the people in general, then he is within the relief of these Laws.

The new Stream and cut which was now of late made and cast by Mr. Middleton from Ware to London, could not have been done by the power of these Laws because it was not made for the draining or sailing, but for household affairs, and therefore special Statutes were enacted to begin, continue and perfect that work in 3, 4 Jac. Regis; and after the Stream was effected, these two Statutes brought the same within the power of these Laws.

And now seeing my Law hath brought me in my argument and discourse among the things defended by these Laws; I shall now make a little digression from my Case, to treat of Bridges, and Calceys and Goats, the proper inventions and works of mens hands, and pertinent to this place to be treated of by the order of this Statute; and they be three material Instruments which this Statute by name hath been carefull to take order for.

Bridges.

Bridges are diversly taken in these Statutes, for some are thereby to be maintained, and other some are to be extirped or reformed as Lets and Impediments; wherein I think it not amiss for instruction, to open some other leading Statutes which have provided for them.

The first Statute of Bridges is in *Magna Charta*, cap. 15. *Magna Charta*, cap. 15.
nulla villa nec liber homo distringatur facere pontes nisi qui ab antiquo & de jure facere Consueverant tempore Henrici Avu nostri

nostr' this word (*facere*) is to be construed in the sense of *Reparare* or *Mannutenere*, for other construction it cannot have, And if this Statute should be in force, I take it that it would abate much the power of the Commissioners of Sewers; for it seemeth by the Letter of it, that either no Bridges were to be repaired, but such as were made in the time of *H. 2.* and before; neither should any be bound to repair them, but such as in His time had then used, and were bound to repair them: but this Statute is neither repealed, nor must be abridged, as not to extend to Bridges made sithence; and I take it, under favour, that it stands on surrounded grounds, which this Statute hath to do with; as also for such Bridges as the Statute of 22 *H. 8. c. 5.* hath power over, which are Bridges standing on High-ways, for both these Statutes do in my Opinion oppose the said Statute of *Magna Charta*: Howsoever Sir *Edward Cook* in his Cases of the Isle of *Ely* recites the said Statute as it were in force at this day; and if so, then the exposition must be made, as I take it, that all Bridges made and erected since are out of the inhibition of that Statute, or else that Statute is totally repealed: For otherwise all Bridges builded since should not be repaired, because no Person or Town should be obliged to do them: And then were the power of Commissioners of Sewers almost altogether inhibited, touching Bridges, and their hands closed up for meddling therewithall, but I take this Statute of Sewers in full strength to deal with such Bridges as come within the reach of it.

H. 2.

22 *H. 8. 5.*

Case of the
of *Ely*.

Bridges within the Law of Sewers, are such as lie on or near surrounded grounds, especially if they be not onely placed there for free passage, but also for strength, to defend the violence of the Waters, as many of this kind be; *viz. London Bridge, Rochester Bridge, the great Bridges at Lincoln, Boston Bridge, and the like;* and such as lie on Inland and high Countreys, over High-ways, as *Burton, Trent, Ware, Wainsford, Huntington* and such like, be within the said Statute of 22 *H. 8.* and I make little doubt of it, but all the said last mentioned Bridges are also with-
in

in the provision of the said Laws of Sewers, for they lie and are built over such Rivers as be all of them within these Laws.

The Statute of 22 *H. 8.* extends not to Bridges lying out ^{22 *H. 8.*} of High-ways, but the Statute of Sewers doth extend to such also: And therefore if a Bridge stand on a common Sewer, Ditch or Gutter which hath his current to the Sea, or to some River, the Commissioners of Sewers have power over such, either to repair the same, or to extirp it, as just cause and occasion shall require.

It appears by what hath been before said, our Reader was of Opinion that all Ditches (except dry Dikes) Gutters, Sewers, Streams and Water-courses, where no passage of Boats is used, nor lying by the Coasts of the Sea or Marsh-ground, are within the survey and correction of the Commissioners of Sewers. And he here saith the like of Bridges standing on any Common Sewer, Ditch, or Gutter which hath its current to any River. But yet, under favour this seems very questionable, upon the words of this Statute of 23 *H. 8. 5.* which speaks onely of Ditches, Gutters, Sewers and Streams by the Coasts of the Sea, or Marsh-ground; and is expressly contrary to the Statute of 3 *Jac. cap. 14.* whereby 'tis de- ^{3 *Jac. 14.*}clared that the Walls, Ditches, Banks, Gutters, Sewers, Gates, Cawseys, Bridges, Streams and Water-courses, in and about the City of *London*, where no passage of Boats is used, having their fall into the River of *Thames*, where it doth usually ebb and flow, and is used for free passage of

of Boats to the Sea, though they were as needfull to be surveyed, reformed and amended from noyance of the River of *Thames*, by the Commissioners of Sewers, as those Rivers, Streams and Water-courses, where the Water doth usually ebb and flow, and where more usual passage of Boats hath been, yet are not under the survey, correction and amendment of the Commissioners of Sewers, nor of any Statute of Sewers. And therefore by that Statute of 3 *Jac.* it is provided, that such Walls, Ditches, &c. within the limits of two Miles of *London*, shall be subject to the Commission of Sewers, and to all Statutes made for Sewers, and to all penalties in the said Statutes contained, as if the Water therein had ebbed, flowed, and therein free passage with Boats, and Barges to the Sea had been heretofore used.

So that by the Judgment of that Parliament, neither such Ditches, Gutters, Sewers, Streams, &c. where there is neither flux or reflux, or passage of Boats, though they fall into a navigable River which ebbs and flows, and is used for free passage of Boats to the Sea, nor any of their Walls or Banks, or the Bridges which stand on them, (other than such as the said Act hath provided for, *viz.* those which are within two Miles of *London*) are within the survey or jurisdiction of the Commissioners of Sewers.

Also

Also private Bridges are within these Laws, as if J. S. and his Ancestors, owners of such a House, have had and used to have a Bridge over a great or less River to the Church, and to his Pasture Grounds, or to his Common, this Bridge, and all other of this kind, are within this Statute of Sewers; *viz.* to be put down or reformed if they be Impediments to the Common-wealth, and also to be maintained, if thereby the same be any material defence against the rage and violence of the Waters, otherwise not, but for putting down such Bridges which have been by prescription, I hope the Commissioners of Sewers will be well advised therein, seeing time hath given great approbation of them, and therefore I shall handle this point more fully, when I come to treat of Lets and Impediments, where that part of this Statute comes most fit to be handled.

The Statute of 22 H. 8. extends to the repairing and amending of Bridges onely, but if it be fit to take an Arch away, or to add a new Arch thereto, or to erect and build a new Bridge where none was before, this is most fit to be done by the Commissioners of Sewers, whose power may be extended thereto.

All Bridges set upon Rivers by persons without authority, may be pulled down by the Commissioners of Sewers, and the parties punished; for no man ought of his own authority to be so bold with the common and High-ways or Streams, as to erect Bridges or other Engines thereon without lawfull Warrant.

Bridges in High-ways, where there is no Stream under, but onely some petty Land Stream at rain and wet seasons, these be dry Bridges, and be not within this Statute of Sewers, but yet they be within the Statute of 22 H. 8. if they stand on High-ways: In 14 *Jacobi Regis* it was found by In-
14 Jac.
 quisi- tion taken at the City of *Lincoln* in the Guild-hall there, before Sir *Thomas Grantham* Knight, and my self, and other Commissioners of the Sewers, that the great Bridge at *Brace-bridge* near the City of *Lincoln*, and standing upon the River
of

of *Wytham* thirty Miles from the Sea, was fallen into great decay, whereby Carts, Carriages and Men on Horse-back could not pass over the same, as in times past had been used, in defect of *Hen. Sapeots* Esq. who ought to repair a part thereof, by reason of his Manor of *Bracebridge*; and of *Bartholomew Gregge*, who by reason of his house standing at the Bridge foot, called the *Hermitage*, on the North side of the River, ought to repair another part; and of the Corporation of *Lincoln* who was to repair a part thereof; and of the Countrey of *Moreland*, who used to repair another part: And the same was decreed accordingly. But Mr. *Sapcot* without cause finding himself grieved thereat, preferred his Bill into the Exchequer Chamber against Sir *Thomas Grantham* and others, to be relieved therein; and did alledge, That the same stood far from the Sea, pretending thereby that the Commissioners of Sewers had no power to deal with the same: but at the hearing of the Cause in *Anno 16. Jac.* he was over-ruled in that and all other parts of this Suit.

A Calcey.

Register
F. H. N. B.
6 H. 6.

A Calcey or Calfway is a passage made by art, of Earth, Gravel, Stones and such like, on or over some high or Common way leading through surrounded grounds for the safe passage of the King's liege people, and these Calceys have always been expressed in the ancient Commissions of the Sewers in the Register, *Fitz. nat. bre.* and in the Statute of 6 H. 6. cap. 5. but not any Calceys be in these Laws, but such as be over surrounded and low grounds, as that of *Barston Bank*, *Southby Bank*, and such like: but touching Calceys lying in Towns and Villages which be in the high uplandish Countries, this Law doth not in any sort extend unto them, but all Calceys leading over the said Bridges, and near unto them, are provided for by this Law; yet no private Calceys are to be dealt withall by the said Commissioners.

Goats.

Goats.

GOats be usual Engines erected and built with Perculleses and Doors of Timber, Stone or Brick, invented first in *Lower Germany* and after brought into *England*, and used here by imitation, and experience hath given so great approbation of them, as they are now, and that with good reason and cause inducing the same, accounted the most usefull instruments for draining the Waters out of the Land into the Sea: There is a twofold use made of them, the one when fresh Water flows and descends upon the low grounds where these Engines are always placed, and whereto all the Channels where they stand have their currents and drains directed, the same is let out by these into some creek of the Sea; and if at some great floods the Seas break into the Lands, the salt Waters usually have their returns through these back to the Sea: Many of these Goats which are placed on High-ways, serve also for Bridges. This Goat is no such imaginary Engine as the Mills be which some rare wise men of late have invented, but this Invention is warranted by experience, the other is rejected as altogether chargeable and illusory: Yet these Engines seem to me not to be very ancient here in this Kingdom, for that I do not find them mentioned in any of the ancient Commissions granted, before this Statute did express the same; and surely this Statute was so curious in the special repetition of such defences *in specie* as it intended to defend and maintain, that I am of Opinion, it can scarce be drawn to extend to any other: And therefore I do agree with the Opinion of Sir *Edward Cook* in his Case of the Isle of *Ely*, that an artificial Mill, and such like new invented Engines, are not to be erected by the power of these Laws, but being once erected and proved by experience to be beneficial to the publique State, they may be continued and maintained by the authority of this Statute.

New Defences.

Hitherto I have proceeded onely in the handling and discourfing of the old and ancient defences which be helpfull both to Sea and Land: And therefore I am now defirous to enter into the argument of new defences, being a matter very fit and apt to be disputed on: And to give some warrant to my argument therein, I have fo compofed my Cafe, as both old and new be therein contained, wherein the point will be fhortly this, Whether the new River and new Bank mentioned in my Cafe, could be ordered to be made by the power and authority of thefe Laws: And thofe which would take a part to argue on the contrary, may alledge much matter, and many reafons to make good their arguments; firft, out of the words of the Law it felf, for thereby it feemeth, that this Statute can bear no fuch expofition by reafon; the words thereof literally taken, feem to extend onely to the old and ancient defences, and not to the erecting of new: And the words thereof in this point be thefe;

*Forasmuch as the Walls, Banks, Ditches, &c. by the rage of the Seas, and by the freſh Waters descending, be ſo lacerate, diſrupt and broken, the Commiſſion therefore doth authorize the Earls of Lincoln, Rutland and Exeter; Robert Lord Wilmoughby of Grimſthrop, Sir William Welby, Sir Thomas Grantham, and Sir John Hatcher, Knights, whereof three to be of the Quorum, to ſurvey and amend the ſaid Walls, and Banks, Ditches, &c. in all places neceſſary, and the ſame as oft as need ſhall be to make new: Upon theſe words of the Statute, do thoſe which argue againſt the new defences infer, that the Commiſſioners have not any power to cauſe new Banks, new Walls, or other defences to be erected; and ſo take a difference between the words *nova conſtruere*, & *de novo conſtruere*, the firſt extending to erect new ones where none were before, and the other purporting the erecting of a new one where before an old one ſtood: and*

the

the words which inforce this exposition, be penned strongly to that purpose; for first, they have power to repair and amend, What? such Walls and Banks as were before, and the same to build new; which words, *The same*, literally taken, must needs extend to such old fences as were before; and the construction being so made, excludes clearly the power to make new ones where none was before: and this exposition may be exemplified in other Cases of like quality, as in 22 H. 6. fo. 18. where it is said, *That if Lessee for 22 H. 6. years suffer a house to fall down, and before an Action of Waste be brought against him, he buildeth another in the same place where the former stood, of the same quality and quantity, that shall excuse him in the Action of Waste:* but so would it not have done if he had builded the same in all points answerable in another place, for the one is renewed, the other a new one: and in the 10 H. 7. fol. 18. in the Abbot 10 H. 7. f. 18. of Thornton's Case, the words in a Lease were, *That the Lessee should repair a Chapel leased to him, and the same de novo construere & constructam curare*, which words there bear the same sense in exposition: And the Statute of Magna Charta cap. 16. seemeth, touching Banks, to sway the same way; for there the Statute is, *Quod nullæ reperiæ defendantur nisi illæ quæ fuerunt in defenso tempore Henrici Regis avi nostri & per eosdem locos & eosdem terminos sicut esse consueverunt tempore suo*; this makes much against erecting of new Banks, if it be in force: for if no person should be bound to repair such as were built since that time, then were it vain to build new ones. Sir Edward Cook in his Case of the Isle of Ely, is strongly of the same Opinion, *That no new River should be made and cast by the power of this Commission*; for the case there is, *That the Commissioners of Sewers in those parts made an order and decree, That a new River should be cut out of the old River there called Owse, through the main Land seven Miles unto another part of the said River:* And the question there was, Whether the Commissioners of Sewers had any such power or not? and he there delivered his Opinion expressly, *That they had not?* and affirms it,

Magna Charta cap. 16.

Case of the Isle of Ely.

Fitz. Na. Bre.
fol. 225.
Regist. 252.

it, That it was dangerous and inconvenient that Commissioners of Sewers should have any such Power and Authority, for then they might thereby stop up the Havens, which are the Ports of the Realm: And for the justifying of this Opinion therein, he alledgeth *Fitzher. Na. Bre. fo. 225.* and the *Register, fol. 252.* that in case where a new River or Stream was desired to be made, the Writ of *ad quod damn'* was to be awarded, which should first be directed to the Escheator of that County, to the end he must enquire and certifie what damage it might be if such a Cut should be made, or a new Trench cast; and so concluded directly against the making of new Rivers and Drains by the Commissioners of Sewers. And truly there is one thing more which makes strong on that side, which is, That a new River, Drain or Cut, cannot be made but through some man's private Inheritance, and to the prejudice thereof, which is a matter very considerable: So that all these things laid together, might very well move Sir *Edward Cook* to be of the said Opinion, That no such new River or Drain could be made by the Commissioners of Sewers by the power of these Laws.

Argumentum in contrarium.

The Law it
self in words
extends to it.

The reasons and authorities put on the other part are weighty and ponderous, and require a very good answer; which I shall endeavour to give thereto: It is true, that the words of this Statute and Commission bear much with the said former exposition; So I hope to find words in this Statute also, which will tend as much the other way: And they be in the fore-part thereof, *viz.* That daily considering the great damages and losses which have happened in many and divers parts of this Realm, as well by the contagious flowing surges and course of the Sea, in and upon marsh grounds, and other low places heretofore through politique wisdom won and made profitable for the Commonwealth of this Realm, &c. And these grounds which have been so won, could not be so kept and preserved, but by banking and new fencing in; which proves directly, that the said new Banks and new fencing might be made for the inning and keeping

keeping of the said new won grounds: And also the Statute of 6 H. 6. cap. 5. gave the Commissioners of Sewers power to repair the ancient Banks, and Walls and Fences & *eadem*, & *alia de novo construere*; by which words the Commissioners which had their power from that Statute, might make new defences, as Banks, Walls and such like: And so is the opinion of Sir *Edward Cook* delivered upon the said Statute of H. 6. in his Case of the Isle of *Ely*, which being observed and granted, makes strongly for this part; for that the Statute of 23 H. 8. doth not onely confirm all former Statutes of the Sewers then in *esse*, but also gives authority to the Commissioners to do after the Tenor and effect of all and singular the Statutes and Ordinances before that time made: And although the said Statute of H. 6. was in time then expired, yet the form and effect of it may be followed and observed: And to that end I take this diversity between a Law repealed and a Law expired, for a repealed Law is made void and frustrate, as either unworthy or unnecessary for some respects to be any longer continued or put in execution, and therefore was forbidden to be used or practised; but a Law expired in time, though it hath lost his vigor and force, yet it is like a vertuous man deceased, his life and actions may be worthy imitation, though the date of days be at an end; but a Law repealed is like a man condemned for some Offence, whose Life and Actions are neither of them worthy Imitation, unless it be to doe the contrary: And the said Statute of *Henry 6.* was a worthy Law, which this Statute intended not to come short on, but to extend farther than the Limits of that Law did reach unto: also the said Statute of *Henry 6.* is used by Sir *Edward Cook* in the pleading of *Rook's Case* in his 5th Report, where he could make there no other use of it, seeing it was in time expired, than onely by way of imitation.

The expired Law of H. 6. giveth aid to this exposition.

Rook's Case.

Also we must conceive, that these Laws of Sewers are of great and urgent necessity and use for the good of the whole

The equity of this Law will help this exposition.

whole Commonwealth of the Realm, and therefore the intent thereof may be extended in exposition beyond the letter of the words; for the words be (*and the same to make new*) which according to the bare words in a literal construction, cannot extend to new ones where none was before, but to the reedifying of the decayed old ones; but the learned Expositor, whose constructions be not so much grounded upon the letter as upon the sense, may in equal justice extend the sense to new making, as well as to renewing of defences; for Mr. *Bract. li. 1. Chap. 3.* defineth equity to be *Rerum convenientia quæ in paribus causis paria desiderat jura & omnia bene coequiperat & dicitur equitas quasi equalitas*: And if the grave and learned Judges have in private affairs introduced this equity to direct, enlarge or diminish the letter of the Laws in the sense of construction, as by many Presidents we find in Mr. *Plow. Com.* in *Hill and Grange's Case, fol. 178.* and in many other authorities, *à fortiori* shall this Statute of 23 *H. 8.* be expounded with as much favourable equity as can be, to enlarge the letter of the Law in the sense of construction, because it tends so much to the advancement of the Commonwealth, *Et qui heret in litera heret in cortice.* And if the makers of the Law, when this Statute was put into the frame, had been demanded, whether their meaning was to have it extended to the making of these new defences where either just occasion or necessity did inforce it; they would have answered, That they so intended it; for the soul and life of the Law lieth in the sensible exposition thereof, and not in the bare letter, as Mr. *Plow.* also fully demonstrates in his *Com.* in *Easton and Stud's Case.*

Bracton.

*Hill and
Grange's
Case.*

And whereas it is formerly alledged, that the wariness of the Common-law was such in these Cases, that it admitted not one such new Trench, River or new Cut to be made, without the awarding out of the Writ of *Ad quod damn'* directed to the Escheator, an Officer sworn to enquire, first, what damage it might be if such a new cut or drain were made? and then upon his inquisition returned, there might

might be one made, if by the inquisition it were found convenient, else not to be proceeded farther in: But in answer thereto, being the argument set down in the said Case of the Isle of *Ely*, I am of Opinion, That there may be more wary and circumspect proceedings by this Commission, than in the *Ad quod damn'* by the Escheator; for there be many Commissioners which be all sworn, and in the *Ad quod damn'* there is but one, the Escheator, *plus vident oculi quam oculus & tutius est rem committere pluribus, quam uni*, and in my opinion, it is much better to commit this weighty business to many Commissioners of great gravity, experience, learning, wisdom and integrity, than to one Escheator, who may perhaps want all those vertues: And farther, whereas in the said Case of the Isle of *Ely*, it is inferred, or rather feared, that by giving this power to the Commissioners of Sewers, they may thereby stop up the Havens of this Kingdom; that fear is needless, for I find, that neither by the letter nor the sense of these Laws, any such exposition can be made, either to the stopping up or hindring of their currents and passages. But to proceed in my former discourse in making new defences: I know that in the 43, 43 & 44 *Eliz.* a great controversie did arise in the County of *Lincoln*, about the building and erecting of two new Goats at *Skirbeck* and *Langrate*, for the draining of the Waters out of South *Holland* Fens into *Boston* Haven; which work Sir *Edward Dimeock* Knight, did further what he might, by the strength of himself and his friends; and it was opposed by the Countrey of *Kesteven*: and the very exception thereto taken, was, That the Commissioners of Sewers could not by the power of their Commission make a Law for the erecting of these new Goats where never any stood there before: And that Case proceeded so far, as the same came in the end before the two Chief Justices, *Popham* and *Anderson*, who both delivered their opinions, that the said new Goats, if they were found to be profitable for the good and safety of the County, might be erected by the power of this Statute; but they then wished and advised, that the

Commissioners should be wary, provident and circumspect to advise deliberately before hand, that by the opinion of experienced persons in those affairs, the said new works should in all appearance seem to be profitable to the Commonweal, if they were effected; and that Commissioners should not in any sort make such devices at the suit, prosecution, and request of private persons for their private and peculiar good, who many times sought their own ends under pretence of the publick good. And a like great controversie did arise in 12 Jac. in the Counties of *Cambridge, Huntington* and *Northampton*, about the making of new cuts and drains in the Isle of *Ely* by the power of the Commissioners of Sewers, which being much opposed, the same came in the end to be heard before the King and Council, wherein this Order was conceived as followeth.

The King's Councils Order.

HIS Majesty's Attorney-general having according to an Order of this Board of the Thirteenth of *October* last, called unto him the King's learned Council; and taking information of such Complaints as were first exhibited unto this Board, touching sundry Suits and Vexations moved of late by certain obstinate and ill-disposed Persons, against His Majesty's Commissioners of Sewers, for the Counties of *Lincoln, Huntington, Northampton* and *Cambridge*, and their Officers and Ministers, for executing the Orders and Decrees of the Commissioners, to the manifest destruction and inundations of many large levels and parts of the said Counties: And having by their Lordships like Directions,
upon

upon advised consideration, weighed and compared the said late and undue proceeding with ancient Laws of this Realm, appearing in divers notable Records in the point now questioned, with the continual and concurrent practice of ancient and later Times; and also the Opinions of the Lord *Popham*, late Chief Justice, delivered in writing very exactly and fully upon the said Questions, touching the Power and Authority of the said Commission; and thereupon making report at large unto their Lordships this day in full Counsel, of the whole state of the Cause; Forasmuch as thereby it appeared, That these Inventions and Disturbances consist upon four Heads, wherein the extent of the Commission was questioned, upon pretext and conceit of Law: First, That the Commissioners of Sewers had not authority to cause new Banks, Drains or Sluces to be made where there had not been any before. Secondly, That they might not lay the Tax or Rate upon Hundreds, Towns or Inhabitants thereof in general, but upon the first presentment or judgment to charge every man in particular, according to the quantity of his Land or Common. Thirdly, That they had not power sufficient to commit to prison Persons refractory and disobedient to their Orders, Warrants and Decrees. And lastly, That Actions of Trespass, False imprisonment,

ment, and other Proceſs at the Common-law, have been brought againſt ſome of their Officers and Miniſters for executing their Decrees and Warrants; Their Lordſhips finding in their wiſedoms, that it can neither ſtand with Law, nor with common Senſe or Reaſon, that in a Cauſe of ſo great conſequent the Law can be ſo void of providence, as to reſtrain the Commiſſioners of Sewers from making new Works to reſtrain the fury of the Waters, as well as to repair the old where neceſſity doth require it for the ſafety of the Countrey, or to cauſe a charge upon the Towns or Hundreds in general that are intereſſed in the benefit or loſs, without attending particular ſurvey or admeaſurement of Acres, when the ſervice is to have ſpeedy and ſudden execution, or that a Commiſſion of ſo high a nature, and of ſo great uſe to the Commonwealth, and evident neceſſity, and of ſo ancient juriſdiction, both before the Statute and ſince, ſhould want means of coercion for obedience to their Orders, Warrants and Decrees, when as on the performance of them, the preſervation of many thouſands of His Maſteſty's Subjects Lives, Goods and Lands doth depend; It plainly appearing, That it will be a direct frustrating and overthrow of the Authority of the ſaid Commiſſion of Sewers, if the Commiſſioners, their Officers and Miniſters ſhould be ſub-
ject

ject to every Suit at the pleasure of the Delinquent in His Majesty's Courts of the Common-law, and so to weary and discourage all men from doing their duties in that behalf: For the Reason aforesaid, and for the supreme Reason above all reasons, which is the salvation of the King's Land and People, Their Lordships did order, That the Persons formerly committed by this Board for their contempt concerning this cause, shall stand committed untill they release or sufficiently discharge such Actions, Suits and Demands as they have brought at the Common-law against the Commissioners of Sewers, or any the Ministers or Officers of the said Commission; saving unto them nevertheless any Complaint or Suit for any Oppression or Grievance before the Court of Sewers, or this Table, if they receive not Justice at the Commissioners hands. And their Lordships farther Order, That Letters from the Table shall be written to the Commissioners of Decrees of like nature, when it should be found needfull, requiring, incouraging and warranting them to proceed in the execution of their severall Commissions, according unto former practice and usage, Any late disturbance, opposition or conceit of Law whereupon the said disturbance hath been grounded notwithstanding; with admonition nevertheless, That care be taken that there be

be no just cause of complaint given by any abuse of the said Commission.

Examinat' per Edmunds Cleric' Consilii.

Present at this Order making, were,

- | | |
|---|---|
| 1. The King's Majesty
in Person. | 9. Viscount Wallingford. |
| 2. The Archbishop of
Canterbury. | 10. Viscount Fenton. |
| 3. L. Chancelour <i>Elf-</i>
<i>meare.</i> | 11. Andrews Bishop of
<i>Ely.</i> |
| 4. L. Treasurer Earl of
<i>Suffolk.</i> | 12. Lord Wotton. |
| 5. L. Steward D. de Le-
<i>nox.</i> | 13. Lord Cary. |
| 6. L. Admiral Howard
Earl of Nottingham. | 14. Secretary Winwood. |
| 7. L. Chamberlain Earl
of Pembroke. | 15. Secretary Lake. |
| 8. E. of Arundel, Ho-
ward. | 16. Sir Foulk Grevil
Chancelour of the
Exchequer. |
| | 17. Master of the Rolls
<i>Cesar.</i> |
| | 18. Sir Francis Bacon
Attorney-general. |

All of them of the Privy-Concil.

This order is in some points legal, and may stand for a direction in matters of Law, and the other parts thereof may stand for a president of state; and it thereby plainly appeareth, that the King's learned Council were of opinion, That the said new works might be ordered and decreed to be done by the Commissioners of Sewers, and that the same had warrant from former presidents.

But

But the laſt allegation on the contrary party is very forcible againſt this argument, That by the making and erecting of theſe new Defences, the inheritances of private perſons are thereby prejudiced whereon they be built; yet as *Cato* ſaith, *Vix ulla Lex fieri poteſt quæ omnibus utilis ſit ſed ſi majori parti proficiat ſufficit*; and therefore this objection I thus Answer, That theſe new works are not to be undertaken but upon urgent neceſſity in defence of the Countrey, or for the ſafety thereof, ſo that the Commonwealth be therein deeply intereſſed and ingaged; and things which concern the Commonweal are of greater accompt in the Law, than the intereſt of private perſons.

And ſo it is 13 H. 8. fol. 16. That the Commonwealth 13 H. 8. ſhall be preferred before the private Eſtate, and for the good of the Commonwealth a private perſon ſhall receive damage, if otherwiſe it cannot be eſchewed; as a private man's houſe ſhall be pulled down, if the next houſe thereto be on fire, to ſave the Town; and the Suburbs of a City may be pulled down in time of War, to ſave the City; and Bulwarks may be raiſed on private mens grounds for defence of the Realm: And what greater Enemy can there be than the Sea, who threatens with his merciless waves to ſwallow up all before it, but that the hand of the Almighty hath tied and bound him in the fetters of his eternal decree, and given policy and means to man to keep him from invading the Land by artificial works, proper for ſuch ſervices? Therefore in my Opinion, by the very true intent and meaning of the ſaid Statute, and by a juſt, equal and reaſonable conſtruction, it ſhould lie in the power of the Commissioners of Sewers, upon juſt and urgent occasions and conſiderations, to make Orders and Decrees for erecting and making of new Banks, new Walls, Goats, Streams, Sluces, and other neceſſary Defences againſt the overflowing of the Sea; For *Ubi nova ſit maris incurſio ibi novum eſt apponendum remedium*, with this caution, That under the pretence of the Commonweal a private man's welfare be not intended to the charge, trouble and burthen of the Countrey: And with this

Pro ch. 8.
ver. 27.

this also, That where any man's particular interest and inheritance is prejudiced for the Commonwealths cause, by any such new erected works, That that part of the Countrey be ordered to recompence the same which have good thereby, according as is wisely and discreetly ordered by two several Statutes, the one made in *Anno 27 Eliz. Chap. 22. Rastal* 27 *El. c. 22.* Havens and Rivers, is where the Commissioners have power to compound and agree with the Lords and owners of the grounds through which the new Cuts are to be made; And the other 3 *Jac. Reg. c. 14.* for bringing the new stream to *London*: and although these Statutes hold not in the general case of Sewers, but are applied to the said particular matters therein expressed, yet they may serve as good Rules to direct our Commissioners to imitate upon like occasion happening.

In the Case of the Inhabitants of *Outwell, Newton* and *Tyd*, *Hil. 1649.* in *sup. Banc.* it was urged by *Twisden* of Council, with the said Vills, that the Commissioners of Sewers cannot order a new Wall to be made, notwithstanding what *Calis* here saith; and *Roll* seemed to incline to that opinion; but yet allowed the Commissioners Order, because it appeared that the Wall which they had ordered to be made was not wholly a new work; and so not within the Case of the Isle of *Ely*, which was for the making of a new work totally: *Style 192.*

But it was clearly resolved, *Pasch. 18 Car. 1. B. R.* That if an old Wall or Bank be thrown down by the violence of a Tempest, and that was straight, the Commissioners of Sewers may order a new one to be made there, in the form of
of

of a Horseshoe, or any other form: March 198, 199, 200.

The second Point upon this Statute.

It appeareth by my Case, That the Commissioners of Sewers did decree a new Bank to be raised, and a new River to be cast, and an old Sewer to be repaired upon their view, survey and discretion. The Words of this Commission upon which I framed this part of the Case be these (*videlicet*) *We have assigned you Theophilus Earl of Lincoln, Robert Lord Willoughby of Earsby, Sir George Manners Knight, Sir Philip Tyrwhit, and Sir John Wray, Knights and Baronets, Sir William Pelham, Sir John Read, Sir Edward Ascough, Sir Hammond Knights, Anthony Erby, Esq. Quor'*; the said Earl, Lord, and Sir George Manners, *we will to be three to survey the Walls, Banks, Drains, Sewers, &c. and the same to cause to be repaired, amended or put down as cause shall require, after your wisdom and discretions, and to doe after our Statutes; as also to inquire by the oaths of lawfull and honest men of those places where such default be.* By the Tenor of which words I conceive, That Commissioners of Sewers have power by their Commission to proceed three manner of ways; (*viz.*) first, By Survey: 2. By Jury: 3. By discretion; wherein it behoveth Commissioners of Sewers to know perfectly how to use and dispose of their powers with due understanding of these parts of this Commission and Law: And the better to prepare them herein, I shall take some pains to declare unto them what they may do by survey without a Jury, and what by Jury, and what by their discretion, without both survey and Jury.

View and Survey.

VIEW is the primary part of Survey, and Survey is much, but not altogether directed by view. It is true that View is of great use in the Commonlaw, and it is to be

Penington's
Case.

be done and performed in person, and such Views are taken in Trials of Assizes; yet by the 36 H.8. in *Dyer* f. 61. a very personal View needeth not in an Assize, if upon examination of the Jurors it may appear, that a competent number of them know the grounds in question, in such sort as they can put the party in possession if he recover; but in an Action of Waste, an express personal View is both required and requisite, for the words of that Writ directs the Sheriff *Accedere ad locum vastatum*; In a word, there is a diversity between a View and a Survey, for by the View one is to take notice onely by the eye, but to survey is not onely to take notice of a thing by the eye, but also by using other ceremonies and circumstances, as the hand to measure, and the foot to pace the distances.

And the Commissioners Surveyors have power to take information by examination of others: And although Judge *Fitz.* in 27 H. 8. fol. 28. holds a Surveyor of very small esteem in his power and authority, that is, That he may hear, see and say nothing, *Oier voier & rien dire*: Yet under the favour of that Book, I take a Surveyor to be of more esteem and authority; for by an old Statute made in 4 Ed. 1. *Rastal* Surveyors, first, he is there described to be a man which is to view the work, and to make inquiry, and to set down which be Copiholds, which be Freeholds, &c. whereby it appeareth, that a Surveyor is an actor, and not a looker on, as Mr. *Fitzherbert* would have him; so by these descriptions the Commissioners may inform themselves what is meant by the word *Survey*, put in the Statute: And many of our Statutes take notice of such an Officer as a Surveyor; For in the Statute of Bridges and High-ways, there be such Officers appointed; and in the Statute made for the erection of the Court of Wards and Liveries, there is a grave Officer appointed, who is called the Surveyor general of that Court, and he is a Judge in matters there handled.

And there is also an Officer in this Statute of Sewers, called a Surveyor, who hath no judicial power, but is meerly an Officer.

What

*What things Officers of Sewers may doe by
Survey onely.*

EVery thing which Commissioners of Sewers are to do, must be by the true understanding of their authorities; and this must be so done, that they make such distinctions, differences and applications as may stand with knowledge, skill and learning; or otherwise their proceedings will prove irregular: And therefore it is not onely meet to describe the Officer Surveyor as formerly I have done, but also his Office, which I now mean to do.

First, Commissioners of Sewers may view the Defences, and thereby may inform themselves which stands in need of repairing and amending, and which not; and wherein the defaults and defects appear to be, and what they be.

Secondly, they may by Survey take notice and knowledge, by conference with Carpenters, Masons, Smiths and other Officers, what things are fitting to be provided for effecting the works, and what sums of money will be spent for the finishing thereof.

Thirdly, the Commissioners may by view and survey, take knowledge of the lets, impediments and annoiances in the Banks, Walls, Rivers, Streams, Gutters, Sewers, and of the height and lowness of the said Banks and Walls; and may thereby discover and find out the wants, imperfections, weakness and strength of them, and so may cause the lets and impediments to be removed, and the wants to be supplied, and the weak places strengthened, as cause shall require.

Fourthly, also by Survey onely they may sufficiently inform themselves of the incroachment, and of the straitness, depth, wideness and shallowness of the Rivers, Streams, Gutters and Sewers, and may view the defects in these kinds.

These things I have produced, as proper to be performed by view and survey of the Commissioners.

And by *Herne's* opinion in his Reading, p. 3. a Man that is blind cannot be a Commissioner of Sewers, because he cannot view or survey.

And now I shall proceed to the rest.

Things to be done by a Jury.

1. **F**irst, what person or persons did erect and set up any let and impediments, as a Floud-gate, Mill-dam or such like, must be found by Jury; for here the words of the Statute are to be observed, which are these, *And also to inquire by the oaths of good and lawfull men of the said shire or shires, place or places, where such defaults or annoyances be, as well within liberties as without, by whom the truth may rather be known through whose default the said hurts and damages have happened, or who hath, or holdeth any Lands or Tenements, or Common of pasture, or profit of fishing, or hath or may have any hurt, loss or disadvantage by any manner of means in the said places, as well near to the said Dangers, Lets and Impediments, as inhabiting or dwelling thereabouts, by the said Walls, Ditches, &c.* So that the first Article is full within the words of this Statute; and therefore it must be done by Jury, and no other accusation is of sufficient strength in the Law to put a man to his answer. And herein the makers of these Laws did sagely, for how should Commissioners of Sewers take notice by view or survey of such things as are done or committed in their absence?

2. Secondly, if any Wall, Bank, River, Sewer, or other defence be defective by neglect or sufferance of such as should repair the same, the Commissioners of Sewers are to inquire by Jury in whose default the same happened.

3. Thirdly, the Commissioners are to enquire, What person or persons ought or be bound by Custome, Prescription, Tenure, Covenant or otherwise; or for or by reason of what Lands or Grounds he or they be tyed or bound to do the repairs, and where those Grounds do lie, and who be the owners thereof?

And

And if a Jury find before the Commissioners of Sewers, that one ought to repair a Bank, &c. which is decayed by the Sea, &c. and it be removed into the *King's Bench*. The Justices there will not quash the Inquisition, or grant a new Trial, unless the Person who was found guilty will first repair the Bank, of which he shall be reimbursed, if he be acquitted; And because the Lord *Dunbarr* refused so to doe, the Court of *King's Bench* granted a *Procedendo*, *Siderfin* 1. 78. And this stands with great reason, because of the damage which may happen, if the repair should be deferred, untill it were determined who ought to doe it.

Fourthly, also it must be inquired by Jury, What Grounds lie within the hurt or danger of Waters, either within the surrounder by the Sea, or the inundation of the fresh Waters, and to whom they do belong? 4.

Fifthly, and if a new Sluce, Goat or other defence is to be erected, built and made, or a new Sewer, Gutter or Trench to be cast, this may be determined of by the view and survey of the Commissioners, and so may the aptness of the places where they are to be set or cast, and the length, height, bredth and depth of them; for these things are proper for a view and survey: But what persons hold Lands and Tenements within the Level, which are fit to be chargeable thereunto, and the quantity of their Lands are to be inquired of by Jury. And these few causes I have put for example sake: and if any other fall out within the like reason, then they are to receive the same construction. 5.

Sixthly, in every case where an Amerciament is to be imposed, it must be by presentment of good and lawfull men upon 6.

upon their Oaths, *Et hoc per statutum de Magna Charta, c. 14. nulla miserecord' ponatur nisi per Sacramentum proborum & legalium hominum de viceneto, &c.*

Upon a presentment made by a Jury to the Commissioners of Sewers, an Order was made by them to reimburse the Dyke Reeves for money expended in repairing a Sea-wall, by laying a Tax upon divers Towns; which presentment, order, and the proceedings thereupon being removed by *Certiorari*, *Mich. 1649*. Exception was taken thereunto for that 1. It did not appear that the Breach was within the Hundreds whence the Jury came, and so they had no authority to enquire. 2. The Jury had onely power to enquire of things within the Hundred of *Wifbitch*, and it did not appear that *Newton* and *Tyd*, two of the Vills taxed, were within that Hundred; and so the Commissioners had exceeded their authority; and the presentment was quashed: *Style 185, 191, 192.*

The presentments at a Court of Sewers must be by the oaths of twelve men; and therefore is upon a *Certiorari* directed to the Commissioners of Sewers, they return a presentment to be *per sacramentum Furatorum* generally, without saying, twelve men, it is not good, because that for any thing appears to the contrary, it might be by two or three onely, where it ought to be by twelve, *March 198.*

Surveyors

Surveyors presentment.

BUT it hath been used, that Surveyors of the Sewers have made presentments of defaults of things governed by these Laws; but whether such a presentment be binding or not, is a good point. It is clear in my Opinion, that they can make no presentment, but such as happeneth within their view and survey, and what those things be they formerly appeared. They cannot present that J. S. is bound by prescription, custome, covenant or otherwise, to repair such a Wall, Bank or Sewer, for this is not within their Office. In *Kelloways Rep. f. 141.* there is a custome alledged, that two men within the provost might present the Articles of the Leet; But I doubt of such Presentment, though it have a custome to strengthen it: I take this difference, that an original presentment Surveyors cannot make, as to present J. S. that by the tenure of his Lands he ought to repair such a Bridge, Wall, Bank or other Defence; But the Surveyors may make a supplemental presentment; as for example, if it hath been presented before by a Jury, that J. S. ought to have repaired such a Ditch, and hath not done the same, and day is given him by the Commissioners of Sewers to doe the same, if the same be not repaired at the day, the Surveyor may present in this case the not repairing, because this is but an Oath of assistance, *ad informandum conscientiam Judicis*, for the amerciamment shall be imposed by the force of the said former presentment; and this latter presentment by the Surveyors, is onely to give the Justices notice of the Parties farther neglect, to the end they may impose the greater amerciamment: And a presentment by Surveyors is not traversable, being of so small esteem in Law, as our Law will not vouchsafe to take an issue upon it, for their act herein is not in the ordinary legal form.

*Kelloway's
Rep. f. 141.*

What

*What Commissioners of Sewers may doe by
discretion.*

Discretion is the herb of grace that I could wish every Commissioner of Sewers well stored withall, for the makers of this Statute had an intention to make it of great use, being literally nominated nine or ten times in this Law, and for this cause I have inserted in my Case; but note, that the word *Wisedom* is coupled with it, and the word (*Good*) is annexed to them both, as best shewing of what pure Metal they should be made of, *After your good Wisedom and Discretion.*

There be three severall degrees of Discretion, *Discretio generalis*, *Discretio legalis*, *Discretio specialis*.

1. *Discretio generalis* is required of every one in every thing that he is to doe or attempt.

2. *Legalis discretio* is that which Sir Edward Cook meaneth and setteth forth in *Rooks* and *Keighly's Cases*, *Hoc est scire per legem quod sit justum*; and this is meerly to administer Justice according to the prescribed rules of the Law; and herein is this discretion limited, that it go not beyond or besides those Laws which are to be executed: And this discretion is to be governed by the Laws, for *Cicero* saith, *Sapientis est judicis cogitare tantum sibi esse permissum quantum sit Commissum aut creditum.*

Cicero.

And according to this discretion the Commissioners of Sewers ought to proceed, as was resolved in the Case of *Hetley versus Sir John Boyer*, *Bulstr.* 2. 197, 198. *Cro. Hil.* 11 *Jac.* 336.

3. The third Discretion is where the Laws have given no certain rule to be directed by in a Case within the power of this Commission, there the Commissioners are to order these affairs with such Wisedom and judgment, that although their censure be not framed in a Rule of Law, yet they

they are to do therein *secundum equum & bonum*; and here-
 in discretion is the absolute Judge of the Cause, and gives
 the Rule: But in the case of Legal Discretion, there dis-
 cretion is but a servant, and is tied to attend upon the
 Law; and there the Law directs the censure, and Discreti-
 on is but to doe the same wisely and temperately; for *ipse Cato*.
etenim leges cupiunt ut jure regantur. Sir Ed. Cook in Rook's *Rook's Case*,
 Case 5 Report, gives this Rule to the Commissioners, *That*
although the words of the Commission be, That they should do
according to their Discretions, yet their proceedings ought to
be limited and bounded within the Rules of Law and Reason;
for that Discretion is a Science to discern betwixt falsity and
truth, between right and wrong, between shadows and sub-
stance, betwixt equity and colourable glosses, and the Commis-
sioners ought not to follow their wills and private affections; for
 that *talis discretio discretionem confundit*: And therefore
 now I will declare in few words, in what things these
 Commissioners are to be ruled by good Discretion.

First, the quantity of Fines be left to the discretion of the
 Commissioners.

1.

Item, Imprisonment of the Bodies of the Offenders when
 they deserve, and the time how long, lieth much in their
 discretion.

2.

Item, It lieth in their grave Wisedoms and Discretions,
 when and where to erect new Walls, Banks and other De-
 fences, and what sums of Money to raise and levy there-
 fore.

3.

The election of Officers lieth in their discretion.

4.

It lieth many times in their discretion whom to fine, and
 whom to imprison.

5.

I take it this word *Discretion* used in the Statute, giveth
 power to the Commissioners to order busineses there ari-
 sing in course of equity, for *hoc nihil aliud est*, but to pro-
 ceed *secundum equum & bonum*.

6.

I have put these few Cases as examples to direct and in-
 struct what may be done by Discretion, omitting many o-
 ther, because I had rather trust to the word certain Law,

Q

than

than to give too much way to the uncertain discretion of the Commissioners, according to the old saying, *Quoad fieri possit quàm plurima legibus ipsis definiantur quam paucissima vero iudicis arbitrio relinquantur*; and herein I suppose I have made good my words in this, that I have proved by my Argument, That the said new Bank and new River might well be decreed by the view and survey of the Commissioners, and by their good discretion, and so might the said old Sewer be repaired; and therefore these being ended I will now proceed to the handling of the rest remaining.

My former labour hath been to expound and declare what defences, as well against the overflowing of the Sea, as against the inundation of fresh Waters, were and be to be maintained, and also new erected by the Tenor and power of these Laws: So that now it comes very aptly to be handled, for what causes, considerations and matters one shall or may be tied to the repairing and keeping thereof; which I take to be these nine several ways.

1. By Frontage. 2. By Ownership. 3. By Prescription. 4. By Custome. 5. By Tenure. 6. By Covenant. 7. *Per usum rei*. 8. A Township. 9. By these Laws of Sewers.

I suppose I shall produce sufficient Warrant and Authorities for to maintain all these distinctions, wherein I am desirous that Commissioners of Sewers, for whose learning and instruction I have taken these pains, would apply themselves to doe their duties and service herein carefully and advisedly and like to skilfull Physicians, would apply fitting Medicines to the curing of every Disease, else shall they oftentimes *Opprimere infantes & dimittere reos*: But if they will seriously cast their eyes upon these insuing Cases, they will be very helpfull to them in their proceedings.

Frontage.

Frontage.

FRontage is where the Grounds of any Man do join with the brow or front thereof to the Sea, or to great or royal Streams; and in case of the Sea or royal River, the property of the Banks and Grounds adjoining are and belong to the Subject, whose Lands do but and bound thereon, but the soil of the Sea and royal Rivers do appertain to the King, as formerly in my Tractate of Rivers may appear. But in case of petty and mean Rivers and Streams, the soil of them, as well as the Banks thereof, do appertain to them whose Grounds adjoin thereto; so that Frontage and Ownership in base inferior Rivers do not differ, but in great Streams and the Sea they do vary as aforesaid: And in 37 lib. Affiz. plac. 10. it seems that the Frontagers are bound to the repairs; and in 8 H. 7. he whose Grounds are next adjoining to a High-way, is bound to repair the same. And by these cases there is no difference touching repairs of the High-streams and the High-ways in my opinion.

Ownership.

THE Ownership of a Bank, Wall or other Defence is a sufficient warrant to impose the charge of the repairs thereof upon him, without being tied thereto by prescription, as appears in 8 H. 7. fol. 5. and it stands with reason, that every man should be bound to repair his own; and the consideration is also moving, for that his Grounds which lie nearest the Waters are soonest subject to drowning, and if any increase be upon the small Rivers it falls to his share.

Prescription and Custome.

Prescription and Custome are much of one quality, for in both of them the efficient matter is (use to repair) and the Law hath taken notice of them in many of our Books: Prescription doth not bind or tie one to the repair of any thing, unless it be *ratione terræ*.

And neither in that case, barely in respect of the Land, but of the Estate which the Party hath in the Land; And therefore it hath been adjudged, that a prescription that every Occu-
pier, &c. used to repair a Defence is naught, for 'tis too general, and would extend to Tenants at will, sufferance, disseisors, &c. but it ought be, He and all those whose Estate, &c.
Cro. Jac. 445. Audly versus Fawkenor.

And in this it doth differ from Custome: for if it be presented that *A. B.* and his Ancestors have time out of memory used to repair such a Bank, Wall or other Defence, this presentment is void, and doth not bind the party *prout constat* in 21 E. 4. 38. 7 H. 4. 31. 19 H. 7. *Kelwey, fol. 52.* and 45 E. 3. But Bodies politique or corporate may be by Custome bound to repairs, without making mention in the Presentment or Indictment that they are to do the same *ratione talis Messuagii terræ aut tenementi*; And to that purpose be the Books of 21 E. 4. 38 and 44 Ed. 3. *Fitzherb. Title Bar. plac. 103.* for there a Prior was presented, that he and his Predecessors had used time out of memory to repair such a Bridge, which was in decay, and this presentment, though it charged no Land, was good: And in 19 Hen. 7. *aforesaid*, it is said, that one might be bound to repair a Bank or Wall *ratione Resiantie*, but this could not be otherwise taken but that he was charged to doe the same

21 Ed. 4.
7 H. 4.
19 H. 7.
45 Ed. 3.

21 E. 4.
44 E. 3.

19 H. 7.

same for the House he dwelt in, for *Resistantia* imports so much.

Also if a man and his Ancestors have voluntarily made a defence for a long season, this will not bind his Heir thereto, though he have assets descended to him in Fee simple, for descending charges will not bind the Heirs, unless he descending have assets, as an equal consideration ^U bind him thereto; neither will descending assets of Land bind an Heir in this case, unless the Land it self be really tied and charged.

Tenure.

A Man by the Tenure of his Land may be bound to repair a Wall, Bank or other Defence mentioned in this Law, and in proof thereof the Book Case of 11 H. 7. f. 12. ^{11 H. 7.} is full in the point; where it is said, *That if before the Statute of Westminster the Third, a man had made a Feoffment in Fee; or if since that Statute one had made a Gift in Tail, to hold the same by repairing a Bridge, the said Feoffee and Donee and his heirs should have been bound by the said Tenure to repair the said Bridge;* and with this agree the Books of 12 H. 7. 18. and ^{12 H. 7.} 24 H. Br. Case fol. 9. and in Porter's Case in Sir Edward Cook's ^{24 H. 8.} first Report, it is said, *That if Lands were given to repair Ways, Bridges, Calceys or such like, this doth bind the Owners of those Lands to do those repairs in perpetuity:* And in the Case of 12 H. 4. fol. 7. the Prior of St. Marks in Bristol ^{12 H. 4.} was obliged and bound by the Tenure of his Land to repair a common Sewer: and this enough to satisfy this point.

Covenant.

SO likewise a man may be bound by his Covenant to repair a Wall, Bank, Sewer or other such like matter, and he may bind himself and his Heirs to do the same; but yet this Covenant will not bind his Heirs after his death, unless there be left assets in Fee simple to descend to the said ^{28 & 29 H. 8.} Heir ^{Dyer, fol. 33.}

Heir from the said Ancestor which made the Covenant.

Wherein I take this difference between a Covenant to bind an Heir, and a Prescription; for by Covenant the Heir shall be bound to the repairs, if he have assets descended to him from that Ancestor; but the Heir shall not be bound by Prescription to repair, though he have assets descended from his Ancestor who repaired the said Defences: But if Land be charged therewithall by Tenure or otherwise, as a charge impos'd upon Land by prescription, then the said Lands are therewithall chargeable *in cujuscunque manus devenerint, quod nota.*

Lessee for years of Lands within a Levell, subject to be drown'd by the Sea, covenants with his Lessor to pay all Assessments, Charges and Taxes, towards or concerning the reparation of the premisses: A Wall which was in defence of this Levell, and built straight, was thrown down by a sudden and inevitable Tempest: By order of the Commissioners of Sewers, a new Wall was built in the form of a Horseshoe; and the Commissioners taxed every man within the Levell, and among others a Lessee for years, whom they also trusted with the collection of all the money: Lessee for years dies, the lease being within a short time of expiration; His Executor enters into the Land, and the Commissioners charge him with the whole, and the years immediately after expire: And it was resolved that the Covenant doth bind the Lessee, and that the Commissioners may take notice of it, and tax the Lessee totally for his Land, without

out laying any thing upon him in the reversion; for the Covenant doth extend to this new Wall, and the making of it in the form of a Horshoe, is not material, seeing it was adjoining to the Land: and although the new Wall be not parcel of the Premises, as it was at the time of entring into the Covenant, because the Wall then in *esse*, and to which the Covenant did extend, was a straight Wall, yet according to the words of the Covenant the Tax is towards the reparation of the Premises: And *Bramston*, Ch. Just. took this difference, that if a Stranger covenants to pay charges towards repairing such a Wall, that that is not within the Commissioners jurisdiction, because he is a mere Stranger, and not within their Commission, and therefore they cannot take notice of such a Covenant; but otherwise it is where the Covenantor is the occupier of the Land, for there the Person and the Covenant are within their jurisdiction, and they may tax him for reparations according to his Covenant: It was likewise resolved, that the charge upon the Executor was legally imposed; And whereas it was objected, That the term was determined, and peradventure the Executor hath not assets: It was answered, That the Executor was an occupier at the time of the Decree, and therefore was within the words of the Commission; And he having
not

not alledged before the Commissioners, that he had no assets, he hath lost that advantage, and it shall be intended that he hath assets, by his not gainfaying it: And accordingly the Court confirmed the Commissioners Decree against the Executor, *March* 198, 199, 200, 201.

43. *El.* 4.

It appears by the Statute of 43 *El.* cap. 4. That if Lands, Rents, Annuities, Goods or Chattels, be given towards the repairing of Bridges, Ports, Havens, Calceys or Sea Banks, that the same shall be so employed by that Statute: So that Goods, Chattels and Annuities, be chargeable to these repairs by the force of that Statute, as well as Lands, Houses and Grounds, in case any such thing shall happen to come before the Commissioners of Sewers, and they may compell the performance, *March* 200.

But note besides all the former matter, That an Heir shall not be bound by the Covenant of his Ancestor, though he have assets descended, unless he be bound expressly by the word *Heirs* in the Covenant.

Usus rei.

I Now intend to declare where use shall tie one to the repairs of the Defences mentioned in this Law (I do not hereby mean that use which I have formerly mentioned in Prescription and Custome, which is use to repair) but the use I intend in this place, is, the use which one is to have of the defence or thing which is to be repaired: As where one and his Ancestors have used to have the use of the River or Waters by sailing up and down the same, or have used to have a Ferry on or over them, or a Staith to go up and down, or a Crane to draw up Waters, or some other Engine to draw up the Waters for the use of their Houses; These uses which men have of these things may be causes and

and considerations sufficient to tie them to the repairs of the Walls, Banks and Rivers: And for warrant in this learning is the Book of 37 *Lib. Assiz. plac. 10.* for there were some persons which were bound to repair the River, because they had passage on it with their Boats, and others were charged because they had free fishing in the River; and in my Opinion it stands with good reason, and agreeable to Law, That those persons, before others, should be bound and tied to the repairs of such things whereof they have peculiar and several profits and use of more than others have: And it is manifest, that this very Statute aims full at this point, when it directed that such persons should be rated, taxed and sessed towards the repairs, which had profit of fishing and other Commodities in the Rivers.

But lest some may mistake my meaning and learning also in the said former Cases, I will therefore make the same plain by distinction, which is this, That Frontage, Ownership, and this use I last spake of, do not bind any to the repairing and maintaining of Walls, Banks, Bridges, Sewers or other Defences, when and where any other man or Corporation be bound to do the same by Prescription, Custom, Tenure or Covenant: For the said three parts, Frontage, Ownership and *Usus rei*, be but implicate ties onely in construction of Law, and serve the turn onely when no other person or persons are bound expressly thereunto; and this distinction may be maintained by the Book of 8 *H. 7.* *8 H. 7. fol. 5.* and other Books, where it is said, *That he whose Grounds are next adjoining is bound to repair, unless some other be bound to do the same by Tenure or Prescription:* Whereby it followeth, that if one be bound to do the same by special Tenure or Prescription, it freeth the Frontager.

Note also another difference, that in cases where a Frontager and one who hath *liberum passagium* on the River, and a man which hath a free Piscary there, are not any one of them bound to make the repairs alone, but all alike together; and so is the Book of 37 *Assiz. plac. 10.* and I suppose

R

pose

37, 38 Affiz. pose the Book of 38 Affiz. plac. 15. maintains this point with me; for there the Law is declared to be, *That he which is bound by prescription to repair, is bound peremptorily alone to do the work, and not any other; and if no such person can be found, then the parties whose Grounds do adjoin, and those which have free fishing in the River, and free passage thereon, be all of them to do and perform the same jointly, and no one of them is a discharge for the other, because they shall be in confimili casu.* So by this which hath been said touching these matters, the Commissioners may see and behold how carefully and understandingly the Laws of this Realm have indeavoured to do equal Justice; and my desire is, that they would as carefully put them in execution.

A Township assessed.

Case of the
Isle of Ely.

Rumney
Marsh Case.

IT hath been held for a great question, Whether a Township or Hundred in general might be assessed and taxed to the Sewers, without imposing the same on particular Persons? And Sir Edward Cook in the Case of the Isle of Ely, is of opinion directly, That a Tax, Rate or a Sess could not, nay might not be set or imposed upon a Town, or upon the Inhabitants of a Town; for, saith he, *The taxation, sessment or charge ought to have these qualities; It ought to be according to the quantity of their Lands by number of Acres and Peaches, or by the tenure of profit of fishing and Common of Pasture, which if it should be laid upon a Town, it would hold none of those proportions:* and his opinion is not alone in this very point, for in the ancient Charter of Rumney Marsh, pag. 50. it is said, *Quod unusquisque proportionem, ac periculo incumbentium æquè contribuat;* And page 12. and 39. of the same Charter, the Taxation is expressed to be by Acres, Perches and Carucates; and our Statute in express words is, *And all those persons and every of them to tax and assess, charge, distrain and punish, as well within the Limits, Leets and Bounds of old time accustomed, or otherwise, or elsewhere within this Realm of England, after the quantities* of

of their Lands, Tenements and Rents, and by the number of Acres and Perches, and after the rate of every person's portion, tenure or profit, or after the quantity of their Common of Pasture, or fishing, by such ways and means as you the Lord Fitzwilliams, Sir Francis Vane, and Sir Thomas Mounson Knight and Baronet, Sir Edward Dimock, Sir William Armin, Sir Thomas Grantham, Sir George Fitzwilliams, Knights, Richard Totheby and Edward King, Esquires, whereof three to be of the Quorum, shall seem most convenient: These words literally taken, afford the construction to be according to the opinion of Sir Edward Coke.

And of the same opinion with Sir Edward Coke, viz. that a whole Township cannot be assessed upon the Commission of Sewers, Justice Dodderidge declared himself to be in the Case of *Hetley versus Sir John Boyer* and others, *Hil. 11 Jac. B. R.* and his reason was, because then upon such an assessment one man may be charged with the whole; *Bulstrode 2. 199. Cro. Jac. 336. And Roll, Mich. 1649.* in the case of the Inhabitants of *Outwell*, held that a Tax imposed by the Commissioners of Sewers ought to be particular, and not to be laid upon the Township; unless there were a particular custome for such Township to be so rated or taxed, *Style 179.*

But on the other part I find by many ancient Books and Authorities of the Law, that Taxations and Charges have been generally laid upon Townships and Hundreds in matters of this kind, as in the 37. lib. *Affiz. plac. 10.* Four several Townships were charged with the repairs of a River, because they had passage thereon with Boats; and in 38. lib. 37 & 38 *Affiz. plac. 15.* a Township was there charged with the repair of a Bridge: And the Statute of *Magna Charta, cap. 15.*

quod nulla villa nec liber homo distringatur facere pontes nisi qui ab antiquo facere consueverunt; so that if *ab antiquo* a Township had used to repair Bridges, it was tied thereunto by the implied construction of this Statute: And the Statute of 22 H. 8. cap. 5. gave authority to Justices of Peace to charge a County, Hundred or Town with the repair of Bridges, if no certain Person were specially tied to the repair thereof: and many times in ancient Statutes and Books of our Law, we shall find Townships and Hundreds charged generally, as in *Doctour and Student*, fol. 74. a Township was amerced; and by the ancient and famous Statute of *Winchester* a Township shall be amerced for the escape of a Robber by the High-way: And 3 Ed. 3. Title *Corone* in *Fitz.* pl. 293. a Township was amerced for the escape of a Murtherer; and in 11 H. 4. 2. *Brook* 94. a Town was sessed for the expences for the Knight of the Parliament, and it might be levied on any Person's goods of the Town; and this was for the uncertainty of the Persons, and for the infiniteness of the number of them, as it is said in *Richard Godfrey's Case*.

Dr. and Student.

Stat. Winton.

Fitzh.

Brook.

But it may perhaps be objected on the other part, That if a Town or Hundred may be jointly taxed, then it might so come to pass, that one Man's Goods which had no Grounds subject to the charge, and which could reap nor take any hurt thereby, might come to be distrained for the whole tax, rate or sels of the Town; and another man which had great quantities of Grounds there subject to danger might escape free; and therefore such exposition to be made of the said Law, were not within the rule and compass of equality.

And another objection may also be made, That it is true, that by an express Statute or Custome, an assess, rate or tax, may be laid upon a Town or Hundred, as was done by the said Statute of the 22 H. 8. and others formerly mentioned; but such exposition were contrary to the letter of this Statute of 23 H. 8. of Sewers.

I do confess, that if these two objections could not be answered, I should change my Opinion: It is true: That if a tax or sels had been set upon a Hundred by the said Statute of *Winchester*, for the escape of a Robber, and that charge had been levied upon one man's goods of the Town, as it might have been, he had had no remedy to cause his fellow Townsmen to be contributors to him to bear equal share with him; and so if the party robbed had recovered by Action against the Hundred, and the goods of one in the Hundred had been taken in execution, he had no means to get contribution: And yet that Law carried that defect with it three hundred years, or thereabouts, till in the 27th year of Queen *Eliz.* Chap. 13. wherein Order was taken, ^{27 Eliz. 13.} that if some one or few mens goods were taken in execution upon the recovery in an Action taken against the Hundred by the party robbed, he or they should have contribution, which before that Statute of 27 of *Elizabeth* could not be had.

But to give answer to the two objections; First, if in our case of the Sewers, a Township should be Taxed, yet this Tax could not be taken or levied, but onely of such as had grounds within the charge, which had good by the repair, or might have hurt by the neglect thereof; for in *11 H. 4. fol. 35.* it is said for Law, *That if a Town be assessed in the Tax, and the Collector doth distrain the goods of a man of the Town who was not chargeable thereto, that party may have and take his Action of Trespass against the Distrainer and Collector, for that he at his peril must look well to it, that he whose goods were taken were subject to the charge.* ^{11 H. 4. f. 35.}

So in our case of the Sewers, if the goods of one which was not subject to the Tax or Assess imposed were taken, he might have his Action of Trespass against the Distrainer, and should recover his damages thereby; so this salve cures one of the said maladies.

But then the case goes farther, *That if the goods of one man of the Town should be taken for the whole Sesse of the Town, and he is such a person as in truth is chargeable thereunto,*

unto, he can have no Action against the Distrainer for taking his Cattel, for he is such a person as cannot excuse himself but that he is chargeable: This indeed draws the Case to a desperate issue, for this seems to be as great a mischief as ever the Statute of *Winchester* did ever suffer, which was remedied by the Said Statute of 27 *Eliz.* but our Case hath not such a Cure provided; Therefore it puts me to the old adage of Law, *Better it is to suffer a mischief to one or more particular persons, than to permit an inconvenience to the whole Commonwealth which concerns a multitude:* But yet I shall give this objection a better answer, I hope, than with an old adage; for in our Case the party whose goods are taken for the whole town, is not without a fitting and convenient remedy; for when his goods be taken and he is constrained to pay the whole seshment of the Town, he may make his complaint to the Commissioners of Sewers, and may give in the particular names of every Townsman, and the quantity of each mans Estate which be charged thereto, or the true value of their Lands, and may crave of the Commissioners of Sewers for to make a Law to make them all to contribute, every one according to his portion of Land: And in my Opinion the Commissioners of Sewers have power to impose a proportionable rate upon every of them, according to the quantity and quality of his ground, by way of contribution, and may award Proceſs to force and compell them to pay the same to the said party; whereby it plainly appears, that the party so distrained hath a direct remedy to come by his losses. In *Doctor* and *Student* a whole Town was amerced, and they met together by common consent, and assessed and rated every man equally according to his ability, and allowed of as a good cause. But Commissioners of Sewers may if they can come to the knowledge of the certainty of every man's Estate, rate in the primary and original Sesse every person according to his several quantity of Estate, which may be done in this manner, when the Commissioners be agreed how much to lay upon such a Town, then to send for three or four of the Inha-

Inhabitants, and cauſe them to give in every man's Eſtate; and to make and appoint them Seſſors to rate every man, or elſe the Commiſſioners themſelves, having true intelligence of every man's Land, may eaſily ſet the rate and charge upon every particular perſon in an even and proportionable ſum; and thus every man at the firſt ſhall know his own rate, as in the aſſeſſing of the Subſidy, and no man ſhall be burthened with his Neighbours charge; and theſe were good courſes to be uſed within both the letter and ſenſe of theſe Laws: And this courſe was uſed by the Four and twenty Jurators in *Kent* in *Rumney Maſh*, who alwaies upon their Oaths ſet down every particular man's grounds in certain, and their juſt quantities, and accordingly were the parties ſeverally taxed.

*Chart. of
Rumney.
pag. 50.*

And if the Commiſſioners of Sewers do in the primary and original ſeſs, rate every Perſon according to his ſeveral quantity of Land, they ought (as it ſeems) to deſign in certain the Perſon whom they tax: And therefore by the opinion of *Roll, Paſch. 23 Car. 1.* if they tax a Man and his Aſſigns, or the Land of ſuch an one, and his Aſſigns, that is too generally expreſſed, and the tax ill; for there is no rule how to levy the money equally upon ſuch a tax, *Style 13.* And whereas afterwards in the Caſe of the Inhabitants of *Outwell, Mich. 1649.* it was ſaid by *Roll*, That ſuch tax ought to be laid upon the number of the Acres, and not upon the Perſons of the Inhabitants, *Style 185.* By that I conceive he means, that in the taxation of every man the Acres ought to be ſet down, in reſpect of which he is taxed: For otherwiſe if the

Perſons

Persons should not be named in the tax, there could be no distress taken of the Goods of the Owner of the Lands (for the uncertainty who is Owner) unless upon the Lands themselves which are charged; which would be inconvenient, and a great obstacle to the execution of this Commission.

Howsoever the Tax in my Opinion generally imposed upon the Town is good, as appears by many Authorities and Books before remembred, even by this Statute, as well
 37 & 38 lib. as by Custome; for in the said Book of the 37 and 38
 Assiz. lib. Assiz. it doth not appear that the Townships there rated were so taxed by any Custome, but meerly by the Law of the Land; and so is the learning delivered to be in the Council's Order aforesaid.

And I do remember, that at the Assizes held at *Lincoln* in *Anno 12 Jacobi*, in a Tryal before Sir *Edward Cook* then Judge of Assize, in the Case of Sir *Philip Conisby* Knight, the Town of *Manton* was assessed five pounds, and *Twiggmore* as much, and a distress was taken for non-payment thereof, and was justified in a Replevin, and the verdict passed for the distrainer, and no great scruple was then made of the said Asses laid and imposed generally upon the Towns; which Case I specially noted, because it was tryed and passed for current before the said Sir *Edward Cook*, who had the year before reported the Law in his *Tenth Report* to the contrary. And I am also of Opinion, that if a new defence be agreed to be made, as a Wall, Bank, Sewer or any other, and a Sesse is appointed for this work, and laid upon a Town, That the same is a good Sesse and well laid, as well as in the Case of old repairs, where Custome may give Warrant unto it, and the Commissioners in their discretion may so do in imitation of the said former rules and presidents, and it stands with good wisdom and discretion to imitate and follow ancient and approved Laws and Statutes

tutes made in Parliament, which are done by the wisdom of the whole Realm: And in my conceit a decree made which hath no reference or dependency to former presidents, may be doubted whether it be legitimate or not, having no ancient Laws to patronize it. And thus I conclude my third point of my Case, That a Township may be taxed by the Laws of Sewers.

Tythes.

HERE is likewise in my Case a Parson rated and sessed for his Tythes, and is now to be put to the question, Whether by these Laws he may be taxed for them, or not. The ancient Commissions of this kind have very strict words in them to tie every one to the charge of these Defences, being for the preservation of the Commonweal; and this Statute extends it self with a long and large arme to fetch and reach every Man that hath Grounds lying within the Level, and which partake of the good which the Defences bring to them, to be contributory to the charge.

It is true that Ecclesiastical and Spiritual Persons, as Parsons and Vicars hold their Ecclesiastical Livings exempt *ab omni onere seculari*, for they do not hold their Churches of any Lord, but of the Lord of Heaven, in respect of the spiritual service they doe therefore: And I take it that Parsons and Vicars hold not their Churches in free Alms, for then the Founder should be their Lord in point of tenure and service, which I have not observed to be so in any: And in our Law-books it appears, that spiritual Persons were exempted from lay and temporal charges, as in *Mag. Ch. 14. na Charta, cap. 14. A spiritual Person shall not be amerced according to his spiritual Living: In Fitz. Nat. bre. f. 228. Fitz. Nat. bre.* there is a Writ directed by the King to his Officers and Ministers, forbidding them that they take not any Toll, Murage or Pontage of ecclesiastical Parsons, Vicars and such like; and the said Writ sheweth, that by the Custome of
S the

the Realm no such exactions ought to be taken of them : And there is another Writ there to discharge them for paying Customs *de bonis suis Ecclesiasticis vel de aliis pro sustentatione sua emptis* ; And also they have this privilege, That the Sheriff nor any Lay-officer are not permitted to meddle with their ecclesiastical Possessions ; for in 20 H. 6. fol. 20. and in many other Books, it is held, that in a Writ of Summons the Sheriff may not summon a spiritual Person on his Spiritualities, but he must rather return that he is *Clericus beneficiatus non habens laicum fiodum* ; and upon this return the Party is to take a Writ directed to the Bishop, to summon him on his Spiritualities : And therefore if the Possessions of spiritual Persons are had in such great esteem in our Law, what then shall be done with Tythes which are said to be due *Jure Divino* ? I have not read that they shall be charged to any thing but to the repair of the Temple ; in the 18th Chapter of Numbers, the 21, 22, 23, 24, 25, 26, 27, and 28th verses, The Lord said, *I have given to the Children of Levi all the Tenth in Israel for an Inheritance* ; and yet the Levites paid a Tenth thereof to the Priests ; and so Clergymen in times past paid a Tenth to the Pope ; and in imitation, or rather in reformation thereof by the Statute of 26 H. 8. cap. 3. the like is now paid to the King, as supreme Head and Governour of the Church here on Earth : So here be charges paid out of the Tythes, but they be spiritual charges. And in Mr. Selden's History of Tythe, pag. 13. it appears by collection and connexion of Stories divine, That the first or the first year Tythe was paid to the Levite, The second to the Feast at Jerusalem, and the third to the Poor : And had not the Statute of 43 of Eliz. cap. 2. made the Parson and the Vicar liable and chargeable to the relief of the Poor, which was in imitation as it seemeth of the Mosaical Law, they had not been bound or tied to doe the same ; for it is held to be more charity to relieve the Church than the Poor : And in payment of Taxes and Subsidies they are granted in their Convocation-house, a Council merely consisting

consisting of the Clergy, and then are confirmed in Parliament, of which House also they are a Member. And therefore in my opinion, seeing Tythes are so sacred a duty, that a Lay-man could not have any help for at the Common-law, and were exempt from temporal and prophane uses, I am therefore of opinion, That they are not to be rated or taxed by the general words of these Laws; Yet I am of opinion, That Tythes in the hand of a Temporal or Lay-man are to be rated by these Laws, for when they are come into his hands, *Tunc res spirituales fiunt temporales & transeunt decime in Catalla.*

But I must here leave these Ecclesiastical persons and their Church livings: There is another point of this Law will reach unto some of their possessions, as to their Glebe Lands which belong to their Churches, and their Meadow and Pasture grounds, for these be not sacred, as Tythes be, But came to them by the benevolent gifts of Laymen, and not *ex dono dei & evangelii* as Tythes did; and so they took that burthen with them from the Lay-donor, which after may be imposed upon them: And therefore such Parsons, Vicars or other Spiritual persons which hold a plough Land in *Culture*, are chargeable by the Statute of 2 Mar. towards 2 Mar. the repair of the High-ways, as other Lay men be: But in that Statute there be Ecclesiastical Officers used, as Churchwardens, whereby it was conceived, that that Statute had an eye to bring Ecclesiastical persons within the reach of it: And so for their houses and grounds I take them to be within these Laws of the Sewers, for the King's own Lands are also chargeable thereunto, and yet on earth within His Dominions He is said to be *caput Ecclesie*, and as much reason were it to exempt His possessions as theirs, if the respect of the person should bear any such sway in the Case.

Also I do find by divers ancient Records, That Abbeyes, Priories, and other Spiritual possessions, have been chargeable to the repair of Bridges, Calceys, Banks and Highways, by Custome and Prescription, as appeareth also by the Books of 11 H. 4. fol. 82, 83. and 44 Ed. 3. *Fitz. Title 11 H. 4. Bar. 44 Ed. 3.*

Bar. pl. 301. and I take it, that by a very exprefs and ſpecial Cuſtome or Preſcription, a portion of Tythes in a Clergy mans hand may be charged with the repairs of Bridges, Waies, Walls or Sea Banks, but not without a direct affirmative Cuſtome; for I ſuppoſe that they may as well indure a charge in this kind, as a charge in a *Modus decimandi*.

And ſo I conclude this part of the Caſe, That the Parſon was not to be ſeſſed for his Tythes by the general words of this Law.

Notwithſtanding the opinion of our Reader here; It ſeems that Tythes, though in the hands of a ſpiritual or eccleſiaſtical Perſon may be rated or taxed by the Commiſſioners of Sewers by the general words of the Statute of 23 *H. 8. 5.* For it was reſolved 5 *Car. 1.* by all the Judges of *England* (as Sir *Nicholas Hyde*, heretofore Chief Juſtice of the *Kings Bench*, reported) that Tythes are at this day chargeable with all charges impoſed by any Act of Parliament, wherein they are not particularly excepted, as upon the Statute of 43 *Eliz.* to the Poor, to maimed Souldiers, *King's Bench*, *Marſhaleſey*, Bridges, &c. *Parſons Counſellor, part 2. cap. 15.*

A Copyholder.

HERE is alſo a Copyholder taxed within my Caſe for his Copyhold Land, and whether he for his Copyhold, and the Lord for the Freehold of that ſoil, ſhall be aſſeſſed therefore, is another queſtion.

A Copyhold by the Cuſtome of the Manor yieldeth and affordeth to the Lord Seigniory Rent, Fines due upon admit-

admittances, and such like duties; but the Copyholder hath the real and visible profits of the soil, and therefore both Lord and Copyholder receive *Et commodum & saluationem*, by the said defences: And therefore the words of this Law be exceeding copious and full in this point of self (*viz.*) To inquire who hath and holdeth any Lands or Tenements, or Common of pasture, or fishing, or hath or may have any hurt, or damage or loss by any means, in or near the said places; and in this case the Lord holdeth the said Land in Tenure, though not in *Culture*, and many ways may have hurt and damage; As if the Copyhold were overflowed by the Sea, the Lord should lose his Freehold of the soil, his Seignior, yearly Rents and Fines for admittances, and all other *perquisites*: So that the said words of this Statute beat mainly upon him. But as there be reasons to be urged against him, so there be matters to exempt him from this charge, and to lay the burthen on the Copyholder.

First, though he be Lord of the Copyhold, yet he is seized of the Freehold thereof, but in Imagination and construction of the Law, for the Copyholder is pernor and taker of the visible and substantial profits.

Secondly, the charge of repairs respects the possessor *in presenti*, which is easie to be found out, and not imaginary owners as the Lord is.

And Thirdly, if the Lord and owner should both be charged *pro una eademque re*, which the Law doth never permit, for this is not like the Case of Lord and Commoner; they there shall be charged, the one for his soil, and the other for his Common; for in this Case the Lord is the immediate proprietor of the Soil, and he hath the present and real occupation thereof, as well as the Commoner hath the use of his Common; and therefore they shall both be taxed to these repairs *diversis tamen respectis*.

But for the Copyholder it may be objected, that he is not within this Statute; for in *Heidon's Case* in Sir Edward Cooks 3d Report, it is truly said, That a Copyholder is not within the Laws and Statutes which alter the Service, Tenure, Interest.

Interest of the Land, or other thing in prejudice of the Lord; and this is the cause that a Copyholders Lands cannot be extended or put in execution upon the Statute of *Westminster the Second*, nor in extent upon the Statute of *Acton Burnel* and *De mercatoribus*, for if they should, then might the Sheriff make the Lord new Tenants, without surrender and admittances, which is contrary to Custome, the life and essence of all Copyholds; yet there is another good rule put in the said Case of *Heidon*, that is, *That where a Statute is made for the general good and wealth of the Realm, and that no prejudice can come to the Lord by alteration of Tenure, Service, Estate or Custome, there Copyholds may well be within those Statutes;* Therefore now it is to be considered, whether this Statute of Sewers will in any sort hurt or prejudice the Lord or no; for it is certain, that these Laws tend as much to the wealth and welfare of this Realm, as any can do; and in rating and assessing these Copyholds to the repairs of Banks, Walls and Sewers, &c. it alters neither the Copyholders Interest, nor the Lords Tenure, nor doth it in any sort prejudice the custome of the Manor.

But then it may be objected, That if sesse be imposed upon a Copyholder for his Land, and be not paid, these Laws give sale of Lands, which indeed is the onely clause of this Statute which is material, to exempt a Copyholder out of these Laws; for clearly I take it, That Commissioners of Sewers have no power to decree the Copyhold Land away for non-payment of the sesse: Yet I am of Opinion, that a Copyholder, though he be not within that part of the Statute which giveth sale of Lands, yet he is within the other part thereof, for divers Reasons.

One I find by experience, and in divers presidents, that many Copyholds have been and be charged with repairs of Bridges and other Defences in divers parts of this Realm by Customs: Also if a Lord grant a Copyhold to J. S. and his Heirs by Copy, *Tenendum* by the repairs of such a Wall, Bank or Bridge, this bindes this Copyhold thereto in point of charge.

And

And lastly, this Statute bindes such to the repairs which may have good by the doing, or hurt by the neglect: And it is apparent, that by overflowing or inundation, a Copyholders Land sustains equal damage with other Lands; and for these Reasons I resolve that a Copyhold is within these Laws: And shortly touching Copyholds, I do confine them to these four heads.

My four Tenents concerning Copyholds.

First, a Copyholder is seffable towards these repairs for his Copyhold.

1.

Secondly, that the Lord of the Copyhold is not to be taxed for the Soil of the Copyhold; for although he might come to it by forfeiture committed, yet that is a foreign possibility: and although he be seized in Law of the Freehold, yet because the Issues and Profits go with the Copyholder, this Law therefore will not charge him for the Soil.

2.

Thirdly, in respect the Copyhold rent is a rent of Assize, and rents be within the expresse letter of this Statute, and because his rents by the overflowing of the Sea be lost, therefore the Lord shall be assessed for it if it be of value.

3.

Fourthly, I am of opinion, that a Copyhold may not be sold by the Commissioners of Sewers, and yet Copyholders be within other parts of this Law.

4.

Now because it is a high point in this Statute, in what manner to rate, tax and assess by the judicious power of these Laws: and in regard my Case toucheth all manner of Sesses and Rates which be or may be imposed by these Laws, I will therefore spread it abroad: and I do intend to treat of what Lands and other things are to be assessed, towards the repairs in my Case, and what persons to be assessed, and in what degree.

Wherein first I am of opinion, that one is not to be assessed for his high and descending grounds, for so it appears Register. was the opinion of *Brudnel* in the 12 H. 8. fol. 3. where he saith, *That if a man's ground be surrounded with Waters, he may make a trench in his own grounds to let the Water run down.*

Rook's Case.

downwards, and to descend upon his neighbours grounds, for water is an element descendable (*jure naturæ*) And also high descending grounds can have no such use of Walls and Banks, as other grounds situate lower may have, for the Waters can have no force against them, and therefore the owner is not chargeable therefore; and the words of the Commission expressed in the Register be, *Qui defensionem Commodum & salvationem per Predictas Wallias, Gutturas, Pontes, Calceta & gurgites habere poterint nullatenus parcantur.* And the Charter of Rumney Marsh seems to bear the same sense (*viz.*) *Quod pro securitate dicti Marisci distractiones fiant ita quod æquè fiant secundum portiones majores & minores quas homines habent in eodem Marisco;* But high grounds by nature need not Engines of art to defend them: And in Rook's Case in Sir Edward Cook's 5th Report, and Keighley's Case, it is truly declared, *That the grounds lying on the Level which are in apparent danger subject to surrounder, are onely chargeable to repairs by this Law;* But yet grounds lying on high Mountainous places may be by Custome, Prescription or Tenure liable and stand chargeable to repairs of Walls, Banks, Sewers, Goats and other Defences: And in such cases though they be never so high, yet these Laws will reach unto them, but no charge is to be imposed on them by this Statute, and by force thereof onely, without a special Custome or Prescription to warrant the same.

Annuity.

IF a Dean and Chapter or other Corporate persons or Body Politique be by Prescription to pay a yearly Annuity to J. S. and his Heirs, J. S. is not seisable for his Annuity, yet the said Corporate or Politique persons pay the same in respect of their Lands which lie in danger of surrounding, and so the grounds be subject to these Laws, but it issueth not thereout: And the said Corporate and Politique persons are not charged in their Lands, but in respect of their Lands to pay the same.

Commons.

Commons.

THose persons which have Common of Piscary, Turbary or of Pasture in great Fens, Marishes and Wastes, may be charged, but Commoners in *agris seminat* after the corn severed, as stock Commons which be of a small value, are not to be charged for their Commons, but for their Lands.

Ferry.

HE which had a Ferry over a River was in 37 *lib. Assiz. pl. 10.* charged to repair the River, and so for a Ferry one may be charged by this Law.

Herbage.

HE which hath the Vesture or Herbage of grounds, as *Prima tonsura vel vestura terræ*, may be charged to the repairs.

Free passage.

IT appears likewise, that those persons which had passage for their Boats on the River, were to be rated towards the repairs in 37 *Lib. Assiz. pl. 10.* but this is to be intended of those persons which had free and customary passage thereon, as a liberty and inheritance, and was not meant or intended of poor Boatmen which come thereon with their Boats accidentally, by the general Custome of the Realm.

Parks.

Parks, Warrens, Chases.

A Man for his Park of Deer, and Warren of Conies, shall be charged if these liberties lie within the Level; but for Chases I suppose one is not chargeable onely, for Deer which be *feræ naturæ* not bound to certain precincts, but in that Case the owner is onely to be taxed for the Soil.

Mart, Fair or Market.

AL SO if one have onely the liberty of a Mart, Fair or Market to be kept in a place which is subject to surrounder, In my Opinion, because they are but casual in their profits, and not continual in their being, although they be conscribed to place and circuit, yet being no part of the Soil, nor of the issues and profits thereof, they are not taxable within these Laws.

Offices.

THE Office of the Clerk of the Market, Town Clerk, or such like, although these Officers be confined to a certain place and precincts within the Level which is subject to surrounder, are notwithstanding exempt from these taxations.

Proxies, Synods.

HE which hath Proxies or Synods of Annual sums of money, such as was in the Case of *Proxies* in the *Irish Reports*, is not sellable within this Law; for although the person is charged therefore in respect of the grounds, yet the same doth not issue thereout.

The Morgager for the Title he hath by the Condition to reduce the Lands back again to him, or he which hath Title

tle to Land by Action, Condition or Entry, or he which hath a contingent use shall not be taxed for them.

Neither was *Cestuy que use* at the Common Law before the Statute of 27 H. 8. of uses, nor is the Bargainee of 27 H. 8. Land before the Deed be inrolled seffable by this Law.

Neither is one who hath the presentation or nomination to a Church as Patron, or he which is Founder for his Foundership, Taxable within this Statute, yet they be Tenements, the largest Words of charge within this Law; but the Law intends the immediate possession of such Tenements which be proficuous, and not these things which be Tenements in Law, and which be but conveyances, and their fruit is Ceremony without Substance.

This Law setteth down such things for the which one is chargeable, viz. (*He which hath Lands, Tenements, Rents, Common of Pasture, Profit of Fishing or other Commodities, and such as have Safety, Profit, Defence or any other Commodity*) These be the Words of charge recited by this Law: This Word *Land* is of large extent, for it reacheth to Houses, Arable, Pasture, Meadow, Mills, Tofts, and to all other Edifices, Moors, Marishes, Woods, Wood Grounds, for all these the Earth is the substance *Et omne solo cedit*, and the severall increases thereof be but qualities.

The Word *Tenements* is of larger extent than Lands; for it containeth all which the Word *Lands* doth, and all things else which lie in Tenure: so that I think it shall be but labour lost to enter farther into the particulars thereof

Lord and Tenant.

IF there be Lord and Tenant, and the Tenant holdeth of the Lord by yearly Rent services, the Lord may be rated as well for his Rent, as the Tenant for his Land, to Annual repairs, as well as to accidental, by reason of these Words in the Statute (that is, *That every one be rated and taxed according to the rate of every persons Rent, Tenure or Profit,*)

here be full words to charge the Lord for his Rent; and so Rent charges, and Rent seck shall be subject to seffes in this kind: for otherwise the Tenant of the grounds may be undone thereby, in regard the Rents going and issuing out of the grounds may amount to as much almost as the yearly value of the grounds do: But if the Rents be so small as they are scarce worth the gathering, then in discretion the Commissioners may spare them, for *De minimis non Curat Lex*.

Also whether the remainder man, and he in Reversion depending upon an Estate in Tail, shall be rated and taxed, or not, by the power of these Laws, is an apt question for this place; and therein my Opinion is, That being dry and fruitless Remainders and Reversions, they shall not be seffed to the repairs, but the Tenant in Tail in possession shall be solely charged; for it is more to be feared, that Tenant in Tail will cut off the Remainder and Reversion by a Recovery, than that the Sea shall drown his Estate by an overflow.

Lessee for years, and he in reversion.

IN the Case of the Lessee for years and for life, and those in Reversion and Remainder, there is a greater cause of dispute than between Tenant in Tail, and he in the Reversion: And because it is an often Case, I have therefore taken the more pains to resolve the same.

First, the Lessee is in the present possession, and so is subject to all ordinary charges; and with this agreeth *Jeffrey's Case*. *Jeffreys Case* in Sir *Edward Cook's* 5th Report; for there the Case was resolved, that where the Inhabitants of a Town were assessed towards the repair of a Church, there the Lessee for years was charged, and not the Lessor, though he had a yearly Rent reserved.

And the same resolution was by all the Judges of the *King's Bench* in the Case of *Paget* and

and *Crumpton*, Pasch. 41 Eliz. upon view of *Jefrey's Cafe*, Cro. Eliz. 659.

For in point of the Rent this Cafe and that will differ, by reason Rents be expreſſy within this Law; but I now ſpeak of a Leſſee where no Rent is reſerved: In 17 Ed. 4. 17 Ed. 4. f. 6. a tenth was granted to the King by Parliament, of the value of their Lands, and the Leſſee for years was charged therewithall, and ſo was the Law there taken, if the Parliament had given the tenth part of the iſſues and profits of the Lands.

The Cafe of the Proxies in the *Iriſh Reports* doth in my opinion in reaſon reſemble this Cafe; for the Cafe was there, *That the Biſhop of Meath in Ireland had a Proxy of fifteen ſhillings payable out of the Commandry of Kells, then parcell of the Poſſeſſions of St. John's, all which came to the Crown by the diſſolution of Monasteries in that Kingdom; and after the ſaid Biſhop granted the ſaid Proxies to Queen Elizabeth, and after Queen Elizabeth made a leaſe of the Commandry to Dr. Forth, reſerving a yearly rent, without mentioning the Proxy; And it was there reſolved, That Doct^r Forth the Leſſee for years ſhould be at the charge to pay the ſaid Proxy, with all the arrears thereof which did incur in his time:* And ſo in the caſe of a Rent-charge, the Leſſee is chargeable, and he is to pay the Tythes, and the Composition-money due therefore: So that theſe Caſes ſway ſtrongly againſt the Leſſee for years, to lay the whole charge upon him, and to exempt the Leſſor.

But yet we muſt here diſtinguiſh and make a difference between annual repairs in ordinary things, and extraordinary repairs. For to furniſh the Defence with petty reparations, they ſhall be laid onely upon the Leſſee for years or for life; but if a new Wall, Bank or Goat, or Sewer be to be built new, and erected; or if the ancient Defences be decayed in the main Timber, or in the principal parts thereof, here as well the Leſſor as the Leſſee ſhall be put to the charge, for theſe things be not ordinary and annual charges,

49 Ed. 3.
3 Eliz. Dyer.

charges, but do reach from the beginning of the lease to the top of the Inheritance : as for petty reparations they are by intendment to continue but for a short time, which are likely to be spent during the term and lease ; but these new Defences are apparently done to save the Inheritance : And this difference holds good correspondency with other Cases in our Law, as in 49 Ed. 3. fol. 1. and 3 Eliz. in Dyer, fol. 198. and in that Book again, fol. 134. and in divers other Books it is holden for Law, That if a House in lease decay in the Groundsels, Post or Balk, in the great Timber, in direct wearing by tract of time, and not in default of the Lessee ; the Lessee may take and cut up Timber growing on the Grounds leased to repair the same, and the Lessee shall be at charges of workmanship, for the repairs are in matter of right, and doe the Lessee good during his lease, and the Lessor after the expiration thereof : And because these great repairs extend to both their Goods, therefore they shall both be contributory thereto : But if a House be decayed in splinting, thack, walling, or in such petty matters, the Lessee for years shall be at the sole charge, for these may be spent in his own time.

So I suppose my meaning is herein well perceived, which is, That in petty, annual and ordinary repairs, the Lessee alone shall doe the same ; but where the same wants in great Timber, or when a new Defence is to be built, they shall both be at the charge : And with this the Statute of 7 Jac. c. 20. 7 Jac. cap. 20. doth directly in reason agree withall ; out of which Statute it is plainly to be observed, that in the great repairs, as also in the new building, as well the Lessor as the Lessee shall be both at the charge : Yet in the Statute of 3 Ed. 6. cap. 8. there is a clause in effect, *That all Lots, Scots and sums of money hereafter to be rated by the Commissioners of Sewers upon the King's Lands, shall be gathered or levied by distress on those Grounds as in case of other Persons ; and that all Bills of acquittance signed with the hand of such Receiver or Collector, shall be a sufficient Warrant to the Auditors and Receivers, and other the King's Officers, for allowance*

lowance to the Farmer or Tenant to the King's Majesty ;
Whereby it appeareth, that the Farmer of the King shall
not be at the charge, but His Majesty ; yet by the Statute
13 Eliz. cap. 9. it may be collected, that the Lessee for 13 Eliz. c. 9.
years shall be charged, but all these are to be reconciled
with my said diversity.

But *Heath Justice B. R.* in the Case of *Com-
mins* and *Massam* was of opinion that the Com-
missioners of Sewers may charge the Lessor or
Lessee, at their discretion, though it were for a
new Defence, *March 198.*

But now it may be objected to me ; Sir, *do you think it* Norm.
*reasonable or possible for Commissioners of Sewers to take no-
tice at the first of every private Man's Inheritance, and the
several Estates which the Parties have therein, when it will
scarce be possible by private search to find them out ?*

To this I answer, That it is not reasonable to tie the
Commissioners to such difficult and obscure busineses ; but it
is sufficient for the Commissioners to impose or lay the rate,
tax or sels on the Grounds, or on the visible Possessours
thereof : and if the money so rated be demanded on the
Lessee for years, or for life ; or if the Goods be distrained
therefore, or they be compelled to pay the same, then they
may come before the Commissioners, and shew forth their
lease, and make it appear, that *J. S.* hath the reversion,
and as the case is, to be charged as well as himself ; and
upon due proof thereof made, the Commissioners upon
hearing the Parties on both sides may apportion the tax on
either of them, as in justice, discretion and true judgment
is requisite. And so if a tax be set upon Land, the Owner
may come in before the Commissioners, and make it to ap-
pear before them, that *J. D.* hath a Common, and Rent
thereout ; and upon proof thereof made, the Commissio-
ners are to lay the charge accordingly : And so it shall not
tie the Commissioners at the first to lay the charge upon
every

every particular Person, for that were *opus infinitum & impossibile*, but to relieve the Parties upon their complaint; and this may be easily done, and it stands with the justice of these Laws so to doe: And if the Parties grieved will not complain for relief, let it be justly accounted their own folly, and no injustice of the Commissioners; for the very Statute directs, that such as are grieved shall have relief upon their complaints, which confirms my opinion in this point.

Taxes, Rates and Assessments imposed merely by the Laws of Sewers.

I Have formerly put nine several matters to tie men to the repairs, and this, by the Laws of Sewers is the last, but not the least of them: I propose these to be by the Laws of Sewers, because they be not backed, helped, aided or assisted by Customs, Prescriptions, Common right, or by any other Rule of the Commonlaw, or by Tenure or Covenant, or any act of the party, as all the rest be, but are onely composed, made, ordered and directed by the sole power and authority of these Laws of Sewers: and these are such as fall out of all the former rules, and therefore *in nova causa novum remedium est adhibendum*: But yet before I enter into my own works, I will set down and declare the opinions delivered in Rook's and Keighley's Cases, which seemed one of them opposite to the other: for in Rook's Case it is said, That if one be bound in respect of his Lands to repair a Wall or Bank by Tenure, Prescription or otherwise, that yet the Commissioners of Sewers could not assess the said party alone to repair the same; and said, that the Commissioners were not tied to the Rules of Prescription, Tenure, Custome or otherwise, but ought to assess all the Level to do the same, which are to have good thereby: But this being mistaken, is very justly and discreetly altered in the said Case of Keighley by the Authour himself; for how could it be presumed, that the learned makers of this worthy Law would have stricken down

Rook's Case.

5 rep: 100.

Keighley's Case.

10 rep: 139

down at one blow so many thousand Prescriptions, Customs, Tenures, Covenants and Uses, as be within this Realm, which be tied and bound to doe and make the repairs in this kind, some in consideration of Houses and Land, others for yearly Rents, and for other causes, which to have set at liberty, and to have imposed the charge on the Levellers, would have wrought and brought a wondrous innovation, change and alteration in these works; all which by this exposition are freed and saved: But yet there be certain Cases which of meer necessity lay the charge upon the Level, which are as follows:

The charge upon the Level.

FIRST, If any grounds were heretofore by Custome, Prescription, Tenure or otherwise obliged and bound to repair any Wall, Bank, River, Sewer, Goat, Sluce, Jetty, or other Defence, which grounds so charged have been of late devoured and overflown by the Sea, and so remain; The Commissioners of Sewers are in that Case tied to lay the charge now upon the Level, which stand in danger of taking hurt by the not making the repairs, or which are to receive good by the doing thereof.

1.

Secondly, Also if *A. B.* be bound by the Tenure of his Land to repair a Bridge, Calcey or Bank, and he dieth without Heirs, whereby the Land escheateth to the Lord of the Fee, in this Case the Tenure is ended, and the chief Lord is not bound to the repairs, and therefore now the charge must lie on the Level, and so is the Law if this Tenure had been in other sort extinguished.

[2.

Thirdly, Where no persons or grounds can be known, which ought to make the repairs by Tenure, Prescription, Custome, Covenant or otherwise, then the Commissioners of Sewers are to lay the charge on the Level.

3.

Fourthly, If *John à Stile* be chargeable to make the repairs, and be not able to doe the same, here the Level are to be charged to assist him therein, as appears in *Keighley's* Case.

4.

Keighley's Case.

U

Fifthly,

5.

Fifthly, If J. S. by reason of his Lands or otherwise be tied to repair the Sea Bank, but the hazard is so apparent dangerous to the Countrey, that J. S. in all likelihood cannot repair the same, and so the Countrey might be in danger to be overflown e'er J. S. alone could do it, here also the Countrey on that Level are to be rated and taxed towards the same: *Keighley's Case.*

And so *Roll* in the Case of the Inhabitants of *Outwell, &c.* if it be to prevent a present and publick danger, *Style* 192.

6.

Sixthly, If the Sea at the Spring-tides, or at extraordinary casual swelling Tides or Floods, have broke down the fences, and overthrown the Banks, and drowned the Countrey without any default in the party who was tied to have repaired the same; the Level shall in this Case make up the breach, for things which happen extraordinarily by the Sea or great Waters, which neither policy of man could prevent, nor industry or force could resist, are counted inevitable and undefenceable: and so is the Law in the Case of Lessee for years or for life, if they suffer by neglect their Banks or Walls to be broken down, and their grounds surrounded, they be punishable in an Action of Waste; But if those grounds by the extraordinary rage and violence of the Sea or Waters be born down, and their grounds surrounded thereby, they are in this case freed from all Wastes; and in proof thereof the Case in 28 and 29 H. 8. *Dyer fol. 33* is much to this purpose, where one made a Lease for years of grounds to J. S. lying near the River of *Ex*, and the Lessee covenanted to sustain and repair the Banks of the River to preserve the Meadow from surrounder on pain of ten pounds; yet after an extraordinary flood, the Banks were broken down, and the Meadows were surrounded, and it was there holden to be no breach of Covenant, and that he should be excused from the penalty: but yet he must make and repair the Banks in convenient time.

28 H. 8.
Dyer.

Nota,

Nota, this was in the Case of a fresh River, whereby in this Case the Law must lay the charge on the Level, if any danger be likely to ensue by the protracting of time.

In an Action of Waste brought in *C. B.* against the Lessee, for suffering the Sea-wall adjoining to his Land to be ruinous, *per que per fluxum & refluxum Maris, le terre fuit surround*, *Dyer*, Chief Justice, held, that though the Lessee shall be excused where the Wall is born down by the sudden violence of the Sea, and the Land surrounded thereby, and the same could not be prevented; yet if there be a small breach in the Sea-bank or Wall, and the Lessee doth not repair it, but suffers it to continue, so that afterwards the violence of the Sea, breaks the rest of the Wall, and surrounds the Land, that in that case it is waste in the lessee, for it was his own fault, that he did not amend it at the beginning, *Moor 62, 63.* see the same difference taken by *Dyer* and *Welch* in another case, *Moor 73.*

But this difference was not allowed for the Banks of the River of *Trent*, *6 Eliz.* in the Case of *Griffith*, who brought an Action of Waste, for that the Lessee suffered the Banks of the said River, which ran by the Lands to be unrepaired, whereby the Water brake the Banks, and surrounded the Lands; For there it was said by all the Judges, that the *Trent* is not so violent, but that the Lessee by his policy and industry, might have

have preserved the Banks, and caused the water to have run within its limits, Moor 69. so that it seems in such case, where there is neither Sea, nor any extraordinary high swelling-waters, but a River of an ordinary and gentle current, such excuse of the Lessee is not to be received, but if there be any irruption and surrounding, it is waste.

7. Seventhly, if one do hold his Land by the yearly payment of Ten Shillings towards the repair of a Wall, if this money will not defray the charge, the rest must be laid on the Level.
8. Eighthly, If a new Wall or Bank be to be erected, or a new Sewer, Trench or River to be cast, or Sluce or new Goat to be built, in these cases the Commissioners must lay the charge on the Level which are to take benefit thereby, as well for new building thereof, as with the maintaining of them: for in the Case of new Defences there can be no Prescription, Custome or Tenure bound to doe the same.
9. And lastly, In case there be a great Port in the Countrey, by the which the whole Countrey hath benefit; for the Ports and Havens, as hath been said, be *Ostia & janua Regni*, and are the Defences to the whole Countrey *tempore pacis & tempore belli*, and are those places, by means whereof the upland Countreys be made partakers of the Sea Commodities; therefore in my opinion, the extraordinary repairs of these be not altogether tied to the Level, as in other Cases, nor to prescription or Custome of repairing, which extends but to ordinary defects, but upon great and urgent necessities, for the safety of the Port, upon the welfare whereof the safety of the Countrey doth depend, the whole Countrey are obliged and bound to contribute towards the repairs, for these reasons following:

First,

First, for that in time of peace it is the Gate which openeth it ſelf to let in from Foreign parts the Ships and Barques, which bring hither to this Iſland ſuch Merchandizes, Wares and Commodities, both for our profit and pleaſure as we have need to uſe.

Secondly, At theſe Ports we ſhip out to Foreign Nations our exceſs of Corn, Cloth, Skins, Lead and other Wares, wherewithall we do abound, and receive in truck therefore other things more uſefull and neceſſary for us.

Thirdly, In time of War we have ſhipping here for our Souldiers, and means at the eaſieſt charge to tranſport them to ſuch Places as the King and Council ſhall direct.

Fourthly, In thoſe Ports are commonly great Havens, which are the chief receptacles of all our freſh Waters, into which the Waters which drown the grounds of the countries adjoining are conveyed.

And laſtly, it appears by divers Authors, that a Countrey well furniſhed with Ports and Havens, is not more ſtrengthned than honoured thereby; and if it be as lawfull as convenient to put a caſe of Chronicle Law upon it, in the 28th year *Eliz.* in *Holingshead's* Chronicles, it appeareth what great care the Queen and the Lords of the Privy Council, and the Knights and Gentlemen of *Kent* took for the repairing of *Dover* Haven, what preparation was made for it, what moneys Levied, and how forward all the Countrey was to effect that work, may be a Spectacle to others for to lend their helping hands to the maintaining of ſuch worthy Works, being of all other the moſt Honorable to our Nation, and the moſt uſefull to the enriching thereof; for which cauſes in my opinion, becauſe the Mountains as well as the Valleys have both *Salvationem deſenſionem & commodum* thereby, therefore in time of need the one as well as the other ſhould be charged by the power of this Commiſſion, to contribute to the extraordinary repairing of the ſame.

A Sea-wall was overthrown by a sudden and inevitable Tempest; one within the Level subject to be drowned, disbursed all the money for the building of a new Wall: Afterwards the Commissioners taxed every man within the Level for the repaying of the sum disbursed, with his damages, *viz.* interest for his money, and this matter being disclosed upon a return to a *Certiorari*, *Brampton*, Ch. Just. and *Heath*, Just. B. R. were of opinion that this charge was legally imposed, as well for the damages, as the principal money; And that the Commissioners having jurisdiction of the principal, have jurisdiction likewise of the damages, which are the accessory: For who else would hereafter disburse all the money in any imminent danger and necessity, if he should not be allowed use for his money? *March 198, 199, 200, 201.*

I have now proceeded in this point of Sess so far, that I take it, I may Justly here make my full period of this days exercise; and I have taken up the more time herein, because thereupon a main part and strength of this Law consists: And therefore I will now apply my self to my conclusion, in the which I have already proceeded so far, that I have made it in some sort to appear, that some of the Sesses in particular are not well imposed, as the Lessee in case of the new defences was not alone chargeable, for that he in the reversion was to contribute thereto, and that no imposition ought to have been laid upon the Parson for his Tythes, but the owner of the Soil was to be charged for all; so that these two be already ruled for me: But yet if any of the Sesses should be good, then I should fail in my conclusion;
I shall

I shall therefore set forth in few words, that all the Sesses are void.

And the cause is this, That the draining of the superfluous Waters in *S.* appeareth by my Case to be onely commodious for *S.* and that *D.* the other Town had no good thereby: And it appears also, that by the repairing of the ancient Sewer in *D.* that Town onely had benefit thereby, therefore to assess *S.* to repair in *D.* and *D.* to contribute to *S.* where in those Cases there could be no benefit, is directly against the letter and sense of these Laws; but herein either of them ought to have been at charge with that, by the which it took benefit, and that not otherwise; and therefore the mixture marred all the matter: And so upon all this I conclude my Argument as I did my Case, that the new Bank, new River, and old Sewer were well decreed, but that the assess is void *in toto & in qualibet parte.*

Finis Secundæ Lecturæ.

Lectura

Lectura Tertia.

IN my two preceding Cases, the main body of this great Law were contrived, and therefore I took a greater and larger compass in my Arguments therein, than otherwise I would have done; and I am now come to the execution of these Laws, wherein the life and livelihood of all Laws consist: And it may well be said of execution, as Mr. *Plowden* in *Zouch* and *Stowell's Case*, in his *Commentaries*, fol. 358. saith of a fine, that it is *finis fructus exitus & effectus Legis*; so is execution the fruit, issue and end of the Law, and without it nothing is effectual, and till it come nothing is material; for to begin a Suit and stay at the declaration, were a fruitless enterprise; and to proceed on to judgment, and to go no farther, were like a Traveller which undertook a journey, and returns or sits down without farther moving, before he came at the end of his intended progress.

Law, as *Cicero* saith, is but *mutus Magistratus*, the Magistrate is *Lex loquens*; but I shall add something, which upon the matter is the sum of all things, that is, That *executio est Lex agens*: And because I esteem the time to be almost lost or mispent which is prologued out in preambles, I will therefore now briefly divide this part of this Statute into these insuing heads:

Either in punishing the { Imprisonment,
body and person of the { Fine, or
Delinquent with { Amerciament.

1.

X

Or

2. Or in doing execution { By distress,
upon the Offender's { or by the
Goods { Absolute sale thereof.

3. Or otherwise in exten- { By charging the Land in per-
ding upon the Real { petuity, or temporarily; or
Estate, { by the absolute sale thereof.

The true and due execution of all these in a just, legal, equal and qualified decree, requireth of all other parts of Law this greatest and truest discretion, consideration, wisdom and judgment of the Commissioners: And I take it, it may stand as a ground infallible, that there be as many degrees of punishment, as there be offences; It behooveth therefore the Commissioners to be circumspect, that they apply to every offence his due punishment; for it is injustice to punish the offence committed in a wrong degree; to pronounce a Traitor's judgment upon a Felon, or a Felon's judgment upon a Traitor, is grand misprision; to imprison the Body, or to fine the person, where an Amerciament is onely due, is not onely injustice in the Commissioners, but thereby also their discretions are to be drawn in question and censured.

And seeing the Statute doth so much lie upon discretion of the Commissioners, as in many parts of this Law it is mentioned; It seemeth the Parliament did give them to understand, That such as were to meddle in those affairs, should be both discreet and wise, and should strive to become learned in those affairs.

And therefore for the better furnishing of them with the true understanding of the said parts of this Statute, I have framed a Case thereupon, which doth give just occasion to treat fully of them all.

The third Case.

A. Gave the Office of a Ranger of a Forest, to which a Manor is belonging to *J. S. & Abnepti*, and to the heirs, males and females, of their Bodies in Frank-marriage, and dieth, *B.* and *C.* their legitimate Son and Daughter, and *D.* their Bastard Daughter enter, and dieth in seisin, and *E.* her Daughter enters: The Commissioners of Sewers at a Court make a Law, That a Goat shall be repaired, and assess severally *A. B. C.* and *E.* to doe it, upon surmise that they all had benefit: *B.* and *C.* refuse to obey, for which *B.* is imprisoned, and *C.* is fined; *A.* and *E.* tender pleas of discharge, which are refused, and they are severally amerced, and a Law made, that *A.* should be distrained, and for non-payment the distress to be sold, without allowance of Replevin, and the interest of *E.* should be also sold, because she hath nothing to be distrained by.

I conclude, the Commissioners of Sewers have done due Justice upon the Offenders in every part of this Law.

Argumentum Lectoris.

The passages of this Case are both at the Commonlaw and by this Statute: The Commonlaw is the means, but the Statute is the matter I must insist upon: But seeing the Statute Law can receive no due construction, but by the Rules of the Commonlaw, I have therefore made a harmonial composition of them both in my Case, and I do distinguish and branch out my Case into these ensuing points.

Points at the Commonlaw.

- | | |
|---|----|
| <i>Imprimis</i> , Whether this Office may be intailed or not? | 1. |
| Secondly, Whether it be an ordinary Intail, or a Frank-marriage? | 2. |
| Thirdly, Whether the Bastard be inheritable to this Estate, or not? | 3. |

Points upon the Statute.

1. First, Whether the Commissioners have a Court, or only the strength of the Commission without a Court?
2. Secondly, Whether Commissioners of Sewers have power to imprison and to fine? if so, then whether they have well behaved themselves in this Case, or not?
3. Thirdly, Whether this Law doth admit of any pleas, and especially of pleas of discharge?
4. Fourthly, Whether the Law made touching the distress be well made, because it seemeth *prima facie* to oppose a main point of the Commonlaw, in denying of Replevins?
5. Fifthly and lastly, If the Law made for sale of Lands or Tenements in Tail be warranted by this Statute, or not?

These be the materials of this Case, wherein you may perceive by the beginning, what you are to expect in the sequel and conclusion of my argument.

These Points upon the Statute are of great consequence and importance, and tend much into the powers of these Laws: In the handling whereof, according to my wonted fashion, I intend to maintain the Affirmatives of my Case.

First Point.

I did not intend it a point of any importance in my Case, Whether Land might belong to an Office; for that in the 1 H. 7. fol. 28. in Sir Richard Croft's Case, it is resolved it might: For there Land did belong to the Office of a Forester, and might belong to the Office of the Warden of the Fleet, and also to a Corody which was no Office, and these as well as to a spiritual Office, Parson, Vicar, Prebend or such like.

And yet it hath been held, that Land may be appendant to offices of Inheritance, but not to offices for life; for then the Freehold would upon the death of every Officer be in obedience: Dyer 6. E. 6. 71. Davis Rep. fol. 34.

Dyer 6.
E. 6. 71.
Davis Rep.
fol. 34.

But

But whether or no theſe Lands might be parted from the Office by alienation, I thought that an argumentable point: in 6 H. 8. *Dyer*, f. 2. *Empſon's* Caſe it is ſaid, if the King create a Duke, and grant to him an annuity to maintain his Dignity, that annuity was ſo incident to his Dignity as it could not be ſever'd therefrom; and ſo of Lands belonging to a Parſon, Vicar, Biſhop or ſuch like, becauſe they were given to the maintenance of them in their places, and therefore if theſe were ſevered, they might be recontinued again to their Succeſſors.

And in the Caſe of Sir *Henry Nevil* in *Plo. Com.* an Office of a Parker was granted to two, and Annuity for the exerciſe of it; and it is there reſolved, that the Annuity might not be ſevered from the Office: and ſo it might be ſaid in my Caſe, That the Manor which belongs to the Office was at the firſt laid thereto, or given therewithal for the maintenance of the Officer in his place by the Founder, and ſo may not be ſevered therefrom without his conſent. And touching the intailing of the Office of the Ranger of a Foreſt, it is held in *Mancel's* Caſe in the Comment of Mr. *Plowden*, that the Office of a Bailiff or Receiver of the Rents of a Manor may be intailed.

And ſo it was reſolved by all the Judges of England in *Nevil's* Caſe, Co. 7. 33. and that the office of Steward of a Manor might be likewise intailed within the Statute *de donis conditionalibus*.

So an uſe and a Copyhold, becauſe theſe concerned and depended upon Land. But the Office of the Maſter of the Hawks, or the Maſter-ſhip of the Horſe could not be given in Tail within the Statute of *West. 2. de donis conditionalibus*, nor an Annuity which chargeth the perſon; Yet all theſe may be given or granted within theſe intailed limitations, but yet they are no intails within that Statute.

I am of Opinion, That the Office of a Ranger of a Forest cannot of it self be given in Tail, but having a Manor belonging to it, makes the question of more moment; For as the Office *De se* is not intailable, so the Land *per se* may be intailed: But Land in our case is not the principal, but the accessory & *accessorium sequitur suum principale*; and therefore seeing the Land follows the Office, as the shadow doth the Body, and passeth out of his own kind by the ceremony belonging to the Office, and not by the ceremony by which Land is transferred and passed, I should therefore take it, that the Estate of the Land should be such as the Office of it self might bear, which could not be intailed; yet because in the said Case of the Forester, with Land belonging to it, it is taken to be in Tail in 1 H. 7. aforesaid, with a remainder thereof over in Fee, I am therefore concluded to make any farther Question of it, and so I leave it as I found it, and do pass to the argument of the other Points.

1 H. 7.

Second Point.

The second Commonlaw Point is, Whether this gift in my Case be a Frank-marriage or another intail; I have observed in Books that there be five things incident to a gift in Frank-marriage (*viz.*)

1. First, It must be to or with a Cosin within the four degrees.
 2. Secondly, The Word *Frank-marriage* must be literally expressed.
 3. Thirdly, The Reversion must be left at the time of the gift in the Donor; and then there be two other things follow as consequents.
 4. Fourthly, Acquital of payment of Rents and Services; But the Tenant in Frank-marriage shall doe fealty, according to *Littleton*.
 5. And Fifthly, Warranty to secure the Estate.
- And the want of these or any of these in the creation doth destroy that Estate in the conception.

Here

Here seem to be two Impediments in my Case to hinder this gift to take root as a Frank-marriage; It is made *abnepti*, which is the Cousin in the fourth degree, and the last in those gifts, whereby the gift that way cannot have his full operation, for that the first Heir of their Bodies is out of the former Privileges: But in regard I take it that a Frank-marriage doth more respect his original creation *In incepto* than the descent of the privileges to the Heirs *In suo progressu*, I take this to be no impediment to hinder this from being a gift in Frank-marriage. But here the words in the gift preceding the word *Frank-marriage* do differ much from it, for by the special limitation the Heirs Females shall inherit with the Heirs Males, *Simul & Semel* as Heirs in common; But in the Case of the Frank-marriage Heirs Males shall first inherit single, and for want of them then the Females.

I do agree the Law, that in cases where the special words of limitation may in construction be made to agree with the word, and limitation of Art contained in Frank-marriage, the gift shall be taken a Frank-marriage, as in the Case of 2 H. 3. *It. suff. Fitz. Mordanc. plac. 52.* where Lands were given in Frank-marriage to R. S. *cum Alicia sorore le donor ita quod post mortem dictæ Aliciæ & puerorum suorum*, the Land should revert to the donor; and this was adjudged a gift in Frank-marriage, and the words *Ita quod* were holden of no validity; neither will the words of *Reservandum Reddendum Tenendum* or *Warrantizandum*; though they vary from the nature of a Frank-marriage, yet they shall not destroy the same as an *Habendum* may do, which is the word whose proper place is to create the Estate: and therefore if any thing come therein, which is repugnant thereunto, the same will alter the quality of the gift: And with this agreeth the Case in 45 Ed. 3. Title *Tail* 14. and 31. where Lands were given to J. S. in Frank-marriage with B. the Daughter of the Donor, *Habendum* to them and their Heirs, and this was held a Fee simple, and no Frank-marriage; so in *Webbe and Potter's Case*, Owen 26.

And

Godb. 20.

And the like Law is where Lands are granted in Frank-marriage, the remainder in Fee to J. S. and his Heirs; the Frank-marriage is defeated by the opinion in *Br. Cafes*, and *Godb.*

Moor 643.

20. And if Lands be given in Frank-marriage, the remainder to the Heirs of the Husband, by this remainder the Frank-marriage is defeated, *Moor 643. case 888.* And so in my Case, because there can be no reconciliation between the special words of limitation in my Case, and the Word Frank-marriage: I am therefore of Opinion, that this Gift is an Estate in Tail, according to the special limitation, and no Frank-marriage.

1 Inst. 21.
Godb. 20.

Note, The Cafes here put, are of a remainder in fee simple; For if Lands be given in Frank-marriage, the remainder to the Donees, or to a Stranger in tail, the gift in Frank-marriage stands good, notwithstanding this remainder, because the Donor hath still the reversion in fee in himself, and the Donees in Frank-marriage hold of the Donor, *Co. 1 Inst. 21. b. Godbolt 20. Webbe and Potter's Case.*

Third Point.

Whether the Bastard shall inherit to have an Estate in tail, is the third Common-law question; for I am clear of opinion, that a Bastard cannot inherit to a gift in Frank-marriage, because Adultery and Fornication, which is the Seed of every Bastard, is opposite to marriage, and in breach of that powerfull link and knot of Matrimony, which is an Ordinance derived from the Divine Power of the Almighty: And therefore seeing marriage is the material consideration of such a gift, Bastardy the opposite can never (being out of the consideration) come within the privileges to inherit this Estate.

So

So if I give Lands to J. and S. and to the Heirs of their two Bodies lawfully begotten, their Bastard cannot inherit to this gift, because he is not heir of their two Bodies lawfully begotten; But if the Word *Lawfully* had been out of the limitation, then I see no reason but that a Bastard may inherit to an Estate in tail, as to a Fee-simple conditional, which he might have done at the Common-law, seeing an Estate tail may be made before marriage, as expecting to be confirmed thereby; and so a Bastard born before marriage is by the consummation of a succeeding marriage made capable to inherit to them, if his possession continue without disturbance to his death: Yet in *Plow. Com. fol. 57.* in *Winbish and Tailboy's Case*, it is said, *That Pl. Com. 57. if there be a Bastard, Eigne and Mulier puisne, and the Bastard after the death of the Ancestour entreth into intailed Lands, and dieth seized, this doth not bind the Mulier in case of Estates Tail, as it doth in an Estate of Fee-simple:* and voucheth for authority in the point, *39 Ed. 3. plac. 39 Ed. 3. ultimo*, where the Case is, *That Lands were given in tail to J. S. the remainder in tail to C. and J. S. hath Issue by a Woman a Bastard, and dieth seized, and then the Bastard dieth seized, having Issue, he in the remainder may recover the Land against the Issue of the Bastard;* affirming, *That the continuance of possession in the Bastard shall not be prejudicial to him in remainder:* To which opinion I do subscribe, because he in remainder is a stranger in blood, and so cannot be concluded as the *Mulier* shall be; for a *Mulier* indeed is like a graft drawn out of both the bloods of Father and Mother: so the Bastard is a slip which is derived from the same Stock, and had his being therefrom.

And for my own opinion, considering the Statute of *Westminster 2. de Donis* doth accept of Gifts in tail made before Marriage, upon the hope and expectation of a succeeding Marriage to perfect the same, even so the Marriage succeeding to a Bastard's birth gives him and his Issue a privilege in these Cases of descent, which is denied to other Bastards or mere Strangers. And I see no reason wherefore

fore that maxime and principle of Law should be altered by the said Statute of *West.* 2. but because *Mountague's* opinion in *Mr. Plow. Com.* sways the other way; I will therefore submit this Point to men of greater judgment than my own: So that if the Law fall out for the Bastard Issue, then she should have title to the half part belonging to the Females, and to no part belonging to the Heirs-males: And with this Conclusion I do here end my Common-law Points, and will now resort to the handling of my Statute Points.

In the Case of *Blodwell versus Edwards, Mich. 38 & 39 Eliz. B. R. Popham* Chief Justice, and other of the Judges were of opinion, that if a limitation be to such issue of the Body of a Woman, as shall be reputed to be begotten by *A.* on her Body, and she hath afterwards a Bastard, who is reputed to be their Issue: The Bastard can never take by such a limitation: For the Law hath not any expectancy that any such Person should be, nor will give liberty or scope, to provide for such before they be; And if he cannot take at the time of his birth, he never afterwards shall take; Now the Bastard was not capable to take at the time of his birth, because he could not then be reputed to be the Son of *A.* For none can gain such a reputation at the instant time of his birth, but it must be gained by continuance of time, and reputation of the Countrey. The limitation also to one and the Issue of his Body, is always to be intended lawfull Issue; and the Law will never regard any other Issue, *Cro. Eliz. 510.*

Which

Which opinion directly contradicts that of our Reader, *viz.* That if Lands be given to J. and S. and to the Heirs of their two Bodies begotten, without the word (lawfully) a Bastard may take by such a limitation: And the case seems to be stronger against him, because he puts in the word, Heirs. For though a Bastard may be the Issue of their two Bodies, yet he cannot be the Heir of their two Bodies: Nor can the marriage of J. and S. subsequent to the birth of the Bastard alter the case, if that in *Croke* be Law; For although what our Reader saith is true, that the Statute of *W. 2. de donis* doth accept of gifts in tail, made before marriage, upon the hope and expectation of a succeeding marriage to perfect the same, yet a Bastard cannot perfect such a gift in tail in the eye of the Law, which onely regards lawfull Issue.

The Sewers are a Court of Justice.

I Am desirous to attribute to this Law all the honour and dignity which may in any sort belong to it; and therefore I am unwilling to forget any thing which may materially tend to the upholding and maintaining thereof: wherein amongst the rest, and the chiefest of them all, it is, To prove the Commissioners of Sewers a Court of Justice: I know some Opinion hath been to the contrary, and held, That the Commissioners had onely the power of a Commission, and not any Court; and I suppose much may be said to maintain that Opinion,

1. First, Because *in expressis terminis* there is no Court ordained by this Statute, or by any other, and without words express in the Point, they can have no Court.
2. Secondly, By presidents in the like case it hath been held
The Case of no Court, as in the Case of the City of London, in Sir Edward Cook's 8th Report, The King granted to the Major and Commonalty *Plenum & integrum scrutinium gubernationem & correctionem omnium & singularum misteriarum*, and it was resolved, That they had no Court in this case, because no Court was granted to them by the Patent, as it is holden in Doctour Bonham's Case, f. 119. in the same Report, wherein the principal Case there put sways the same way; for there the Physicians had power to imprison, and to fine Offenders, yet they had not any Court thereby.

And so if a Commission issue out of the Chancery to examine matters in a Suit there depending, and to Oyer and Terminer the same, yet hereby these Commissioners have not any Court; for in that case the Commission is derived out of the proper power of the Chancery, which is the Court for that cause *eo instante* when it is in Commission: And one Cause cannot *uno eodemque tempore* depend in several Courts; neither have the Commissioners upon the Statutes of Bankrupts and charitable uses any Courts: nor the Commissioners in the case of 1 & 2 Eliz. Dyer, fol. 175. which had power to hear and determine the Office of the Exigenter, had not any Court, but onely the power of a Commission: For in truth these are all of them rather Ministerial than Judicial Commissions, and so a Court is not proper to them.

Yet I am of opinion, That the Commissioners of Sewers have an eminent Court of Record: It is true, that Courts had their beginnings in three sorts;

1. First, By Prescription.
 2. Secondly, By Charter-grant from the Crown. And,
 3. Thirdly, By Act of Parliament.
1. The Courts, Hundred and Leet began by custome, and so did the eminent Courts of *Westminster-hall*.

2. Courts.

2. Courts in Corporations most of them took their beginnings by Charters. And,

3. The Courts of first Fruits and Tenth, and the Court of Wards and Liveries were erected by Act of Parliament, the one in 32, the other in 33 H. 8. But to bring the question nearer home to our Statute of Sewers, which is but ^{32 H. 8.} ^{33 H. 8.} *additamentum legibus antiquis Sewerarum*, for they have been used from the beginning of Laws, though perhaps not known by that name: And yet before the 6 Hen. 6. they were known by that name, as by the perusal of that Statute may be collected: And therefore for the causes and reasons hereafter ensuing, I hold the same to be a Court.

First, For that the Statute of 12 Ed. 4. cap. 7. and our very Statute of 23 H. 8. calls the Commissioners of Sewers ^{12 Ed. 4.} *Justices*, So Fitz. N. B. 113. b. and one cannot properly be a Justice or a Judge but in a Court, and that in Fitzherbert was urged by Brampston, Chief Justice B. R. Pasch. 18 Car. 1. in the Case of *Commings* and *Massam*, to prove they were a Court before the Statute of 23 H. 8. 5. March 201. ^{I. 1 H. 4: c. 12.}

Secondly, Here be legal Proceedings and Process: for this Statute saith, *That the Commissioners may make and direct all Writs, Precepts, Warrants, and other Commandments, to all Sheriffs, Bailiffs, and other Ministers, &c.* And the Statute of 1 H. 4. cap. 12. hath these words in it ^{1 H. 4.} *(That he that thinks himself grieved may pursue and he shall have right)* and where there be legal proceedings, and where parties grieved may come in and have remedies for the wrongs and injuries done to them, there is properly a Court of Justice to have them in: But in Dr. *Bonhams* Case the Physicians had no legal proceedings, and therefore parties grieved could have no remedy, which was the reason they had not a Court.

And

3. And Thirdly, The chief reason wherefore I take it that Commissioners of Sewers have a Court, is, Because the Commission of Sewers is a member of the ancient and renowned Court of *Oyer and Terminer*, which was and is a Court of great esteem, power and authority; and so it was needless to erect a new Court in this case, as it was needfull to erect and found the Courts of Wards and first Fruits, the first would else have remained in the Chancery, to the which primarily it did belong, and the other was a new Revenue, and wanted a Court to direct or dispose of it.
4. Fourthly, The Commissioners have a Clerk proper to themselves to register their Laws.
5. Fifthly, The Commissioners have power to make Orders and Decrees, which are Judgments in effect, and some of them cannot be reversed but by Act of Parliament.
6. And Lastly, Writs of Error have been brought to reverse Judgments given in that Court.

For all which causes I do conclude, That the Commissioners of Sewers have a Court of Record, although it be not holden *in aliquo loco certo*: So was the *King's Bench*, a Court of more Eminency than this, but *ubicunque fuerimus in Anglie*, and for expresse Authority in the point is *Gregory's Case* in the 6th Report of *Cook* Chief Justice, that the Sewers is a Court of Record.

*Gregory's
Case.*

Herne.

And this Court (by the opinion of *Herne*, *Lect. p. 7, 8.*) may sit and inquire by a Jury on the Sunday, though the same be not in Law *dies juridicus*; For judicial Acts *propter necessitatem* are good on that day; And the Sea is an Enemy not to be repelled but by this Court.

Note, All Commissions of Sewers, and all returns and proceedings thereupon are by the Statute of 23 *H. 8. 5.* to be in English, and not in

in Latin: And such strictness is not observed in the forms of such proceedings, as in Indictments, *Siderfin* 1. 78. *Style* 85.

Siderf. 1. 78.
Style 85.

Neither doth there need any adjournment of the Commission of Sewers, as was agreed, *Mich.* 1649. by the Court of upper Bench (then so called) in the Case of the Inhabitants of *Outwell, &c.* *Style* 179.

Style 179.

And although before the said Statute, when the Proceedings of the Commissioners of Sewers were in Latin, a Writ of Error would lie thereupon: yet no Writ of Error now lieth upon any of their Proceedings, because they are all in English: *March* 197, 201. *Commins versus Massam*: But in that Case *Brampston* then Chief Justice *B. R.* said the Party grieved should be at no loss thereby; for he shall be permitted to discharge himself by Plea, as in all Cases the Party shall be, where he can neither have a Writ of Error or *Audita querela*, as in 11 *H.* 7. 10. *Ib.* 201. And a *Certiorari* likewise still lies, to remove such Proceedings into the *King's Bench*: See for this *postea*, pag. in *Certiorari*.

March 197, 201.

11 *H.* 7. 10.
fol. 10.

Imprisonment imposed by the Commissioners of Sewers.

IT is a point of high consequence, whether Commissioners of Sewers have power by these Laws to imprison the Body of a man for any thing touching the same, for that imprisonment of the Body seemeth to sway somewhat against the

28 H. 8.
Dyer.

Clark's Case.

Mayor of
St. Albans.

Magn. Chart.

Dr. Bonham's
Case.

2 Eliz. Dyer
175.

the grand Charter of *England*, and against the liberty of a free-born Subject; and it is said in *Bonham's case*, 28 H. 8. in *Dyer*, that liberty is a thing which the Law much favo-
reth: and I find in our Books of Law, That the Judges have been very carefull and curious in not extending words contained in Charters to the imprisonment of mens Bodies, unless they were express in the Point: And therefore in
the case is, That the Term was to be kept at Saint *Albans*, and the Major there and his brethren did assess every Townsman towards erecting and building of the Courts of Justice, and made an Order, That he which should refuse to assist and pay should be imprisoned; and one being arrested and imprisoned, brought his Action of false imprisonment against the Major, who pleaded in effect, That they were incorporate by King *Ed. 6.* and had power granted to them in their Charters to make Ordinances, by reason whereof they made the said Order, and so justified, the imprisonment: But it was adjudged against the Major, for that by the said Charter they had not any power to make an Ordinance to imprison a man's Body, for that were against the grand Charter in *Magna Charta*, cap. 29. *Quod nullus liber homo imprisonetur nisi per legem terræ*: But by that Book they might have inflicted a penalty, and distrained, or brought an Action of Debt for it. In Doctor *Bonham's case* in the 8th Report, King *H. 8.* incorporated the Physicians of *London*, and gave them power by Charter to examine the Imperites, and to find out the defects, *Et pro delictis suis in non bene exequendo faciendo & utendo illos per punitionem eorum delinquentium per fines amerciamantum & imprisonamentum corporum suorum*: hereby it appears, that by the King's Letters Patents they had power to imprison the Body; but I find their Charters confirmed by Act of Parliament: Yet in 2 *Eliz. Dyer* fol. 175. the case is, That the Queen did award a Commission directed to certain Commissioners, to Hear and Determine the controversies betwixt *Scrogs* and *Colshil* touching the Office of the Exigenter, and that if *Scrogs* should refuse

to obey to make answer before them, they should commit him to Prison; but the validity of this last Commission I much doubt of. I am of Opinion, That the Commissioners of Bankrupts and charitable uses, have no power to commit any man; but if any abuse or misdemeanor be committed in contempt or derogation of their Authorities, they may make Certificate thereof into the Chancery, and refer the punishment thereof to the will and discretion of the Lord Chancellor or Lord Keeper for the time being.

In *Godfrey's Case* in the 11th Report and Roll 1. 73, &c. Godfrey's Case. there is a Discourse what Courts have power to imprison, and which not, and there it is said, Some Courts may Fine, but not imprison, as the Courts Leet and Sheriff's turn; some others could neither fine nor imprison, as Courts Baron and County Courts; and some could neither fine, imprison nor amerce, as Ecclesiastical Courts; And some may imprison and not fine, as chief Constables at their Petty Sessions for an affray done in disturbance of them; And other Courts there were which might fine, imprison and amerce, as the eminent Courts of *Westminster*.

So that imprisonment is not incident to every Court, nor to every offence; Yet I am of Opinion that the Commissioners of Sewers may imprison the Body, for it is not only a Court of Record, but is authorized by Act of Parliament; and I suppose that there be words in the Commission and Statute which will bear this construction, which are as follow, viz. *And all such as ye shall find negligent, gain-saying or rebelling in the works, reparation or reformation of the premises, or negligent in the due execution of the Commission, That ye compell them by distress, fines and amerciements, and by other Punishments, ways or means, &c.* Which words are strong, and large enough to authorize the Commissioners of Sewers upon just cause to imprison the Body; But here they are to be carefull, and not to think that they may imprison, fine or amerce in any case, because the words be generally put together: But this construction must be thereof made, That they may imprison where imprisonment is

Z

due,

due, and fine in cases fineable, and amerce in cases amerceable, and distrain where a distress properly lieth by the Rules of Law; and they may not imprison, where by the Laws imprisonment is not due, but every one of the said punishments is to be used in its proper kind; for these words promiscuously put together, must be ordered by a just and legal construction, according to the Rules of Law and Reason.

R. 3.

And I have known the words of a Statute generally and promiscuously put together, have been marshalled according to their distributive operations, as the Statute of 1 Ri. 3. which is, *That all Feoffments, Gifts, Grants, Releases and Confirmations of Land made by Cestuy que use should be good*; Yet though these words were generally put together, notwithstanding the wise and discreet Sages and Expositors of our Laws have so Marshalled the words of this Statute, that they made construction thereof according to the Rules and Reasons of the Law, That this, That *Cestuy que use* in Possession might make a Feoffment; and that *Cestuy que use* in Reversion or Remainder might grant the Land, and *Cestuy que use* of a discontinued Estate might release or confirm: and yet the words of this Statute were general, howsoever Reason must be the Expositor, that every thing be done in due form of Law, and not in preposterous manner.

And these matters being thus passed over, I shall endeavour my self to declare in what Cases Commissioners of Sewers may imprison, fine and amerce, and where not.

Imprisonment, fine and amerciament.

Fines.

IF one give evil language to Commissioners in Court, or disturb the peace there, or hinder the business of the Court in a Turbulent fashion, he may be by them Fined or com-

committed to Prison, or both, at the discretion of the Commissioners; for by 34 H. 6. fol. 24. in every case when a man is fined, he may be imprisoned; and by 19 Hen. 6. fol. 67. ^{34 H. 6. } not so.} in every case where one is imprisoned he may be fined; and our Law in expresse words gives the Commissioners power to set fines: and then by the opinion of the said Books *ex consequenti* they may imprison.

But in all Cases where the Commissioners of Sewers impose a fine upon a Man, the same ought to be reasonable; and if it be excessive, a *Certiorari* may be granted by the Court of King's Bench, and the Judges there may moderate the fine: By *Brampton*, Chief Justice, B. R. 18 Car. 1. March 202.

If one oppose against a Law of Sewers not legally in questioning the same, but refractory contemning thereof, or by dissuading persons assessed not to pay such, or not to obey the Law, I am of opinion that a person is both fineable and imprisonable; and if this be done *in facie Curie*, it aggravates the contempt; and this is the Rebelling which this Statute speaketh of.

If one do refuse to obey the Decree, Rule or Order of the Court, especially if it be done in affront of the Commissioners, when they be in execution of their Commission, This is a contempt, and he is to be imprisoned for such his disobedience, and this agreeth with 37 Hen. 6. fol. 14. ^{37 H. 6.}

There is no question but a man may be fined by the Court of Sewers for not obeying their Decree, Rule or Order: See *Bruster's Case*, Style ^{Style 445.} 445. where one was fined by them for not obeying their Orders, after a *Certiorari* was delivered to them to remove the Orders, made against the Party. But it being shewed to the Court of

King's Bench that the fine set was for disobeying a new Order of theirs made against the Party, after the *Certiorari* was returned, and not for disobeying the Orders removed by the *Certiorari*, and so no contempt to the Court: An Attachment against the Commissioners of Sewers was decreed; and *Roll* said, that they might proceed upon the Commission of Sewers, notwithstanding the *Certiorari*, for the *Certiorari* doth not remove the Commission.

But for a bare disobedience to their Orders, it seems they cannot imprison. For in the Case of the Inhabitants of *Oldberry versus Stafford*, *Trin. 15 Car. 2.* where the Commissioners of Sewers had made an Order for a Miller to repair the Floudgates, and if he broke the said Order, or refused to observe it, that then he should be imprisoned, it was resolved by the Court of *King's Bench*, that the Order was illegal. For although the Commissioners of Sewers being a Court of Record, may imprison a man for a contempt committed towards them, yet that shall be intended onely of a contempt committed in their presence, and not barely in disobeying their Order, *Siderfin 1. 145.*

Siderf. 1. 145.

20. Jac.

In *Termino Pasche 12 Jac.* in the *King's Bench*, the case there was in debate between *Hetley* and *Carier*, where certain Commissioners of Sewers in the Counties of *Huntington* and *Northampton* made a Law, That certain Townships in those Counties were assessed to a work of Sewers, and one Town

Town was rated to five pounds; and because the same was not paid, the Commissioners caused a Warrant to be directed to the said *Carier*, to distrain for it, and he distrained the Cattle of *Hetley* one of the Inhabitants, and *Hetley* brought an Action of Trespass in the Kings Bench against *Carier* and arrested him thereupon, and upon complaint made to Sir *Anthony Mildmay*, and Sir *John Boyer* Knights, and other the Commissioners of Sewers, they caused *Hetley* to be attached by their Warrant, and committed him till he should release his Action brought against *Carier*, and untill he should be delivered out of the Prison by Warrant to be granted by them: But afterwards *Hetley* procured a *Habeas corpus cum causa* out of the Kings Bench, and was removed, where all the said matter appeared; and thereupon Attachments were awarded against the said Commissioners; and Sir *John Boyer* appearing, was by *Cook* chief Justice, *Crook*, *Dodderidg* and *Houghton*, Justices, committed to the King's Bench Prison, and was fined two hundred pounds; but was after delivered *Ex favore regis sed non ex Rigore Legis*.

And Sir *Anthony Mildmay* not appearing in the King's Bench upon warning given him, an Indictment of *Præmunire* upon the Statute of 27 E. 3. cap. 1. was exhibited against him for this offence, and he had judgment (as it seems) thereupon; But he afterwards obtained the King's pardon, which was allowed in Court: See the Case at large in *Bulstrode* 2. 197, 198, 199, 299, 300. and *Cro. Hil.* 11 Jac. 336.

Bulstrode 2.
197, &c.
Cro. Jac. 336.

And in my opinion, The said Commissioners in this case in making a Warrant to attach *Hetley*, and in imprisoning of him for the said causes did exceedingly err, and the rather, because they took upon them to overrule the Justices of the King's Bench, being of a higher and greater authority

authority than they were of; But this is no president to impeach the power of the Commissioners of Sewers for committing persons offending their authorities to Prison, if their proceedings therein be consonant to the Laws of this Realm; but they were punished in this case, not for executing their power, but for exceeding their limits, and the bounds of their Commission.

If a Collector, or Expenditor, or other Officers of Sewers have been negligent in the execution of his Office and place, he is fineable therefore, though his offence be but neglect, because he was an Officer, and was also sworn to execute the same duly.

But I take it, a neglect in another ordinary person is not to be punished.

And if one be rated to pay towards repairs, and he neglect to pay the same at the days and times appointed, he is not fineable therefore, but is to be amerced in this Case.

If a Collector or Officer of Sewers do distrain a man, or doe any other Act contrary to an Inhibition of Sewers to him directed by the Commissioners of Sewers, he may be fined and imprisoned & *simile factum fuit* in 7 Hen. 4. fol. 33.

If a Purpresture be committed in the King's streams, as in fixing Piles and Stakes therein, or in stopping, straitning or diverting the course of the Waters from their ancient channels or courses, these offences being presented, the offenders are finable therefore, if in the Presentment they be found to be done *vi & armis*, or be presented by the name of Purprestures; for by 19 H. 6. fol. 8. if the offence be done with force, and so presented, then the Offender is fineable, but otherwise it is if the offence be not found, but omitted, for then an amerciament is onely due. And

7 Eliz. f. 240. it is said in Dyer 7 Eliz. fol. 240. That for a Purpresture one is fineable, and a Purpresture may be committed in *aquis Regiis* as well as in *viis Regiis*, by the opinion of Glanvil: And in Keleway's Report, fol. 141.

And

And a Purpresture is taken to be an offence done to the King immediately, or to his Possessions; But if the like offence be done to a Subject or to his Lands, it is termed a *Nusans.*

Nusans.

The Abbat of *Mellefont* was fined for erecting a Were in the Royal River of *Boyne* in *Ireland*, which is expressed in the *Irish Reports* in the Case of the Royal Piscary of the Ban in *Ireland*, and this was a Purpresture.

If one do refuse to accept an Office of Sewers, being thereto duly elected by the Commissioners, he is fineable therefore, for in *Gresly's Case*, 8th Report, One being elected and chosen Constable, did refuse to take the Office, and he was fined.

Gresly's Case.

And if an Officer do misdemean himself in his Office, he is fineable, for in 10 H. 6. fol. 6. A Tythingman did refuse to make presentment, being thereto required, and he was fined therefore. So in case of the Sewers, if one of the Jury, or which is a Surveyor, refuse to make presentment when he is required by the Commissioners, he is to be fined. So if a Juror depart after he is sworn on the Jury, or before he be sworn, after his appearance be recorded, he is to be fined; And if an Expenditor or Collector, Officers of Sewers, be required by the Court to accompt for the moneys received and laid out by them, and they refuse, they may be punished by fines.

10 H. 6.

And if the Sheriff upon Writ or Warrant directed to him to return a Jury before the Commissioners, make no return thereof, nor doth not attend when he is required, he is to be fined by the Commissioners.

Also an Officer of this Court is fineable for falsities done by him in his Office, for these are a violation of his Oath, and is a breach of that trust which the Court reposed in him at his election and entrance into his Office, and therefore the offence is greater in him than in another man.

I have learned in Books that a Fine hath these qualities with it:

First,

1. First, The Party in that case is imprisonable.

2. Secondly, The cause for which it is imposed is not traversable, being merely the Act of the Court; but if it be imposed upon a presentment found by Jury, then the cause is traversable.

3. Thirdly, All fines ought to be assessed, abated or increased in *Plena curia*, and not elsewhere.

4. Fourthly, Every fine ought to be reasonable.

✓ 34 Ed. 3. And therefore I shall put the Commissioners of Sewers in mind as the Statute of 34 Ed. 3. cap. 1. did the Justices of Peace, that those fines that they should impose for any offence coming before them should be reasonable, having respect to the quantity and quality of the offence, for *Excessus in re qualibet jure reprobatur communi*.

41 Affiz. pl. 12. But because in Godfrey's Case it is said, that *Commitment of the Body to prison is incident to a fine, as by a Capias pro fine also may be collected*; Yet I hold it questionable, whether the fine shall precede the commitment, or the commitment the fine. But for my own opinion, I hold that this lieth much in the discretion of the Justices, and I find cases and presidents both ways; for in 41 Affiz. plac. 12. an Officer was imprisoned *quousque finem fecerit*, where the imprisonment preceded the fine: and with this agreeth 7 H. 6. fol. 25. and in 33 H. 6. fol. 21. one was fined, and after imprisoned for it, and there the fine did precede the imprisonment.

But upon all these I take the Law to be, that if one be fined, and this fine may be levied by the Justices, as Justices of the Peace may doe (but not Justices of Sewers) there the imprisonment may be *quousque finem fecit*, because the fine is leviable by them: But the Law is not so of Commissioners of Sewers, because they have no power to levy but to extreat the fines into the King's Exchequer. Howsoever one before them may be both imprisoned and fined *Diversis tamen respectibus*, The one for the wrong done, the other for the contempt or disobedience to the Court; As for example, if one refuse to be a Collectour, he is fineable to the King, because hereby the Commonweal is without

out an Officer ; and he may alſo be imprifoned for diſobey-
ing the Juſtice's command ; and yet in my opinion it lieth
much, if not altogether in the diſcretion of the Commiſ-
ſioners to impoſe or inflict both the ſaid puniſhments, or
one of them, at their pleaſures, being not therein precisely
limited by this Statute.

Amerciaments.

A Merciaments be not ſo grievous as Fines be, for they
be derived of the word *Miſericordia*, which ſignifieth
moderation and mercy ; and to that end was the Writ in
the Register *moderata miſericordia* deviſed, where one is
outragiouſly amerced he might be relieved by ſuing forth
that Writ, which Writ and the Law in that caſe is groun-
ded upon the grand Charter, *cap. 14. Quod nullus liber ho-* *Magna Chart.*
mo amercietur niſi ſecundum quantitatem delicti : And that
none of the ſaid amerciaments be impoſed *ſed per Juramen-*
tum legalium hominum de vigeneto.

Glanvil in his Book ſaith, *Eſt autem miſericordia Domini* *Glanvil.*
Regis qua quis per Juramentum legalium hominum de vigeneto
eatenus amercandus eſt : And Fleta, *lib. 1. cap. 48.* ſaith, *Fleta.*
Quod liber homo non amercietur niſi per ſacramentum parium
ſuorum. And with theſe agreeth *Bracton, lib. 3. cap. 1.* *Bracton.*
and *Fitz. Nat. Bre. fol. 76.* and if the Steward ſet an amer- *Fitz. N. B.*
ciament upon a man on his own head it is void.

By which authorities it plainly appeareth, that amercia-
ments are to be impoſed by a Jury, or by the Oaths of good
and lawfull men ; and therefore I have heretofore much
marvelled, when ſometimes I have ſeen Juſtices of Sewers
take upon them to ſet down amerciaments, without aſſi-
ſtance of the Jury, which act of theirs was directly againſt
the ſaid great Charter of *England*, and contrary to the ſaid
authorities of Law.

So that there is a difference between the impoſing of
fines which are done by the Juſtices, and amerciaments
which be by Jury, or otherwiſe, *per ſacramentum parium :*

A a

So

So is there great diversity between the offences of the one kind, and the other; For if one do suffer a Wall, Bank, or other work of Sewers to fall into decay for want of repairing, which he was bound to maintain by Frontage, Tenure, Custome or Covenant, he is in this case to be amerced therefore: And so if one be bound by any of the said ties to repair a Bridge, Calcey, Goat, Getty, Sluce, or to cleanse a River, if the same by his neglect be left undone or unrepaired, he is therefore amerceable. So if one be presented for casting Dirt, Sand, Ballast, or other annoyance into the Rivers or Streams, or for digging down the Banks, or for pulling down the Walls thereof; if the presentment do not express the same to be done with force, or therein be wanting the word *Purpresture*, the Party presented is then but amerceable therefore: So when one is tied to cleanse the Rivers for passage of Boats and Ballangers, or for the draining of the waters, if he suffer Sandbeds to lie and choak up the Chanel, he is amerceable, and not fineable therefore; for no permission, sufferance, neglect or nonfeasance can be found to be by force, because they consist not *in Agendo, & sic in similibus casibus*; Yet some Cases following fall out of these Rules *prout sequuntur*. As if the violence of waters was so great, either by breaking in of the Sea in an extraordinary manner, or by a sudden floud or inundation of fresh waters after a rain, that thereby the Defences are broken down, or caused Sandbeds or other Nuisances to be, these being presented, no man is amerceable therefore, because the same could not have been prevented by policy, nor resisted by strength.

42 lib. Assiz. In 42 lib. Assiz. plac. 15. a Presentment was, *That J. S. had suffered trees to grow into the water, and lay in the Stream, by reason whereof ships were hindered in their passage; and there was a Writ awarded directed to the Sheriff to remove the Nuisances*: but Knivet Justice said there, *That J. S. should not be amerced, because the Nuisance was no Act of his, but the Trees grew so naturally of themselves.*

But

But perhaps it will be objected to me, Can no Amerci-
aments be set but by a Jury, or by the Oathes of twelve
men?

Yet, I am of opinion it may be done by the presentment
of the Surveyors of the Sewers, for that is *per Sacramen-
tum parium* as the Law appoints; and in a *Nonsuit* we see
daily that in such case the Plaintiff is to be amerced, and
this amerciament shall be assessed by the Coroners of the
County, as appears in *Greisley's* case; and so the Words of *Greisley's*
Case. the Statute and of the Law may herein be satisfied.

Now I hope I have fully instructed the Commissioners,
wherein they may learn whom to imprison, when to fine,
and how to amerce in a legal and orderly sort, and accord-
ing to the ancient and approved Rules of Law, and of the
grand Charter; for in those things they are to direct their
discretions by the said Rules, and they are to be guided
thereby, and are not to proceed therein according to their
own wills.

And herein I shall conclude the Second point of this part
of the Law, that is, That Commissioners of Sewers have
power to imprison, to fine, and to amerce; And that *B.*
for refusing to obey their Order was justly imprisoned,
and *C.* was as justly fined: And for the reasons and causes
aforesaid, the Commissioners in their discretions, though
the offences of both were alike, yet they had power to
imprison the one and to fine the other. And now I do
intend to proceed to the Fourth Point of my Case, and
the Third Point I intend to handle in a more convenient
place.

Distress.

THE Point of Distress in my Case is grounded upon 4 Point.
these words of this Law, *viz. And all those persons*
and every of them to tax, assess, distrain and punish, as well
within the Metes, Limits and Bounds, of old time accustomed,
or otherwise, or elsewhere within the Realm of England.

Three sorts of Distresses.

First, There be divers kinds of Distresses (*viz.*) Judicial, which always issueth out of the Rolls of the Court.

Secondly, Ministerial, and such Distress is to be performed by the Officers of these Laws, without any judgment directing the same.

Thirdly, And there is a Distress of Common right, not given nor awarded by Judgement in Court, or by Warrant of the Commissioners, but incident to the thing it self.

And First of the judicial Distress which is awarded by the Court upon a presentment found of a Nusans, or in the recovery of an assize of Nusans, or in an Action of the case, as it appears by the 42 *Affiz. plac. 15.* 32 *Edm. 3. 23.* and 7 *Henr. 4. 8.* there a *Distringas ad Amovendum* shall be awarded to remove the Nusans; and so in case of a decay presented: As if *J. S.* suffer a Bank or Wall to decay, and that be presented, a *Distringas ad reparandum* shall be directed to the Sheriff to distrain *J. S.* to repair the same.

42 *Affiz.*
pl. 15.
32 *Ed. 3.*
7 *H. 4.*

Secondly, A Distress Ministerial is where one is assessed or rated to pay a certain sum of money towards the repairing of a Wall, Bank, Sewer or Goat; here upon Warrant from the Commissioners of Sewers, the Officer expressed in that Warrant to distrain the cattel of the party which ought to pay the said Rate and Sess, and which did neglect to pay the same: And yet where there is a Rate and Sess imposed upon one by the Commissioners of Sewers, I am of opinion that the Collector or Officer may distrain therefore without any express Warrant from the Commissioners so to do; and my reason is grounded upon the Statute which is this, because the Statute and Commission which be the general Laws, do of themselves in this case give a Distress. And therefore in these cases, the Warrant of the Commissioners is superfluous, like to the Case in 20 *Eliz. Dyer. fol. 362.* where a fine was levied of Lands, to the intent that *J. S.* should have and receive a yearly Rent thereout, although in

20 *Eliz. Dyer.*

in the conveyances there was no mention made, that the party might distrain for the same: Yet in that Book it is mentioned to be adjudged, *That the owner of that Rent might distrain for the same, because the Statute of 27 H. 8. in that 27 H. 8. Case gave a Distress*: Upon which Statute the said conveyance was grounded. So if there be two Coparceners to whom Land doth descend, and they make partition, and for more equality, she that hath the better part doth grant to the other and her Heirs a yearly rent out of her Land, but limits no clause or power of distress, she to whom this yearly rent is granted may distrain therefore: And so may a Bailiff distrain for an amerciamment in a Leet without a Warrant, because the general Law gives a distress in these Cases.

Thirdly, And as touching a Distress of common right, It is in case where one doth hold his Land of his Lord as of his Manor, to repair a Bank, Wall or other Work of Sewers; the Lord of whom these Lands be holden may distrain his Tenant of common right to compell him to make these repairs; and the Distress given in the said Case of the Coparceners, and in the said case of amerciamment in a Court of Leet, seem both to be distresses of common right: And that the Law is, that a Distress lieth for a Rate, Lot or Tax imposed by the Commissioners of Sewers, it is manifest by the Case of *Rook's* in *Cook's* 5th Report, which is full *Rook's Cases.* and direct authority in the point.

But yet note, That the Officer before he distrains, ought to give notice of the tax to the Party, and demand it, *Style* 13. *Style* 13.

In what place a Distress is to be taken.

NOW touching the place where these Distresses are to be taken, comes next into our consideration, wherein the quality of the matter distrained for, and the power from whence the distresses are derived, are to be considered of. And

21 Ed. 4.

And therefore if a Lord do distrain his Tenant *Ratione tenuræ*, for to repair a Wall, Bank or other defence, this distress must be taken on the Ground holden by this Tenure and not elsewhere, for these Grounds are chargeable therewithall, as the opinion of Justice Sylliard is 21 Ed. 4. fol. 38. But not as that case is, but in point of Tenure; for there the case was, That a presentment was found in hæc verba videlicet Juratores present' quod est communis Regia via in Parochia Sancti Martini in Campis in Com' Middlesex inter Hospitia Episc' Dunelmensis & Episc' Norwich totaliter superundat' aquis & quod tam domini spirituales quam temporales & Justiciarii domini Regis & Servientes ad legem & omnes alii Legis ministri & omnes alii per viam illam versus Westmonaster' itinerantes pro legibus domini Regis ibidem ministrandis & observandis sepius impediuntur per quod via illa totaliter superinundata existit excessu emanationis aquæ pluviæ ibidem remanent' quam quidem aquam Episcopus Norwicensis ratione tenuræ suæ ibidem evacuare debuit & quod ipse & omnes predecessores sui ratione Tenuræ suæ ibidem evacuare debent: And in this case I take it the Land was charged, not as in respect the Bishop of Norwich did hold the same of some Lord by the Tenure, to repair the Sewer to avoid the Water; but his Land stood charged with the same as a charge imposed thereon by Custome or Prescription, as by the President it self appeareth; for if the Bishop of Norwich had been by the Tenure of his house or Lands bound to avoid the Waters, there needed no Prescription to have been alledged.

5 H. 7.

Also in 5 H. 7. fol. 3. there is a like Presentment made against an Abbot, *Quod ipse & predecessores sui*, ought to repair a gutter *ratione tenuræ terrar' suar'*; but because in that case the Presentment did not set forth where those Lands lay which were charged, the Presentment for that cause was holden to be void: So that there is a great difference between a Tenure charge, and a charge imposed upon Land by Prescription; For in the case where a Tenant holdeth his Land to repair a Bridge, Wall or Bank of the Lord

Lord of the Fee, The Lord in this case may distrain the Tenant of common right by the Commonlaws of *England*: But where ones Land is charged by Prescription and Custome, there is no remedy to force and compell the Tenant to do the repairs but by Presentment, and upon a Presentment process may be awarded against him to distrain him to make the repairs.

And if upon a Presentment made by the Laws of Sewers, J. S. is charged to repair a Sewer, and a *Distringas ad reparandum* be awarded against him, the Sheriff may distrain the party in any place within the power of the Commission of Sewers. But this being a judicial Distress which issueth out of the Rolls, the Justices are tied to the limits and bounds of the Commission; Yet in 19 H. 6. fol. 7. the case ^{19 H. 6.} was, *That the Admiral of England hath jurisdiction in causes arising onely on the Seas, and he hath no jurisdiction or power to meddle with any thing done upon the Land*: Yet upon a Presentment made in the Admiral Court one was Presented and Amerced, and a distress for this amerciamment was taken on the Land, and exception was thereto taken, that the distress was taken out of the jurisdiction of that Court: But there *Newton* chief Justice and the rest of the Justices said, *That the power of the Admiral to hold plea was restrained by Statute to matters arising on the Seas, but Executions were not so.*

And I have farther observed by the Book of 8 R. 2. *Fitzher. Avoury* 253. that where no place is certainly prescribed to distrain in, that in such a case the distress may be taken in any place within the power and jurisdiction of the Court, out of which the Writ or Warrant of distress doth issue: As if one be amerced in a Court Leet or in a Court Baron, he may be distrained for these amerciamentes in any place within the jurisdiction of these Courts; and for an amerciamment set and imposed in the Sheriffs turn a distress may be taken for it in any place of the County; for so far the power of that Court doth extend it self.

Yet

Yet *quere* whether a distress can be taken for an amerciamment in a Court Baron, in any other part of the Manor, save upon the Lands of the Offender: For in *Pill* and *Tower's Case*, *Mich. 42 Eliz. C. B.* it seems to be the opinion of all the Justices of that Court, that such a distress was not lawfull, unless there were a Prescription for it; and in such case some of the Justices held it good: but *Walmesly* denied that the Lord could prescribe to distrain for such amerciamment, anywhere within the Manor; *Crooke, Eliz. 792.*

Cro. Eliz.
792.

But in the case of a cess, rate or tax imposed by the Commissioners of Sewers, a distress for any of those may be taken in any place within the Realm of *England*; for in this case the distress is meerly grounded upon the Statute, and is bounded by the same limits, which is as large as the Realm of *England*: And hereupon by this construction made in this legal manner, all the words in the said clause of this Statute have their full operation.

Rook's Case.

And although in *Rook's case* the distress was there taken on the ground charged, yet that doth not prove but that a distress might have been taken in any other place; for I verily take it, that the place where the distress was taken, in that case was not intended any material point, though in my succeeding argument for another purpose I shall make it one. So that my opinion touching distresses to be taken in cases of Sewers, appears to stand upon these three distinctions.

I.

First, that the Lord of whom the grounds be holden to make the repairs, must distrain on the grounds so holden, and not elsewhere.

Secondly,

Secondly, That upon a *Distingas ad reparandum* or *Amovendum* upon a Presentment, which issueth out of the Rolls of that Court, and is a judicial process, a distress must thereupon be taken within the bounds of the Commission of Sewers *Ex congruitate*.

Thirdly, A distress for a rate, or sels, or tax assessed and imposed by the Commissioners of Sewers may be taken in any part or place within the Realm of *England*; for this is a distress grounded upon the Statute, and is as large as the extent thereof. And so the difference appears where the distress is guided by the Commission, and where by the Statute.

Whose goods may be distrained.

IT comes now in turn to be handled, whose goods may be distrained and taken within these Laws. For the words of distress be put so generally in this Statute, that they must receive their exposition by the Rules of the Commonlaw, in regard these Laws do give no special direction therein; and therefore the distress mentioned in *Rook's case* Rook's Case. may in this place be questioned: For there *Carter* was assessed, but the goods of *Rook's* were distrained and taken for the said assess, and no challenge or exception was there made of it; and no marvel, for it was specially found that the goods were taken and distrained on the grounds charged, for otherwise that distress had been tortious; wherein I take this diversity, That where grounds are chargeable to repairs of defences, and a Sels is thereon imposed by the Commissioners of Sewers, the goods of a Stranger may be taken therefore on the grounds selsed; and this is warranted by *Rook's case*. But *Rook's* being a Stranger, his goods could not in any sort have been taken for the Sels imposed upon *Carter*, but on the grounds charged: and the like Law for Rents and Services issuing out of Lands, the goods of a Stranger Levant and Couchant on the grounds so holden may be distrained for Rents and Services, by 7 H. 7. 2. and 7 H. 7. 11 H. 7. 4. But

B b

But put the case a little farther, that in the Sessions Court of the Sewers, *A. B.* is amerced for Non-payment of his Sess towards the repairs of a work of Sewers; and in this case I am of opinion, that the proper goods of *A. B.* are to be distrained for this amerciamment, and not the goods of a Stranger going on his grounds charged to the said assess, because this amerciamment is a collateral charge, which falls on the person of the offender who was to pay the assess, and doth not in any sort charge the grounds: and this opinion hath warrant from the case in 41 Ed. 3. fol. 26. *Br. Leet* 4. for there *A. B.* was amerced in a Court-leet, for receiving and keeping one in his House which was not sworn to the King; in which Case it was holden, that no Goods could be distrained for this amerciamment, but onely the proper Goods of the Party amerced, although the Goods of others were levant and couchant on his Ground: And farther in proof of my said opinion, the Case of the Lord *Cromwell* in 15 El. in *Dyer*, f. 322. doth come fully thereto, which is, That a Replevin in an avowry was made for a pein and forfeiture of ten shillings, due for the breach of a Byelaw, *Contra ordinem Curie*, and alledged to make Bye-laws within the Manor by the custome thereof: In which Case it is apparent, that the proper Goods of the Party are to be distrained therefore, and not the Goods of a Stranger levant and couchant on the Grounds.

And in the 47 Ed. 3. fol. 12. the Prior of *Tindal's* Case, where the Prior was amerced, and another Man's Goods were taken and distrained on the Grounds of the Prior for the said amerciamment, and the distress was not well taken; and so my opinion may be conceived, that for an assess the Goods of a Stranger may be distrained on the Grounds charged, but may not there be taken for a fine or amerciamment, which be collateral duties, and attend upon the Person, and do not charge the Soil.

Although the Goods of a Stranger shall not be distrained for an amerciamment, though they are

are levant and couchant upon the Lands of the Party amerced; yet by the opinion of *Brampston*, Chief Justice, *B. R. 17 Car. 1.* the Goods of an Undertenant may for an amerciamment set upon his Landlord; and that without any particular custome to warrant it: As where a customary Tenant is amerced for not repairing, in that case he held, that the Goods of his Under-tenant levant and couchant upon the customary Lands may be distrained for such amerciamment; *March 161.* *Thorne and Tyler's Case*; *Tamen quere*, for the reason of that Case in *41 Ed. 3. 26.* that the amerciamment falls on the Person of the Offender, and the cause of the distress doth not arise *ratione soli*, as is said in *Br. Leet 4.* holds as well in the Case of the Under-tenant, as of a mere Stranger; But if this opinion of *Brampston* be Law, by the same rule, the Cattel of an Undertenant of a Person amerced in the Court of Sewers, if they are levant and couchant upon his Lands, may be distrained for such amerciamment.

This discourse being thus ended, I shall now enter into a matter of greater moment; and yet because these matters be frequent in businesses of the Sewers, that which I shall here pretermitt I will in some other place more fully discourse of.

Goods sold.

THE farther matter of this point will rest upon this, whether Goods distrained and taken for a Sess and Rate of Sewers may be sold, or not; which point hath been ofner practised than the Law truly decided: But before I shall touch upon the main, I will make an Ingress to treat of such matters whereby the property of a Man's Goods may be altered without his consent.

1. And first, at the Common-law, if a Man's Goods be wrecked, waived or taken as strays, or sold in Market overt, the property may be altered.

2. Secondly, by Custome, as in *London* upon a Foreign Attachment Goods may be attached and sold to another: and in 10 *El. Dyer, fol. 279. b.* a Custome is alledged to be in *York* that Foreign Goods there bought and sold are seisable by the Corporation, and so in case of a Heriot Custome.

3. Thirdly, But the King by his Charter cannot take the properties of my Goods from me, as in the Case of *London Cook's Rep.* the Case of *Austen* and *Waltham*, where King *Henry* the 6th granted to the Corporation of Dyers there by Charter, *That if upon search they should find any Clothes died with Logwood, that they seise them as forfeit*; but resolved, that this Grant was in that point void.

4. Fourthly, By a Bye-law in a Court-leet or Baron, the property of my Goods cannot be taken from me.

5. And fifthly, By a judgment against one at the Common-law, although a Man's Person nor his Lands were liable thereto, yet his Goods were.

These five Grounds being first taken, I shall now examine the particular of our Case in question touching the Law made by the Commissioners for sale of Goods; and against this sale many things may be alledged.

First, This Statute I reade on gives a distress, and a distress is but a gage or pledge, and cannot be sold; for if a Lord

Lord distrain his Tenants Cattel for Rent and Services, he cannot sell the Distress : And although in 10 & 11 Eliz. *Dyer* 280. *Dyer*, fol. 280. a return irreplevisable was awarded to the Lord or Avowant, yet he cannot sell this distress, nor work them by the opinion of that Book.

Secondly, The Statute of 7 Jac. cap. 20. *Rastal Marshes* 2. and *Fens*, doth enact, that a Commission in the nature of 7 Jac. 20. this of ours should be directed to the Bishop of *Normich*, and others for the recovery of Fen-grounds ; where for an assesse imposed, and for Fines and Amerciaments, expresse power is given by that Statute to sell the Party's Goods which doth refuse to pay, *Ergo*, without such an expresse clause a sale of Goods could not have been lawfull.

And by the Statute of 1 and 3 Jac. the forfeitures of 1 & 3 Jac. Alehousekeepers may be levied by sale of their Goods, by the expresse letter of these Laws : and so it may be inferred, that our Statute wanting such an expresse clause to authorise a sale, therefore no sale can be.

But much may be said to the contrary ; for although in cases of sale the Laws be tender, yet it is plain, that both our Common-law, Customs and Courts of Justice daily use them, and are frequent in those sales : And we know that a distress is properly a pledge to be detained till satisfaction be made, and then to be restored, and is not to be sold : Yet in 3 H. 7. fol. 4. a distress taken for an amerciament in 3 H. 7. a Leet or Law-day may be sold as well in the case where the Subject hath by Charter or Prescription the profits of the said Courts, as where the King himself hath them ; and all the reason which that Book yieldeth for it, is, because they be the King's Courts ; And so it was likewise resolved in *Godfrey's Case*, *Roll* 1. 76. and the rea- *Roll* 1. 76. son there given why such a distress may be sold, is, because it is for a publick matter : But a distress taken for an amerciament in a Court-baron cannot be sold ; no not although it be a Court-baron of the King's

Bulstr. 1. 53. King's, *Bulstrode* 1. 53. And in 22 *Affiz.* plac. 72.
22 Affiz. and *Cro. Mich.* 8 *Jac.* 255. it is said, That if one re-
Cro. Jac. 255. cover a debt in a Court-baron, the Goods of the Debtor could
 not be sold therefore; At least, if there be not a cus-

Brownl. 1. 41. tome to warrant it; for by the opinion in *Brown-*
low 1. 41. it seems that Goods may be sold up-
 on a *Levari facias* out of a Court-baron, if there
 be a custome for it. Yet I have seen always in prac-
 tice, that for debts and damages recovered in the County
 Courts, the Goods of the Debtors have and be usually sold
 for them by *Levari facias*; and in my opinion this is used
per totam Angliam: and a sale in such a case in a Court-
 baron by custome is good; and with this agreeth the Book
 of 7 *H.* 4. fol. 27. and 21 *H.* 7. f. 40. in a Leet-court one
 prescribed and alledged a custome to have of every one
 which made an affray within his Liberty, a certain sum of
 money, and prescribed also to distrain for it, and to sell the
 distress: and with this agreeth 11 *H.* 4. 14. and 11 *H.* 4.
 fol. 2. A distress taken for the Knights Fees of the Parlia-
 ment was sold. Therefore now let us see and examine well
 by what authority our Officers of Sewers may sell the di-
 stresses taken. The words in our Statute which are most
 powerfull in this point, be these, (*viz.*) To depute and as-
 sign diligent, faithfull and true Keepers, Bailiffs, Surveyors,
 Collectors, Expenditors, and other Officers for the safety,
 conservation, reparation, and making, repairing, reforming
 and amending of the Premisses and every of them, and to hear
 the accompt of the Collectors and other Ministers, of and for
 the receipt and laying out of the money that shall be levied and
 paid in and about the same: Here is the word (*Levy*) used,
 and money levied is properly upon a sale, execution or
 forfeiture; And the words of our Statute go farther, (*viz.*)
 And to distrain, or otherwise to punish the Debtors and De-
 tainers of the same by fines, amerciaments, pains, or other
 like means after their good discretions; and no likelier means

to

to these is there any, than to make sale of the Debtor's Goods for non-payment of his sels, and it is consonant to other Laws: also in another part of this Statute are used these words, *And the Clerk by the Commissioners to be assigned to have two shillings per diem of the rates, taxes, lots and waives as shall be assessed or lost by authority of the said Commission, to be levied and paid by their discretions*: And so it seemeth by the very expresse letter of this Law, the taxes, sels and rates may be levied by the discretion of the Commissioners, which if they please may be by sale of the Offender's Goods: And in many parts of this Statute, the Justices of Sewers have power to make Laws, Ordinances and Decrees, which being done according to reason, shall be held for firm and inviolable: And therefore upon just cause in my opinion, the Commissioners may make a Law or Ordinance for the sale of Goods in furtherance of this service; and this being a Law which tendeth so much to the service of the Commonwealth, and is so profitable and commodious for the same, it is therefore good reason to extend the same, and the exposition thereof, as far as the Letter and intent of the Letter shall reach; which may be as far as shall stand with reason, and rules of other Laws, Statutes, Customs and Usages of other Courts which have power in sale of Goods in causes of this nature, and is not altogether without president: For in the Charter of Romney Marsh, pag. 36, & 37. It is said in these words in a debate between Hamo and Godfrey, *Et predictus Hamo concessit pro se & aliis quod computabit cor' viginti quatuor Jurat' elect' de patria super districtionibus & averiis capt' predicti Godfredi pro predict' Walliis & watergangiis repar' ab initio istius placiiti usque nunc, &c. & districtiones illas secundum quantitatem portionis sibi contingent interim pro predict' Walliis & watergangiis reparandum sicut predict' est per predict' districtiones quod idem Hamo & alii satisficient in omnibus quod injunctum fuerit per predicti comput' inter eos de surplusagio recepto de averiis venditis predict' Godfredi occasione predict'*. Hereby it is manifest, that Hamo the Bailiff sold the Cattel
of

Ch. Romney
Marsh.

of Godfrey to make the repairs of the Walls and the Water-ganges; and our Statute gives power to the Commissioners of Sewers to doe after the customs of *Romney Marsh*, which by this president formerly vouched, warrants the sale of Goods.

And it was ruled in the Case of *Combs and Cheny*, *Mich. 24 Car. 1. B. R.* that the Commissioners of Sewers may sell a distress, *Aleyn 92.*

Yet herein I am of opinion, that the Bailiffs which distress cannot *Ex officio* without a special Warrant first directed to them for that purpose from the Commissioners, make sale of Goods distrained for a lay, tax or sels of Sewers; And I take it, it were a good Warrant for the Commissioners to make an advised special Law of Sewers for sale of Goods distrained upon a just occasion, before they direct any Warrant *Ex subito* to the Bailiffs, or for any such purpose.

But now herein follows a matter of some consequence, and worthy the handling, That if by the Laws of Sewers goods may be sold towards the repairs of these works, as in my opinion they may, Then whose goods may be sold is the question next to be decided; wherein to be brief, I am firm of opinion, That no goods can or ought to be sold by the power of these Laws of Sewers, but onely the proper goods of the party sessed and taxed, though the goods and chattels of other men be *Levant and Couchant* on the grounds sessed to the repairs: For I hold it not consonant to reason, nor that it stands with any rule of Law, That the goods and chattels of a stranger should be absolutely taken away from him, and sold for the dept and default of another man. And to this purpose the case put in the *3 Eliz. 3 El. Dyer, f. 199.* may fitly be applied to this point, where a custome is alledged for a Lord of a Manor to have and take the best Beast which his Tenant had at his death; and if such best Beast should be esloyned, that then he might have and take the best Beast of any other *Levant and Couchant* upon

upon the Land; and this was adjudged a void custome, as to the goods of a stranger to be made subject to such a forfeiture.

It seems questionable, whether the Rule, That no goods can or ought to be sold by the power of these Laws of Sewers, but onely the proper Goods of the Party seised and taxed, be so general, as is here set down; For if a man be taxed in respect of his Land, and he sells or lets the Land to another, it seems reasonable that the Goods of the Assignee may be distrained and sold for the tax, because the same is a charge upon the Land, into whose hands soever it comes; And the reason here given by our Reader why no Goods but those of the Party assessed should be sold, *viz.* that it stands not with any rule of Law, That the Goods and Chattels of a Stranger should be absolutely taken away from him, and sold for the debt and default of another man, holds not in this case; for the Assignee is not a Stranger to the Land, nor consequently to the debt, for he takes the Land *cum onere*; and this seems to be the meaning of what is said in *Style 13.* in the Case of *Whitley and Fawsett, B.R.* That for nonpayment of a tax imposed by the Commissioners of Sewers, the Cattel of the Owner of the Land taxed, or of his Assignee, may be distrained and sold; But a Stranger's Cattel upon the Ground cannot be sold.

Cc

Thus

Thus far I have pursued my argument in discoursing upon these distresses, and touching such matters as do depend thereon, because in my experience I have found them the readiest part of the execution of these Laws; and I have heretofore beheld much enormous proceedings therein, both in the Commissioners and in their Officers, and therefore I thought it very needfull to have treated thereon for their better direction in these affairs hereafter.

Replevins.

YET as I find distress to be the most usefull execution of these Laws of Sewers, so I have seen the proceedings therein much stayed and interrupted by the usual suing of *Replevins*, by which means the said distresses taken by the authority of these Laws have been set at liberty, and the work of Sewers hath been much letted and hindred thereby. And therefore the fifth point in my Case doth minister a good occasion to enter into the serious examination of them.

And now my intent is, to declare in what case a Replevin doth lie, and where not; and surely this point hath heretofore been much stirred in, and not without some cause, for the very Statute seemeth to allow of Replevins in these words, (*viz.*) *That if any action of Trespasse, or any other Action shall be attempted against any person for taking any Distress, or for any other thing concerning the Law of Sewers, that the Defendant in such Action may make Avoury, cognisance or justification, that the taking of the said Distress, Trespasse or other Act, whereof the Plaintiff complained was done by the authority of the Commission of Sewers, for a Lot or Tax assessed by the said Commission, or for other such act or cause as the Defendant did by the said Commission:* And in what action can a man so properly make his avoury, Cognisance or Justification as in a Replevin, being a word onely apt for that action; and a Distress is *de sua natura*, properly replevisable by the Commonlaw: and for direct authority in the point,

point, it appears in *Rook's* caſe, that a Replevin was there *Rook's Caſe.*
 ſued for the delivery of the diſtreſs taken by the power of
 theſe Laws of Sewers: But I muſt here diſtinguiſh, for I am
 of opinion a Replevin doth not lie, nor ought not to be
 granted from the Sheriff, or any of his Deputies, for that
 the Sewer is a Judicial Court of Record, and of greater au-
 thority than the power of the Sheriff, which in theſe caſes
 was but Miniſterial; and the higheſt authority that he hath
 is but vicontiel, which is much inferior to the power of
 this Commiſſion; and therefore the Sheriff is not of ſuf-
 ficient power to ſuperſede a Court of higher power Yet
 if one ſue a Replevin, which afterwards in Bank was abated,
 and a return of the Cattel there awarded, another Replevin
 did lie by the opinion of the Book of 34 *Henr. 6. fol. 37.* *34 H. 6.*
 and ſo it appeareth by the Statute of *Westminster, chap. 2.*
 but theſe new Replevins came out of the ſaid Courts where
 the former was, for it is not likely, that the Sheriff could
 make deliverance by his Warrant of Cattel, contrary to the
 award and return of a Court of Juſtice in a *Retorno habendo*;
 and therefore by the ſame Statute the *Secunda delibera-*
tione, is now to be awarded out of the Rolls of the Court
 whence the *Retorno habendo* came: And if one would re-
 ſemble this caſe with other authorities, and with the rea-
 ſon of other Book caſes of the Law, it will be made there-
 by apparent, that the higher Court may take or remove a
 cauſe out of the inferior Court, but not *E contra*, neither
 can the inferior Court ſuperſede the ſuperior: For if one
 be impleaded in the King's Court at *Westminster*, and in com-
 ing towards *London* he is arreſted in a Corporation Court,
 he may be delivered thence by the power of the ſuperior
 Court to the which he was attendant, and the power of
 the inferior Court ſhall be ſuperſeded thereby, as the Law
 is declared in divers of our Books; By the which it is plain,
 that ones perſon being in the privilege and protection of
 the King's Court, could not juſtly be impriſoned by the
 power of an inferior Court: And in *Stringfellow's* caſe in
 3 *Ed. 6. Dyer fol. 67.* The goods of one were ſeized by the *3 Ed. 6.*
 Sheriff

Sheriff by process out of the Chancery for a subject, and after seisure, and before delivery thereof was made, a Writ of Prerogative came out of the Exchequer, rehearsing thereby, that the King was to be served before any other, and commanding the Sheriff to levy the same on the goods of the same Debtor; And whether these goods that lay under the power of a Process in one Court might be taken from thence by the power of another Court, was the question; and the better opinion therein, as I take it was, that they could not, for that by the former Process they were privileged from all other Jurisdictions, powers and authorities, especially if they were of an inferior degree: Yet there be two cases which not being curiously looked into make shew as if the Law were otherwise; the one is in the 11 Hen. 4. fol. 2. where the goods of J. S. were taken in Execution by the Sheriff by a *fi. facias* which came out of the King's Court of *Westminster*, and the Sheriff sold them to J. D. and there was a Replevin sued in that case, but no deliverance made of the Cattel in Court: and the other case is in 7 Hen. 4. fol. 28. goods were taken by a Levy which issued out of a Court Baron, and they were sold by the Bailiff, and there was also a Replevin sued, but no deliverance made of the Cattel in Court, neither would the Court order the defendant to gage deliverance: so that by these two cases it may seem that a Replevin did lie, though another Court had formerly the jurisdiction of the Cattel taken by the distress: But, under favour, I hope I shall easily reconcile these Books, and shall make it to appear that they do not make against my opinion formerly delivered upon this diversity, That when the Goods were seized or taken by Process, and remained by the vertue thereof in the hands of the Sheriff or of his Bailiffs, during that time no Replevin did lie in the case; but after such time as the goods or cattel were sold away, as in the said two cases formerly alledged they were, then against the party that bought them, or any other, a Replevin did lie in the case; for after the sale they were out of the protection of the former parties, and

and then a Replevin might well take hold of them, being out of all other Jurisdiction. And the same difference I take in this case of the Sewers, that is, That so long as goods distrained by Warrant and Process out of this Court of Sewers remain in the custody thereof, they be not repleviable by the Warrant of the Sheriff or of his Deputies, but after they be sold away, then by the sale thereof they are out of the protection and privilege of the Court of Sewers, and then the Sheriff may cause them to be delivered by Replevin. Yet it may be objected unto me, that in *Rook's* case a Replevin was taken against him which detained the distress by Warrant of the Commissioners of Sewers; it is true, the Book is so, which case I admit, and that the Replevin was well granted there; yet I take it, it doth not contradict my said opinion, because there *Carter* was assessed, but the goods of *Rook's* were taken and detained for the Sess, and *Rooks* did sue the replevin, which he might well do, because against him or his goods there was not any Law of Sewers extant or in force, neither was he or his goods within the privilege or jurisdiction of these Laws of Sewers: But if *Carter's* Cattel had been taken, who was the very party sessed, he could have had no Replevin from the Sheriff or his Deputies to deliver his Cattel.

But although a Replevin doth not lie in the case aforesaid from the Sheriff or his Deputies, *Ex officio* to deliver a distress of Sewers, yet out of the King's Court at *Westminster* a Replevin doth lie in those cases: And the Charter of *Romney Marsh* pag. 18. doth afford us in this case a very good President; for there complaint was made to the King, setting forth thereby, That whereas his Highness had appointed and authorized *Henry de Bathonia* to be his Justice, and to determine the differences depending and touching the repairing of the defences of the said *Marsh*, he had ordained, that distresses might be taken according to the 24 Jurators, *Ita quod nullus vicecomes aut alius balivus noster intromittat in districtionibus illis, tu tamen* (meaning the Sheriff

Ch. *Romney Marsh.*

Sheriff of Kent) *nihilominus districtiones illas propter hoc factum per viginti quatuor Juratores in prejudicio considerationis eorundem reluxasti, tibi igitur precipimus quod districtionibus illis in nullo te intromittas*; and in the same Charter the like matter is there also so determined of pag. 7. By the which may be collected, that the Sheriff *Ex officio* might not meddle with such distresses: and in the same Charter, pag. 8. the words be farther, *Quod si quis de consideratione predictæ districtionis se injuste gravat sentiret & inde conqueri vellet ad ipsum Dominum Regem querelam suam deferret & ipse in Curia sua justitiam fieri facere reservasset*; whereby it is manifest, that a Replevin lay for a distress taken in the King's Courts, for that they be of a superior authority and jurisdiction to these inferior Courts of Sewers: And therefore the Replevins which our Statute aims to give way to, are intended to be taken out of the King's Courts, which in Law and Justice ought to be obeyed, and not from the Sheriff or his Officers by virtue of their Office onely.

But in my case the Commissioners made a Law, that the goods of *A.* should be sold without allowance of Replevin, which is a good Law upon the distinctions and diversities aforesaid; that is, that *A.* who was the person assessed might not have or take a Replevin because he was a person bound expressly by the Law, nor that the Sheriff or his Officers *Ex Officio* might grant a Replevin to deliver the same, being under the power of this Law of Sewers.

But the King's Courts at *Westminster* may in those cases of Sewers deliver the distresses; and this construction made of this Statute, as I take it, stands with Laws and Reason. And in the 31 Ed. 3. *Brook, Replevin, plac. 60.* the Case is put, a man did grant to *A. B.* a rent out of his grounds, with power that if it were behind that he might distrain therefore, and detain the distress against gages and pledges; and yet it was adjudged, that if the rent were behind and the grantor distrained, he could not detain this distress against the Replevin: Yet here were the direct words of the party himself to the contrary, but his words could not overrule

verrule the Law: So that upon all these matters, I hold these Tenents following.

Imprimis, To make a general Law to restrain all Replevins, granted either from the Sheriff or the King's Courts, is no good Law or Ordinance of Sewers; for that Replevins *de jure* are in such cases grantable out of the King's Courts, and such a general Law savours too much of oppression, in stopping up the Gates of Justice.

Secondly, For a Sheriff or his Deputy to grant and award Warrants of Replevin *Ex Officio*, to deliver goods or cattel distrained, and detained for a Tax and Law of Sewers, is in my opinion against Law, and need not to be obeyed, for that the distress was *Sub protectione superioris Curie*, which is of a higher degree than a Sheriff's Ministerial Warrant.

Thirdly, If a distress be taken and sold for a Sess of Sewers, a Replevin lieth against the buyer, for by the sale the goods and cattel were put out of the protection of the Court of Sewers.

Fourthly, If a Rate or Tax be imposed by the Laws of Sewers upon *J. S.* and the goods of *John a Downs* be taken therefore on the grounds of *J. S.* which were charged, *J. D.* may sue a Replevin of his said cattel from the Sheriff, for that he nor his goods were not expressly bound by the Laws of Sewers.

Fifthly, A Replevin lieth out of the King's Courts of *Westminster*, to deliver a distress taken and detained by the Laws of Sewers, for that they be Courts *de altiore natura*, Agreeable hereunto is the Opinion of *Heath Justice B. R.* in the Case of *Commings and Massam*, That the Proceedings of the Commissioners of Sewers are examinable in the *King's Bench*, upon a Replevin brought there; *March* March 198.
198.

Sixthly,

6. Sixthly, A distress taken by a Lord on his Tenant for not repairing a work of Sewers, which by the Tenure of his Land he ought to do and repair, the Tenant may sue a Replevin from the Sheriff *Ex Officio* to deliver the distress, for that this distress was not taken or detained by Warrant, Judgment or Decree of Sewers.
7. Seventhly, If upon a Judgment given in the King's Court, or upon a Decree made in this Court of Sewers, a Writ or Warrant of *Distringas ad Reparandum*, or of that nature be awarded, and the parties goods be thereby taken, these goods ought not to be delivered by Replevin to be taken either out of this Court, or out of any other Court of the King's, because it is an Execution out of a Judgment.
8. Eighthly, Although one grant a Rent out of his Land with clause of distress, and with Grant or Covenant that the Grantee might distrain and detain this distress till he shall be satisfied his Rent, Yet a Replevin lieth in that Case.

A perpetual charge.

SO now I have fully and at large declared my Opinion touching distresses and replevins; wherein, I hope, I have fully satisfied the first point of my Case: I intend therefore now to proceed to the sixth point, which concerns charges and sales of Lands to be made by the Commissioners of Sewers by the power and authority of this Law.

And First, I suppose the question may be extended to this, that is, Whether the Commissioners of Sewers can impose a perpetual charge upon Land to repair a work of Sewers for ever by the power of these Laws.

I do here acknowledge, that this is a knotty Point, yet something may be alledged in maintenance of this Opinion affirmatively: For in the parts of *Holland* in the County of *Lincoln*, almost every one knows which part he is to repair and maintain in perpetuity; And *Experientia est optima*

tima interpretes rerum; And it appeareth by the Charter of Romney Marsh, pag. 12. That the use there was to impose perpetual charges on singular persons; For the words there be these, *Juratores per eor' sacrament' mensurabunt per perticam omnes terras & Tenementa quæ infra dictum Mariscum periculo subjacent quibus mensuration' factis viginti quatuor per communitatem prius electi & jurati habito respectu ad quantitatem Walliar' terrar' & Tenement' quæ periculo subjacent per eor' sacrament' ordinabunt quantum ad predictarum Walliar' sustentationem & reparationem faciend' & sustinend' ad quemlibet pertineat, ita quod proportion' acrar' terrar' periculo subjacent' singulis assignetur sua portio perticar' & predict' assignatio fiat per locos certos ita ut sciatur ubi & per quæ loca, ad quantum, singuli defendere teneantur.* These words in this Charter seem to be plain, That by the Laws established in Romney Marsh, the Commissioners had power to assign to every man his portion to repair in perpetuity; but I find no such words in our Statute: And whereas it may be said, that our Commissioners have power to make sale of the Lands; Ergo, They may charge them perpetually; but this is a *non sequitur* for that, for the sale they have express Warrant, but not so for the charge; And powers and authorities must be duly pursued, and are not to be taken by equitable or argumentable collections or implications, so that it may seem the Laws of Sewers were never held so perdurable as to bind mens Lands with perpetual charges: And therefore this difference I take, That by the custome of a Town or Countrey, every one may know his particular portion, which the owners of grounds are obliged and bound to repair perpetually; but without such a Custome it hath been held, That the Commissioners of Sewers cannot bind any mans inheritance to a perpetual charge, by any power or authority given by this Statute; but in the said case of Romney Marsh, the Custome there maintained this point: yet *Nota bene verba hujus Statuti*, which be these (*viz.*) *And to make and ordain Statutes, Ordinances and Provisions from time to time as the case shall require, for the*

Keighley's
Case.

safeguard, conservation, redress, correction and reformation of the Premises and every of them, and the parts lying to the same, necessary and behoofesfull, after the Laws and Customs of Romney marsh in the County of Kent; or otherwise, by any ways or means after their own wisdoms and discretions: These be the words, and this is the clause which must make good this perpetual charge, for that it doth formerly appear, that such like Laws and Customs there were in Romney Marsh as this is; and therefore I may conclude this point, that the Commissioners in imitation of the said Ordinance of Romney Marsh, may make Decrees to bind Lands to perpetual charges; Yet Sir Edward Cook in Keighley's case sets it down as resolved, That the several Commissioners of Sewers throughout all England, are not bound to pursue the Laws and Customs of Romney Marsh; but in case where some particular place within their Commission have such Laws and Customs as Romney Marsh hath, there they might pursue them. But in my own Opinion, the Commissioners may, if they please, make Ordinances and Laws like to those of Romney Marsh, where there hath not been any such use; and the words of the Statute, as I take it, will bear that construction; and the said Opinion of Sir Edward Cook, is not directly against this. And upon Decrees for sales of Land, it is usual in those Decrees to bind those Lands to the perpetual repairs.

Sales of Lands.

THE words of the Statute which be made for sales of Lands be these, *Provided always, That if any person or persons being assessed or taxed to any lot or charge for any Lands, Tenements or Hereditaments within the Limits of any Commission hereafter to be directed, do not pay the said lot and charge according to the Order and Assignment of the Commissioners, having power of the execution of the said Commission, &c. by reason whereof if it shall happen, the said Commissioners for lack of payment of such lot and charge to decree and ordain*

ordain the ſaid Lands and Tenements from the owner or owners thereof, and their Heirs, and the Heirs of every of them, to any perſon or perſons for term of years, term of life, in Fee ſimple, or Fee tail, for payment of the ſame lot and charge: Then every ſuch decree and ordinance ſo by them made, ingroſſed in Parchment, and certiſied under their ſeals into the King's Court of Chancery, with the King's royal aſſent had to the ſame, ſhall bind all and every perſon and perſons that at the making of the ſame Decree had any intereſt in ſuch Lands, Tenements and Hereditaments in uſe, poſſeſſion, reversion or remainder, their Heirs and Feoffees and every of them, and not to be in any wiſe reformed, unleſs it were by authority in Parliament hereafter to be ſummoned and holden within the Realm.

And alſo that the ſame Laws, Ordinances and Decrees to be made and ordained by the Commiſſioners, or any ſix of them, by authority of the ſaid Commiſſion, ſhall bind as well the Lands, Tenements and Hereditaments of our Sovereign the King, as all and every other Perſon and Perſons, and their Heirs, and ſuch their intereſt as they ſhall fortune to have in any Lands, Tenements and Hereditaments, or other caſual profit, advantage or commodity whatſoever they be, whereunto the ſaid Laws, Ordinances and Decrees ſhall in any wiſe extend, according to the true purport, meaning and intent of the ſaid Laws.

This Clause or Proviſo was ſtrangely placed in this Statute, as if this Statute had not been the firſt Father of it, and as if this Law had made ſome addition to a former Law: But I take it, that this Statute was, and is, the firſt and onely Law which gave ſale of Lands in Caſes of Sewers, and this Clause ſtands upon theſe four Pillars.

Imprimis, For what cauſe Lands may be ſold by the Commiſſioners of Sewers.

Secondly, What Lands are to be ſold within theſe Laws.

Thirdly, What Perſons, what Eſtates and Interests are to be bound thereby.

D d 2

Fourthly,

1.

2.

3.

Fourthly, To what Persons these Lands may be sold or decreed.

The Statute is, *If any Person sessed do not pay*; whereby it is manifest that the Lands are to be sold for sesses and charges imposed by the Commissioners which lieth in payment onely, and they may not be decreed away for any other cause or matter: And therefore if one hold his Land to repair a Wall, Bank, Sewers or other work of Sewers, and he neglect to repair the same, the Commissioners of Sewers cannot for this cause decree the Lands away from the Owner, because this charge lay not in payment: And I cannot gather out of the words of this Statute, that Lands can be decreed for any cause than for non-payment of a lot sels or charge, by reason this word *payment* is reiterated three or four times in this branch of the Statute, and no other words be coupled with it to infer any other or larger exposition.

If *J. S.* do hold his Lands of the Lord of a Manor, by the payment of twenty shillings yearly or other sum, towards the repairs of a work of Sewers, and he do neglect to pay the same, whereby the Work is unrepaired, although this is a charge which lieth in payment, yet because it grows due by Tenure by the Common-law, and was not imposed by the force of this Statute, therefore the Lands of *J. S.* cannot be decreed from him by the non-payment thereof, by the tenor and virtue of this Law of Sewers.

But if the Lands of one be generally charged to repair such a Wall or other work of Sewers by prescription, covenant or otherwise, and the Commissioners impose a sels and rate upon him to repair it, and he do not, there in this case, although the charge was by the rules of the Common Laws, yet because the sels and rate was set upon him by the power of this Statute, I am of opinion, that for neglect of payment the said Lands may be sold by the Decree of the Commissioners of Sewers.

So if one do hold his Lands for the payment of twenty shillings to repair a Bank, and the Commissioners of Sewers

do

do order the Party to pay the twenty shillings at a time by them prescribed (not being contrary to the usual days of payment) and he do neglect to pay, The Commissioners may decree his Lands from him, because this charge, by reason of the said Order, had got the force and power of this Statute.

If a charge be generally laid upon a Township, Hundred or Rape, which is not paid according to the Commissioners Order, no Lands can be decreed in this case, because no Persons or Lands be in this case particularly charged, and the Decree of the sale must be directed by, and depend upon the sels: but if after the general sels be laid, the same be after assessed upon particular Persons by particular sums by the said Commissioners, then upon default of payment, their Lands making default may be decreed from them by the power of this Statute.

If an assess or charge of payment be laid upon certain Lands without mentioning the Owner, the Lands cannot be decreed from him by this Law; for the words of the Statute be (*That if any Person or Persons assessed to any lot or charge do not pay.*) So that I shall take it, that no decree for sale of Land can be made but where there is a Person certainly assessed by name.

Lands cannot be decreed away from the Owners for default of payment of fines, amerciements or pains; for though these be sums of money or charges imposed by the Commissioners of Sewers on Persons certain for matters touching these Laws, yet because they were not sessed or rated towards the repairs of any works of Sewers, but be set upon the Parties as mulcts and punishments, and be due to the King, therefore no decree of Lands can be made for any of them.

Now the second part of this Clause is, what Lands may be decreed by the authority of the said Statute; and thereby it appears they must be such Lands as lie and be within the power of this Commission of Sewers; and herein rests a difference between the case of a distress for a sels which

21

may

may be taken in any place within this Realm, and the decree of sale of Lands for non-payment of a sels which must lie within the bounds and extent of the Commission; for this distress is circumscribed to the extent of the Statute, which is over the whole Realm, and the sale is tied to the limits of the Commission: And I am also of opinion, that no Land can be sold away by the decree of the Commissioners of Sewers, but such as were charged with the sels.

If one hold his Lands in *Comitat' Eborum* to repair a Sea-bank in the County of *Lincoln*, and the Owner is assessed therefore, and makes default of payment, the Commissioners of Sewers in the County of *Lincoln* may give warrant to distrain for this sels in the County of *York*; but they cannot decree away by sale those Lands lying there which were charged with the sels.

A Copyholder's Land cannot be decreed against him by this Law, for if it might, then these customary Lands should be transferred from one to another, contrary to the Customs of the Manors whereof they be parcel; and it would infringe that rule which is delivered in *Heydon's Case* in *Cook's 3d Report*, which is, when an Act of Parliament doth alter the service, tenure and interest of the Land or other thing, in prejudice of the Lord, or of the custome of the Manor, or of the Tenant, there the general words of such a Statute do not extend to Copyholds: And in this case if any sale should be made by the Commissioners, all the said Rules should be infringed, for it were contrary to the custome to pass these Lands without surrender; it were in prejudice of the Lord to have Copyhold-land passed, and he to have no fine: And I am likewise of opinion, that the Freehold of these Lands could not be passed away for a sels or a lay, because the Lord hath but the shadow, and the Copyholder hath the substance; But if the Lord's Rents of Assize should be assessed as they ought to be, and he do neglect to pay, then these Rents might be decreed from him; and so may all other Lands, Tenements and Hereditaments decreed, in respect whereof one is sellable and selsed by these Laws.

The

*Heydon's
Case.*

The third branch of this Clause is the direct point in my Case (*viz.*) *What Persons and what Estates be bound by these decrees?* And first of the Heirs in tail, whether they be bound by a decree made against the Donees in tail their Ancestors, is the question; In the handling whereof I hold it fitting, to shew in what cases the Heirs in tail have been bound by the act of their Ancestors, and the reasons and causes thereof.

And therefore if a Disseisor make a gift in tail, and the Donee in tail grant a rent to the Disseissee for release of his right, this will bind the Heir in tail, for that by this release his Estate, which before was defeisable is now confirmed, as by the Books of 44 Ed. 3. 22. and 20 Ed. 4. 13. appeared: and so in 46 Ed. 3. a gift in tail was made *Ita quod* the Donee might alien to the benefit of the Heirs in tail; and this by Judge *Welbey* was held a condition which bound the Heir in tail for his benefit: And in 12 Ed. 4. 1. *Tregouise* and *Taltarm's* Case was, That a recovery against Tenant in tail, with a Voucher by him over, did bind the Heirs in tail, by the Common-law, by reason of the intended recompence which was to come to him by the Voucher; and so a lineal warranty with assents, and a collateral warranty without assents, were and be both of them bars to the Issues, by reason also of the intended recompences; and these are things which were originally tied to those Estates, and were incidents to them *ab initio*: And therefore this shall suffice to treat of bars to the Issues in tail by the Common Laws; and now I shall proceed to shew in what cases they were barred of their Estates by the Statutes of this Realm.

By the Statute of 16 R. 2. cap. 5. The Lands and Tenements of one attaint in a Premunire are to be forfeited to the King; and in 21 Eliz. one *Trudgin* was Tenant in tail, and was attainted in a Premunire, and the question was, Whether intailed Lands were forfeited against the Issues in tail, or not? And in Doctor *Forster's* Case in *Cook's* 11th Report, it is there said to be resolved, that the general

words

Westm. 2.

words of that Statute did not repeal the Statute of *Westminster* 2. of Intails, and so the forfeiture was there resolved to continue but for the life of *Trudgin*, and did not bind the Issues in tail.

Stat. *Acton*
Burnel.Stat. *de Mercatoribus*.

33 H. 8.

A judgment in debt against Tenant in tail, or if he be bound in a Statute or in a Recognizance in the nature of a Statute, the Lands intailed were not extendable, nor to be held in extent by the Statutes of *Westminster* 2. *Acton Burnel*, or by the Statute *de Mercatoribus* by any of the general words of these Laws; but the Statute of 33 H. 8. cap. 39. by express words bindeth the Heirs in tail, for their Lands whose Ancestors stood indebted to the King by Judgment, Recognizance, Obligation or other specialty.

26 H. 8.

But the Statute of 26 H. 8. cap. 13. Enacts, *That every one which shall be attainted of Treason, shall forfeit the Lands whereof he is seized of any Estate of Inheritance*; and by this Statute intailed Lands were forfeited; and the words (*Of any Estate of Inheritance*) were the words which gave that forfeiture, the one in fee-simple, the other in fee-tail; and the word (*any*) presupposeth more Estates of Inheritance than one.

But whether a decree of sale of Lands made by Commissioners of Sewers shall bind the Heirs in tail, is the point of my case; and in my opinion I think they shall be barred, for the causes and reasons following:

First, The words of the Statute of Sewers be, *That such a decree shall bind all and every Person and Persons that at the making of the same decree had any interest in such Lands, Tenements and Hereditaments in use, possession, remainder or reversion, their Heirs and Assigns*: So that by express words it binds the Heirs; and it would have bound the Heirs of a Tenant in fee-simple, without the word (*Heirs*) expressed in the Statute; therefore the word (*Heirs*) needed not, but onely for the binding of the Heirs in tail.

Also if these Lands were charged by prescription, as many Lands be, then were the Lands originally bound, and the Heirs in tail stand charged with these fesses, as well as Land in fee-simple. And

And lastly, This is a Law enacted for the preservation of the Commonweal, and is more to be favoured than particular Estates of Heirs in tail : But the case of the Premunire was penal in point of a forfeiture, which is to be strictly taken for the King, and favourably for the Subject ; and therefore in my opinion, the Heirs in tail shall be bound in these cases of sale, and the rather because they be within the words of the Statute, *videlicet*, Heirs generally put, which extends to Heirs in tail, as well as to Heirs in fee-simple ; and because the sefs and charge shall bind both alike, so in my opinion the sale shall bind both, in regard the sale depends upon the charge and sefs.

If a Prebend, Parson or Vicar, Dean, Bishop or such like, which be seised of Lands in their politick capacity be seised to repairs of works of Sewers, their Lands cannot be decreed away from them in such sort as to bind their Successours ; for as this Statute of Sewers extends to bind Lands by decrees in perpetuity, so the Statutes of 1 and 13 and 14 *Eliz.* restrain Alienations, and where those Statutes restrain them, I am of opinion, that this general Statute of Sewers doth not dispence with those Statutes. In *Croft and Howel's Case in Plow. Com.* a fine with Proclamations and non-claim by five years did bind the Corporation of the Mystery of the Cooks in *London* for their right in Lands, and so all other Corporations which are absolute of themselves, and needed not the assent of any other, as Majors and Commonalties, Deans and Chapters, Master and Fellows of Colleges : but the Law is otherwise of Parsons, Vicars, Prebends, and such like ; And the like exposition do I make of them in this Statute of Sewers. But I will here make a distinction ; I am notwithstanding of opinion, That the Parsons, Vicars, Prebends, and such like, for their own neglect, are bound during their times, but not their Successours after them ; And note, this Statute though it mention Heirs, yet it doth not at all mention Successours, which is worthy of consideration also : And in my opinion this Statute as to decrees to be made of Lands will bind Women

E e

Covert-

Zouch's
Case.
4 H. 7.

Covert-baron, Infants, Persons that be *non sane mentis*, and such like, because it is a Law made for the safety of the Commonwealth : And so it is held in Zouch's Case in the Com. That the Statute of 4 H. 7. of Fines had bound Infants, Idiots and Women Covert-baron, had they not been excepted in that Statute ; *A fortiori* shall they be comprised in this Statute, for the Statute of fines was made for the peace of the Weal-publick, but the Statute of Sewers was made for the safety thereof.

22 H. 6.

If there be two Tenants in Common which be sessed towards the repairs of a Wall, Bank or such like work of Sewers, and one of them do neglect to pay his proportionable part, Whether Commissioners may decree a moiety without partition both of the sels and Land, is a question ; for their Estates are severall, though there be a community in taking of the profits : And therefore the matter is, whether the assels shall attend upon the possession which is in Common, or upon their Estates which be severall : And although Commissioners in assels be not bound to take notice of their Estate, yet if they take upon them to decree a Man's Lands from him, they are then to take notice of his Estate, and of all other circumstances necessarily depending thereupon : In 22 H. 6. fol. 12. if a trespass be done upon Lands which are held in Common, they are to join in an Action, but if one of them die that Action shall survive, for though they were joint in the personalty, yet they disjoined in the realty.

Latch. 152.
Jones 142.

If the trespass or wrong be done to the Land by ploughing, removing a Boundary, &c. both the Tenants in Common shall join in the Action, and that is because the one hath as great wrong as the other ; But if the Beasts of one Tenant in Common be distrained or chased, he onely shall have the Action ; Latch. 152. Jones 142.

My

My Lord Coke 1 *Inst.* 198. a. gives the same reason why the Action shall survive, as was intended here by our Reader, *scil.* because albeit the property or Estate be several between Tenants in Common, yet the personal Action is joint, and every personal Action shall survive: But the words here are transposed; For whereas it's said, (though they were joint in the personalty, yet they disjoined in the realty;) it should have been, (though they disjoined in the realty, yet they were joint in the personalty:) For the onely reason that could be given why the Action should not survive, is because they disjoined in the realty, and upon this ground it was urged by *Danby* in the abovesaid Case of 22 *H.* 6. that if trespass were done in the Land, and one Tenant in Common dies, the Survivor should not have an Action of Trespass of the entierty. But the Court overruled him therein; and the reason is because they were joint in the personalty, and therefore the Action shall survive; and not because they disjoined in the realty.

If two Tenants in Common of Land join in a grant of ten pounds rent-charge out of their Lands, the Grantee shall have ten pounds yearly of either by the opinion of *Mr. Perkins*; and of *Coke* 1 *Inst.* 197. a. for that every man's grant shall be taken most strongly against himself, and therefore they are several grants in Law. But if a sels of ten pounds be laid and imposed upon them by this Law of Sewers, this sels

shall not double as the rent should ; yet in this case of a joint assels imposed upon Tenants in Common, and one would pay his moiety, and his Companion refuseth, the Commissioners of Sewers cannot sell a moiety of the Land, for that it is a joint sels, and was not imposed by moieties, and the sale doth depend upon the sels, and all may not be sold ; for that one Tenant in Common cannot prejudice his Companion in things of realty.

4. The fourth matter is to whom Lands may be decreed by this Law ; for by the words of the Statute it appeareth, That the Commissioners have power to decree Lands for default of payment for years, for life, in tail, or in fee-simple ; whereby the Law intended they should make their decrees for sale, according to the quantity of the sels, and so should use moderation in the Estates they made or sold therefore ; and it was not intended they should sell the fee-simple away for sels which might be satisfied with the making of a less Estate.

And I am of opinion, that this decree doth make the Estate, with the help of this Statute, according to the limitation which should therein be declared, and that the Party shall have Estate according as the same is thereby limited unto him ; and this is no equitable decree which binds the Person onely, as Chancery decrees be, but it binds the Land, and therefore the Commissioners may not decree Lands to a Corporation, as to a Major and Commonalty, Dean and Chapter or such like, which be Mortmain, for the general words of this Statute do not repeal the Statute of Mortmain in my opinion.

And herein I shall end my Argument touching Decrees ; and I take it, though the interest of *E.* was intail, yet the sale thereof might be made by this Statute for the causes and reasons aforesaid : And now onely remains under my censure to declare my opinion, whether the Commissioners of Sewers did justice, in refusing to admit of Pleas of discharge which were tendred to them by *A.* and *E.* wherein may come justly into our considerations these things, (*viz.*)

Whether

Whether Traverses, Pleas of Exemptions, and other legal proceedings, may be had in this Court of Sewers, or not; saving I add this, that these decrees of sale being binding, must be certified into the Chancery, with the King's Royal Assent had thereto.

Legal proceedings.

Traverse.

TO enter into these parts of my Law, I think it fit to begin with *Traverse*, and to deliver my Opinion, whether such pleas and proceedings are to be admitted into this Court; for a *Traverse* is a Plea of the party containing matter to the contrary of that that the party stands accused of, or which is laid to his charge: And in some cases our Books and authorities of Law admit the party to a *Traverse*, and in other Cases the same is to be denied; for in 5 H. 7. fol. 9. & 45 Ed. 3. fol. 8. & 28 H. 8. in Dyer, fol. 13. 5 H. 7. 45 Ed. 3. 28 H. 8. if one be presented in a Leet Court for a Blowipe or any other personal wrong, this Presentment is not *Traversable*, but the party is without remedy therein, though the Presentment be false and the matter of it untrue; and the Law is so also of such a Presentment made in a Sheriff's Turn: and herewithall agreeth the Books of 2 R. 3. 11. & 19 H. 8. 2 R. 3. 19 H. 8. 11. Fitz. Assiz. plac. 442. & 8 Ed. 4. 5. and the reason thereof is delivered in 5 H. 7. because no Process is there awardable against the party to call him to answer: Yet in the same Book of 5 H. 7. it is said, *That if a Presentment be made which toucheth a mans Freehold, he may there Traverse the same.* But I take it the party must first remove the Presentment into the King's Bench, and there *Traverse* it; for in the Court Leet, in my Opinion, there can be no *Traverse* taken or tried, no more where the Presentment toucheth Freehold, than where it onely concerneth a personal wrong: Therefore the reason alledged in 5 H. 7. cannot be the

the true cause wherefore in personal wrongs the Presentments cannot be traversed; but the very true reason therein is, as I take it, because these petty Presentments be of such petty trifling matters, that in avoidance of trouble the Law esteemed them not worthy of Traverse and Trial; and Justice *Fairfax* in 5 H. 7. is of opinion, *That a Presentment made before Justices of Peace in a Sessions is traversable.*

Stanford 183. and with this agreeth *Stanford*, fo. 183. and in other Courts of Law there oftentimes fall out matters which one shall not be admitted to take a Traverse unto, and in some other cases he shall, as by these succeeding authorities may appear. In the 37 *Affiz. plac.* 7. a Presentment was taken before *Green* and *Ingham*, Justices of the King's Bench, That *J. S.* who had killed *A.* had goods to the value of Eighty pound in the hands of one *John Lombard*; and upon the Presentment a *Scire facias* was awarded against *John Lombard*, to shew cause wherefore these goods should not be seized to the King's use: *John Lombard* came in and tendred a Plea to the Presentment, that these goods were not the Felons but that they were delivered to him to keep to the use of a Cardinal of *Rome*, and he was there admitted to this Plea.

43 *Ed. 3.* and with this agreeth 45 *Ed. 3. fol.* 26. expressly: Yet in that book and Mr. *Stanford*, fol. 183. it is holden for Law That if it be presented before a Coroner that *J. S.* killed *A. B.* and fled for the same fact, and after upon his trial he is acquitted, yet he shall forfeit his goods upon the *Fugam fecit* before the Coroner, and he shall not be received to take any Traverse to the said Presentment in that Point. The difference in which two cases is this in my opinion, that a stranger, as *John Lombard* was, in the first case, shall not be peremptorily concluded; for it were no reason one man's goods should be forfeited in another man's default, and he should have no answer thereunto: But in the other case, in Terror of Felons, though he be acquitted of the Felony, yet he is not acquitted of the flying, and he may be guilty notwithstanding his acquittal. There be other cases in the Law which admit no Traverse, as in *James Bag's* case

Cook

Cook 11 *Rep.* where a Writ was directed to the Major and Burgesſes of *Plymouth* to reſtore *Bag* to his Aldermans place there, which they had put him from, and they return a cauſe ſufficient to bar him, which notwithstanding is falſe; yet he ſhall not be received to his Traverſe therein; neither could a Traverſe be admitted to the Certificate of the Biſhop, wherein was contained, that *J. A. Parſon* of *Dale* had reſuſed to pay his diſmes to the King, by means whereof the Parſon loſt his benefice, which caſe is in *Br. Caſes*, *temp. H. 8. pl. 332.* and *Dyer, fol. 116.* and *7 H. 4. fol. 4.* and *21 H. 7. 8.* and many other Books be, that no Averments ſhall be taken to the returns of Sheriffs to take any Iſſue thereupon.

And in *Dr. Bonham's Caſe* upon a *Habeas corpus*, the Phyſicians returned the cauſe of his imprifonment, which was falſe; yet he could not be admitted to Traverſe the ſame. But yet by the opinion of theſe Books, an Action upon the caſe lieth againſt the Major and Aldermen, and againſt the Biſhop, for their certificates, and againſt the Sheriff for their falſe returns; and if Juſtifications be made by them they may be traverſed: But theſe will not reduce the parties to their former liberties (*viz.*) not the Alderman to his place, nor the Parſon to his Church, but damages in thoſe caſes are onely recoverable.

Theſe caſes I have put as Reaſons and Arguments againſt our caſe of Sewers; But yet I am of opinion, that a Traverſe may be taken to a Preſentment made in this Court of Sewers, and herein this Court may be reſembled to a Seſſions of the peace: And this Commiſſion of Sewers gives the Commiſſioners of Sewers power to hear and to determine at the King's ſuit, as well as at the ſuit of the party; and a Traverſe lieth of a Preſentment found before Commiſſioners of *Oyer and Terminer*, and is triable before them by the Books of *29 Affiz. pl. 33.* and *12 Lib. Affiz. pl. 21.* and the Earl of *Leiceſter's* caſe in *Plow. Com. fol. 397.* and the words of this Statute are ſufficient to yield the party the benefit of a Traverſe if there be cauſe; and for preſident in the

Br. Caſes.
Dyer 116.
7 H. 4.
21 H. 7.

Dr. Bonham's
Caſe.

29 Affiz.
12 Affiz.
Com.

Rom. Marsh. the point, Charter of Romney Marsh, pag. 23, and 24. one
 Godfrey being presented that he ought to repair a Bank or
 Wall, and that he did neglect to do the same, and he came
 in and pleaded a Plea thereto before the said Commissioners,
 19 Affiz. and in 19 Lib. Affiz. plac. 6. there were divers Presentments
 before Commissioners of Oyer and Terminer for Nufances
 done in the River of Lee, and the same were there traver-
 1 H. 4. sed and tryed: And the Statute of 1 H. 4. Chap. 12. doth
 plainly admit of a Traverse, wherein the words be, *That*
in case if any feel himself grieved by execution or otherwise a-
gainst right and reason, let him pursue and he shall have
right: But I verily suppose, that those things which the Ju-
 stices of Sewers do by their view, or by survey and discre-
 tion, are so binding that in those cases no Traverses are to
 be admitted, because these things are merely the acts of the
 Court, and of the Justices themselves: and if they fine a
 man for his contempt in Court by a Record of their own
 view, and not upon a Presentment, the party shall not be
 Dr. Bonham's received to Traverse this: and in Doctor Bonham's case it is
 Case. said, *That the act of a Judge is not Traversable, if he be the*
absolute Judge of the Cause; But in cases done or certified by
such as be no absolute Judges of the Cause, as Commissioners
of Bankrupts, which certifie one a Bankrupt, he may Traverse
 Cut and De- *this in an action brought, as was done in the case of Cut*
 labor. and Delaber in 7 Jac. in the common place, and Vernie's
 7 Jac. Case 1 Mar Dyer fol. 89. no Averment could be taken to
 1 Mar. the certificate of a Judge; and with this agreeth 7 H. 7.
 Dyer 89. fol. 4.
 7 H. 7.

But although a Traverse may be taken to a Presentment
 in the Court of Sewers, yet times and seasons must be obser-
 ved; for if a Presentment be there made, it may be Traver-
 sed for the reasons, causes and presidents formerly mentioned;
 Yet if the cause have been there so far proceeded in as the
 Commissioners make a decree thereupon, I take it then no
 Traverse at all can be taken, because a decree is the final
 Judgment of the Court, and is an act Judicial which can-
 not be traversed and tryed by a Jury, for that were to re-
 fer

fer the Judgment of the Court to be examined by a Jury, which may not be admitted; and at the Commonlaw, after Judgment no Traverse can be taken: And if one be indicted at the general Sessions of the Peace, this is traversable; but if the party suffer himself to be outlawed upon the said Indictment there, no Traverse lieth, but a Writ of Error: So if in our Sessions of the Sewers, the cause proceed to a decree, the party grieved is to take his way by preferring a Bill of Reversal in manner as is done in the High-court of Chancery, and so he may have the cause here thoroughly examined.

Other Legal Proceedings.

THE words of the Statute which give the legal proceedings be these (*viz.*) *That the Commissioners of Sewers may hear and determine all and singular the Premisses, as well at our suit, as at the suit of any other complaining before them, after the Laws and Customs aforesaid, or otherwise, by any other ways or means;* these words give the party remedy to sue before the Justices of Sewers for such things as are contained within these Laws, and which have their dependency thereon: In *Colshil's case* in *Dyer*, fo. 175. the party preferred his Bill of complaint to the Commissioners, containing the effect of his Title to the Office in question, and these were special Commissioners of Oyer and Terminer: Justices of the general Oyer and Terminer, may hear and determine Usury by the Statute of 13 *El. cap. 8.* yet if *J. S.* 13 *Eliz. c. 8.* be bound in a Bond of Ten pounds principal debt, and for Forty Shillings for Interest, although this Bond be for payment for usury, yet an Action of Debt doth not lie thereupon before the said Commissioners, but an Imformation may be preferred against the Lender there to punish him.

So by our Statute of Sewers an Action of Trespas lieth not for a Trespas done within the reach of this Commission; yet *Distinguendum est;* for put the case a Sess is laid upon a man, and the goods of *J. S.* not chargeable thereto

be taken and distrained, who is not chargeable to the payment thereof, J. S. in my opinion (though this case have but the Countenance of this Commission) may have his Action or prefer his complaint before the Commissioners in this Court of Sewers for the recovery of his damages: And although this be but a private Action, yet the distress being taken by an authority drawn from the power of this Commission, the party distrained may have his remedy in this Court by his private Action, because it sprung by the colour of the general power of this Court.

If *A. B.* have a several Piscary in the River of *Witham*, which is a River within the Commission of Sewers, and the said Piscary by these Laws is chargeable to the repairs thereof, if *C. D.* disseize him thereof, or commit a Trespass by fishing therein, *A. B.* can neither have an Assize nor Action of Trespass within this Court.

*Keighley's
Case.*

So if a Royal or Common River hath his current through the Town of *Dale*, and one *A. B.* is tied to repair the Banks there by Tenure, Prescription or otherwise, which notwithstanding in his default are broken down, and the Waters breaking out overflow the grounds of *C. D.* thereto adjoining, yet *C. D.* hath not any remedy to recover his damages against *A. B.* in this Court for the loss of his grounds, but he is put to his private Action therefore at the Commonlaw; and with this agreeth the case of *Keighley*: But if *A. B.* be presented therefore before our Commissioners of Sewers, they may order *A. B.* to repair the breach, but cannot award damages to *C. D.* for our Commissioners of Sewers are herein like to Justices of Peace, and to Stewards of Leets and Law-days, which have power originally to meddle onely with the publick wrong; Yet by the power of their Commission, and of this Statute, they many times accidentally meet with private injuries, as by the ensuing cases may appear.

If a Township be assessed by a Law of Sewers, and the goods of one of the Inhabitants be taken for the sels, that party upon his complaint to these Justices of Sewers may have

have process out of this Court to call before them the rest of the Inhabitants which were subject to the said sels, to cause them to contribute towards the party's damage who was solely distrained for them all, for otherwise this Court should fail of justice in his own proper materials, and the Statute of 1 H. 4. c. 12. saith, *That he which is grieved, let him have remedy:* And if the goods of a man taken for his tax or sels be sold for the payment thereof, for more moneys than his sels came to, the Justices of Sewers have power to cause the Officer to restore the overplus, *Et cum hoc concordat* the Charter of Romney Marsh.

If the Commissioners of Sewers appoint the Officers to take so many Trees of J. S. at such a price, for the repairing of a defence against the Sea, or to make a Trench over the grounds of J. D. and thereto erect something toward these Actions, J. S. hath remedy to come by his moneys in this Court, and the other party over whose grounds this Trench is made, may be relieved in recompence to be made to him for the hurt in his grounds.

If Laborers or Workmen, as Carpenters, Masons, Smiths, Dikers, or other persons be set on work by the power of these Laws, they may by the same power recover their Wages before the Justices of Sewers; for the original cause sprung out of the power of this Commission, and this is there determinable, as incident to the authority of that Court: But if the original cause did not arise out of this Commission, as in some of the preceding cases they did not, then hath this Court no Jurisdiction of the matters depending thereon: And I do ground this diversity upon the reason of the Book-case put in 1 R. 3. fol. 4. where it is said, *That if the original cause do belong to the Court Christian, although in the proceedings therein some matters happen which depend on the principal, which do belong to the Temporal Court, Yet Accessarium sequitur suum principale*, and these matters shall also be determined in the Court Christian: And so if in a cause at the Temporal Law, as in a *Quare impedit*, and in the proceeding therein, some matter do arise

*Kelleway's
Rep.*

rise depending on the principal cause, which belongeth to the Court Christian, yet the Temporal Court shall continue his Jurisdiction thereof: And with this diversity agreeth *Kelleway's Report*, fol. 110. so in our Court of Sewers, although a thing happen in the proceedings, which if it stood merely of it self would not pertain *ad eor' examen*, notwithstanding if it be but a matter accidental, and have his dependance upon a principal matter which is determinable in this Court, the other also shall be here determinable.

*Justification by the Commissioners and Officers
of Sewers.*

IF a man be sued for distraining Cattel or other Goods, or doing any other Act by virtue of the Commission of Sewers, this Statute of 23 *H. 8. cap. 5.* hath provided, That the Defendant may justify by alledging in his Plea, that the said distress or other act was done by authority of the Commission of Sewers for lot or tax assessed by the said Commission, or for such other act or cause, as the said Defendant did by authority of the said Commission, and according to the Tenor, purport and effect of the said Act; without any reherfal of any other matter contained in the said Act, or any Commission, Statutes or Ordinances thereupon made, whereupon the Plaintiff shall be admitted to reply, that the Defendant did take the said distress, or did the said Act of his own wrong, without any such cause alledged by the said Defendant;

fendant; whereupon Issue shall be joined, and upon the trial, the whole matter shall be given on both parts in evidence, according to the truth of the same: which is a beneficial clause for such as act under the authority of the Commission of Sewers, and exempts them from pleading all the special matter, which would be tedious, chargeable and dangerous.

Whitley brings an Action of Trover and Conversion against *Fawsett* for taking his Cattel, by way of distress, and selling them by vertue of a Warrant of Commissioners of Sewers, for not paying of a Tax set by them towards the reparation of Sea-walls; the Defendant waves the benefit which this Act had given him, and pleads all the special matter; the Plaintiff demurs to this Plea, and it was resolved, that seeing the Defendant had waved his benefit of the Plea, given him by the Statute, by pleading specially, he ought to make good his Plea, as he hath pleaded it, at his own peril: And the Plea was adjudg'd to be ill, for several defects, which had been avoided, if the Defendant had pleaded as the Statute directed him; *Style 12, 13.* *Style 12, 13.*

In trespass *B. R. 2 Car. 1.* for taking of Bullocks, the Defendant pleads that King *James* granted to divers Persons a Commission of Sewers, to endure ten years, and justifies the taking for a fine imposed by the Commissioners,

Addition to
Benlowes
199.

ners, but shews not whether it was in the time of King *James*, or of King *Charles*; and it was resolved by the Court, that he ought to have set forth the time; for the Statute of 23 *H. 8. 5.* is intended onely of circumstances, but here the time is matter of substance; Addition to *Benlowes* 199.

Exemptions.

Register.
Fitz. N. B.

IT may be a grand question, Whether these Laws of Sewers will permit any Exemptions to any person or persons, and by the strict penning of the words of this Commission it seems to oppose all such privileges and discharges, as Exemptions be; The ancient Commission which is in the Register, and in *Fitz. Nat. Br.* are exceeding strict; for the words therein be, *Ita quod aliquibus tenentibus terrarum seu Tenementum seu communiam pasturæ seu Piscariæ habentibus diviti vel pauperi vel alteri cujuscunque fuerit conditionis Status aut dignitatis qui defensionem habere potuerint per predictas Wallias Gutturæ Fossata sueras pontes calceta & gurgites seu etiam damnum per trenchæas predictas sustinere vel poterint sustinere sive fuerint infra libertates sive extra non parcantur in hac parte*; And the words in our Statute be in effect, *And all such which reap profit or sustain damage, shall be assessed*; which words seem not to admit of discharges: Yet in my opinion out of the strict words of these Commissions there be some Exemptions, though not expressed in words, yet supplied in reason, and are to be added in construction.

1. First, For the grounds lying betwixt the Sea-banks and the Seas are in reason exempted from the charge of the Banks and Walls, because they can take no safety thereby.
2. Secondly, Those grounds which be upon an ascent, and not on the Level, are also by the rule of reason exempted

ted from assesses to be imposed onely by the power of these Laws.

Thirdly, Where one or more be tied to repair a Bank, Wall or other Defence by Custome, Prescription, Tenure or otherwise, all others be in Law and reason exempted.

Fourthly, A Parson and Vicar with Cure are not to be assessed for their Tythes, and divers of the Hereditaments formerly mentioned in Assesses be by the rule of reason exempted.

Fifthly, But whether one may be discharged and exempted from the repairs of the works of Sewers by any special Custome or Prescription, is a great question of our case, in regard both the old and new Commissions *Quod nullus in hac parte parcatur* seem to toll all Prescriptions and Customs of discharge, and to admit of none of them:

And the Charter of *Romney Marsh*, pag. 31, 32, and 33. Ch. *Romney Marsh*. beareth the same Exposition; for there *Godfrey* pleaded a Plea to discharge him of the repairs of the Walls and Waterganges, because he claims his Lands by Charter from the King, and also prescribed generally *in non reparando*, but he durst not abide his Plea; for there pag. 39. it is said, *That all having Lands should contribute, and that none might be spared*; and also pag. 53. be these words, *Quod starent ordinationi Jurator predictor nulla consuetudine resistente*; which words be direct in the point against such general discharges claimed by blind customs: Yet I have been credibly informed, that Sir *George Fitzwilliams* Knight, had a Custome in his Town and Manor of *Mablethorp* in the County of *Lincoln*, called *Swiftage*, whereby he challenged to be freed from being charged to the repairs of the Sea-banks, because in consideration thereof he and his Ancestors have used in regard of their Manor there to do some other repairs as beneficial for the Commonwealth; and in my opinion, in such a special Custome one may be exempted; like to the case of Tythes, wherein one could not by the Common Laws prescribe in a *non decimando*, yet in a

modus

modus decimandi he may, because there is some competent consideration given in lieu thereof; And so in my opinion one cannot generally prescribe or alledge a custome to be freed and clearly exempted from the repairs of Sewers, but by special custome he may, as in the said Case of Sir George Fitzwilliams.

The Lands of the King are not exempted from being taxed by virtue of the Commission of Sewers; and therefore in the Case of *Whitley and Fawset*, *Pasch. 23 Car. 1. B. R.* where it appeared, that there were 800 Acres of Land in the hands of the King, which were not taxed, as by Law they ought: it was held that the tax laid upon the other persons within the Level was unjust and illegal, because by the not taxing of those 800 Acres, a greater burthen was laid upon the rest of the Land within the Level, than of right ought to be, for that the King's Lands are taxable by the Statute, *Style 13.*

Style 13.

And therefore the Commissioners of Sewers in my Case did very justly and discreetly refuse the said general Pleas of discharge tendred to them by *A. and E.* and so I *super totam materiam* conclude my Argument as I did my Case, That the Commissioners of Sewers did administer true Justice in all the parts of these Laws.

Finis hujus Tertiæ Lecturæ.

Lectura

Lectura Quarta.

IT appeareth by this Statute I read on, that the Law-makers made it not the least part of their care to have such persons put in trust with the execution thereof, as should be of great wisdom and approved experience. And because that persons of profound wisdoms, deep experience, tried Learning, generous Disposition, and of good Estate, should be put into these Commissions of Sewers, the Statute did make choice of four Honorable persons to have and take the nomination of such as should for their Integrity, Learning, Wealth, Wisdom and Experience, be worthy to be put into this Commission. And therefore the Lord Chancellour, Lord Treasurer, and the two Lord chief Justices for the time being, have by this Statute the nomination of our Commissioners; But as these great persons of Honor by their high places are most commonly busied in matters of great importance, they many times refer these matters to others, by means whereof divers persons in some Countreys have of late years crept into Commission, which this Statute doth not allow of, which do not onely want knowledge and experience, but which are also transported and carried away with selfwill, and serve most commonly to make a faction of the greater number to carry away busineses, when the graver and wiser sort are forced (being overladen with popular voices) to give way to run into contrary courses, and are made to surcease from making good and wholesome Laws and Ordinances, and sometimes are as it were forced to agree to those which are worse; even as the Roman Dictator *Fabius* having joined to him the froward *Minutius*, was by the violent stream of his Colleague so crossed and over-

swayed, not out of judgment, but selfwill, that he was forced to give way to *Minutius's* frowardness, though it tended almost to the hazard and the overthrow of the whole Roman Army: And because the Commissioners are the persons through whose hands the execution of all these Laws must pass, I thought it therefore very convenient to take into examination these parts of the Statute which touch and concern them: And I intend to purge the Commission of such of them as these Laws have disallowed, and to that purpose I have framed this insuing case, which I take it will give us occasion to call them all into question and to sever the just from the unjust, the sufficient from the unsufficient, and the learned from the illiterate.

The Case.

A. Demiseth to *B.* and *C.* Land of the yearly value of Sixty Pounds *cum stauro* of the value of Two Hundred Pounds for their lives, the Remainder to *D.* a free Citizen of *Lincoln*, *B.* and *D.* disseise *C.* of the Land and take the stock, *C.* releaseth to *D.* the goods absolutely, and the Land upon Condition; *D.* dieth in Exile, *E.* his son and heir enters, *B.* and *C.* who enter for the Condition broken, *E.* and *Francis* Countess Dowager of *Warwick* and three other Commissioners of the *Quorum* of Sewers, make a Law to raise a Were, erected upon a River navigable at the costs of the party, because it hindred the current of Waters.

My Conclusion is, That here be competent Commissioners in number and in Estate which made this Law, and that this Law is well decreed within this Statute.

The case I do distribute into these points, *viz.* Three at the Commonlaw, and four upon this Statute; the points I intend by the Commonlaw are these:

1. First, Whether the Sixty Pounds stock can be demised and letten for life, with the Remainder over, as this case is.

Secondly,

Secondly, Whereas *B.* and *C.* be two jointenants in possession, whether one of the Jointenants and a Stranger can so disseise the other Jointenant as to transfer thereby an interest and Estate to the Stranger.

2.

Thirdly, Because the Release dependeth upon the disseisin, the question is, in what manner it doth innure, and whether it shall expell *B.* out of that moiety, because it is made to the Stranger; and then what is reduced by the condition, whether a possession, action, or a right.

3.

Points upon this Statute.

First, Whether the Son of the free Citizen exiled is a disabled Commissioner, in respect of his Person; and whether he hath such an Estate, either in Lands or Goods, as will satisfy this Law.

1.

Secondly, Whether the Countess may be a competent Commissioner within this Statute.

2.

Thirdly, Whether a joint interest in Lands or Goods will make the Jointenant a sufficient inabled Commissioner within this Statute.

3.

Fourthly, Whether the Were, as this case is, be raced down or not.

4.

And hereupon I intend to lay open the whole division, touching the Lets, Impediments and Annoyances which this Statute speaketh of.

Argumentum Lectoris.

I meant it not for a point in this Case, whether Goods might be let with Land, nor whether a stock might be leased with a Farm, because I find the Books of 1 H. 6. 1. 1 H. 6. 1. and many others full in the point that they may. And although by the taking of them back again by the Lessor, they will thereby suspend no rent, yet in the original demise they may be a cause to increase the rent: but my point herein is double.

First, Whether they will pass in remainder, as my Case doth limit them.

1.

Secondly, Whether they will inable *B.* and *C.* to be Commissioners of Sewers allowed by this Statute.

2.

I do not onely find stock let with Farms, but also joined in real Actions with Land : for in the Writ of Assize the words be, *Quod vicecomes faciat Tenement' illud reseisiri de catallis quæ in ipso capta fuerint & ipsum Tenement' cum catallis esse in pace usque, &c.* These doubtless were such Goods as stocked the Grounds, and which usually went with the same, for in ancient times when any farmed Grounds, they usually farmed the stock thereon going, and this appears by ancient presidents ; *Sed nunc aliud tempus.*

Wrotley and
Adams's
Case.

37 H. 6.

In the Writ of *Ejectione firmæ* in the Register be contained these words, *Ostensum quare vi & armis manerium de Dale quod C. prefat' A. dimisit ad terminum qui nondum preteriit intravit & bona & catalla ejusdem A. ad valentiam, &c. in eodem manerio inventa cepit & asportavit.* So that in those Writs of Assize and *Ejectione firmæ*, the one to recover the Freehold, the other the Leasehold : We find Goods which went with the Manor or Farm made parcel of the plaint ; and I take it, damages shall be increased therefore ; for these were such Goods as stockt the Farms. And in *Wrotley and Adams's Case* in *Plo. Com.* Exception was taken in abatement of the Writ, because the words (*bona & catalla*) were left out of the same : Yet in my opinion, no Estate, neither in *presenti* nor in remainder can be made of Goods or Chattels, neither shall they go with the Land in point of Estate, but shall pass to the Lessee, and after to him in the remainder, as a dependancy upon the Farm : And the Heir shall have Heir-looms, together with the Mansion-house, as things necessarily concurrent therewithall, yet the Heir-looms have no descending qualities, but they do go with and wait upon the House, as necessary Instruments fitting to be used therewith ; neither can it be gathered by the Book of 37 H. 6. fol. 30. that the Book called *The Grail* (which was devised by will to A. one of the Executors to have the occupation during his life, the remainder thereof in like manner to B. for his life, and after to be disposed by the Executors to the Churchwardens

wardens of *Dale*) that it did pass to *A.* and *B.* in point of Estate, but onely the use and occupation thereof was disposed to be ruled according to the said Limitations, but the property remained in the Executors.

And a devise of such use and occupation of goods in remainder, was, *Trin. 17 Car. 1. C. B.* adjudged to be good; but otherwise it is of a devise of the Goods themselves in remainder, for such devise is void; *March 106. Roll abr. tit. Devise, 610.* *March 106.
Roll abr. 610.*

It was adjudged, *Mich. 28 & 29 Eliz. C. B.* that where a stock of Sheep was leased by Indenture, the property of them still remained in the Lessor; *Godbolt 113.* *Godbolt. 113.*

So in *Paramore* and *Yardley's Case* in the *Com.* and in *Matthew Manning's Case* in *Cook's Reports*, a Term of years could not be devised to *A.* for life, the remainder thereof to *B.* for his life, to pass in this manner in point of Estate; neither could these Estates be made thereof, but by construction the same was disposed of to go by way of executory devise; and so the stock in my Case was not transferred in point of Estate with the Land, but in point of executory disposition of the occupation and use thereof onely; and therefore if one let a stock of Cattel or Sheep with Grounds at the end of the term, the Goods as accessory with the Land as principal shall return to the Lessor, and during the term the Lessor hath the property of them, and the Lessee the possession thereof, and the Lessee shall have the yearly profits thereof for his Rent; and here I do end this first Point, and will proceed to the rest.

The second Point.

There be two Jointenants, and one of them and an Estranger do disseise the other; what interest the Stranger gaineth thereby is the question.

I am.

35 Ed. 3.

9 H. 7.

I am clear of opinion, as many Books be, That one Jointenant may disseise his Companion by an expresse *Offer*, but when a Stranger joineth therein, in what part that doth alter the case is the matter; for if the Stranger should get a joint Estate in possession with the Jointenant whom he joined withall, that were to make a double Jointenancy *in uno eodémque gradu*: for the Jointenant which committed the disseisin, which hath the possession, and the Jointenant which was disseised and which hath the right, do hold jointenancy still; for by 36 Ed. 3. a right may hold jointenancy with a possession, and the one may take by survivor from the other, in 9 H. 7. fol. 23. That he in remainder and a Stranger may disseise Tenant for life, and shall be both Disseisors; but in that case they were both Strangers to the particular Estate: Also it is manifest that one jointenancy may be built upon another, As if two Jointenants be disseised by other two Jointenants of the right *semel*, but not *simul*: But in our principal case, Whether one Jointenant might hold the possession of a moiety with his first Companion in jointure, with his moiety in right, and can also *uno tempore* hold jointenancy in possession with a Stranger, of the moiety upon which the disseisin was committed, I suppose he cannot, because then he should hold partnership with both of one thing: And therefore in my opinion the Stranger getteth nothing in my case, but is onely a Coadjutor, and no Disseisor, which gets the Tenancy.

The third Point.

But admit the Stranger did get a moiety of a moiety by joining in the disseisin, then what alteration this release will work in my Case is the next question.

Littleton.

It is true as Mr. Littleton saith, That if there be two Disseisors, and the Disseisee release to one of them, he shall hold his Companion out of all, and by such release he shall have the sole possession and state in the Land; The like Law is in my Case of two Abaters and two Intruders:

truders: but if two Disseisors be, and they make a lease for years, rendring rent, and then the Disseisee releaseth to one of the Disseisors; I suppose this release shall inure to both, because the Lessee for years, whose Estate shall be strengthened by this release, is in by the title under both of them, and now they are Tenants of a reversion onely, and of a rent thereto incident, which was not got by the disseisin, but was composed by the legal contract of the Parties; But the reason given for this in *Co. 1 Inst. 276. a.* 1 Inst. 276. a. is grounded upon the said words of *Littleton*, that if two Disseisors be, and the Disseisee release to one of them, he to whom the release is made, shall have the sole possession and estate in the Land; which he cannot have, where the Disseisors have made a lease for years, before the release; for by the lease, part of the Estate is in another, and therefore (saith my Lord *Coke*) in such case the release to one of the Disseisors shall enure to both; and though our Reader here puts the case of rent reserved upon the lease for years, yet the reason given by *Coke*, will as well hold, where there is no rent reserved. The like Law is, if the Disseisors make a lease for life, and then the Disseisee releases to one of them, this shall enure to them both, for the same reason, because he cannot by the release have the sole Possession and Estate, for part of the Estate is in another, *1 Inst. 276. a.*

So if two be admitted to a Copyhold by Tort, or to an Office in a Court of Justice unlawfully, though their entry be unlawfull, yet because they came in by admittance, which is at the door of Justice, I suppose therefore, that if
a release

a release be made to one of them by the Disseisee, it shall inure to both, because they had some colour and countenance to enter, more than expresse Disseisors or Intruders have.

But if a Son and a Stranger disseise the Father, and after the Father dieth, and the right descend to the Son, by this release in Law, and by the accession of the right by descent to the tortious possession, it doth inure onely to the Son; and although this release was upon condition, which by the breach thereof seemeth to set the Releffor in the same state he was before, yet it doth not admit the Joint disseisor which was expelled thereby to become a copartner again with his fellow: As if the Son and a stranger disseise the Father, and the Father dieth, the stranger hereby is expelled by the descent of this right to the Son; yet if after a more near Heir is born, as the Elder Brother died his Wife enfeint with a Son, which after the decease of the Grandfather is born, whereby the Inheritance of this Land is his; yet the other Jointdisseisor which was expelled by the descent of the right of his fellow disseisor, by the departure of the right with the possession, cannot enter upon his fellow disseisor, in my opinion.

But now the question is farther, what is reduced by this condition, the right onely which was released, or the possession together with this right; for if but a right be reduced, then a descent hapning may perchance toll the entry of the Releffor, and so he may be put to his Writ of right in Fee: And if it be a right of an inferior degree, as in our case it was but for life, then he should be without remedy.

17 Affix. pl. 2.
17 Ed. 3.

But in my opinion where the release doth inure by way of entry and Feoffment being upon condition, it may in that case by the breach of the condition reduce the possession, and give the Releffor a re-entry, because *in Intelligentia legis* the Land was passed thereby, and not a right onely: But if it had inured by way of *Mitter le droit* onely, I take it then it would reduce but a right; But in our case

Bevil's Case.
4 Report.

I sup-

I suppose if it had had any working at all, it was by Entry and Feoffment; yet I think nothing did inure thereby to the stranger, which in my case is called D. because he wanted the Freehold whereupon it should inure.

And so I end my Common Law points, and I will now in hand with my Statute.

The part of the Statute whereupon I do ground my subsequent matters, doth contain in it these words (*viz.*) *That if any person or persons of what Estate or Degree soever he or they be of, that from henceforth do take upon him or them to sit by vertue of the said Commissions, not being first sworn according to the Tenor of the Oath expressed in the Statute; or if any person so named and sworn do sit, not having Lands, Tenements or other Hereditaments in Fee simple, Fee tail, or for term of life, to the clear yearly value of Forty Marks above all charges to his own use, Except he be Resiant and free of any City, Borough or Town Corporate, and have moveable substance of the clear value of One hundred Pounds, or else be learned in the Laws of this Realm, in and concerning the same; That is to say, admitted in one of the principal Inns of Court for an utter Barrister, shall forfeit forty pounds for every time that he shall attempt so to do, the one moiety to the King, the other moiety to the party that will sue therefore, &c.*

So that by this clause it is manifest, that every one that is not qualified in one of these degrees, is no competent Commissioner within this Statute.

First, That he be an utter Barrister in one of the four Inns of Court.

1.

Secondly, Or have Lands, Tenements or Hereditaments of the clear yearly value of Forty Marks above all charges, in Fee simple, Fee tail, or for life.

2.

Thirdly, Or be free or Resiant in some City, Borough or Town Corporate, and have moveable substance of the clear value of One hundred pounds.

3.

And that person which is not within one of the said Three parts, and yet doth take upon him to sit in the execution of the Commission, incurs two penalties:

H h

The

1. The one, the forfeiture of his discretion for his presumption.

2. The other, of Forty pounds for his contempt.

And therefore for the more clear examination of these things, I will observe that method in my Argument, which my case hath formerly prescribed to me.

1. And first of all, I shall proceed to the personal abilities, and first of the son of the free Citizen of *Lincoln*, I am of opinion, that every Commissioner of this kind must be indowed with these three qualities.

- | | | |
|----|--|--|
| 1. | First, He must be free of a City, &c. | If he want any of these, then he is out of this |
| 2. | Secondly, He must be there Resiant, and | Branch of this Statute. |
| 3. | Thirdly, He must have in clear moveable Substance, One hundred pounds; and | Therefore what person is such a Freeman, is now to be handled. |

I am of opinion, that every Subject born within the King's Dominion is a Freeman of this Realm, as appeareth by the Grand Charter, *Chap. 14.* yea though he be a Bond-slave to a Subject; but a stranger born is no Freeman of the Kingdom, till the King have made him Denizen, by whose power alone, without the help of any other, one may be made free: And to be a Freeman of the Realm, the place of his birth is held more material than the quality of his Parents; for if Aliens have a child in *England*, it is free of the Kingdom: yet by the opinion of *Hussey* Chief Justice in *1 R. 3. fol. 4.* and in *Calvin's* case of the *Post Nati*, it is holden for Law, That if Ambassadors of this Realm have children born in *France*, or elsewhere where the Father and Mother be natural born Subjects, the Children are free of the Realm of *England*; but if either the Father or the Mother of such Children were an Alien, then are not those Children free. One out of the King's protection, is, as I take it,

1 R. 3. fol. 4.
Calvin's
Case.

it, for that time no Freeman of the Realm: But in what Case a Man Exiled is in, setteth the nearest to our Question.

Exile is one of the Eight Punishments which the Roman Laws did inflict upon Strangers, which be, videlicet,	1. <i>Damnum.</i>
	2. <i>Imprisonamentum.</i>
	3. <i>Plagæ.</i>
	4. <i>Compensatio.</i>
	5. <i>Ignominia.</i>
	6. <i>Exilium.</i>
	7. <i>Servitudo.</i>
	8. <i>Mors.</i>

Mr. Bracton doth in this manner describe Exile, that is, *Certi loci interdictio*, and doth distribute it into Four heads; That is to say,

1. *Specialis, hoc est interdictio talis provincie Civitatis Burgi aut ville.*

2. *Generalis, Interdictio totius Regni & aliquando est,*

3. *Temporaria, pro duobus tribus quatuor aut pluribus annis aut, &c.*

4. *Perpetua, pro termino vite & Exilium est aliquando ex arbitrio principis sicut in exiliando Duces Hertfordie & Norfolkie per Regem Ricardum secundum, Et aliquando per Judicium terre ut fit in casu Piers de Gaveston & etiam in casu Hugonis de le Spencer junioris qui ambo fuerunt exiliati per Judicium in Parlamento.*

Abjuration also was a legal Exile by the Judgment of the Commonlaw, as also by the Statute Law; and in the Statute of *Westminster the Second, Cap. 35.* He which ravisheth a Ward, and cannot render the Ward unmarried, or the value of his Marriage, must abjure the Realm; and this is a general Abjuration: And by a Statute made in *31 Ed. 1.* Butchers are to be abjured the Town, if they offend the fourth time in selling meased Flesh; and this is a special Abjuration. *Westm. 2. 35. 31 Ed. 1.*

But I must put this Case to a farther Question, which is, What a man Exiled doth forfeit thereby? And in my opinion he forfeits these things following;

1. First, He loseth thereby the freedom and liberty of the Nation out of which he is Exiled.

2. Secondly, He forfeits his Freedom in the Borough or City where he was free; for he which forfeits the Freedom of the whole Realm, by consequence forfeits his Freedom in every part thereof.

3. Thirdly, He is of as little esteem in our Law as if he were dead, for his Heir may enter, and so may his Wife enter into her own Lands, and may sue an Action as a Woman sole, by 31 Ed. 1. & 1 H. 4.

31 Ed. 1.
1 H. 4. 1.

4.

Fitz. abr.

And Fourthly, in my opinion he shall forfeit those Lands to the King, which he shall purchase in the Realm during his Banishment *quod vide* 15 Ed. 3. Fitz. Petition' plac. 2. But there in that case *Hugh Spencer* was banished by a Judgment in Parliament, which gave a forfeiture of his Lands; howsoever I take him as strongly barred from purchasing in the Realm during his Banishment, as an Alien is, for *fit alienigena* by his Banishment, and he is in a worse case than an Alien; because he taketh with him *Indignatio principis*: But a banished man forfeits neither Title of Honor, as Knighthood, which is *de jure gentium*, nor the Lands he had before he was Exiled, unless by special Judgment given in a legal course they be so decreed.

Then our case goes farther, That *E.* is not Exiled himself, but *D.* his Father was Exiled, whose Heir *E.* is: now whether by the Exilement of the Father, the liberty and Freedom which *E.* might claim in the City of *Lincoln* by being the Son and Heir of a Freeman, be forfeit for his Father's Banishment, or not, is the matter of my case.

A Freeman of a City or Borough may be made divers manner of ways, as appeareth in the Case of the City of *London* in Sir *Edward Cook's* 8th Report, fol. 126. That is to say,

City of London's Case.

First,

First, By Service in his Apprentiship.

Secondly, By Birth, by being the Son of a Freeman.

Thirdly, By Purchase, and that is by the Common-council of the City: And at *Bristol* by Marriage.

In the Chronicles in the Reign of *Richard* the 2d it is said, *Freedom was obtained but by two means, videlicet, By Service, and by Birth*; yet it seems it may be obtained by purchase, because the Centurion claimed his Freedom thereby, in the 22d Chapter of the Acts of the Apostles. In the *Irish Reports*, fol. 12. it is said, *That one may be a Freeman by Birth, Marriage and Service*: Saint Paul indeed was born at *Tarsus* in *Cicilia* which was under the obedience of the Romans, he challenged therefore to be a Citizen of *Rome*; but I take it the Text there took it but to be National Freedom, which is such a general Freedom, as *Calvin* being born in *Scotland* claimed and had in *England*, because he was born under the obedience of the King of *England*; But that made not St. Paul free of the private Customs, Privileges and Franchises of *Rome*, no more than *Calvin's* birth made him a free Citizen of *Lincoln* to the peculiar Customs of that City. 1.
2.
3.

If one be born in a City of Parents that are not free, the Child hereby is no Citizen by birth; and if one be born of free Parents out of the place of Privileges, as out of *Lincoln*, he yet is a Freeman by Birth; Yet in the Charter Grant of *Yarmouth* the words were, *Concessimus Burgensibus de Magna Yermutha de villa predicta oriundis*, that they should have such liberties and such; so that it may be the special words of the Charter may alter the case: yet in the case of the City of *London*, *Cook's 8th Report*, the King by his Letters Patents could not make one a Freeman of *London*, yet he may thereby make him a Freeman of the Kingdom. Calvin's Case.
Cook's 8th Report.

But whether those that are Free by Birth, Service or Marriage be Freemen within my Statute, or not, is a Question: because the words thereof be *absolutè posita* to all purposes; And therefore I take it, that this Statute intends it of such as have

James Bag's
Case.

as have challenged their Freedom, and which have taken the Freeman's Oath, and are admitted into the Society and fellowship of the Freemen, Citizens and Burgesles; for in *James Bag's Case* in the 11th Rep. such a one is taken for a perfect Freeman, and no other: So in my opinion *E.* the son of *D.* is no competent Freeman of the City of *Lincoln* within the Branch of this Statute; But admit he were, then it may be objected to me, that by the Exilement of the Father the Freedom of the son was forfeit, by reason he was by this Exilement become no free Citizen. But in answer thereunto I say briefly, That if the son had attained this Freedom by the death of his Father, as a thing descendible, then it had been forfeit by his fathers Banishment, but the son had this Freedom by his own birth, as a purchase, and not by the death of his Father by descent, *Ergo*, it was not forfeited by his Fathers Exilement. Like to the case where *J. S.* hath many Children, and then he confesseth himself Villain to *J. D.* in a Court of Record, yet his Children formerly born are Freemen and no Villains, because they were free by their own births, but the Inheritance is intralld, because it is to come to the Heir by descent: So that I am of opinion, that if *E.* had otherwise been a competent Freeman, as he was not, then the Exilement of his Father could not have disabled him.

Our Freeman which this Statute speaketh of, must not onely be free of the City or Borough, but he must also there be resiant; for these words are materially placed in the said Law, and here *E.* was the son of *D.* a free Citizen of *Lincoln*, who did there reside and dwell, and every Child is part of the Father's family, for the Husband and Wife, Father and Children, Master and Servant are of a Family; and a Ward is part of his Gardians Family: But in our case when *D.* was Banished, he then forewent his local Habitation, and so his said son could not then be of his Family, nor could be intended to dwell with him who had no Habitation in the Realm: And I am of opinion, that this Statute requireth an actual Habitation or Resiency, and

and not a Mathematical or Imaginary Resiency, such a one as was in *Jeffrey's Case* in *Cook's 5th Rep.*; for there the case *Jeffrey's Case.* was, *That one did personally and locally dwell and reside at Dale, and occupied Lands in Sale*; here the party was in Law, but not in fact, an Inhabitant in *Sale*, and was there assessed as an Inhabitant to the repair of that Church; But this Commissioner of ours is bound to such Resiency as a Minister is to his Resiency, which in *Butler and Goodale's case* *Butler and Goodale's Case.* in *Cook's Report* ought to be locally and personally abiding in the Parish where his Parsonage or Vicarage house is, for resiency or residency have a like signification, and be both of them words of that efficacy, as they tie a man to his personal and actual abode and habitation with his Family: But put the case that in *Lincoln* there be places exempt out of the Freedom of the City, and yet within the Circle of the Walls, as *St. Martins* doth in *London*, I take it if a Freeman dwell there, this is no resiency intended within this Statute, because the words of our Law be, *That he be Resiant and free of the City*, which going together draweth his Habitation to the place where his Freedom is: And with this agreeth the Decree made for *London* touching Tithes in *Anno Dom. 1535.* which did not extend to *St. Martins*, because it was In but not Of *London*, *Dr. Graunt's case, Cook's 11th Rep.* *Dr. Graunt's Case.*

Our Freeman must also have in clear moveable substance to the value of a hundred pounds; this word (*Substance*) would have extended as well to ones real Estate as to his personal, if it had gone alone; but being coupled with the word *Moveable*, declares plainly that it onely extends to the personal Estate: And I take it, that these words (*Moveable substance*) do not onely contain and extend to such things *Quæ de se movere possint*, as live Goods, Horses, Oxen, Sheep, and such like, but also to such things *quæ de se movere non possint*, as Plate, Jewels, ready Money, Utensils of House, Mercery, Drapery, and other Wares and Goods of value, Hay, Corn, Goods of Husbandry, and Housewifery; but Birds and Beasts of Parks and Warrens, and Doves in
Dove-

25 H. 8.
Dyer.

Dovehouses, be not valuable substance; a Hive of Bees, and a Villain for years, and a Captive taken in the Wars be, for there shall be paid for him a Ransom, as is mentioned in the *Register*, f. 102. Moneys due upon Statutes, Judgments, Recognizances, Bonds, Bills or Contracts, be not valueable substances within this Statute; for by this Statute it must be clear and not doubtfull or accidental, as Moneys out of hand be, which is like to a Bird in the Bush; yet these be all valueable, and are valued in Inventories taken in the Ecclesiastical Courts: But yet the Executors or Administrators shall not be charged for assets for them, till they have received them: And in 25 H. 8. in *Dyer*, fol. 5. Obligations are not held valueable, but things in action; and if one have got Goods by tort and wrong to the value of One hundred pounds, yet this is clear valuable substance within this Law; for although the word *clear* be inserted into the Statute, yet that relates to the value, and not to the Title of those Goods: And if one have Goods as Executor or Administrator, these are not his own, and therefore do not inable him to be a Commissioner within this Law.

Neither do the Goods of the Church inable the Parson, Vicar or Curate, nor the Goods of a Corporation do not inable the Major and Aldermen, or Citizens of a City, or Town Corporate, for these do not belong to their particular persons, neither did this stock in my Case, which is demised to B. and C. make them competent Commissioners within this Statute, because they had not the property therein, but onely the use and occupation thereof.

And although in this Statute it is not declared in what place these goods which should inable a man to be a Commissioner of Sewers should be in, it will suffice if the party have them in any place within the Realm; for this very Law calls them *Moveable substance*: And herein I end my free Citizen, and in my opinion E. had neither Freedom in his person, nor real Estate in Land, nor moveable substance in any sort to make him a competent Commissioner within this

this Law; yet if a Freeman be destitute of Goods, or want perfection in his Freedom, if notwithstanding he have Lands to the value of forty Marks *per annum*, then he shall be allowed a Commissioner within this Statute: Touching which point of Lands I now intend to proceed in.

In the handling of this matter it is to be considered, which be Hereditaments within this Law; for the other two words *Lands* and *Tenements* need no exposition; wherein I am of opinion, That Messuages, Cottages, Tofts, Crofts, Houses, Land, Meadow, Pasture, Feedings, Moors, Marishes, Heaths, Furs, Mills, Orchards, Gardens, Hopyards, Rents, Annuities, *Prima vestura terre*, Piscaries, Tythes, Pensions, Portions, Proxies, Parks, Warrens are all of them Hereditaments within this part of this Law, for the word *Hereditament* is a word of the larger size and largest extent in our Law, being *Omne quod Hereditari potest*; and yet every Hereditament is not within this Branch, for it hath two other words joined therewithall (*videlicet*) *yearly value*: And therefore Franchises and Liberties, as Waifs, Strayes, Felons Goods, Deodands, Fines, Amerciaments, Profits of Courts, Fairs, Markets, Ferries, Hundreds, Leets, and such like, are all of them out of this Statute in this point, because they be not of a certain yearly value, but be accidental and depend in contingency, by the opinion in *Butler and Baker's case* Butler and Baker's Case. *Cook's 3d Report*; But as it is there said, *If these things have heretofore been usually letten and demised for certain yearly Rents, then they may be Hereditaments of clear yearly value within this Law.* All Offices and Vocations, as Physicians, Chirurgions, or Trades, as Merchants, Mercers, Grocers, Drapers, and such like, be neither Hereditary, nor of certain yearly value, and therefore they be not within this Law, though perhaps one gain thereby Five hundred pounds *per annum*. Also dry reversions or remainders depending upon Estates for lives are out of this Branch, for the words of the Statute be (*having*) which is in *presenti* and not *futuro*.

Neither is an Advowson of force in this point, though it be assents in a Formedon, yet it is no assents in an Action of debt brought against Executors; Homages, Fealties, Es- cuages, Heriots, Reliefs, *Nomine pænes*, and such like, be Hereditaments; but because they are not of yearly value, they are not therefore within this Law.

Dyer 123.

Also if a Commissioner of Sewers be seised of a Rent or Annuity payable every second year, it doth not inable him to sit because it is not Annual, which is intended yearly, and every year, as the Prior of *Plymton's Case* in *Dyer*, fol. 123. is, but if one do grant to J. S. an Annuity or Rent of forty Marks in fee, payable at the Feast of *Easter* yearly, if the Grantee will then come for it to such a Place, that is of certain yearly value within this Law.

But put the case that A. is seised of Land in fee, and grant to B. forty Marks *per annum* for his life onely; I am of opinion that B. is no sufficient qualified Commissioner within this Law.

But if A. be seised of a Rent of forty Marks *per annum* in fee, and he grant the same to B. for his life, he is a competent Commissioner within this Law: *differentia apparet.*

Our Statute goeth on in these words, *That the Commissioner which would sit without exception, must have in Lands, Tenements or Hereditaments of the clear yearly value of forty Marks to his own use*; Therefore a Man seised of Lands to that value in the right of his Wife, although he take the Rents and Profits to his own use, yet this will not inable him to be a Commissioner within this Law, but he must have them *in ejus usu & ad ejus usum.*

A Feoffee to a use before the Statute of 27 H. 8. of Uses, was no competent Commissioner within our Statute, for he had the Land then to another Man's use; Neither was *Cestuy que use* sufficiently qualified to be a Commissioner.

Two Tenants in Common, or Coparceners of forty pounds Lands *per annum* are neither of them of sufficient ability to be Commissioners within this Law.

And

And the like law is of two Jointenants of Land of that yearly value, for though they be ſeiſed *per my* and *per tout*, yet in truth, and in a legal conſtruction, either of them be ſeiſed but of a moiety : So that if two Jointenants, Tenants in Common, or Coparceners be ſeiſed of Lands of the yearly value of threeſcore pounds, either of them may ſit by this Commiſſion.

A Dean and Chapter, Major and Commonalty, Maſter of a College and Fellows, which be ſeiſed of Lands and Tenements of the yearly value of a hundred pounds *per annum*, are not in reſpect thereof to ſit.

If a Biſhop, Dean, Chancellor, Archdeacon, Prebend, Parſon or Vicar be ſeiſed of Lands in *Jure Eccleſiæ* of the clear yearly value of forty Marks, I ſuppoſe theſe may ſit Commiſſioners by this Statute, for they have theſe Lands in *eorum uſu* during the time they continue in their places, which in intendment of Law is for their lives ; but yet by the intendment of Law they are not to ſit in the execution of any humane Affairs ; and therefore ſeeing their Perſons are out of the intendment of this Law, ſo likewise ſhould their Church-livings be : but this is but a conceit, for although they be not Perſons *having* theſe Lands within the Statute of 32 H. 8. of Wills, which is a having to diſpoſe, ^{32 H. 8.} yet they may be within our Statute, which is a having to retain.

If an Executor have a Villain for years which purchaſeth Land of forty Marks *per annum*, he may ſit in the execution of this Commiſſion, for till his Lord enter he hath them to his own uſe ; but if the Executor enter, then neither the Villain nor Executor can ſit a Commiſſioner by this Law.

If an Alien purchaſe Lands of ſufficient value in fee, he in reſpect of his Perſon is a diſabled Perſon to ſit, neither is he a Perſon having Lands, becauſe he is not ſeiſed thereof to his own uſe, but to the uſe of the King ; But if he be made a Denizen, then in his perſon he is made capable.

The Warden of the Fleet who hath Lands belonging to his Office, may in respect thereof sit a Commissioner by this Law.

13 Eliz. 9.

But shall a Termor or Lessee for years of Land of good value be thrust out of Commission, and be counted neither a sufficient Landed man, nor his term and lease to be accepted moveable substance, and not onely so, but that his Farm shall be a farther disablement unto him, as the Statute of 13 El. cap. 9. seemeth to purport; the words of which Statute be, *That no Farmer or Farmers for term of years, of any Manors, Lands or Tenements, lying or being within the Precincts or Limits of any such Commission of Sewers, which be or which hereafter may be ordered and chargeable by any Laws, Ordinances and Constitutions made or to be made by virtue of any such Commission wherein he or they shall be named or appointed Commissioner or Commissioners, not having Estate in Freehold within the Realm, of or in Manors, Lands or Tenements of the yearly value of forty pounds, shall any time hereafter have power to sit, or in any-wise intermeddle with the execution of such Commission or Commissions, during the time he or they shall continue or be such Farmer or Farmers of any such Manor, Lands and Tenements, and shall not have Estate of Freehold as aforesaid; but that every such Commission, having respect onely to every such Person or Persons for such and so long time as he or they shall be or continue Farmer or Farmers of any such Manors, Lands or Tenements, shall be deemed and judged in Law as void.*

But yet in the closing up of that Statute of 13 Eliz. there is a Proviso to this effect, *Provided always, that it shall be lawfull for any Commissioner, being also a Farmer, and not having Lands or Tenements to the clear yearly value of forty pounds of Freehold, to sit by virtue of the said Commission, and have his voice and full authority with others to make and establish Ordinances for Sewers, according to the Tenor of the Commission touching and concerning all Lands and Tenements within the Precinct of every such Commission, other than such Lands and Tenements as he or they for the time hold and enjoy*

enjoy as Farmer, as he or they might have done before the making of that Statute; but he could not have sitten in execution of this Commission before the making of this Statute, unless he had besides his lease Lands to the value of forty Marks *per annum*: And therefore a lease for years is no inablement at all, but a disablement, as this Statute declares.

But the times when this having of Lands, &c. will suffice to qualify a Commissioner to sit within this Law, is now to be considered of, wherein I am of opinion, that the *When having* must be referred to the *Then sitting*: For the words of the Statute be, *That none take upon him to sit, not having Lands to the yearly value of forty Marks*; so that if he have not Lands of that value when he is first made a Commissioner, yet if he have so much when he sitteth upon the Commission, it will satisfy this Law; and if once he have Land of that value and sitteth, and after sell the Land away, or if they be evicted from him, he is then disabled to sit as a Commissioner by this Statute: And so if he were but Tenant for the life of J. S. and J. S. dieth, he ought not to sit: In 12 H. 7. 4. a Juror which was to pass upon trial of Land was to have forty shillings *per annum* of Freehold, and after he was impanelled, and before he was sworn, he sold away his Land, and when he came to be sworn, he was challenged for want of Freehold, but the challenge was disallow'd, for after he was impanelled, his Land (though after sold away) was chargeable with the Issues which he after might lose in that matter; and with this agreeth 14 H. 7. 2. by *Frowick*: But our Statute is more precisely penned, which is, *That none do presume to sit, unless he have Lands of that value, or be, &c.* therefore when he sits he must have the Lands.

And if A. do bargain and sell his Lands to B. by Deed intended of that value, and before the inrollment of the Deed B. do sit as Commissioner, and after the Deed is inrolled, yet this doth not qualify his offence, and the relation of the working of this Deed doth not assist him to take off the penalty of this Law.

Also

32 H. 8.

Also a man disseised is during the Disseisin disabled to sit, for he had not then power to devise the Lands by the Statute of 32 H. 8. of Wills, for that Statute doth as ours doth, use the word *Having* in *presenti*, and not in *futuro*.

And thus much I thought convenient upon this occasion to deliver my opinion, when the Commissioner must have Lands of forty Marks *per annum*, to enable him to sit as a Commissioner within this Statute.

To treat of the utter Barister I need not, for when he hath taken the Oath mentioned in the Statute, he is an absolute and compleat Commissioner within this Law, to all purposes, although he have neither Lands or Goods, according as the Statute appointeth others to have.

It is enacted likewise by this Statute of 23 H. 8. 5. that if any Person not qualified as aforesaid, do sit by virtue of the Commission of Sewers, he shall forfeit forty pounds for every time that he shall attempt so to doe, the one half thereof to be to our Sovereign Lord the King, and the other half thereof to the use of him or them, that will sue therefore by action of debt, bill, plaint or information, in any of the King's Courts, in which action or suit no wager of Law shall be admitted, nor any essoin or protection shall be allowed.

In this case when the Person who sits contrary to the Statute hath forfeited one forty pounds, he may forfeit another forty pounds for sitting a second time, though there be no conviction of him for that first time, because the penalty is equal and alike for every offence: But otherwise it is where there are steps or gradations

dations in a penal Law, to double or increase the penalty; for there he must be convicted for the first offence, before he can forfeit any thing for the second offence, which prior conviction not being necessary here, the Party who sits two several times by virtue of this Commission, may be sued for the whole eighty pounds together, and the like for as many more times as he shall sit, not being qualified, as the Act requires.

By the Statute of 18 *Eliz. cap. 5.* It is enacted, ^{18 *Eliz. 5.*} That none shall be admitted or received to pursue against any Person, upon any penal Statute, but by way of information, or original action, and not otherwise: See *Co. 6. 19, 20. Moor 412.* ^{*Co. 6. 19, 20. Moor 412.*} *case 565. and 600. case 827. Cro. Hil. 39 Eliz. 544.* ^{*600. Cro. El. 544.*} And no Prosecutor *Qui tam, &c.* can now sue by Bill upon any Statute precedent to that of 18 *Eliz.* as was resolved in *Woodson and Clarke's Case*, in a popular suit brought by Bill in the *King's Bench* upon the Statute of 23 *H. 6. cap. 10.* ^{23 *H. 6. 10.*} of Sheriff's, *Co. 3. Inst. 194.* and in *Udeson and* ^{3 *Inst. 194.*} the Mayor of *Nottingham's Case*, *Moor 248. case Moor 248.* 390. contrary to the opinion in *Style 381, 382.* ^{*Style 381, 382.*} So that although this Statute of 23 *H. 8. 5.* gives the Prosecutor power to sue by Bill, yet that is taken away by 18 *Eliz. 5.* and he can sue by way of information or original action onely.

The Informer or Prosecutor who sues a Commissioner (not qualified) upon this Statute for the

the forty pounds must begin his suit within one year after the offence committed, otherwise he shall not have any part of the penalty; For the Statute of 31 Eliz. 5. restrains the Prosecutor, *Qui tam, &c.* upon all penal Laws (except the Statute of Tillage) to that time: But if he doth not prosecute within a year after the offence, yet the King may at any time within two years after that year ended: And therefore it was resolved, *Hil. 12 Jac.* That where an Information was brought in the Court of Exchequer, *tam pro Domino Rege quam pro seipso* upon the Statute of 3 Jac. cap. 4. for three years forbearance to receive the Sacrament, although it was not good for the Informer, yet it was well enough as to the King, *Cro. Jac. 166. Syvedale versus Sir Edward Lenthall.*

By the King's Courts, The four ordinary Courts at *Westminster* seem to be here onely intended; For they are the King's general Courts, where the King's Attorney may acknowledge or deny: And the words of this Statute being general (*scil.* in any of the King's Courts) are left to the construction of Law, where the Rule is, *verba æquivoca, & in dubio posita intelliguntur in digniori & potentiori sensu*: And in this sense shall these words (the King's Courts) be construed in all penal Statutes where the penalty is to be recovered in a popular suit, *Jones 193. Co. 6.*

Co. 6. 19, 20. Moor 421. case 581. Cro. Mich. 4 Car. Co. 6. 19, 20.
Moor 421.
Cro. Car. 146.
112, 113.
Hutton 99. 146. Cro. Trin. 4 Car. 112, 113. Hutton 99. so that the Commissioner, who sits by virtue of the Commission of Sewers, without being qualified, can be sued onely in those Courts for the forty pounds, and not in any inferior Court.

And; as it seems, the Commissioner so sitting contrary to this Act cannot be indicted for such offence; For it hath been held for Law, that when a Statute appoints a penalty for the doing of a thing which was no offence before, and appoints how it shall be recovered, it shall be punished by that means, and not by indictment; and so it was resolved in the Case of *Innocent Castle*, who was indicted for acting as a Justice of Peace, not having Lands to the value required by the Statute of 18 H. 6. cap. 11. but was discharged of the Indictment, for that the Statute had prescribed another way of punishment, viz. by an Action of Debt, *tam pro Domino Rege, &c.* Cro. Mich. 20 Jac. 643. And consonant to this was the opinion of all the Judges of England, save three, Mich. 6 & 7 Eliz. Dyer 236. And yet see *Crofton's Case* in *Modern Reports* 34. where there is related an opinion of two Justices to the contrary, and that the Party may in such case be punished by Indictment.

The Second question.

The second question in my case touching this Statute, is, Whether the Countess of Warwick be a compatible Commissioner within this Statute.

Although it is uncouth in our Law to have Women Justices and Commissioners, and to sit in places of Judicature, yet by the Authorities ensuing you shall find this a point worth insisting upon, both in Humane and in Divine learning; for in *Genesis*, Chapter the first, after the Creation of all other Creatures being finished, the Heavens adorned, and the Earth replenished, God said, *Let us make man in our own Image, after our likeness, and let him have dominion over the fish of the Sea, and over all the Earth, and every creeping thing that creepeth upon the Earth: So God created man in his own Image, in the Image of God created he him, Male and Female created he them; and said unto them, Be fruitful and multiply, and replenish the Earth, and subdue it, and have dominion over the fish of the Sea, and over the fowl of Heaven, and over every living thing that moveth upon the Earth: This was the first Commission that ever was granted, and it passed under the divine immediate Seal of the Almighty, and extended over the whole world; and by the virtue of the word *Dominamini* in the Plural number, God coupled the Woman in Commission with the Man. But in the 18th Chapter of *Exodus*, Ver. 21. *Jethro* adviseth and counselleth *Moses* his son in law to provide out of all the people men of truth, hating covetousness, and place such over them to be Rulers of Thousands, Rulers of Hundreds and over Fifties and Tens; where by the word *Men* twice repeated by *Jethro*, this place of Scripture seemed to exclude Women wholly from Government, and the former Commission extended over Fishes, Birds and Beasts, and neither over men nor women: And in the first of the *Corinthians*, Chapter 14. it is said by St. Paul, *Let the women keep silence in the Churches, for it is not permitted to them to speak. And in Gren-don's case in the Comment. fol. 497. Dyer saith, That women could not administer the Sacraments, nor were they permitted**

mitted to ſay Divine Service. And in the ſecond Chapter of Timothy, V. 12. he ſaith, *We ſuffer not the woman to rule over the man*; but this laſt of Timothy may be moſt aptly applied to husband and wife. 1 Tim. 2.

I remember out of the Abbey Book of Eweſham this Note worthy of obſervation, *Quod Alicia Peeres Regis miniona ſupra modum mulierum nimis ſupergreſſa, ſui etiam ſexus & fragilitatis feminæ Immemor, nunc Juſticiarios Regis, nunc in foro eccleſiaſtico juxta doctores ſedendo, & pro deſenſione cauſarum ſuadere & etiam contra juſt poſtulare minime verebatur, unde propter ſcandalum petierunt à rege in Parliament tent' An. 50 Ed. 3. penitus amoveri*; but hereby I collect, that ſhe was not in Commiſſion with the Judges Temporal or Spiritual, but was a favorite of the King's, and took upon her to intermeddle in buſineſſes nothing concerning her: But whether the Text meant it, for a Woman to ſit Judge in a Court of Juſtice, was *contra modum mulierum*, or becauſe ſhe ſate there to wreſt righteous Judgment, I refer to the Readers of that Hiſtory; For *Debora* was Judge of *Iſrael*, and Judged the people as the fourth of Judges hath it. Judges 4. *Dyer* indeed ſaith in *Grendon's* caſe, *That divers Churches were appropriated to Prioſſeſſes and Nunneries, whereof women were the Governeffes*; whereby and by the ſaid Chapter of the *Corinthians* it appears, that women might be admitted to have Rule and Government over the poſſeſſions and perſons Temporal and Eccleſiaſtical, but were not admitted to have *curam animarum*, nor to meddle with the Adminiſtration of the Service or Sacraments.

And for Temporal Governments, I have obſerved women to have from time to time been admitted to the higheſt places; For in ancient Roman Hiſtories I find *Eudochia* and *Theodora* admitted at ſeveral times into the ſole Government of the Empire: and here in *England* our late famous Queen *Elizabeth* whoſe Government was moſt renowned: And *Semiramis* governed *Syria*: and the Queen of the South which came to viſit *Soloman*, for any thing that ap-

pears to the contrary, was a sole Queen: And to fall a degree lower, we have presidents that King *Richard* the first, and King *Henry* the fifth appointed and deputed by Commissions their Mothers to be Regents of this Realm in their absence in *France*: And the wise and renowned Lady *Margaret* Countess of *Richmond* was put in Commission, and *Humphrey de Bohune* Earl of *Hereford* was by Tenure Constable of *England*, which is a Judge in Martial affairs, and he died without issue Male, by reason whereof the Office (amongst other things) descended to his two Daughters and Co-heirs: And in the 11 of *Elizabeth*, in *Dyer*, it is holden for Law, That although this was an Office of Justice, yet they might execute the same by deputy; for in truth women were unfit Martialists to judge of matters of that nature; and yet it is clear, a deputy doth nothing in his own name, but in the name of his Master or Mistress, therefore the Martial Court was to be kept in their names: But yet I will descend a step lower; It was adjudg'd in *B. R.* 5 *Car.* 1. That the Office of Marshal of that Court well descended to a *Feme*, and that she might execute it by her Deputy; See *Hern's* Reading 4. And doth not our Law temporal and spiritual admit of women to be Executrixes and Administratrixes? and hereby they have the rule or ordering of great Estates, and many times they are Gardianesses in Chivalry, and have thereby also the Government of many great Heirs in the Kingdom, and of their Estates.

10 *H.* 7.

And in 10 *H.* 7. a man devised his Lands to be sold by a woman; and died, and she sold the same to her husband: So by these cases it appeareth, that the Commonlaw of this Kingdom submitted and committed many things to their Government; yet the Statute of Justices of the Peace is like to *Jethro's* counsel to *Moses*, for there they speak of men to be Justices, and seemeth thereby to exclude women; But our Statute of Sewers is, *Commission of Sewers shall be granted by the King to such person and persons as the said*
Lords

Lords ſhould appoint; So the word *persons* ſtands indifferently for either Sex; And therefore although by the weakneſs of their Sex they are unfit to travel, and they be for the moſt part uncapable of learning to direct in matters of Judicature, for which cauſes they have been diſcreetly ſpared, yet I am of opinion, for the authorities, reaſons and cauſes aforeſaid, that this honorable Counteſs being put into Commiſſion of the Sewers, the ſame is warrantable by the Law; and the Ordinances and Decrees of Sewers made by her and the other Commiſſioners of Sewers, are not to be impeached for that cauſe of her Sex.

And I conclude here, that although in diſcretion women have been ſecluded as unfit, yet they are not in Law to be excluded as uncapable.

If an Infant above the age of Fourteen, and under the age of One and twenty be made a Commiſſioner, his Infancy ſhall be no cauſe to diſable the Laws made by him; young *Daniel* was Judge over both the Elders. And in *Little Brook, fol.* The caſe is, a Parſon or Prebendary being within age made a Leaſe for years of his Benefice, and would but could not after avoid it for his Nonage, for ſeeing the Church had made him of full age to diſcharge the ſpiritual Office, our Commonlaw thought it fit to inable him to diſpoſe of his Temporalties: and in *21 H. 7. fol. 12. and 21 H. 7. 13.* the caſe is put by *Bridges*, and confirmed by Juſtice *Sylliard*, and was not denied by any, that an Obligation made by a Major and Commonalty, Dean and Chapter, Abbot and Covent, ſhall not be avoided for the Nonage of the Major, Dean or Abbot; yet all theſe ſerve in place of Government, howbeit in the ſaid matters their Nonages ſhall not impeach them: And in the third of *Iſaiah* it is ſaid, *I Iſa. 3. will give them Children to their Princes, and Babes to rule over them*; noting thereby an unſitneſs in them to govern, but that debarred them not of the place: and of this matter this ſhall ſuffice.

But now admit, as oftentimes it falls out, that Commiſſioners ſhall ſit in the execution of this Commiſſion of Sewers,

ers, which have not taken the Oath, which have not Lands of value, or which is not a free Citizen, and yet there be Ordinances, Decrees and Laws made at those times; Now whether those Laws and Ordinances so made by a disabled Commissioner be void or not, is the question; or whether the disabled Commissioner shall onely undergo the penalty of forty pounds.

6 H. 8.

There was a Statute made in 6 H. 8. cap. 10. whereby it was enacted, *That the Chancellor of England for the time being should make no Commission to any Person or Persons (except he had Lands and Tenements of Estate of Freehold to the yearly value of twenty pounds, or else be Justice of the Quorum) within any of the Shires where he should be made a Commissioner; and if any such Commission were directed to any Person or Persons not having Lands or Tenements to the yearly value of twenty pounds, or not being one of the Justices learned of the Quorum, as aforesaid, That then every such Commission, and all Presentments and Accusations had and presented before any such Commissioners, be utterly void and of none effect.*

But this Statute is in time expired long ago, and therefore it is no interruption to our Commissioner; for although the Statute of 23 H. 8. which I read on hath a Clause in it in effect, *That all and every Statute and Ordinance heretofore made concerning the Premises, made in the time of the said King, or of any of his Progenitors, not being contrary to that Statute, should stand in force;* yet these words do not set on foot a Statute expired in time, as that of 6 H. 8. is: Also in the said Statute of 13 Eliz. if a Termor or Lessee for years be in Commission, all Laws made which concern Lands whereof he is a Farmer are void as to him, *vide antea.*

23 H. 8.

But to relie on our Statute of 23 H. 8. in my opinion it doth not avoid any of the Laws and Ordinances made by disabled Commissioners, but doth onely inflict the punishment and penalty of Forty pounds a piece upon every of them, for every time they or any of them shall sit in or about

bout the execution of this Commission; yet it seemed in the case *de Jure Regis Ecclesiastico*, That whereas the Statute of first of *Elizabeth* authorized the Queen to grant Commissions to natural born Subjects, that if she had granted the same to an Alien, the acts done by him had been void.

Case de Jure Regis Ecclesiastico.

But now my case proceeds to the next point or step, and that is touching the Law and Ordinance made to raise the said Weres; I inserted this clause in my case, because I had not formerly occasion or fit opportunity to treat of the Lets, Impediments and Annoyances which be contained within this Statute of 23 *H. 8.* and therefore I took this occasion to close up this daies Exercise with the Discourse of them.

These by name are such Impediments and Annoyances as this Statute speaketh of,	1. Streams.	And the rest must be comprised within these general words (<i>videlicet</i>) Other like Lets and Impediments.
	2. Mills.	
	3. Bridges	
	4. Ponds.	
	5. Fishgarths.	
	6. Mildams.	
	7. Locks.	
	8. Hebbingweres.	
	9. Hecks, and	
	10. Floudgates.	

And the discourse upon all these will rest most upon the Statutes heretofore made touching the same.

And the first Statute thereof made is in *Magna Charta*, *Magn. Chart. cap. 23.* *Omnes kidelli deponantur de cetero penitus per Thamesiam & Medweyan & per totam Angliam nisi per costeram maris*; what this word *kidellum* signifieth appeareth by the title of that Statute, which is Weres.

This extends not to the King's, Keddels per Keble in

The next Statute to this is, 25 *Ed. 3. cap. 4.* which doth enact, *That all Mills, Weres, Stanks, Stakes and Kiddels which were levied and set in the time of King Edward (that King's Grandfather) and after, whereby Ships and Boats were disturbed,*

13 H. 7. 35. 25 Ed. 3.

sturbed, that they might not pass the Rivers as they were wont, should be cut and pulled down without being relevied.

The said first Statute is general, that all Weres should be put down but by the Seacosts, yet this word (*All*) are intended of such onely as were erected without lawfull Warrant; and the said Statute of 25 *Ed. 3.* doth explain the generality of the said former Statute; For thereby it appears, That Weres erected in Navigable Rivers where Ships and Boats were wont to sail, should be extirped, because they were a hinderance to Navigation; but this extends onely to navigable Streams which have been navigable by use and custome; and it is manifest by this Statute, that these Weres which were so to be put down must be onely such as were erected in the time of *Edward the First*, and sithence, because those seemed to be erected without lawfull authority; and being but erected in those times, they had not the countenance of custome and prescription to strengthen them.

The next Statute in time is that of 45 *Ed. 3. cap. 2.* which confirms the said Statute of 25 *Ed. 3.* and then adding thereto, that if any such annoiance be done, it shall be pulled down; and that he which shall relevy such annoiance, and be thereof duly attainted, he shall incur the penalty of one hundred Marks to the King, to be levied by the Estreats of the Exchequer; and the penalty is thereby given for the inhauncing of such Weres, Mills, Stanks, Stakes and Kiddels: This Statute is in part a confirmation of the said Statute of 25 *Ed. 3.* and in other part thereof it is a new Act in these Points.

1. First, In the forfeiture of a hundred Marks.
2. Secondly, This is the first Statute in my opinion made against inhauncing of such things which are counted annoyances.
3. And thirdly, It gives the like penalty against him which shall relevy the annoyance, as against the Inhauncer: And because this Statute depends upon the said Statute of 25 *Ed. 3.* it extendeth therefore but to navigable Streams.

The

The Statute of 1 H. 4. cap. 12. is a Statute in these Points of great consequence, and it doth also confirm the said two former Statutes of Ed. 3. and doth thereto also make additions in these insuing Points :

First, That Justices should be assigned to survey and keep the Waters and great Rivers, and to correct and amend the defaults, as well by survey, advice and discretion, as by inquest.

Secondly, To survey the Weres, Mills, Stanks, Stakes and Kiddels in old time made and levied before the time of Ed. the First, and them which they should find too much inhaunced or straitned, to correct, pull down and amend; saving always a reasonable substance of Weres, Mills, Stanks, Stakes and Kiddels so in old time made and levied.

Thirdly, And if any such annoyances of Weres, Mills, Stanks, Stakes and Kiddels of Passages, and straitning in old time made and levied, be adjudged and awarded by the said Justices to be pulled down and amended, he that hath the Freehold of the same shall make thereof execution at his own costs within half a year after notification thereof made, upon pain of a hundred Marks; and he which shall relevy, or inhaunce or straiten them against the said judgment, shall forfeit one hundred Marks to the King, to be paid into the Exchequer.

Fourthly, And he which shall find himself grieved by execution or otherwise in this behalf against right and reason, he may pursue and have right.

First, by this Statute I collect these matters; First if that a Were, Mill, Stank, Stake or Kiddel be newly or of late years built and erected in any Streams without warrant or lawfull authority, the same may be caused to be pulled down by Order of the Commissioners of Sewers, at the costs of the Party which erected the same.

Secondly, If Weres, Mills, Stanks, Stakes or Kiddels have stood and been time out of memory in Rivers or Streams, and so have warrant from custome and prescription,

tion, these may not be cut up or pulled down by the Commissioners of Sewers, because long use and custome, which is a Law of this Kingdom, hath established them.

3. Thirdly, If there have been Weres, Mills, Stanks, Stakes or Kiddels time out of memory in Rivers or Streams, which of late years have been inhaunced, enlarged, or otherwise exceeded the ancient size and accustomed compass, the excess in those cases is onely to be abated and pulled down; but so far as the ancient size did extend to is not to be impeached: For the words of the said Statute be, *That there be reserved always the reasonable substance thereof in old times accustomed.*

And in my opinion the generality of the said Statute of *Magna Charta*, cap. 23. is restrained by the succeeding Statutes, if the exposition should have been as large as the letter is.

And these three distinctions do fully declare the true effect of the said preceding Statutes.

4. H. 4. Then next in order of time is the Statute of 4 H. 4. c. 11. which reciteth, *That by Weres, Stakes and Kiddels in the water of Thames, and in other great Rivers through the Realm, the common passage of Ships and Boats be disturbed, and much People perished; and also the young fry of Fish destroyed, and against reason wasted and given to Swine to eat; Therefore this Statute enacts, That all former Statutes thereof made be holden, kept and put in execution.*

Here be two things which none of the former Statutes took order for;

1. The one is the perishing of the King's People;
2. The other the destroying of the fry of Fish which were occasioned by the erecting of these Weres, Mills, &c. Yet these are busineses which are otherwise provided for, and be not pertinent to these Laws of Sewers: And therefore I shall pass them over without any other farther explanation thereof.

12 Ed. 4. The Statute of 12 E. 4. cap. 7. doth confirm all the said former Statutes made against Lets, Impediments and Annoyances;

noyances; And doth farther enact, That if contrary to the award, rule or judgment of the Commissioners made according to the Statute of 1 H. 4. it be found, that any Weres, Fishgarths, Mills, Mildams, Locks, Hebbingweres, Stakes, Kiddels, Hecks or Floudgates be made, levied, inhaunced, straitned or enlarged against the said Statute, the Offenders therein contrary to the aforesaid award, rule and judgment being warned by the Sheriff or Under-sheriff of the County upon a Scire facias to that purpose directed where those Annoyances be, and within three months after such garnishment do not wholly amend, break down and avoid the said making, levying and inhauncing, straitning or enlarging, That the Party being defective in that behalf shall forfeit one hundred Marks to the King, to be levied by Estreats out of the Exchequer; and if the Offender, his Heirs, Assignee or Assigns, or any of them do defer or continue the same default, contrary to the award, rule and judgment of the Commissioners, he or they shall forfeit one hundred Marks, the one moiety to the King, the other moiety to the Party that will sue for the same.

And also it was farther enacted, That if any Person or Persons, other than such against whom such award, rule or judgment was made, or any of them, do presume to occupy or continue any of the Weres, Fishgarths and Impediments aforesaid, or other Incumbrances, he shall forfeit for every default for every month one hundred Marks, the one half to the King, the other half to the Party that will sue.

It appeareth that this Statute speaketh of Milldams, Locks, Hebbingweres, Hecks and Floudgates, which the other Statute never speaketh of; so in extent thereof it hath more enlargment: And in my opinion all the foresaid Statutes did extend onely to navigable Streams and Rivers, with Ships and Boats.

If a Lessee for years of Lands or Tenements where any such Nufance or Annoyance is doth continue it, he is within the latter clause of this

Statute, though it was erected before his time;
 For a Lessee for years may lawfully abate any
 such Nufance, as was resolved in the Case of
Cro. Jac. 555. Brent and Haddon, Cro. Mich. 17 Jac. 555. And
Leon. 2. 103. may be punished for the continuance of it, *Leonard 2. 103. Washbourn versus Mordant.*

In the Tenth Report of Sir Edward Cook, the case of *Chester Mills* upon the River of *Dee*, was as insueth, That a Causey or Milstank of Stone in the River of *Dee*, in the City of *Chester*, was made and erected for the necessary maintenance of certain Mills, some of the Kings, others of the Subjects, which stood at the end of the Causey; were of late by the Decree of the Commissioners of Sewers ordered, That a breach therein of Ten Roods or Pearches should be made, which Causey or Milstank was by the agreement of all parties erected before the time of *Ed. the first*, and so had continuance without any inhauncing or exaltation: And whether this Decree was warranted by any of the said Statutes or not, was the question, which was referred by the Lords of the Counsel to the two Chief Justices, *Fleming* and *Cook*, and to *Tanfield* the Lord Chief Baron, to be considered on; and the said Chief Justices and Chief Baron declared their opinion, That the said Decree was not warranted by any of the said Statutes; for they said that the two Statutes of *25 Ed. 3.* and *45 Ed. 3.* extended but to such Impediments as were set up and erected in the time of *Ed. 1.* and after; and that the generality of the Statute of *Mag. Char. ca. 23.* was restrained by these two Statutes; And that the Statute of *1 H. 4.* extended to such Weres, Kiddels, &c. and other Lets as were erected before the Reign of King *Ed. the first*, and which have been inhaunced and exalted sithence, and so was out of all those Laws, because there was no such inhauncing.

And the Statute of *23 H. 8.* which I now read on, did not alter the former Statutes in these points; But provided,
 That

That all and every Statute, Act and Ordinance heretofore made concerning the Premises in that Act recited, not being contrary nor before then repealed, should stand then in force: But the said Judges did hold opinion, that all the said Statutes stood unrepealed, and accordingly made their Report to the Lords of the Council.

The Commissioners of Sewers ordered that J. S. who had a certain Mill should make the holes of his Floudgates of a less size, than they were before; and the order being removed by *Certiorari* into the King's Bench, it was moved to be quashed, for that 1. It did not appear by the order, what Estate J. S. had in the Mill. But the Court held it to be well enough, for that every one who is owner of a Mill, ought to repair the Floudgates, whatever Estate he hath in the Mill. 2. Another objection was, that the Commissioners had no power to make any such alteration in an ancient Mill, as this shall be presumed to be; and it doth not appear that there hath been any enlarging of the Floudgates since the Mill was first erected; But it was answered by the Court, that it shall not be intended to be a Mill before the time of E. 1. and if it were not, the Commissioners had power to straiten or enlarge the Floudgates, according to the case of *Chester Mills*, and the Court confirmed the order, as to that Point; *Siderfin* 1. *Siderf.* 1. 145.

There be many private Statutes made for the abating private Weres in some Streams which are not within my intent

to recite, farther than by naming of them, because I take it they are not confirmed by the Statute I read on; As 11 H. 7. cap. 5. Southampton: 14 H. 8. cap. 13. 23 H. 8. cap. 18. Havens: 25 H. 8. Cap. 7. for killing Fry of Salmons, 27 H. 8. Rastal Havens. 9, 10, 11.

In 19 *Jacobi Regis* there was a great Cause depending in the Court of the Dutchy at *Westminster*, between *Benedict Hall Esq;*, Plaintiff, and *John Mason, George Warrel, and Thomas Powel*, Defendants; which was in effect as followeth, That *Queen Mary* was seised of the Manor of *Monmouth*, with the Appurtenances in that County, and of a Free fishing in the River of *Wye*, and of a Were and a Fish-yard there, which were erected in the time of the said Queen, in the place where an old Foundation of an ancient Were did stand: This Were had been letten by the said Queen, and also by *Queen Elizabeth*, under the Seal of the said Dutchy by yearly Rents, and so there were ancient Presidents shewn in that Court, whereby it appeared, that the ancient Were there had been letten to Farm by the Earls and Dukes of *Lancaster*, and by the Kings and Dukes for a long time for yearly Rents: So that it was manifest that it was an ancient Were time out of memory: And this Were and Fish-yard, and the profits of fishing were letten by the King's Majesty that now is under the Seal of the Dutchy of *Lancaster*, in the Tenth year of his Reign, to one *John Abrahall Esquire*, for One and Thirty years, for and under the yearly Rent of Six Pounds thirteen Shillings and four pence paialbe to his Majesty his Heirs and Successors; And the said *Abrahall* being so thereof possessed, did afterwards in the Tenth year assign the same to one *William Hall, Esq;* by reason whereof the said *William Hall* was thereof possessed; and in the 12th year of this King, made his last Will and Testament, and did thereby ordain the complainant his Executor, and after died; by and after whose decease the Complainant came to be possessed of the said Lease and Term therein to come; and in the Nineteenth *Jacobi Regis*, the Commissioners of Sewers in those parts caused a Jury to be impanelled and sworn,

sworn, touching this Were and Fish-yard and gave therein a Verdict to this effect; that is, *That Benedict Hall the Complainant was possessed of the said Were, called Monmouth Were, upon the River of Wye, which was excessive high and hurtfull, and was an Impediment to the common passage of Boats, Barks and Ballangers up and down the said River, and by means thereof they could not pass but in great danger, which if the said Were were not, Boats of two or three Tuns might pass the River; and that the said Were had been the death and drowning of one of the King's Subjects, and is the cause of the scarcity, dearneſs and want of Salmon, and other Fiſh within the said River, by reason many of them were taken in Gins of the said Were, when they were out of season, and that the same was a great abuse, wrong, enormity and annoiance to the whole Countrey.*

Whereupon the said Commissioners made an Ordinance or Decree, setting forth thereby in effect as followeth, *That whereas it did appear to them, as well by the examination of Witnesses, as by the said Verdict of the Jurors, and by their view, that the said Were was a great Let and hinderance to the common passage of Boats and Ballangers up and down the River, indangering of the lives of the King's Subjects, and to the destruction of Fiſh, as the Salmon and Fry thereof; They therefore ordered, That the said Were should be overthrown, and that the Timber and Stone thereof should be removed, whereby the Chanel should be cleared for passage of Boats; And accordingly did direct their Warrant under their Hands and Seals to the Defendants, authorizing them thereby to overthrow the said Were, which they performed accordingly: and all this matter of the verdict of the Jury, and Decree of the Commissioners were set forth at large in the Defendant's Answers; and after examination and publication of Witnesses, the Cause came to be heard in the said Dutchy-court before Sir Humphrey May, Knight, Chancellor of the Dutchy, Sir John Denham, Knight, one of his Highneſs's Barons of the Exchequer, an Assistant to that Court, and Sir Tho. Chamberlain, Knight, one of the King's*

King's Justices of his Bench, another Assistant of the said Court, and Sir Edward Mosley, Knight, Attorney of the said Court, who were of opinion, That the said Were being an ancient Were by prescription and custome, it ought not to have been overthrown by the Decree of the Commissioners of Sewers, and that the said verdict of the Jurors was defective, because though they presented the said Were to be over high and inhaunced, yet in regard they did not present in *quanto* nor in *qua parte*, the said Were was inhaunced above the ancient assize, therefore they esteemed the said Verdict of no validity.

But now it comes next in time and turn to declare my opinion touching and concerning Bridges, Mills, Mil-dams, Mil-stanks, Floudgates, Hecks, Locks and Hebbing-weres, which in the said Statutes be set forth for Lets, Impediments and Annoiances, wherein they are to receive their Exposition according to the said cases of Weres, without other distinctions; for if they have had continuance time out of memory, then are they the proper and peculiar Inheritances of the King, or of his Subjects, allowed by ancient Custome, confirmed by long use, and to remain established without overthrowing or destroying: But if they have been inhaunced or enlarged over their ancient and accustomed assize, then the enlargement and excess is onely to be abated, and no more; for the Statute of 1 H. 4. saith, *That there must be left sufficient substance of the ancient*: And if any new Were, Stank, Stake, Floodgate, Kiddel, or other thing have of late been erected on the Rivers, which is an annoiance or hurtfull, then the same may be ordered by the Commissioners to be abated, overthrown, destroyed and pulled down, because the same was erected without lawfull warrant or authority: And so as I take it, these few distinctions do fully declare my opinion touching those matters.

The Statute of 23 H. 8. which I read on touching and concerning Lets, Impediments and Annoiances, hath these words in it in effect, *And the Commission giveth authority to*
Edmond

Edmond Lord Sheffield, Sir Philip Tyrwhit, Sir Nicholas Sanderfon, *Knights and Baronets*, Sir Richard Auncots, Sir John Thorold, Sir John Read, Sir Charles Bouls, Sir Ralph Maddison, Sir William Hansford, Sir Francis South, *Knights*, Thomas Tyrwhit, John Bolles, and Nicholas Hamerton, *Esquires*, whereof the said Baronet and Baronets were of the Quorum, to survey the Walls, Streams, Ditches, Banks, Gutters, Sewers, Goats, Calceys, Bridges, Trenches, Mills, Mildams, Floudgates, Ponds, Locks, Hebbingweres, and other Impediments, Lets and Annoiances, and the same to cause to be made, corrected, repaired, amended, put down or reformed, as cause shall require, after their wisdoms and discretions; and therein to ordain and do after the form, tenor and effect of all and singular the Statutes or Ordinances made before the first day of March, in the 23d year of H. 8. touching the Premisses, or any of them; as also to inquire by the Oaths of honest and lawfull Men of the said Shire or Shires, Place or Places, where such defaults or annoiances be, as well within Liberties as without, by whom the truth may rather be known through whose default the said hurt and damages have happened; and who hath or holdeth any Lands or Tenements, or Common of Pasture, or profit of fishing, or hath or may have any hurt, loss or disadvantage by any manner of means in the said Places, as well near to the said Dangers, Lets and Impediments, as inhabiting or dwelling near about the said Walls, &c. and Impediments aforesaid, and all those Persons to tax, assess and distrain.

In a former clause of this Statute, the Commission giveth power to survey the Walls, Banks, Ditches, Gutters, Sewers, Goats, Calceys, Bridges, Streams; In which Clause these as necessary Defences are ordered to be repaired.

Then comes another Clause, wherein these things are recited as Lets and Impediments, *videlicet*, Streams, Mills, Bridges, Ponds, Fishgarths, Mildams, Locks, Hebbingweres, Hecks and Floudgates; So that by these two Clauses, the first sort were to be maintained and not destroyed,

and the second fort should have been destroyed and not repaired.

And if these two first Clauses had been alone, then the Commissioners had been bound to maintain the one and destroy the other, without any toleration; but then came in the said third Clause, which is the Clause of moderation, and therein as well the Defences, as the Lets and Impediments, come all in one clause promiscuously put together; and so the words (*amend, correct, repair and put down*) are therein referred to them all; so as in my opinion all Defences, as Walls, Banks, Sewers, Calceys, Goats, &c. be not to be maintained, because in tract of time some may prove unnecessary and unusefull, which for that cause may be pulled down: so all Mills, Mill-dams, Floudgates, Weres, Stanks, Stakes, Kiddels, and such like, are not to be put down and overthrown, but such as are ancient and are thereby grown to be the proper Inheritances of men, and such also which are usefull and necessary are to be maintained, kept and repaired; for in some great Havens and Ports, great abundance of Piles and Timberposts are set in the Waters to stay the rage, force and violence of the Waters for the safegard of the Port and Haven.

It were a very ridiculous exposition of this Law, to urge the Commissioners to overthrow those things which are helpfull, and not hurtfull; for this Statute did foresee, that these Mill-dams, Stakes, Stanks, Floudgates, Weres, &c. were not at all times and in all places hurtfull, and therefore was the said Clause of the Statute inserted, which gave the Commissioners power to put down such as were Lets and Annoyances in truth, and where they were used for strengths and were of good use to maintain the same: And this construction I take it is fully maintained by this Statute, but more especially by the Statute of 7 *Jacobi*, c. 20. where Peres, Piles, Jetties, and the like, set for fortifications and strengths, are expressly ordered to be maintained.

And upon this part of this Law I do collect these insuing matters:

First,

First, That if one do erect and build a Were, Mill, Mildam, or other thing on a River navigable, to the hinderance of Navigation; or if there was an ancient Were which was inhaunced of late years, the Commissioners of Sewers are to order him that did erect the one, and he which did inhaunce the other, to pull down the first, and to abate the excess of the other at the costs and charges of the Owner: and if he or his Assigns or Heir, shall contrary to the Decree, Order or Judgment of the Commissioners, after the same hath been reformed, relevy the same again, or do continue the same contrary to order, the punishment of one hundred Marks is to be imposed upon the Offenders, as by the Statute of 1 H. 4. and 12 H. 4. formerly appeareth.

I.

1 H. 4.

12 H. 4.

And if one which is a Stranger of his mere malice or own wrong doth pitch down Piles, or set down Stakes in the Rivers and Streams, he is to be fined or amerced for this offence, as the case shall require, and he is to be ordered to remove the Nusances at his own costs and charges; and if it cannot be found out who did the Nusances, then the Commissioners of Sewers are to order those to remove that Annoyance which in all likelihood are to sustain most damage thereby, *Et ita factum fuit*, in 42 lib. Assiz. plac. 15. and this Statute extendeth to Rivers and Streams navigable, as well as to such as be not navigable, for Nusances either in the one or the other are within the conuſance of the Commissioners; as was resolved in *Hide's Case*, *Style 60.* But a Nusance in the High-way, though occasioned by the penning up of water is not within their conuſance, nor have they any power to meddle therewith; or with any Nusances in the way; And this was the Case of *Hide*, who was indicted before Commissioners of Sewers for that by reason of the penning up of the water in the River at his Mill,

42 Lib. Assiz.

Style 60.

the Banks were overflown, and the High-way annoyed ; And the Indictment being removed into the *King's Bench*, was there quashed for that reason.

And touching the removing of Nufances, I shall put the Commissioners some presidents ruled and adjudged in our Books of Law which come fully to the purpose of the matters and things I now treat of.

32 Ed. 3.

In 32 Ed. 3. fol. 8. an Affize of Nufans was brought by *A.* against *B.* for that *L.* had made a Trench over a River, and drew away thereby part of the Waters and Stream another way than that which it did formerly use to run ; and thereby surrounded the Grounds of *A.* and the Affize passed for the Plaintiff ; and it was adjudged, that the Waters should be removed into the ancient Current and Chanel at the Costs of the Defendant, and the Plaintiff recovered his damages *Et quod defendens capiatur* : out of which case I observe these things :

First, Though an Affize was a private Action, yet the Nufans was *tam querenti quam populo* to the Plaintiff, for drowning and surrounding of his Grounds ; to the people, in changing or diverting the ancient course of the Waters, so that for the people the offender was ordered to reform the Nufans, to the King he was fined, and the Plaintiff for his own private wrong recovered his damages.

19 Ed. 3.

In 19 Ed. 3. lib. Affize, plac. 6. A Presentment was found by Jury before Commissioners, that certain persons by name had turned the course of the River of *Lee*, which is there termed the Kings Stream, and runs from *Ware* to *Waltham*, and so to *London*, and had fixed and pitched Piles and Stakes therein, by means whereof Boats and Ballangers were hindred in their passages up and down the River, and upon this Presentment it was awarded, that those persons which were presented by name, and which had done part of the Nufans ; should reform the same ; and because some of the parties names could not be discovered which had done o-

ther

ther part of the said Nufans, It was ordered that the Sheriff should be commanded by Writ to him to be directed to reform that part of the Nufans, taking therein to his assistance those persons who had Grounds next adjoining; And *quod defendentes sint in misericordia domini Regis*, because the Nufans was not found to be done by force.

In 19 Ed. 3. fol. 23. in the Action upon the Case for a Nufans done, the Judgment in part was, That the Nufans should be removed & *cum hoc concordat*, 7 H. 4. 8. upon 7 H. 4. these three cases I observe.

That be the Action private or popular, always one part of Judgment was, That the Nufans should be removed at the costs and charges of him or them which did it.

Therefore these Cases do fully maintain my Opinion formerly delivered: And although in all the said Cases it appeareth, that there was a legal course taken to remove the Nufances, yet there is another course allowed of by the Law, and that is by abating of the Nufance, in pulling or cutting the same down; and the Law is exprefs so in the point in 9 Ed. 4. fol. 35. as if it be a Nufance done to J. S. 9 Ed. 4. he or some other by his directions may overthrow the Nufans; but if it be done *ad nocumentum populi*, as in the high or royal Streams, then any Person prejudiced thereby may abate the same.

The Statute of 23 H. 8. 5. doth not extend, nor give authority to the Commissioners of Sewers to reform the great hurt and nufance by reason of the sand rising out of the Sea, and driven to Land by Storms and Winds, as was declared by Parliament Stat. 1 Mar. Chap. 11. and therefore by that Statute, there was a special provision to enable the Commissioners of Sewers for the County of Glamorgan to reform the same, Co. 4. Inst. 275, 276. But for all other Counties

in

4 Inst. 275, 276.

in *England* and *Wales*, the Commissioners of Sewers have no power to meddle therein.

To make a Stream navigable.

BUT it hath been objected to me by way of Interrogation, Can the Commissioners of Sewers make an unnavigable River or Stream to become or to be made navigable by these Laws of Sewers, yea or no? Touching which I shall deliver my Opinion as followeth:

If this could have been done by the Commissioners of Sewers, then what should it have needed to have procured Acts of Parliament for the doing thereof, as 9 *H. 6. cap. 9.* to make the River of *Lee* navigable, and 6 *H. 8. cap. 17.* a Statute to make the River at *Canterbury* navigable; and in 31 *H. 8. cap. 4.* to make the River of *Ex* near *Exeter* navigable: and 27 *Eliz. cap. 20.* to make a River navigable at *Plymouth*; and in 3 *Jac. cap. 10.* for making *Thames* navigable in the Counties of *Oxford, Berks, Wilts* and *Glocester*: These in truth are good Arguments, but not convincing Proofs; for I am of opinion, that if Streams cannot be made navigable unless there were certain Mills, Weres, Stanks or Kiddels removed which be the Inheritances of private Persons, and have had continuance time out of memory, then directly the Commissioners of Sewers have not power to raze or impair these by the removing thereof, to make the Stream navigable: but in these Cases a new private Act of Parliament must be obtained for the effecting thereof, which was the occasion many of the said private Statutes were obtained: But if none of these inheritable Incumbrances stand in the way, but that by the cleansing or deeper casting of the Chancel the same may be made navigable, Then I am of opinion, the Commissioners of Sewers have power to doe the same, and there be words in our Statute will bear this Exposition (*videlicet*) *And to cleanse and purge the Trenches, Streams, Sewers, Gutters and Ditches, in all Places necessary.*

And

And herewithall I intend to close up this day's Exercise with this short Conclusion; that is, That *E.* was no sufficient Freeman, nor was resiant, nor had Goods of value to make him a competent Commissioner; That notwithstanding *B.* and *C.* and the Countess of *Warwick* were competent Commissioners, and they joining with three of the *Quorum* had power to make and ordain Laws of Sewers; and because this Were was newly erected, therefore the Law and Ordinance made to raze it and to pull it down was a good Law, and warranted by this Statute, &c.

Finis hujus Quartæ Lecturæ.

Lectura

And now we shall attend to close up this day's Lecture
with the third Condition; that is, that it was not
clearly proven, that it was not a Good of value to
make him a competent Commissioner; that notwithstanding
that it is not the Council of War, but the Council
of War, and they joining with the Council of War,
and had power to make and make laws; and
because this was very much, that the law
and Ordinance made to tax it and to pull it down was a
Good Law, and warranted by the Statute.

First Lecture on the

Lecture

Leſſura Quinta.

Generous Auditors, my Fellows and Friends of this moſt famous and renowned Inns of Court, I have ſailed ſo far within the Land, that my Ship hath taken up her Harbor in the Inland Streams, and I my ſelf am got up to the higheſt Mountains, to the end I might take the view and ſurvey of all my former days labours; and this being the laſt day of my reading, I muſt now make my accompt to you of my Stewardſhip: The Talent which was delivered me when I entered upon my firſt day's Exerciſe, was this worthy Statute of Sewers, which I have put forth to the beſt uſe I could in my poor ſkill and underſtanding; But in the caſting up of my Accompts, it may be it will come ſhort of your expectations; if it do, I pray you help to increaſe it out of your abundant ſtore; and conſider with your ſelves, that your Reader took in hand to read upon a Maiden-law, which never before this time abode his Expoſition in any Inns of Court, and our Law-books are exceeding ſcarce in the handling of matters of this kind and nature; and ſo I wanted thoſe means and helps which many other Readers have had, who have taken upon them to make their readings of Statutes formerly read on, and which have received a more plentiful Expoſition in our Books and Terms of the Law than this of mine hath done.

It hath been the ancient cuſtome of this Houſe, for the Reader in his laſt day's Exerciſe to make a brief repetition in the manner of an Index, of the moſt ſubſtantial heads of his Statute, and of his diviſions: And becauſe every profeſſion is moſt graced when it is followed and trode out in the ſteps of learned Predeceſſors, I intend therefore to be

no Changling, nor mean I to produce or bring up new usages, lest old Custome should forget what her self had been : In this manner therefore do I make my Repetition ;

First, I delivered my opinion touching the extent of this Statute, which was as large as the Realm of *England* ; and that the English Seas were within the Realm.

I made it to appear, that the Dominion and Empire of these Seas, The legal power of administration of Justice, The property, profit and possession thereof, doth appertain to the King.

And that these Profits { Real and
were of two kinds, { Personal.

The Real profits were the Grounds relinquished by the Sea, which were always such Grounds as had been always before covered with Waters : But Shores and such Grounds which *Alternis vicibus*, were wet and dry, were not accounted relinquished Grounds, and that relinquished Grounds belonged to the King ; but the Shore and casual drowned Grounds might belong to a Subject.

The Personal Profits of { Wreck.
the Sea did consist in { Flotsan.
{ Jetsan.
{ Ligan ; and

great Fishes, which are due to the King by the Royal Prerogative of his Crown ; But Subjects might have the Inheritance of the first four by Prescription, and of the last by Charter from the King.

Then I descended into Islands ; Which are of two sorts : First, On the Sea, old ones and new ones, That both were within the King's power, and the new ones His in property.

Fresh Islands in the Land might belong to Subjects ; The nature of them all were, that they were *undique circumdatæ aquis*.

I then

I then landed at the Shore, which in definition containeth those Grounds which extend from the lowest Ebb to the highest Floud; That the King had the property thereof *de Jure*, a Subject might have it *ex perquisito*, and the People had their *usum necessarium*.

I proceeded farther to the Coasts, whose content and contingent I described so near as by Histories I could inform my self; And Shores and Coasts I held them to be *Maris accessoria*.

From these I proceeded to Creeks, Havens and Ports, and these I set forth in their several kinds.

And I concluded with the compass of my Statute and my Commission, and with the diversity thereof, That within the circle of my Statute, Seas, Isles, Shores, Coasts, Ports, Havens, Creeks gained, and relinquished Grounds were comprehended, because that might depend (*in posse*) but yet the Commissioners which was (*in presenti operative*) did extend but to the utmost Banks and Walls towards the Seas: And I concluded the points of my Case with the difference between Grounds left and Grounds gained from the Seas; and thus I ended my First Lecture.

The Second Lecture.

IN my Second Lecture I came on Land, and took upon me to set forth her Friends from her Foes; her Friends I counted such as had defended her from the violence of the Seas, and from inundation of Salt-waters.

And these were her Friends (*viz.*) Banks, Sewers, Goats, Calceys and Bridges; these are to be maintained and repaired, and are the Defences which I fully treated of.

And these were the Enemies, Streams, Mills, Ponds, Fishgarths, Milldams, Locks, Hebbingweres, Hecks and Floudgates.

These are Lets and Impediments which this Statute speaketh of, and are to be corrected, reformed or put down as cause shall require.

I shewed then that Rivers were of two kinds, Royal and Common Rivers; That there were other inferior kinds of those watery instruments which might take place after Rivers, as Ditches, Gutters, Sewers, Pools, Ponds, Springs.

That Water is the substantive of all these, and if it be a running Water at random, then it is a Stream; if it be a running Water, and pent within Walls or Banks, then it is a River, Gutter, Ditch or Sewer; These in their several kinds I did distinguish; And Springs I held to be the vital spirit of them all.

I then described the Commissioners manner of proceedings, which might be three manner of ways;

By view and survey, and wherein they consisted.

By Jury, and on what parts that stood.

By discretion, and the diversities and definition thereof.

After these I took upon me, by how many several ways the Defences might be maintained, which were nine in number,

1. Frontage.
2. Ownership.
3. Prescription.
4. Custome.
5. Tenure.
6. Covenant.
7. *Usus Rei*.
8. A Township; and
9. By the Laws of Sewers.

All these I proved by Reasons, Presidents and Authorities, and did at large discourse of them.

Then I came by the course of this Case to treat of Sesses, Taxes and Lays set by Commissioners of Sewers, whereby I found some Inheritances there were which were subject to these Sesses; as those that follow Houses, Land, Meadow,

dow, Pasture, Woods, Heaths, Furs, Moors, Marishes, Rents, Ferries, Piscaries, Commons, Free passage, Parks, Warrens.

And many Inheritances I found in reason freed from these Taxes and Lays, as Tythes in Spiritual Hands, Annuities, Chafes, Pensions, Proxies, Portions, Marts, Fairs, Markets, Offices, things in Action, Conditions, Contingents, Uses, Presentations, Founderships.

I also found these Sesses of three kinds, viz.

Customary, and then they may bind the Mountains as well as the Valleys.

Hereditary, and then the particular Tenant and the Reversion must both contribute.

Temporary, which bound the Possessor.

And here I ended my second day's Lecture.

The Third Lecture.

MY Third Lecture I did distribute into three general Heads, which were merely the grounds of the execution of these Laws.

Which consisted either in punishing the Body and Person of the Delinquent with

1. Imprisonment.
2. Fine : and
3. Amerciament.

11.

Or in doing execution upon the Offendor's Estate,

1. By distress : or
2. By sale thereof.

21.

Or

Or otherwise in extending it
upon a Man's personal E-
state, by

1. Charging of the Land perpetually : or
2. By the absolute sale thereof.

And under these general Rules I comprised these particulars which follow :

First, For the Honour of this Commission, and for the more necessary execution of these Laws, I found them out a Court, wherein I set forth in what Cases Commissioners might imprison the Bodies of Delinquents, and in what Cases they might impose a fine, and when amerciaments be due ; and then I shewed that for some transgressions neither imprisonment, fine nor amerciamment was to be imposed.

I then came to Distresses, and held a treble distinction of them (*videlicet*) that some were

1. Judicial, and issued out of the Judicial Records of this Court.
2. Other Ministerial.
3. The third Legal ; wherein all these Diversities I screwed out by proved Authorities.

Then I shewed in what places these Distresses might be taken, when upon the Land charged, when within any place within the extent of this Commission, and sometimes within any place of this Realm ; And when the proper Goods of the Party might be taken, and when the Goods of Strangers, and when Goods may be sold by this Law.

Afterwards according to the order prescribed me by my Case, I declared that there were some Interrupters to the execution of these Distresses.

The one was by suing Replevins, wherein I took these diversities.

That a Sheriff being an inferior Officer could not of his own power deliver a distrefs taken by warrant of Sewers; But that the Commissioners of Sewers are bound to obey a Replevin coming out of the King's Courts at *Westminster*, *Quia de altiori natura*; Thus yet notwithstanding Goods taken by a judgment were exempted from that Replevin.

Then I proceeded to the charge of Lands, whether a perpetual charge might be imposed, or not.

And from thence I	{	1. For what cause.
came to Sales, and		2. What Lands.
those I distributed		3. Whose Lands.
into four points;		4. To whom these Lands might be sold.

I after came into the Tractate of Legal Proceedings, which may be used in our Court of Sewers; and first when and which Presentments of Sewers are traversable, and which not.

And then wherein a Party wronged may have his justice in this Court, and in what cases not.

And whether the strict words of the Statute would admit of Exemptions, and the difference of them, that some were general, others special; and therein I ended the Third day's Exercise.

The Fourth Lecture.

THE fourth day I treated of the Ability and Non-ability of the Commissioners, either by reason of some personal defect, whether it consisted in Sex, Exile or other Impediment that way.

And what Estate and value of Lands made one a competent Commissioner, and what did the contrary; and the times when the Commissioner must have this Estate.

Then

Then I delivered my opinion upon the words of the Statute, which be valuable Hereditaments to inable a Commissioner, and which were not.

Then I proceeded to intreat of a Commissioners Ability in Goods and moveable substance, and which were moveable substances within this Statute, and which not.

And because in the Citizen-Commissioner Three things were required to make him able (*viz.*) Freedom, Estate in goods, and Resiency, I therefore handled fully all these parts thereof.

After all which, because I had before this time no fitting opportunity to treat of Lets and Impediments, I therefore in this Lecture disposed my case in such sort as it took hold of them all.

And First, Because the Statute I read on confirmed all other former Laws concerning the same, I therefore repeated them all from *Magna Charta* to this very time, and gave an Explanation or Declaration of them all.

I then distributed the learning of these Laws into three Heads:

1. First, That these which had the strength of a Custome, and were grown to be particular Inheritances of private persons, could not be extirped.
2. Secondly, And whereas some were newly erected without Authority, they might be overthrown.
3. Thirdly, And whereas some were ancient, and were exalted above or beyond the ancient Assize, the excess might onely be abated; with these differences I satisfied these Statutes.

Then came I to our Statute I read on, and therein I took new diversities that was upon the Three Clauses of my Statute.

1. The First did maintain the Defences.
2. The Second destroyed the Offences.
3. And the Third was a general Clause, reciting the Defences and Offences together, and did give the Commissioners power to reform or amend, repair or put down, as cause should require. Wherein

Wherein I publiſhed this learning thereupon, That if an old Wall, Bank, Bridge or other Defences, were found to be out of uſe, it might be extirped.

And if a Were, Mill, Milldam, Stanks, Stakes, Piles, or Floudgates were found beneficial to the publick good, they might be preſerved and maintained.

And I vouched ſome preſidents, at whoſe charges the ſaid Lets and Impediments ſhould be removed, and I ended my Argument with this, In what caſes Commiſſioners of Sewers might make unnavigable Rivers navigable, and where not; and in that I concluded my fourth Exerciſe.

This is the extent of my accompt, wherein I think I have done my ſelf ſome wrong in making ſo ſhort a Breviate, in omitting many things which I truly took pains in; but becauſe you were all preſent and privy to my layings out, I hope though I have omitted them in my extreats, you will allow me them in *Summa totalis*.

But by your good favors I intend not to break Cuſtome or Promise in any thing; for I have ſome ſtock more left, which I told you when I began I had caſt under hatches, which now alſo I mean to diſtribute amongſt you; And becauſe there is ſome part of this as yet left untreated of, I will now therefore proceed to the unfolding thereof.

And the ſame conſiſteth in theſe words of the Law, *That the Commiſſioners hereafter named in any Commiſſion, according to the purport of the ſame, have full power and authority to make, conſtitute and ordain Laws, Ordinances and Decrees, and the ſame Laws and Ordinances ſo made to repeal, reform, amend and make new, as the caſes neceſſary ſhall require in that behalf.*

So that whereas other Judges have power onely *Jus dicere*, theſe Commiſſioners have alſo power *Jus facere*; yet this Statute gives not the Commiſſioners of Sewers abſolute power and authority to make and ordain Laws but *ſecundum quid*; for theſe Laws which they are to make, muſt be for the ſafeguard, conſervation, redreſs, correction and reformation, and more than theſe, they muſt be neceſſary

fary and behovefull; so they must not be made out of self-will, and affection, but after their Wisedoms and Discretions.

Wherein I conceive, that never a Sentence in this Statute is seasoned with more variety of Caveats and grave directions than this Statute is in this very clause of making new Laws; so that these Laws ought to be made to amend, not to make worse; they must be necessary, not nugatory, they are to be composed with Wisdom, and disposed of with good Discretion, and they ought chiefly to be made *pro bono publico*, and not *Pro privato alicujus*.

New Laws are to be ordained for these purposes onely, that is, either for making and erecting of new necessary Defences, or for the overthrowing of some unnecessary Lets and Annoiances, or for the continuance of the Ancient.

And in alteration, new addition, or diminution of a Wall, Bank, Sewer, Goat, Calcey or other Engine, a new Law is to be made for the effecting thereof.

Also if an ancient Wall, Bank or other Defence be worn out of use, and is altogether unnecessary; but in the Wisdom and Discretion of the Commissioners, and that a new one in another place were more convenient for the safety of the Countrey; this must be all done by a new Law.

But here a matter of Law will arise, and another matter of great caution: The matter of Law will rest in this, Whether an ancient Wall, Bank or other Defence which is grown out of use, may be overthrown and pulled down; and in my opinion it may, by the said third clause of the Statute, wherein power is given either to maintain them or to put them down.

But because I have formerly handled this point, I will therefore proceed to the caution which is of great weight and importance; for whereas one or more persons are by Tenure, Covenant, Custome, Prescription or otherwise bound and tied to repair and maintain the said ancient Bank, Wall,

Wall, Sewer, or other Defence at their ſeveral and peculiar charges; if then the Commiſſioners of Sewers ſhould make a Law to overthrow or remove the ſame, and ſhould execute the ſame accordingly; and then ſhould make a Law to erect and build a new Wall, Bank or other Defence in another place more convenient, yet the parties which were bound to maintain and repair the former old Defences, ſhould not ſo be tied and bound to repair and maintain theſe new erected ones, becauſe by the deſtroying of the ancient Walls and Banks, the Preſcriptions, Cuſtoms, Tenures and Covenants were either utterly diſſolved, or otherwiſe ſuſpended; and the charge for the erecting and maintaining of the new ones are to be laid on the Level: So that it behoveth Commiſſioners to be carefull in theſe affairs, elſe things in the Concluſion may fall out contrary to their expectations; for it is well ſaid, *That Rerum progreſſus oſtendunt multa que in initio nec præcaveri aut prævideri poſſunt.*

In making new Laws and Ordinances theſe things are alſo conſiderable;

First, What the matter of the Law is which is to be enacted.

1.

Secondly, When the matter is known, then to weigh it well, whether if it be made, if then it will prove neceſſary and behovefull for the good of the people; and this neceſſary point is to be ſcanned by the Counſel and advice of the moſt diſcreet and experienced perſons, and of the beſt tried judgments in matters of this nature.

2.

And Thirdly, to conſider what charge the work will coſt, for the which this Law muſt be made; for in Scriptures he is not counted ſapient that before he build a houſe will not firſt count the charge of it.

3.

And Fourthly, What perſons muſt bear this charge, leſt it prove too burthenſome; and this muſt be directed by the ability of the people which are to be charged, and by the ſafety and commodity they are to have by the work.

4.

I observe also that this Statute useth three words, which are all powerfull in signification and operation, *videlicet*, *Laws*, *Ordinances* and *Decrees*; and I think it fitting for me, so near as I can, both to deliver the definitions of them, and the differences between them.

A Law.

A Law is properly a matter which hath taken his essence and power by a Custome time out of memory, as the Commonlaws have done; Or else is a matter acted and enacted in Parliament by the King and the great Counsel of the Realm, and by the Authority thereof, for the ordering of mens Bodies, Lands and Goods; and such a Law is hereby intended, because the Laws which the Commissioners shall make have the power of an Act of Parliament to strengthen and assist them, and they are to receive life and perfection from this Statute I read on.

Ordinance.

AN Ordinance is a word having a more private and less powerfull signification than the word *Law* hath; for it is a Law but of a secundary power, enacted by a Corporation, Company or Commission, proceeding meerly out of the Power and Prerogative of the King by Charter, Grant or Commission warranting the same, as those Corporations, Societies and Companies which have power by Charters or Patents to make the same; as is set forth in the cases of the City of *London*, and of the Chamberlain of *London's* Case in Sir *Edward Cook's* Reports.

Case of the
City of *Lon-*
don.

Case of the
Chamberlain
of *London.*

Also Ordinances may be made by the power of a Court, as in a Court Baron to make Orders, or by the Inhabitants of a Town by Custome, for the ordering of their Commons, repairing of their Churches and Highways: And these are more properly By-laws than Laws; for a Law is either the Commonlaw, Customary-law, or an Act of Parliament;

liament; all which are of greater force than any Laws made by these secundary means, which of themselves are of little or no strength but as they are assisted by other primary powers.

Decree.

A Decree is neither a Law nor Ordinance in proper definition, but is onely a Sentence or Judgment in a Court of Justice, delivered or declared by the Judges there, by and through the power and strength of a general former Law, for *Decretum est Sententia lata super Legem*.

So that a Law is a general direction for a multitude.

An Ordinance is a subordinate direction, proceeding out of a more general power.

And a Decree is a Sentence delivered for or against a particular person, grounded upon the said Laws and Ordinances.

Continuance of Laws.

IT comes now fitly for me in turn and course to declare the continuance of these Laws, Ordinances and Decrees; for it is to be observed that some of them be but temporary, though others perpetual.

The words in our Statute are, *That every Statute and Ordinance made before the Statute of 23 H. 8. concerning the things and matters therein mentioned, as well in the time of H. 8. as of any of his Progenitors, not being contrary to this Statute, or heretofore repealed, shall stand in force for ever, and are commanded to be put in due Execution:* But this clause is intended of all Acts of Parliament made touching the Sewers, and be not intended or meant of Laws and Ordinances made by the Commissioners of Sewers themselves.

Laws and Decrees made for sale of Lands by the Powers and Authorities of this Statute, are to be made and ingrossed into Parchment, and certified under the Seals of the Commissioners into the Chancery, and the King's Royal Assent had thereto, under the Privy Seal, shall also stand good and effectual.

And all Laws and Ordinances written in Parchment, and indented, and under the Seals of the Commissioners, whereof the one part shall remain with the Clerk of the Sewers, and the other part to remain in such places as the Commissioners should appoint (notwithstanding the same be not certified into the Chancery, nor the King's Royal Assent be had thereto) shall continue in force till the same shall be altered, repealed or made void by another Commission of Sewers, although the former Commission by the which these Laws were made were determined by *Superseas*.

^{13 Eliz. cap. 9.} The Commission is to continue for ten years from the date thereof by force of the Statute of 13 *Eliz.* yet notwithstanding all Laws and Ordinances which are written in Parchment, indented and sealed by the Commissioners of Sewers, without certifying into the Chancery, or the King's Royal Assent had thereto, shall notwithstanding the determination of the Commission by the Expiration of the said ten years, continue in force for one whole year next ensuing, to be put in Execution for that time by six Justices of the Peace, whereof two to be of the *Quorum*, but then the power of the Justices of the Peace is ceased by the coming of a new Commission of Sewers.

All other Laws and Ordinances of Sewers which are but made and writ in Paper, or which be but in Parchment, and not Indented, or which be Indented also, if not sealed, continue in force no longer than that Commission continueth by the Power whereof they were made.

And so by this short Declaration I have made, the Commissioners may the better observe how long time Laws and Ordinances of Sewers are to continue in force; yet though they

they lose their vigor they may notwithstanding be revived by the power of a new Commission, or remain for presidents for after Ages to imitate.

Repealing of Laws.

IN this last Place I intend to deliver my Opinion, what Laws, Ordinances and Decrees may be repealed, altered or made void by the Commissioners of Sewers.

Therefore it is first to be considered, what Grounds are to be observed in repealing or altering former Laws.

It appears in *Esther*, that the Laws of the *Medes* and *Persians* were so perdurable, as they could never be changed: And in my Opinion there is required as great foresight, Judgment, and as sound discretion and mature deliberation in repealing of old Laws, as in making new ones; For *Quæ preter consuetudinem & morem major' sunt neque placent neque recta videntur.*

I have noted how carefull and constant the Lords of the Parliament house were in the 20 year of *H. 3.* when they all cried out aloud *Nolumus leges Angliæ mutare.*

Seeing therefore there ought to be great care in making Laws, so must there be great heed taken in repealing of Laws.

And because Commissioners of Sewers have power herein, I will therefore deliver my Opinion how far that power will extend: And if one note this Branch of the Statute well, he shall well perceive the Judicious care taken by the Parliament in penning of it; For the words be, *That the Commissioners of Sewers should have power and authority to make, constitute and ordain Laws, Ordinances and Decrees, and the same Laws and Ordinances (omitting the word Decrees) to alter, repeal and make void;* for a Decree is a Judgment, and is *Finis operis*, and a Judgment cannot be reversed without a Writ of Error: Neither can a Sentence or a Decree in Chancery be reversed without a Bill of Review; neither can the Commissioners of Sewers reverse a

Judg.

Judgment or Decree of Sewers Judicially pronounced, which is a Judgment upon a Tryal betwixt the King and the party, or betwixt party and party, without a Bill of Reversal; for it is truly said, *Quod naturale est unumquodque, dissolvi eo ligamine quo ligatum est.*

A Writ of Error lay at the Commonlaw for to reverse a Judgment given by Commissioners of Sewers when the Commission was in Latine, as is set forth in the Register, being then one of the special Commissions of *Oyer and Terminer*; but since the Commission was put into the English Frame, the Writs of Error ceased.

A Law for sale of Lands ingrossed into parchment, and certified into the King's Court of Chancery, with the King's Royal Assent had thereto, is not reversable without an Act of Parliament; but then the said Sale must be made according to the Form, Frame and Power of this Statute.

For put the Case that *A. B.* holdeth his Lands of *J. S.* by the payment of Twenty Shillings yearly towards the repair of such a Bridge Bank, or Wall, it fortuneth that *A. B.* paid the Twenty Shillings yearly to his Lord for that purpose, who neglecteth to pay it, though he be thereto ordered and assessed to pay the same to the said repairs by the Commissioners of Sewers, the Seigniorie of Twenty Shillings yearly is to be decreed, and not the Land, for that the fault was in *J. S.* and not in *A. B.* the owner of the Land.

If any persons be by prescription, Custome, Tenure, Covenant or otherwise, bound to repair Walls, Banks or other Defences of Sewers, the Commissioners have not any power by their Commission to repeal, alter or make void any of these, because these are establisht by the Commonlaw, and Customs of the Realm, and not by the power of the Commission of Sewers: But their power is to repeal, alter or make void Laws and Ordinances made by themselves, or by the power of their Commission: And so the words of their Commission plainly describe it; For thereby they have power to make Laws and Ordinances, and the same to repeal, alter and make void, so they must be the same
and

and no other: And herein I end all my arguments and discourse upon this Statute, for I accompt all the rest which remaineth unspoken of not to be worthy of a Reader's dialect, because I have fully handled all the Materials of this worthy Law; And therefore I may justly conclude my argument with this, That *Finitum est hoc opus & consummatum.*

Certiorari's and Returns.

Although by the Statute of 13 *El. cap. 9.* it ^{13 *Eliz. c. 9.*} is enacted, That the Laws and Ordinances of the Commissioners of Sewers shall continue in force as therein is appointed, and that the said Commissioners, or any of them shall not be compelled or compellable to make any certificate or return of any their ordinances, Laws, or doings by the authority of any the said Commissions, nor shall have any Fine, Pain or Amerciament set upon them or any of them, or any ways be molested in Body, Lands or Goods for that cause; yet the Court of King's Bench do not take themselves to be restrained by those general words. And it was said by the Judges there, in the case of *Smith* and others, *Hil. 21 & 22 Car. 2.* that it was never doubted but that the Court of King's Bench might question the legality of the Commissioners of Sewers orders notwithstanding that Statute; for it shall not be ousted of its jurisdiction, by general words in an Act of Parliament, without exprefs and particular words; *Modern Reports 44, 45.* And in

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the

Modern Reports 44, 45.

the Case of *Commings* and *Massam*, *Pasch.* 18 *Ca.* 1. *B. R.* If the Commissioners of Sewers proceed where they have no jurisdiction, or without Commission, or contrary to their Commission, or not by Jury (where a Jury is requisite) &c. their doings may be examined and corrected in a superior Court, *March* 197, 198.

March 197,
198.

And accordingly Writs of *Certiorari* have been from time to time as well since as before the said Statute of 13 *Eliz.* granted to remove into the *King's Bench*, their Orders and Proceedings, and Presentments taken by them; and such Orders, Presentments and Proceedings have been quashed there. See *Stile* 13, 60. 85. 185, 191,

Stile.

Siderf. 1. 145.

192. *Siderfin* 1. 145. And the Commissioners of Sewers have been brought into that Court by Attachment, and there fined, for proceeding to fine a Person, after a *Certiorari* was delivered to them, *Modern Reports* 44, 45. And that Court

*Modern Re-
ports* 44, 45.

March 201.

have taken upon them to confirm a Decree of the Commissioners of Sewers; *March* 201. And have confirmed their Order for part, and

Siderf. 1. 145.

quashed it for other part, *Siderfin* 1. 145. And may moderate a fine set by the Court of Sewers,

March 202.

March 202.

And whereas it hath been objected, that the Statute of 23 *H. 8.* 5. hath appointed the Orders and Proceedings of the Commissioners of Sewers to be in English, and consequently hath taken

23 *H. 8.* c. 5.

away

away the *Certiorari*, for that the Court of *King's Bench* can judge onely of Proceedings in Latin; to which Opinion *Mallet*, Justice *B. R.* seems to incline in the Case of *Commins* and *Massam*, *Pasch.* 18 *Car.* 1. It was resolved, that a *Certiorari* to the Commissioners of Sewers lies since that Statute, and is not taken away thereby, *March* 197, *March* 197, 198, 199. 198, 199.

In *Apſley's* Case, 17 *Car.* 1. *B. R.* where certain Orders made against him by the Commissioners of Sewers at *Westminster* were removed by *Certiorari* into the Court of *King's Bench*, these Exceptions were taken to the return. 1. It doth not say, that the Commission of Sewers was under the Great Seal. 2. It appears not that three of the Commissioners who made the Orders were of the *Quorum*, as the Statute of 23 *H.* 8. 5. appoints. Nor 3. That the Place 23 *H.* 8. 5. touching which their Orders were made was within *Westminster*, and so it cannot be known whether it was in their power by virtue of their Commission to make any Orders touching that Place; And for these defects, the return was adjudged ill, and the Proceedings of the Commissioners were quashed: And though *Hales* moved for liberty for the Commissioners to amend their return, it was denied by the Court, because the Return was made the term before, *Stile* 85. *Stile* 85.

away the Court, for that the Court of King's Bench can judge only of Proceedings in Law; as which Opinion Master Justice B. R. seems to incline in the Case of Conway and Mayne, 1841. It was resolved, that a Certificate to the Commissioners of Sewers lie since that 21st

1841

case, and is not taken away thereby, March 27 1841

In King's Case, 17 Car. 1. B. R. where certain Orders made against him by the Commissioners of Sewers at Westminster were removed by Certiorari into the Court of King's Bench, these Exceptions were taken to the return, 1. It doth not say, that the Commission of Sewers was under the Great Seal. 2. It appears not that three of the Commissioners were made the Order, whereof the Return, as the Statute of 25 H. 8. appoints. Nor 3. That the Place touching which their Order was made was within the City, and so it cannot be known whether it was in their power by virtue of their Commission to make any Order touching that Place; And for these defects, the return was adjourned, and the Proceedings of the Commissioners were quashed: And though these objections were quashed, the Commissioners to amend their return, it was denied by the Court, because the Return was made therein before 25 H. 8.

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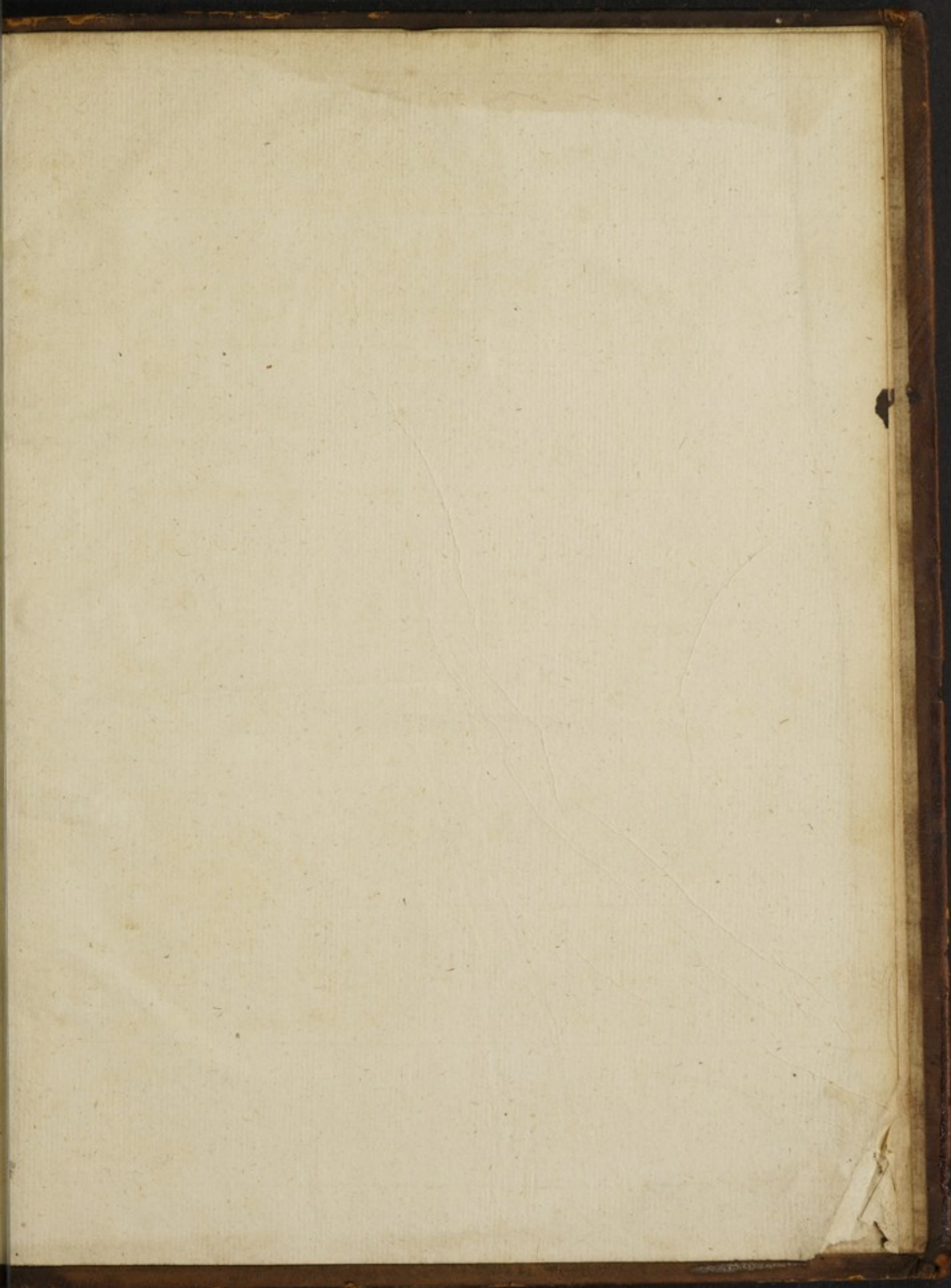
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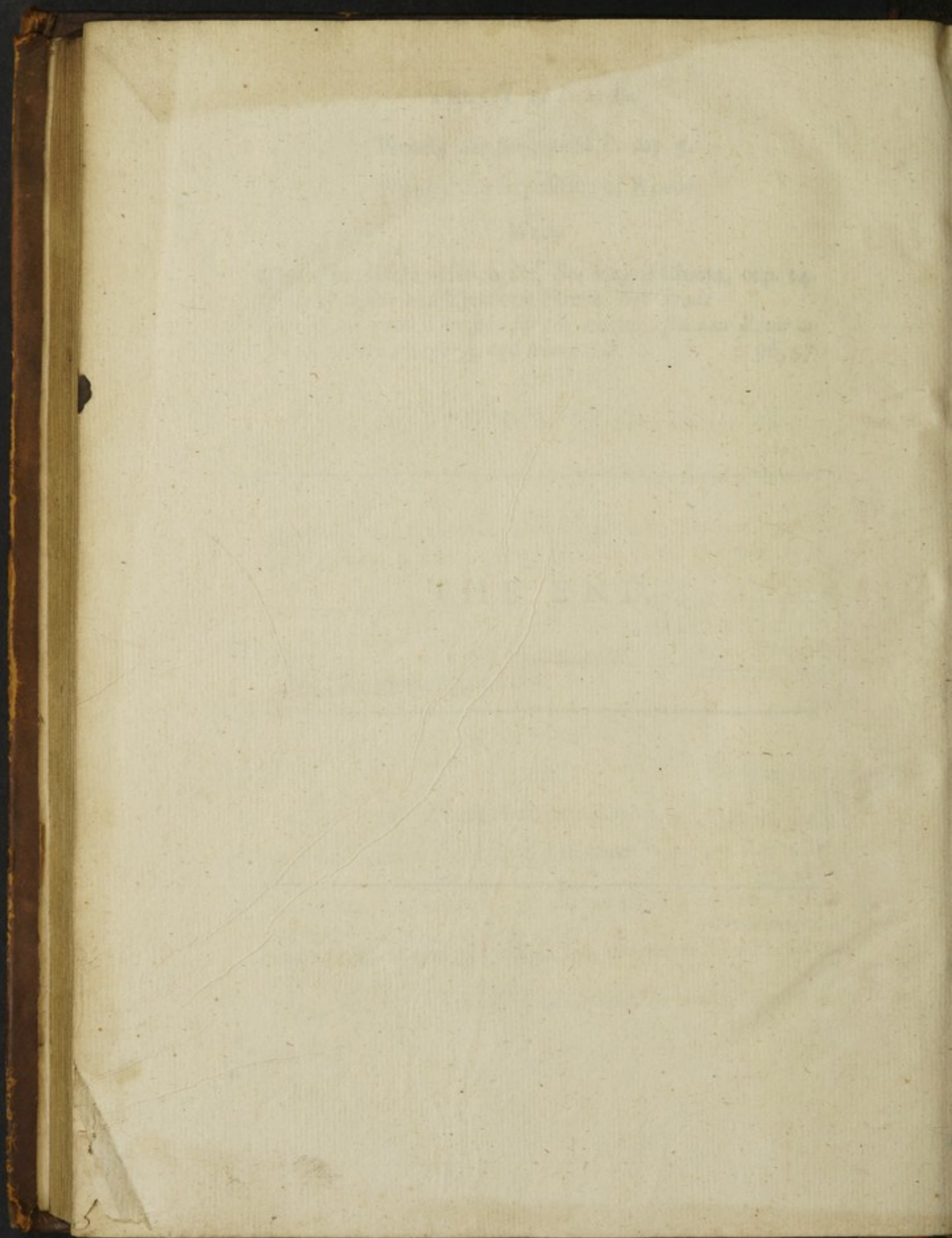
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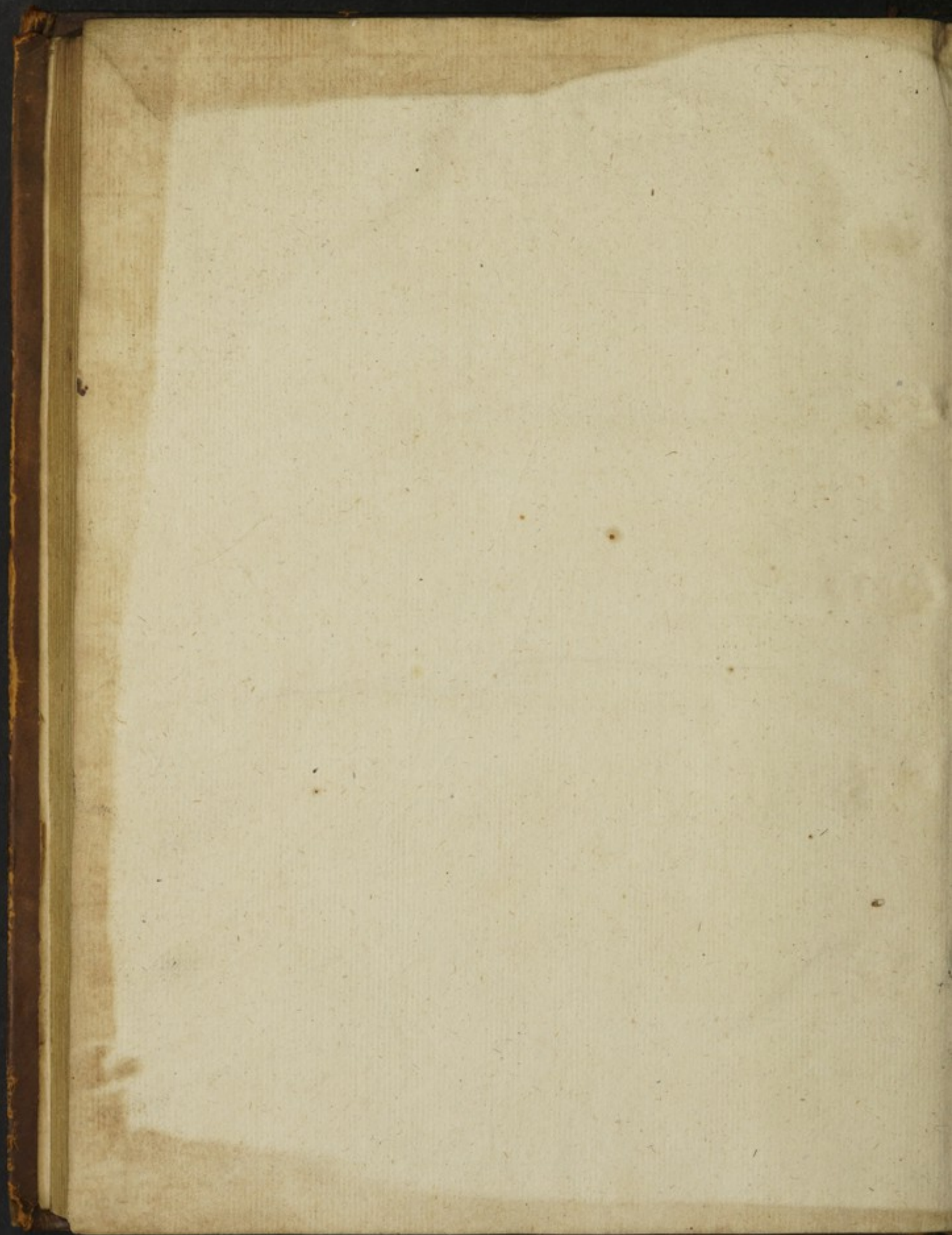
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