File Ref: L/M (H) in PELB(CR)10/32/98

Bills Committee on Adaptation of Laws (No.5) Bill 1999
Follow-up to Meeting on 13 July 1999

Aliens (Rights of Property) Ordinance (Cap. 185)

(a) To provide case law to show the application of the common law rule which precludes aliens from holding land

A Commentary by Coke upon Littleton which elaborates on the Common Law position that an alien could not hold land is at Annex A. The cases referred to were several hundred years old and the only two cases which we can trace are the Calvin's case and the case entitled Gravenor v. Brook, a copy of which is attached at Annex B.

We do not agree to the view that "the purpose of enacting the Ordinance has become obsolete on 1st July 1997 as the Act for the Naturalization of Aliens has ceased to apply to Hong Kong". You may wish to refer to my reply to Question 6 on this subject, as set out in the Summary enclosed with my letter of 12 July 1999. As the English Common Law still applies in Hong Kong, Cap 185 is still required to enable aliens (as now defined) to hold and transfer immovable property in Hong Kong.

(b) To consider amending the Chinese rendition of "alien" to "外籍人士" to put beyond doubt that the term carries the same meaning as that used in the Interpretation and General Clauses Ordinance (Cap. 1)

We agree to amending the Chinese rendition of "alien" to "外籍人士" as requested by Members and we will move the CSAs accordingly.

Demolished Buildings (Re-development of Sites) Ordinance (Cap. 337)

(c) To clarify why the references to the United Kingdom Law of Property Act 1925 and laws in England relating to real property in the Ordinance have not been substituted by the Conveyancing and Property Ordinance, Cap 219 after the enactment of the latter Ordinance in 1984

The background to the enactment of the Conveyancing and Property Ordinance, Cap 219, in 1984 was that the law relating to immovable property and conveyancing in Hong Kong, had remained virtually unchanged since the earliest conveyancing in Hong Kong in 1844. The Administration was of the view that with the passage of time and the rapid development of Hong Kong, the existing laws relating to immovable property and conveyancing at the time had become out dated and required revisions.

The purpose of Cap 219 was basically to introduce certain provisions relating to the law of property and to simplify conveyancing by the introduction of implied covenants and standard conveyancing forms. The question of whether the references to the United Kingdom Law of Property Act 1925 in Cap 337 should have been replaced by references to the Conveyancing and Property Ordinance, Cap 219 was beyond the scope of the enactment.

As regards Cap 337, the Ordinance was first enacted in 1963. Section 12(iii) remained unchanged since its enactment apart from a change made in 1985 pursuant to Cap 1 which changed "Colonial Treasurer Incorporated" to "Financial Secretary Incorporated". There seems to be no compelling legal reason why the references to United Kingdom Law of Property Act 1925 should have been substituted by references to the Conveyancing and Property Ordinance, Cap 219 upon or after the enactment of Cap 219 until the change of sovereignty in July 1997.

Planning, Environment and Lands Bureau
September 1999

[2. b.] lands, tenements, or hereditaments to him ☞ and his heires, albeit he can have no heires, yet he is of capacitie to take a fee simple (1) but not to hold (2). For upon an office found, the king shall have it by his prerogative (3), of whomsoever the land is holden (4). And so it is if the alien doth purchase land and die, the law doth cast the freehold and inheritance upon the king (5). If an alien purchase any estate of freehold in houses, lands, tenements, or hereditaments, the king upon office found shall have them. If an alien be made a denizen and purchase land, and die without issue, the lord of the fee shall have the eschent, and not the king. But as to a lease for yeares, there is a diversitie betweene a lease for yeares of a house for the habitation of a merchant stranger being an alien, whose king is in league with ours, and a lease for yeares of lands, meadows, pastures, woods, and the like. For if he take a lease for yeares of lands, meadows, &c. upon office found, the king shall have it (6). But of a house for habitation he may take a lease for years as incident to commerce; for without habitation he cannot merchandize or trade (7). But if he depart, or

32 Hen. 6. 23. 14 Com. 483.

5 Mar. Br. tit. Denizen, 22.

(1) Therefore on a covenant to stand seised, an use will arise for an alien. Godb. 275. But by *act of law*, as by *descent*, he cannot even *take* for the benefit of the king. 7 Co. Calvin's case, 25. a. Post. 31. b. and 1 Ventr. 417. See in Dy. 283. b. the case of a feoffment to an alien and another to uses.

(2) If the purchase is made with the *king's license*, it seems that he may hold. See 14 Hen. 4. 20. How the law is, where an alien purchases in the name of a trustee, see King and Holland, Styl. 20, &c. All. 14, and 1 Ro. Abr. 194. See also 13 Geo. 3. c. 14, which enables aliens to lend money on land, &c. in the West Indies.

(3) But not *before* office, except in case of the alien's death. Adj. 5 Co. 52. b. Before office, recovery by an alien tenant in tail will bar remainders. Adj. Gouldsb. 102. 4 Leon. 84.

(4) If an alien purchases a copyhold, it is said that it shall escheat to the lord. Dy. 2. b. in marg. but see 1 Mod. 17, and All. 14.

(5) See in Plowd. 229, several cases, in which, for a like reason, the king is entitled without office.

(6) Accord. 7 Co. Calvin's case, Dy. b. in marg.

(7) But 32 H. 8. c. 16. s. 13, makes void all leases of houses or shops to an alien being an *artificer* or *handicraftsman*. This law, however contrary it may seem to good policy and the spirit of commerce, still remains unrepealed; but in favour of aliens it has been construed very strictly. See 1 Sid. 309. 1 Saund. 7. 2 Show. 135. 3 Mod. 94. 3 Salk. 29. In the latter book a lease to an *alien artificer* is said to be forfeitable to the king at common law; but for this extraordinary doctrine no authority is cited (a). As to the capacity of aliens to take personal chattels, see 2 Ro. Rep. 93.——(a) It should be such a lease, viz. of a house or shop: I have no doubt it was meant to be so understood: and so indeed it is, in the referred to passage in 3 Salk. 29. As to the word extraordinary, which I have applied to the doctrine (at end of n. 7), I now hesitate as to its propriety. 16 Feb. 1811: see my opinion, of this date, on a case which required my investigation of the doctrine, as to leases for years to aliens. [The part of the opinion to which Mr. Hargrave refers, applicable to the subject, is as follows: "As to the other points, raised "on the *supposition* of the *party's being an alien*, the result of the strict doc- "trine in Co. Litt. 2. b., I conceive to be, that, to prevent forfeiture to the crown,

or relinquish the realme, the king shall have the lease. So it is if he die possessed thereof, neither his executors or administrators shall have it, but the king (8); for he had it only for habitation as necessary to his trade or traffique, and not for the benefit of his executor or administrator. But if the alien be no merchant, then the king shall have the lease for yeares, albeit it were for his habitation (9); and so it is if he be an alien enemie. And all this was so resolved by the judges assembled together for that purpose in the case of sir James Croft, Pasch. 29 of the raigne of queene Elizabeth. Also, if a man commit felony, and after purchase lands, and after is attainted, he had capacitie to purchase, but not to hold it; for in that case the lord of the fee shall have the eschent (10); and if a man be attainted of felony, yet he hath capacitie to purchase to him and to his heires, albeit he can have no heire, but he cannot hold it; for in that case the king shall have it by his prerogative, and not the lord of the fee; for a man attainted hath no capacitie to purchase (being a man *civiliter mortuus*) but onely for the benefit of the king, no more than the alien-née hath. If any sole corporation or aggregate of many, either ecclesiasticall or temporall (for the words of the statute be *si quis religiosus vel alius*) purchase lands or tenements in fee, they have capacitie to take but not to retaine (unlesse they have a sufficient license in that (11) behalfe); for within the yeare after the alienation, the next lord of the fee may enter; and if he doe not, then the next immediate lord from time to time to have half a yeare; and for default of all the mesne lords, then the king to have the land so aliened for ever, which is to be understood of such inheritance as may be holden. But of such inheritances as are not holden, as

Pasch. 29 Eliz. in Sir James Croft's case. 49 Ass. pl. 2. 49 E. 3. 11. (5 Co. 52. b.)

Magna Charta, cap. 36. 7 E. 1. stat. 2. de Religiosis. IV. 2. 13 E. 1. cap. 33. 15 R. 2. cap. 5. 23 H. 8. cap. 10. 39 El. cap. 5. 23 H. 3. Ass. 436. 29 Ass. p. 17. Brit. fo. 32. Fleta, lib. 3. cap. 4 & 5. 19 E. 2. tit. Vill. 34. 29 E. 3. Ibid. 13. 21 E. 3. 5.

"crown, the alien, taking lease for years, should fall within the description of "a merchant friend, and the house should be for his habitation: and that, "even with those circumstances, the crown will be entitled to the lease, "either on his death, or on his quitting the realm. Whether, however, the "courts would now hold to this extent, I have some doubt: and certainly, "the short case of Trin. 6 E. 6. New Bendl. 36. and 1 And. 25. clashes with "the doctrine; and the case in Cro. Car. 8. on the administration granted on "the death of the Holland agent, Sir Upwell Caroon, might, if such points "should be as stated, require to be closely examined. As to the particular "point on the st. 32 H. 8, c. 16, I think that the party's not being an artificer "or handicraftsman would prevent the statute's being applicable, and con- "sequently, it being a void lease."]

(8) Contra 1 And. 25. N. Bendl. 36. See in Cro. Cha. 8, a case where administration to an intestate alien was granted to his nephews and nieces, who were also aliens, and part of the estate consisted of leases for years.

(9) If this be the common law, ought not its severity to be corrected by the legislature? To deny the right of taking a house for habitation to aliens not being *merchants*, is like forbidding all *other* foreigners to come and reside here. See 7 Co. Calvin's case, 17. a. where lord Coke seems to express himself without distinguishing between aliens being merchants and other aliens.

(10) Tenant in tail is guilty of murder, and before conviction levies a fine. It was a question, whether the fine should bar the issue for the lord's benefit; and the court inclined to think that it should; but no judgment was given. 1 Wils. 2 Part. 220.

(11) As to this, see post. 98. 2.

Sovereign Lord the King had granted unto him safe conduct, not named by his name of dignity, judgment of the writ, &c. And there Justice Littleton giveth the rule: the plaintiff (saith he) is an earl in Scotland, but not in England; and if our Sovereign Lord the King grant to a duke of France a safe conduct to merchandize, and enter into his realm, if the duke cometh and bringeth merchandize into this land, and is to sue an action here, he ought not to name himself duke; for he is not a duke in this land, but only in France. And these be the very words of that book-case; out of which I collect three things. First, that the plaintiff was named by the name of a knight, wheresoever he received that degree of dignity. *Vide* (*c*) 7 H. 6. 14 b. accord. 2. That an earl of another nation or kingdom is no earl (to be so named in legal proceedings) within this realm: and herewith agreeth the book of (*d*) 11 Ed. 3. *The Earl of Richmond's case* before recited. 3. That albeit the King by his letters patent of safe conduct do name him duke, yet that appellation maketh him no duke, to sue or to be sued by that name within England: so as the law in these points (apparent in our books) being observed and rightly understood, it appeareth how causeless their fear was that the adjudging of the plaintiff to be no alien should make a confusion of the nobilities of either kingdom.

Now are we in order come to the fourth point (which is the fourth general part), *alienigena*, wherein six things did fall into consideration. 1. Who was *alienigena*, an alien born by the laws of England. 2. How many kinds of aliens born there were. 3. What incidents belonged to an alien born. 4. The reason why an alien is not capable of inheritance or freehold within England. 5. Examples, resolutions, or judgments reported in our books in all successions of ages, proving the plaintiff to be no alien. 6. Demonstrative conclusions upon the premises, approving the same.

1. An alien is a subject that is born out of the ligeance of the King, and under the ligeance of another; and can have no real or personal action for or concerning land: but in every such action the tenant or defendant may plead that he was born in such a country which is not within ligeance of the King; and demand judgment if he shall be answered. And this is in effect the description which Littleton himself maketh, lib. 2. cap. 14. Villen. fol. 43. *Alienigena est alienæ gentis seu alienæ ligeantiæ, qui etiam* [16 b] *dicitur peregrinus, alienus, exoticus, extraneus, &c. Extraneus est subditus, qui extra terram, i.e. potestatem Regis natus est.* And the usual and right pleading of an alien born doth lively and truly describe and express what he is. And therein two things are to be observed. 1. That the most usual and best pleading in this case, is, both exclusive and inclusive, viz. *extra ligeantiam domini Regis, &c. et infra ligeantiam alterius Regis*, as it appeareth in (*a*) 9 Ed. 4. 7. b. Book of Entries, fol. 244, &c. which cannot possibly be pleaded in this case, for two causes. 1. For that one King is sovereign of both kingdoms. 2. One ligeance is due by both to one sovereign; and in case of an alien there must of necessity be several Kings and several ligeances. Secondly, no pleading was ever *extra regnum*, or *extra legem*, which are circumscribed to place, but *extra ligeantiam*, which (as it hath been said) is not local or tied to any place.

It appeareth by Bracton, lib. 3. tract. 2. c. 15. fol. 134. that (*b*) Canutus the Danish King, having settled himself in this kingdom in peace, kept notwithstanding (for the better continuance thereof) great armies within this realm. The peers and nobles of England, distasting this government by arms and armies, *odimus accipitrem quia semper vult in armis*, wisely and politically persuaded the King, that they would provide for the safety of him and his people, and yet his armies, carrying with them many inconveniencies, should be withdrawn: and therefore offered that they would consent to a law, that whosoever should kill an alien, and be apprehended, and could not acquit himself, he should be subject to justice: but if the manslayer fled, and could not be taken, then the town where the man was slain should forfeit sixty-six

Britain; the right and privilege of sitting in the House of Lords, and the privileges depending thereon, and the right of sitting on the trial of peers, only excepted.

(*c*) Br. Brief 159. Fitz. Brief 35.

(*d*) 11 E. 3. Fitz. Brief 173. *Antea* 15 b. Moor 803. 9 Co. 117 b.

marks unto the King; and if the town were not able to pay it, then the hundred should forfeit and pay the same unto the King's treasure: whereunto the King assented. This law was penned *quicunque occiderit Francigenam, &c.*; not excluding other aliens, but putting *Francigena*, a Frenchman, for example, that others must be like unto him, in owing several ligeance to a several sovereign, that is, to be *extra ligeantiam Regis Angl'*, and *infra ligeantiam alterius Regis*. And it appears before, out of Bracton and Fleta, that both of them use the same example (in describing of an alien) *ad fidem Regis Francie*. And it was holden, that except it could be proved that the party slain was an Englishman, that he should be taken for an alien: and this was called Englesherie, *Englesheria*, that is, a proof that the party slain was an Englishman. (Hereupon [17 a] Canutus presently withdrew his armies, and within a while after lost his Crown, and the same was restored to his right owner.) The said law of Englesherie continued until 14 Ed. 3. cap. 4. and then the same was by Act of Parliament ousted and abolished. So amongst the laws of William the First, (published by Master Lambert, fol. 125.) *omnis Francigena* (there put for example as before is said, to express what manner of person *alienigena* should be) *qui tempore Edwardi propinqui nostri fuit particeps legum et consuetudinem Anglorum* (that is made denizen) *quod dicunt ad scot et lot persolvat secundum legem Anglorum.*

Every man is either *alienigena*, an alien born, or *subditus*, a subject born. Every alien is either a friend that is in league, &c. or an enemy that is in open war, &c. Every alien enemy is either *pro tempore*, temporary for a time, or *perpetuus*, perpetual, or *specialiter permissus*, permitted especially. Every subject is either *natus*, born, or *datus*, given or made: and of these briefly in their order. An alien friend, as at this time, a German, a Frenchman, a Spaniard, &c. (all the Kings and princes in Christendom being now in league with our sovereign: but a Scot being a subject, cannot be said to be a friend, nor Scotland to be *solum amici*) may by the common law have, acquire, and get within this realm, by gift, trade, or other lawful means, any treasure, or (*a*) goods personal whatsoever, as well as an Englishman, and may maintain any (*b*) action for the same: but (*c*) but lands within this realm, or houses (but for their necessary habitation only) alien friends cannot acquire, or get, nor maintain any action real or personal, for any land or house, unless the house be for their necessary habitation. For if they should be disabled to acquire and maintain these things, it were in effect to deny unto them trade and traffic, which is the life of every island. But if this alien become an enemy, (as all alien friends may) then is he utterly disabled to maintain any action, or get any thing within this realm. And this is to be understood of a temporary alien, that being an enemy may be a friend, or becoming a friend may be an enemy. But a perpetual enemy (though there be no wars by fire and sword between them) cannot maintain any action, or get any thing within this realm. All infidels are in law *perpetui* (*d*) *inimici*, perpetual enemies (for the law presumes not that they will be converted, that being *remota potentia*, a remote possibility) for between them, as with the devils, whose subjects they be, and the Christian, there is perpetual [17 b] hostility, and can be no (*a*) peace; for as the Apostle saith, 2 Cor. 6. 15. *Quæ autem conventio Christi ad Belial, aut quæ pars fideli cum infideli*, and the law saith, *Judæo Christianum nullum servial mancipium, nefas enim est quem Christus redemit blasphemam Christi in servitutis vinculis detinere.* Register 282. *Infideles sunt Christi et Christianorum inimici.* And herewith agreeth the book in 12 H. 8. fol. 4. where it is holden that a Pagan cannot have or maintain any action at all (*t*).

And upon this ground there is a diversity between a conquest of a kingdom of a

(*a*) Co. Lit. 2 b.

(*b*) 1 Bulst. 134. Yel. 198. Owen. 45. Co. Lit. 129. b. 1 And. 25. Moor 131. 1 Keb. 266. Cr. El. 142. 683. Cr. Car. 9. 1 Inst. 152. Dy. 2. pl. 8. 0. Bend. 10. B. N. C. 375. Br. Non-ability 62.

(*c*) Poph. 36. Co. Lit. 2 b. Dy. 2. pl. 8. 1 Saund. 5. 1 Bos. & Pull. 163.

(*d*) Wing. Max. 10. Skin. 166.

(*a*) 4 Inst. 155.

(*t*) The position in the text seems to have been a common error founded on a

1572-1678 1616 kb

The SEVENTH PART of the REPORTS of SIR EDWARD COKE, Knt., Lord Chief Justice of the Common Pleas, of divers RESOLUTIONS and JUDGMENTS given upon solemn Arguments, and with great Deliberation and Conference of the reverend Judges and Sages of the Law, of CASES IN LAW which were never Resolved or Adjudged before: and the REASONS and CAUSES of the said Resolutions and Judgments. Published in the Sixth Year of the Most High and Most Illustrious JAMES, King of England, France, and Ireland, and of Scotland the XLII., the Fountain of all Piety and Justice, and the Life of the Law. With NOTES and REFERENCES, by JOHN FARQUHAR FRASER, Esq., of Lincoln's Inn, Barrister-at-Law.

(1 a) *POSTNATI(1).

CALVIN'S CASE.

Trin. 6 Jac. I.

Low v. *Routledge*, 1865-68, L. R. 1 Ch. 47; L. R. 3 H. L. 100; *Reg.* v. *Keyn*, 1876, Ex. D. 236; *De Geer* v. *Stone*, 1882, 22 Ch. D. 251. *Dicta* at 27 b dissented from, *Stepney Election Petition*, 1886, 17 Q. B. D. 46; *In re Johnson* [1903], 1 Ch. 833.]

James by the grace of God of England, Scotland, France, and Ireland, King, Defender of the faith, &c. To the Sheriff of Middlesex greeting: Robert Calvin,

Moor 790. *Vide* Dyer fo. 304 3 Jon 10. Vaugh. 260. 279. 301. 1 Lev. 59. Case of the *Duchy*. Ellesmer, Postnati, 1, 2, &c. Bacon of Government 2 pt. Atwood's Superiority 301. Salk. 411, 413. Skinner 134. 172. 198. 336. 442. Dig. Allegiance.

Vid. Doe v. *Acklam*, 2 Barn. and Cress. 779. S. C. 4 Dow. and Ryl. 391, that an born in the United States of America, since the recognition of their independence, of parents born there before that time, and continuing to reside there afterwards aliens, and cannot inherit lands in this country.

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Annex B
(P. 1/6)

gent. hath complained to us, that Richard Smith and Nicholas Smith, unjustly, and without judgment, have disseised him of his freehold in Haggard, otherwise Haggerston, otherwise Aggerston, in the parish of St. Leonard, in Shoreditch, within thirty years now last past; and therefore we command you, that if the said Robert shall secure you to prosecute his claim, then that you cause the said tenement to be reseised with the chattels which within it were taken, and the said tenement with the chattels to be in peace until Thursday next after fifteen days of Saint Martin next coming; and in the mean time, cause twelve free and lawful men of that neighbourhood to view the said tenement, and the names of them to be inbreviated; and summon them by good summoners, that they be then before us wheresoever we shall then be in England, ready thereof to make recognition; and put, by sureties and safe pledges, the aforesaid Richard and Nicholas, or their bailiffs, (if they cannot be found), that they be then there, to hear the recognition; and have there the summoners, the names of the pledges, and this writ. Witness ourself at Westminster, the 3d day of November, in the 5th year of our reign of England, France, and Ireland, and of Scotland the one and fortieth

For 40s. paid in the hamper,

KINDERSLEY.

Middlesex, ss. The assize cometh to recognise, if Richard Smith, and Nicholas Smith unjustly, and without judgment, did disseise Rob Calvin, gent. of his freehold in [1 b] Haggard, otherwise Haggerston, otherwise Aggerston, in the parish of St. Leonard in Shoreditch, within thirty years now last past: and whereupon the said Robert, who is within the age of twenty one years, by John Parkinson, and William Parkinson, his guardians, by the Court of the said King here to this being jointly and severally specially admitted, complaineth, that they disseised him of one messuage with the appurtenances, &c. And the said Richard and Nicholas, by William Edwards, their attorney, come and say, that the said Robert ought not to be answered to his writ aforesaid, because they say, that the said Robert is an alien born, on the 6th day of Nov. in the 3rd year of the reign of the King that now is, of England, France and Ireland, and of Scotland the thirty-ninth, at Edinburgh within his kingdom of Scotland aforesaid, and within the allegiance of the said lord the King, of the said kingdom of Scotland, and out of the allegiance of the said lord the King of his kingdom of England; and at the time of the birth of the said Robert Calvin, and long before and continually afterwards, the aforesaid kingdom of Scotland, by the proper rights, laws, and statutes of the same kingdom, and not by the rights, laws, or statutes of this Kingdom of England, was and yet is ruled and governed. And this he is ready to verify, and thereupon prayeth judgment, if the said Robert, to his said writ aforesaid, ought to be answered, &c. And the aforesaid Robert Calvin saith, that the aforesaid plea, by the aforesaid Richard and Nicholas above pleaded, is insufficient in law to bar him the said Robert from having an answer to his writ aforesaid; and that the said Robert to the said plea in manner and form aforesaid pleaded, needeth not, nor by the law of the land is bound to answer; and this he is ready to verify and hereof prayeth judgment; and that the said Richard and Nicholas to the aforesaid writ of the said Robert may answer. And the said Richard and Nicholas, forasmuch as they have above alleged sufficient matter in law to bar him the said Robert from having an answer to his said writ, which they are ready to verify; which matter the aforesaid Robert doth not gainsay, nor to the same doth in any ways answer, but the said averment altogether refuseth to admit as before pray judgment, if the aforesaid Robert ought to be answered to his said writ, &c. And because the Court of the lord the King here are not yet advised of giving their judgment of and upon the premises day thereof is given to the parties aforesaid; before the lord the King at Westminster until Monday next after eight days of St. Hilary, to hear their judgment thereof, because the Court of the lord the King here thereof are not yet, &c. And the said aforesaid remains to be taken before the said lord the King, until the same Monday there, &c. And the sheriff to distrain the recognitors of the assize aforesaid: and in the interim to cause a view, &c; at which day, before the lord the King at Westminster, come as well the aforesaid Robert Calvin, by his guardians aforesaid, as the aforesaid Richard Smith and Nicholas Smith by their attorney aforesaid; and because

the Court of the lord the King [2 a] here of giving their judgment of and upon the premises is not yet advised, day thereof is given to the parties aforesaid before the lord the King at Westminster, until Monday next after the morrow of the Ascension of our Lord, to hear their judgment; because the Court of the lord the King here are not yet, &c. And the assize aforesaid remains further to be taken, until the same Monday there, &c.; and the sheriff, as before, to distrain the recognitors of the assize aforesaid, and in the interim to cause a view, &c. At which day, before the lord the King at Westminster, come as well the aforesaid Robert Calvin by his guardians aforesaid, as the aforesaid Richard Smith and Nicholas Smith, by their attorney aforesaid, &c.; and because the Court of the lord the King here, &c.

[2 a] THE CASE.

A man born in Scotland after the accession of King James the First to the English throne, and during his reign, may hold lands in England. S. C. Howel's State Trials, Vol II. p. 559.

The question of this case as to matter in law was, whether Robert Calvin the plaintiff (being born in Scotland since the Crown of England descended to His Majesty) be an alien born, and consequently disabled to bring any real or personal (a) action for any lands within the realm of England. After this case had been argued in the Court of King's Bench, at the Bar, by the counsel learned of either party, the Judges of that Court, upon conference and consideration of the weight and importance thereof, adjourned the same (according to the ancient and ordinary course and order of the Law) into the (b) Exchequer Chamber, to be argued openly there; first by the counsel learned of either party, and then by all the Judges of England; where afterwards the case was argued by Bacon, Solicitor-General, on the part of the plaintiff, and by Lane, Hide for the defendant; and afterward by Hobart, Attorney-General, for the plaintiff, and by Serjeant Hutton for the defendant; and, in Easter term last, the case was argued by Heron, puisne Baron of the Exchequer, and Foster, puisne Judge of the Court of Common Pleas; and, on the second day appointed for this case, by Crook, puisne Judge of the King's Bench, and Altham, Baron of the Exchequer; the third day by Snigge, Baron of the Exchequer, and Williams, one of the Judges of the King's Bench; the fourth day by Daniel, one of the Judges of the Court of Common Pleas, and by Yelverton, one of the Judges of the King's Bench: and, in Trinity term following, by Warburton, one of the Judges of the Common Pleas, and Fenner, one of the Judges of the King's Bench; and after by Walmesley, one of the Judges of the Common Pleas, and Tanfield, Chief Baron; and, at two several days in the same term, Coke, Chief Justice of the Common Pleas, Fleming, Chief Justice of the King's Bench, and Sir Thomas Egerton, Lord Ellesmere, Lord Chancellor of England, argued the case (the like plea in disability [2 b] of Robert Calvin's person being pleaded *mutatis mutandis* in the Chancery in a suit there for evidence concerning lands of inheritance tried, by the Lord Chancellor, adjourned also into the Exchequer-Chamber, to the end that one rule might over-rule both the said cases). And first (for that I intend to make as summary a report as I can) I will at the first set down such arguments and objections as were made and drawn out of this short record against the plaintiff by those that argued for the defendants. It was observed, that in this plea there were four nouns, *quatuor nomina*, which were called *nomina operativa*, because from them all the said arguments and objections on the part of the defendants were drawn; that is to say—1. *Ligeantia* (which is twice repeated in the plea; *for* it is said, *infra ligeantiam Domini Regis regni sui Scot', et extra ligeantiam domini Regis regni sui Angl'*) 2. *Regnum* (which also appeareth to be twice mentioned, viz. *regnum Angl'*, and *regnum Scot'*) 3. *Leges* (which are twice alleged, viz. *leges Angl'*, and *leges Scot'*, two several and dis-

(a) 1 Bulstr. 131. Yelv. 198. Owen 45. Co. Lit. 129. b. 1 And. 25. Moor 431. 1 Keb. 266. Cr. El. 142. 683. Cro. Car. 9. 4 Inst. 152.

(b) 2 Bulst. 146.

Sovereign Lord the King had granted unto him safe conduct, not named by his name *of dignity*, judgment of the writ, &c. *And there* Justice Littleton giveth the rule: the plaintiff (saith he) is an earl in Scotland, but not in England; and if our Sovereign Lord the King grant to a duke of France a safe conduct to merchandize, and enter into his realm, if the duke cometh and bringeth merchandize into this land, and is to sue an action here, he ought not to name himself duke; for he is not a duke in this land, but only in France. And these be the very words of that book-case; out of which I collect three things. First, that the plaintiff was named by the name of a knight, wheresoever he received that degree of dignity. *Vide* (c) 7 H. 6. 14 b. accord. 2. That an earl of another nation or kingdom is no earl (to be so named in legal proceedings) within this realm: and herewith agreeth the book of (d) 11 Ed. 3. *The Earl of Richmond's case* before recited. 3. That albeit the King by his letters patent of safe conduct do name him duke, yet that appellation maketh him no duke, to sue or to be sued by that name within England: so as the law in these points (apparent in our books) being observed and rightly understood, it appeareth how causeless their fear was that the adjudging of the plaintiff to be no alien should make a confusion of the *nobilities* of either kingdom.

Now are we in order come to the fourth room (which is the fourth general part), *alienigena*, wherein six things did fall into consideration. 1. Who was *alienigena*, an alien born by the laws of England. 2. How many kinds of aliens born there were. 3 What incidents belonged to an alien born. 4 The reason why an alien is not capable of inheritance or freehold within England. 5. Examples, resolutions, or judgments reported in our books in all successions of ages, proving the plaintiff to be no alien. 6 *Demonstrative conclusions upon the premises, approving the same.*

1 An alien is a subject that is born out of the ligeance of the King, and under the ligeance of another; and can have no real or personal action for or concerning land: but in every such action the tenant or defendant may plead that he was born in such a country which is not within ligeance of the King; and demand judgment if he shall be answered. And this is in effect the description which Littleton himself maketh, lib. 2. cap. 11. Villen. fol. 43. *Alienigena est aliene gentis seu aliene ligeantie, qui etiam* [16 b] *dicitur peregrinus, alienus, exoticus, extraneus, &c. Extraneus est subditus, qui extra terram, i e potestatem Regis natus est.* And the usual and right pleading of an alien born doth lively and truly describe and express what he is. And therein two things are to be observed. 1. That the most usual and best pleading in this case, is, both exclusive and inclusive, viz. *extra ligeantiam domini Regis, &c. et infra ligeantiam ulterius Regis*, as it appeareth in (a) 9 Ed. 4. 7. b. Book of Entries, fol. 214, &c which cannot possibly be pleaded in this case, for two causes. 1. For that one King is sovereign of both kingdoms. 2. One ligeance is due by both to one sovereign; and in case of an alien there must of necessity be several Kings and several ligeances. Secondly, no pleading was ever *extra regnum*, or *extra legem*, which are circumscribed to place, but *extra ligeantiam*, which (as it hath been said) is not local or tied to any place.

It appeareth by Bracton, lib. 3. tract. 2 c 15. fol 134. that (b) Canutus the Danish King, having settled himself in this kingdom in peace, kept notwithstanding (for the better continuance thereof) great armies within this realm. The peers and nobles of England, distasting this government by arms and armies, *odimus accipitrem quia semper vivit in armis*, wisely and politically persuaded the King, that they would provide for the safety of him and his people, and yet his armies, carrying with them many inconveniencies, should be withdrawn: and therefore offered that they would consent to a law, that whosoever should kill an alien, and be apprehended, and could not acquit himself, he should be subject to justice: but if the manslayer fled, and could not be taken, then the town whereon the man was slain should forfeit sixty-six

Britain; the right and privilege of sitting in the House of Lords, and the privileges depending thereon, and the right of sitting on the trial of peers, only excepted.

(c) Bk. Briel 159. Fitz. Briel 35.

(d) 11 E. 3. Fitz. Briel. 473. *Antea* 15 b. Moor 603. 9 Co. 117 b.

marks unto the King; and if the town were not able to pay it, then the hundred should forfeit and pay the same unto the King's treasure: whereunto the King assented. This law was penned *quicunque occiderit Francigenam*, &c.; not excluding other aliens, but putting *Francigena*, a Frenchman, for example, that others must be like unto him, in owing several ligeance to a several sovereign, that is, to be *extra ligeantiam Regis Angl'*, and *infra ligeantiam alterius Regis*. And it appears before, out of Bracton and Fleta, that both of them use the same example (in describing of an alien) *ad fidem Regis Francie*. And it was holden, that except it could be proved that the party slain was an Englishman, that he should be taken for an alien: and this was called Englesherie, *Englesheria*, that *is*, a *proof* that the party slain was an Englishman. (Hereupon [17 a] Canutus presently withdrew his armies, and within a while after lost his Crown, and the same was restored to his right owner.) The said law of Englesherie continued until 14 Ed. 3. cap. 4. and then the same was by Act of Parliament ousted and abolished. So amongst the laws of William the First, (published by Master Lambert, fol. 135.) *omnis Francigena* (there put for example as before is said, to express what manner of person *alienigena* should be) *qui tempore Edwardi propinqui nostri fuit particeps legum et consuetudinum Anglorum* (that is made denizen) *quod dicunt est scot et lot persolvit secundum legem Anglorum.*

Every man is either *alienigena*, an alien born, or *subditus*, a subject born. Every alien is either a friend that is in league, &c. or an enemy that is in open war, &c. Every alien enemy is either *pro tempore*, temporary for a time, or *perpetuus*, perpetual, or *specialiter permissus*, permitted especially. Every subject is either *natus*, born, or *datus*, given or made: and of these briefly in their order. An alien friend, as at this time, a German, a Frenchman, a Spaniard, &c. (all the Kings and princes in Christendom being now in league with our sovereign: but a Scot being a subject, cannot be said to be a friend, nor Scotland to be *solum amici*) may by the common law have, acquire, and get within this realm, by gift, trade, or other lawful means, any treasure, or (a) goods personal whatsoever, as well as an Englishman, and may maintain any (b) action for the same: but (c) but lands within this realm, or houses (but for their necessary habitation only) alien friends cannot acquire, or get, nor maintain any action real or personal, for any land or house, unless the house be for their necessary habitation. For if they should be disabled to acquire and maintain these things, it were in effect to deny unto them trade and traffic, which is the life of every island. But if this alien become an enemy, (as all alien friends may) then is he utterly disabled to maintain any action, or get any thing within this realm. And this is to be under stood of a temporary alien, that being an enemy may be a friend, or becoming a friend may be an enemy. But a perpetual enemy (though there be no wars by fire and sword between them) cannot maintain any action, or get any thing within this realm. All infidels are in law *perpetui* (d) *inimici*, perpetual enemies (for the law presumes not that they will be converted, that being *remota potentia*, a remote possibility) for between them, as with the devils, whose subjects they be, and the Christian, there is perpetual [17 b] hostility, and can be no (e) peace; for as the Apostle saith, 2 Cor. 6. 15. *Quæ autem conventio Christi ad Belial, aut quæ pars fideli cum infideli*, and the law saith, *Judæo Christianum nullum servat mancipium, nefas enim est quem Christus redemit blasphemum Christi in servitutis vinculis detinere.* Register 282. *Infideles sunt Christi et Christianorum inimici.* And herewith agreeth the book in 12 H. 8. fol. 4. where it is holden that a Pagan cannot have or maintain any action at all (f).

And upon this ground there is a diversity between a conquest of a kingdom of a

(a) Co. Lit. 2 b.

(b) 1 Bulst. 134. Yel. 198. Owen. 15. Co. Lit. 139. b. 1 And 25. Moor 431. 1 Keb. 266. Cr. El. 142. 683. Cr. Car. 9. 4 Inst. 152. Dy. 3. pl. 8. O. Benl. 10. B. N. C. 375. Br. Non-ability 63.

(c) Poph. 36. Co. Lit. 2 b. Dy. 2. pl. 8. 1 Saund. 5. 1 Bos. & Pull. 163.

(d) Wing. Max. 10. *Skin.* 166.

(e) 4 Inst. 155.

(f) The position in the text seems to have been a common error founded on a groundless opinion of Justice Brooke, *Anon.* 1 Salk. 46, and has long since been [illegible] Willes's Rep. 538.

modus in placitando aliquem de terris et tenement' in Francia ita nec debet Francigena alienigena, qui fuit ad fidem Regis Franciae, audiri placitando in Anglia: sed tamen sunt aliqui Francigenae in Francia qui sunt ad fidem utriusque, et semper fuerunt ante Normanniae deperditam et post, et qui placitant hic et ibi, ea ratione qua sunt ad fidem utriusque, sicut fuit Willielmus comes marescallus et manens Anglia, et M. de Gynes manens in Francia, et alii plures. Concerning the reason drawn from the (a) etymologies, it made against them, for that by their own derivation *alienae gentis* and *alienae ligeantiae* is all one: but arguments drawn from etymologies are too weak and too light for Judges to build their judgments upon: for *saepenumero ubi proprietas (b) verborum attenditur, sensus veritatis amittitur*: and yet when they agree with the judgment of law, Judges may use them for ornaments. But on the other side, some inconveniences should follow, if the plea against the plaintiff should be allowed: for first it maketh ligeance local: *videlicet, ligeantia Regis regni sui Scotiae*, and *ligeantia Regis regni sui Angliae*: whereupon should follow, first, that faith or ligeance, which is universal, should be confined within local limits and bounds: secondly, that the subjects should not be bound to serve the King in peace or in war out of those limits; thirdly, it should illegitimate many, and some of noble blood, which were born in Gascoin, Guienne, Normandy, Calais, Tournay, France, and divers other of His Majesty's dominions, whilst the same were in actual [28 a] obedience, and in Berwick, Ireland, Guernsey, and Jersey, if this plea should have been admitted for good. And, thirdly, this strange and new devised plea inclineth too much to countenance that dangerous and desperate error of the Spencers, touched before, to receive any allowance within Westminster hall.

In the proceeding of this case, these things were observed, and so did the Chief Justice of the Common Pleas publicly deliver in the end of his argument in the Exchequer Chamber. First, that no commandment or message by word or writing was sent or delivered from any whatsoever to any of the Judges, to cause them to incline to any opinion in this case; which I remember, for that it is honourable for the State, and consonant to the laws and statutes of this realm. Secondly, there was observed, what a concurrence of judgments, resolutions, and rules, there be in our books in all ages concerning this case, as if they had been prepared for the deciding of the question of this point: and that (which never fell out in any doubtful case) no one opinion in all our books is against this judgment. Thirdly, that the five Judges of the King's Bench, who adjourned this case into the Exchequer Chamber, rather adjourned it for weight than difficulty, for all they in their arguments *una voce* concurred with the judgment. Fourthly, that never any case was adjudged in the Exchequer Chamber with greater concordance and less variety of opinions, the Lord Chancellor and twelve of the Judges concurring in one opinion. Fifthly, that there was not in any remembrance so honourable, great, and intelligent an auditory at the hearing of the arguments of any Exchequer Chamber case, as was at this case now adjudged. Sixthly, it appeareth, that *jurisprudentia legis communis Angliae est scientia socialis et copiosa*: sociable, in that it agreeth with the principles and rules of other excellent sciences, divine and human: copious, for that *quamvis ad ea quae frequentius accidunt jura adaptantur*, yet in a case so rare, and of such a quality, that loss is the assured end of the practice of it (for no alien can purchase lands, but he loseth them; and *ipso facto* the King is entitled thereunto, in respect whereof a man would think few men would attempt it) there should be such a multitude and *farrago* of authorities in all successions of ages, in our books and bookcases, for the deciding of a point of so rare an accident. *Et sic determinata et terminata est ista quaestio.*

[28 b] *The Judgment in the said Case, as entered on Record, &c.*

"Whereupon all and singular the premises being seen, and by the Court of the Lord the now King here diligently inspected and examined, and mature deliberation being had thereof; for that it appears to the Court of the Lord the now King here, that the aforesaid plea of the said Richard Smith and Nicholas Smith above pleaded,

(a) Co. Lit. 68. b.

is not sufficient in law to bar the said Robert Calvin from having an answer to his aforesaid writ: therefore it is considered by the Court of the lord the now King here, that the aforesaid Richard Smith and Nicholas Smith to the writ of the said Robert do further answer."

[See now the statutes for the union of both kingdoms.]—*Note to former edition.*

[1 a] BULWER'S CASE.

Mich. 28 & 29 Eliz.

[See *British South Africa Company* v. *Companhia de Moçambique* [1893], A. C. 631.]

B. brought an action on the case in the county of N. for maliciously causing him to be outlawed in London upon process sued out of a Court at Westminster, and causing him to be imprisoned in N. upon a *capias utlagatum* directed to the sheriff of that county, but issued at Westminster; and upon demurrer it was adjudged that the action was well brought in the county of N.

In all cases where the action is founded on two things done in several counties, and both are material or traversable, and the one without the other does not maintain the action, the plaintiff may bring his action in which county he will. S. C. 4 Leon. 53.

Bulwer of Dalling in Norfolk, brought an action on his case against George Smith, and declared that one Henry Heydon, Esq. did recover 20l. &c. in the Common Pleas against the plaintiff, and after judgment, and before execution, the said Henry Heydon died, and afterwards the said defendant knowing thereof, at W. in the county of Norfolk to outlaw the plaintiff upon the said judgment in the name of Henry Heydon *maliciose et deceptive machinatus est*, in performance of which the defendant, Trin. 23 Eliz. at Westminster in Middlesex, purchased a writ of *capias ad satisfaciendum*, in the name of the said Henry, upon the said judgment, directed to the Sheriffs of London, who by the procurement of the defendant returned *non est inventus*; whereupon the defendant purchased a writ of *exigent* in the name of the said Henry, which writ the said sheriff by the procurement of the said defendant returned, that at several Hustings the said now plaintiff had been demanded, *et ad Hustingum de communibus placitis tent' in Guildhalda civitatis praed' die Lun' prox' post Festum Apostol. Simonis et Jud. anno supradict' praed'* the now plaintiff, *quint' exactus fuit, &c., et ideo ipse* the plaintiff *utlagatus fuit*: and afterwards Pasch. 24 El. the defendant purchased out of the said Common Pleas a writ of *capias utlagatum*, in the name of the said Henry, directed to the Sheriff of Norfolk, to arrest his body, &c. which writ did mention that the said now plaintiff was outlawed *die Lun' prox' ante Festum Apostolorum Simonis et Jud'*, &c. And the said writ the defendant at W. aforesaid in the said county of Norfolk, did deliver to one Robert Godfrey then deputy to the sheriff of the said county, to the intent that he should execute the said writ, the which Robert by force of the said writ took, and arrested the said now plaintiff, and did imprison him by the space of two months, until the now plaintiff purchased his charter of pardon, by reason of which outlawry he forfeited all his goods and chattels: and upon this declaration the defendant did demur in law; and the principal cause of the demurrer was because this action, by the pretence of the defendant, [1 b] ought to have been brought in Middlesex where the wrong began, for there (as it was said) the defendant took out as well the *cap' ad satisfac'* as the *exigent* and the *cap' utlagatum* also. And although the *cap' utlagat'* was executed in Norfolk, yet the action ought to be brought where the wrong began; as in the case of conspiracy in 43 E. 3. 14 a. and divers other cases also were put; also by the outlawry which was in London all his goods and chattels were forfeited where it is more reason to bring the action than in Norfolk. But it was answered and resolved, that the (a) action was well brought in Norfolk; for it

(a) ... Cr. Car. 90. 91. Dy. 40. pl. 66.

Annex B (P. 4/6)

upon it, but plead to the *writ*, that he owes him nothing, and it is found against him, he shall be thereby charged of the goods of the dead; and the cause why he may be helped by demurring upon the declaration in that case, is, because the testator might have waged his law in that case of debt, which the executor could not do of other contracts, and therefore shall not be charged with it by such an act, if he will help himself by demurrer; but in the assumption of his testator, he could not have waged his law: and it is founded upon the death of the testator, to wit, his debt, with which the executor by a mean may be charged as before, and therefore the assumption in such a case maintainable against the executor. But if the testator upon good consideration assume to make assurance of land, or to do any other such collateral thing which doth not found in a duty of a thing payable, there the executor shall never be charged with such an assumption to render recompence for it. And to this agreed all the Justices of the Common Bench, and Barons of the Exchequer; and such an assumption hath not been allowed in the King's Bench but of late time, and that but in one or two cases. But in the other case it hath been common and of long time used, and therefore now too late to be drawn in question; and if it should be, it may be maintained with good reason in this case of a duty of a thing payable, in as much as the testator cannot wage his law in the action, but in the other case there is no reason nor course of the Court to maintain it: but the Judges in the Exchequer Chamber reversed all these judgments in both cases.

[33] 2. *Note*, that this term was adjourned to *Octab. Trin.* and because the writ was, that adjournment shall be made in *Octab. Trin.* of all cases, until *Tres Trinitat.* the adjournment was made in every of the Courts of King's Bench, Common Bench, and the Exchequer, the very first day of *Octab. Trin* then it was holden by the justices, that the adjournment ought not to have been made until the sitting of the Court the fourth day from *Octabis*.

And because that the writs were, that at the said *Tres Tr.* the term shall be holden thereafter, as if no adjournment had been, the justices hold that they ought to sit the first day of the said *Tres Trin.* and so from thence every day until the end of the term, and for all causes, as if no adjournment had been; and so they did accordingly, saving by assent some of the justices did not come thither by reason of their far distance from London, at the end of the term upon the last adjournment: but they held, that if it had not been for the especial words in the writ, which were, that it shall be then holden as if no adjournment had been, the essoins had been the first day of *Tres Trin.* and the full term had not been until the fourth day, which was the last day of the term, *quod nota*, and so it was of the adjournment which happened first at Westminster, and afterwards at Hertford from Michaelmas term now last past.

GRAVENOR *versus* BROOK AND OTHERS.

Michaelmas Term, 35 and 36 Eliz.

1. In an *ejectione firmæ* by Edward Gravenor plaintiff, against Richard Brook and others defendants, the case appeared to be this; Henry Hall was seised in his demesn as of fee, according to the custom of the manor of A. in the county of D. of certain customary tenements holden of the said manor called Fairchildes and Preachers, &c. In the third year of H. 8. (before which time the customary tenements of the said manor had always been used to be granted by copy of court-roll of the said manor in fee-simple, or for life or years, but never in fee-tail but then) the said Henry Hall surrendered his said copy-hold land, to the use of Joan his eldest daughter for her life, the remainder to John Gravenor the eldest son of the said Joan, and to the heirs of his body, the remainder to Henry Gravenor her other son, and the heirs of his body, the remainder to the right heirs of the said Henry Hall for ever; whereupon in 3 H. 8. at the court then there holden, a grant was made by copy of court-roll accordingly, and seisin given to the said Joan by the lord accordingly.

Henry Hall died, having issue the said Joan and one Elizabeth, and at the court

by the homage, and that the said daughters were his heirs, and that the surrender made as before was void, because it was not used within the said manor to make surrenders of estates tail, and thereupon the said homage made division of the said land, and limited Fairchildes for the purparty of the said Joan, and Preachers for the purparty of the said Elizabeth, and seisin was granted to them accordingly.

Elizabeth died seised of her said part, after which, 33 H. 8 Margaret her daughter was found heir to her, and admitted tenant to this part; after which Joan died seised of the said tenements as the law will.

[34] And after the said Margaret takes to husband one John Adye, who with his said wife surrendred his said part to the use of the said John Adye and of his said wife, and of their heirs; and afterwards the said Margaret died without issue, and the said John Adye held the part of the said wife, and surrendred it to the use of the said Richard Brook, and of one John North, and their heirs who were admitted accordingly, after which, the said John Gravenor died without issue, and now the said Henry Gravenor was sole heir to him, and also to the said Henry Hall who had issue Edward Gravenor, and died, the said Edward entred into the said land called Preachers, and did let it to the plaintiff, upon whom the said Richard Brook and the other defendants did re enter and eject him. And all this appeareth upon a special verdict.

And by Clench and Gawdy, an estate tail cannot be of copy-hold land, unless it be in case where it hath been used, for the Statute of Donis Conditionalibus shall not enure to such customary lands, but to lands which are at common law, and therefore an estate tail cannot be of these customary lands, but in case where it hath been used time out of mind, and they said, that so it hath been lately taken in the Common Bench; but they said, that the first remainder limited to the said John Gravenor here upon the death of the said John, was a good fee-simple conditional, which is well warranted by the custom to demise in fee, for that which by custom may be demised of an estate in fee absolute, may also be demised of a fee simple conditional, or upon any other limitation, as if I. S. hath no long issue of his body, and the like, but in such a case no remainder can be limited over, for one fee cannot remain over upon another, and therefore the remainder to the said Henry was void: but they said, that for all the life of the said John Gravenor, nothing was in the said Elizabeth which could descend from her to the said Margaret her daughter, or that might be surrendred by the said Margaret and her husband, and therefore the said Margaret dying without issue, in the life time of the said John Gravenor who had the fee-simple conditional, nothing was done which might hinder the said Edward, son to the said Henry Gravenor of his entry, and therefore the said plaintiff ought to have his judgment to recover, for they took no regard to that which the homage did, 4 H. 8.

But Fenner and Popham held, that no estate tail is brought out of copy-hold land by the equity of the Statute of Donis Conditionalibus, for otherwise it cannot be that there can be any estate tail of copy-hold land, for by usage it cannot be maintained, because that no estate tail was known in law before this statute, but all were fee simple, and after this statute it cannot be by usage, because this is within the time of limitation, after which an usage cannot make a prescription, as appeareth 22 & 23 Eliz. in Dyer: and by 8 Eliz. a custom cannot be made after Westm. 2. And what estates are of copy-hold land, appeareth expresly by Littleton, in his chapter of Tenant by Copy hold, &c. and in Brook title, Tenant by Copy-hold, &c. 15 H. 8. in both which it appeareth that a plaint lyeth in copy-hold land in the nature of a *formedon* in the descender at common law, and this could not be before the Statute of Donis Conditionalibus for such land, because that before that statute there was not any *formedon* in the descender at common law, and therefore the statute helps them for their remedy for intailed land which is customary by equity: and if the action shall be given by equity for this land, why shall not the statute by the same equity work to make an estate in tail also of this nature of the land? We see no reason to the contrary; and if a man will well mark the words of the statute of Westm. 2. cap. 1. he shall well perceive that the *formedon* in descender was not before this statute, which wills that in a new case a new remedy may be given, and thereupon acts the

Brevium: the *tenendum* in the descender is founded upon this statute, and was not at common law before; and the reason is, because these copy-holds are now become by usage to be such estates that the law allows them to be *good* against the lords themselves, they performing their customs and services, and therefore are more commonly guided by the guides and rules of the common law, and therefore as appeareth in Dyer, Trin. 12 Eliz. *possessio fratris*, of such an estate, *facit sororem esse hæredem*. And to say that estates of copy-hold land are not warranted but by custom, and every custom lies in usage, and without usage a custom cannot be, is true, but in the usage of the greater the lesser is always implyed: as by usage, three lives have been always granted by copy of court roll, but never within memory, two, or one alone, yet the grant of one or two lives only is warranted by this custom, for the use of the greater number warrants the lesser number of lives, but not *e converso*: and so fee simples upon a limitation, or estate in tail are warranted by the equity of the statute, because they are lesser estates than are warranted by the custom, and these lesser are implyed as before in the greater, and none will doubt but that in this case the lord may make a demise for life, the remainder over in fee, and it is well warranted by the custom, and therefore it seems to them that it is a good estate tail to John Gravenor, and a good remainder over to Henry his brother, and if so, it follows that the plaintiff hath a good title to the land, and that judgment ought to be given for him. And for the dying seised of Elizabeth, they did not regard it, for she cannot die seised of it as a copy-holder, for she had no right to be copy-holder of it: and by the dying seised of a copy holder at common law, it shall be no prejudice to him who hath right, for he may enter; but here in as much as she cometh in by admittance of the lord at the court, her occupation cannot be tortious to him, and therefore no descent at common law by her dying seised, for it was but as an occupation at will. But if it shall not be an estate tail in John Gravenor, as they conceive strongly it is, yet for the other causes alledged by Gawdy and Clench, judgment ought to be given for the plaintiff, and the remainder which is not good shall not prejudice the fee-simple conditional granted to John, which is no more than if the surrender had been to the use of John Gravenor and his heirs, the remainder over, because that we as Judges see that this cannot be good by law, and therefore not to be compared to the case where the custom warrants but one life, and the lord grants two jointly or successively, there both the one and the other is void: and this is true, because the custom is the cause that it was void, and not the law, and also it is a larger estate than the custom warrants, which is not here, and upon this judgment was given that the plaintiff shall recover.

And by Popham, it hath been used, and that upon good advice in some manors, to bar such estates tail by a common recovery prosecuted in the lord's court, upon a plaint in the nature of a writ of entry in the post.

2. Julius Cæsar Judge of the Admiralty Court, brought an action upon the case for a slander against Philip Curtine a merchant-stranger, for saying that the said Cæsar had given a corrupt sentence; and upon not guilty pleaded, and 200 marks damages given, it was alledged in arrest of judgment, where it was tryed, by Nisi Prius at the Guild hall by a partial inquest, because that upon the default of strangers, one being challenged and tryed out a tales was awarded *de circumstantibus* by the Justice of Nisi Prius; whereas (as was alledged) a tales could not have been granted in this case, for the statute of 35 H. 8. cap. 6. which give the tales is to be intended but of common tryals of English, for the statute speaks at the beginning but of such [36] juries, which by law ought to have 40*s.* of free-hold, and wills that in such cases the *venire facias* ought to have this clause, *quorum quilibet habeat* 40*s.* *in terris, &c.* which cannot be intended of aliens which cannot have free hold: and it goes further that upon default of jurors, the justices have authority at the prayer of the plaintiff or defendant, to command the sheriff or other minister to whom it appertaineth to make a return of such other able persons of the said county, then present at the same Assises or Nisi Prius which shall make a full jury, &c. which cannot be intended of aliens, but of subjects, and therefore shall be of tryals which are only of English, and not of the inquest which

And further the tales was awarded only of aliens, as was alledged on the defendant's part, but in this point it was a mistake, for the tales was awarded generally *de circumstantibus*, which ought always to be of such as the principal panuel was. But *per Curiam* the exceptions were disallowed, for albeit the statute is, as hath been said, yet when the statute comes to this clause, which gives that a tales may be granted by the Justices of Nisi Prius, and is generally referred to the former part of the Act, for it is added: furthermore be it enacted that upon every first writ of *habeas corpora*, or *distringas* with a Nisi Prius, &c. the sheriff, &c. shall return upon every juror 6*s.* issues at the least, &c. which is general of all: and then it goes further, and wills that in every such writ of *habeas corpora*, or *distringas* with a Nisi Prius where a full jury doth not appear before the Justices of Assise, or Nisi Prius, that they have power to command the sheriff, or other minister to whom it appertains, to nominate such other persons as before, which is general in all places where a Nisi Prius is granted, and therefore this is not excepted neither by the letter nor intent of the law. And where it is said (such persons) by it, is to be intended such as the first, which shall be of aliens as well as English, where the case requires it, for expedition was as requisite in cases for, or against them, as if it were between other persons. And aliens may well be of the county or place where the Nisi Prius is to be taken, and may be there: for although an alien cannot purchase land of an estate of free-hold within the realm, yet he may have an house for habitation within it, for the time that he is there, albeit he be no denizen, but be to remain there for merchandise, or the like: and by Gawdy, where the default was only of strangers, the tales might have been awarded only of aliens, as where a thing is to be tryed by inquest within two counties, and those of the one county appear, but not those of the other, the tales might be of the other county only.