11. The Bankers Case in Cam. Scacc.

[Followed, *Thomas* v. *R.*, 1874, L. R. 10 Q. B. 31. Referred to, *Windsor, &c., Railway Company* v. *R.*, 1886, 11 App. Cas. 614.]

This case was argued this term by Holt Chief Justice, it having been argued by all the Justices of the Common Pleas and King's Bench before, upon a writ of error upon a judgment in the Court of Exchequer; in which the case was, that Williamson one of the defendants in the writ of error, came into the Exchequer, and brought in there the letters patents of Car. 2, in which he recites that he was indebted to diverse persons in diverse sums particularly there mentioned, and that there was such a deficiency in his affairs, that he could not pay them, and particularly that he was indebted to Sir Robert Viner 416000l. 8s. 2d. ob. for the payment of the interest of which sum, he grants for him, his heirs and successors 25000l. per ann. to be paid out of his revenue of the hereditary excise to Sir Robert Viner in trust for such creditors of Sir Robert Viner, who would deliver their securities, and take assignments for their debts; and by the same letters patents he directs the officers of the Exchequer to strike talleys, and upon the receipt of the revenue of the excise, to pay them immediately after the sum of 14000l. in charge to the Queen, and another sum to the Duke of York: proviso, that if the King pay to Sir Robert Viner, &c. their principal sum, then the letters patents to be void: Williamson took an assignment of 60l. per annum, for a debt due to him by Sir Robert Viner of 1000l. and delivered his security, and this assignment was enrolled; and he brought the letters patents and assignments into the Court of Exchequer, and prayed them to be allowed, and that he might be paid the arrears of the 60l. per annum, and the annuity of 60l. per annum for the future, by the commissioners of the Treasury, and the Chamberlain of the Exchequer out of the Treasury, out of the revenue arising out of that part of the excise charged by the letters patents; upon which the Attorney General demurred; and it was adjudged for the complainants, **[602]** upon which a writ of error is brought; and two points have been made.

First, if the grant by the King of these annual sums be good to charge this hereditary revenue. Secondly, if it be good, then the question is, if the parties have taken a proper remedy; and he said, that he would consider thirdly, if the entry of the judgment be good.

First, he said that the grant is good to charge the hereditary revenue in fee, and to bind his successors; for the King was seised of this revenue in fee, to which estate a power to alien or charge is annexed by the law; that he had such estate, is without question, because this revenue was given in lieu of purveyance, and tenures in capite, and by knight's service, in which the Crown had an inheritance, and therefore without such an estate, which he had before, it had not been a satisfaction. Secondly, the words of the Act gave to him an inheritance; and he having an estate in fee, it is a fundamental point of law, that it may be charged or aliened, for so is Littleton express, Sect. 360, and no person natural or politick who has a fee, but may alien it; and it is no objection, that they are given under a trust, for every one knows that a bishop, dean and chapter, &c. are corporations which have their estates under a trust, yet they may alien; and though a parson may not alien by himself, yet he may by the consent of the patron and Ordinary; but the law not having appointed others to consent in the case of the King, he may alien without any consent; and to say that he may alien with the consent of the Estates of the Realm, is all one as to say that he may alien by Act of Parliament, which is to say that he may not alien at all without an Act of Parliament; for to alien by Act of Parliament, is to alien by a new law made for that purpose; and he said, that it was not given to the King under a trust, but it was a purchase by the King in the place of an inheritance heretofore in him, which he had given up for the advantage of the subject, and accepted of this as a satisfaction for his pristine inheritance; and as to the objection, that if the King has such a power to alien the inheritance of the Crown, that this will be prejudicial, and he might infeeble the realm, and waste the revenues of the Crown by lavish **[603]** and profuse grants of it; he answered that such a dishonourable thing ought not to be supposed of the King, to whom the law attributes so much power and dignity;

and to restrain the King from such a power, is absurd, and against the constitution of the realm. First, absurd, because by this he would have less power than any of his subjects, or than he himself had, when he was a subject; and many who have ascended the throne were masters of great estates and possessions, the which they might have aliened when they were subjects; but when they came to ascend the throne, they were seised of these possessions in jure Coronæ in their politick capacity, and not in their private capacity, 7 Rep. 12. Dyer 178. Com. 105, 166, 244, and if they could not be seised but in jure Coronæ, and they could not alien that of which they were seised jure Coronæ, they were under a greater disability, after their ascent to the throne, than when they were subjects, when the maxim is, that the descent of the Crown takes away all disabilities: also secondly, it is contrary to the constitution; for the necessity of affairs might require the King to raise money, before a Parliament could be convened to give it, in which case he has not any way but to borrow; now if the King has not any power to charge or alien his revenue, there may be such a juncture, that the realm might be destroyed for the want of it; for tho' the way which has been often used to extort loans from the subject by Privy Seals, &c. is not to be commended or practiced, but condemned; yet he did not see any harm in the prince's borrowing; and in fact many of our Kings have borrowed, as may be seen in Cotton's Posthuma 175, 176, &c.

Secondly, in all Governments there ought to be a power of rewards and punishments, which are the supports of every State; punishments are directed by the law, but rewards are arbitrary; and where a man has done service to his country, pensions for life are not sufficient; for men endeavour to ennoble their families, especially under a Monarchy; Mirroir 2, 3. Selden 538, 839, that before the Statute de Donis, all honours were granted in fee, and by this the nobles were more strongly incited to actions of virtue and honour; and the law does not admit infancy in the King, because **[604]** that he should not be disabled to reward; as it is said in 7 Rep. 12, and this is also approved on by Act of Parliament, scil. 34 Hen. 8, cap. 20, the preamble of which Act he recited. Thirdly, there is greater reason that the King should not be disabled to grant or charge, than there is for a subject or common person; for the King has so many ways to augment his revenue, as forfeitures, escheats, fines, and other incomes, that if he could not alien them, and was a frugal prince, he would possess the greater part of the land in a little time, which would be a great discouragement to industry; and if Hen. 8, had been of the temper of his father, he by the dissolution of the monasteries, and the great treasures of his father, would have been owner of all the lands in the realm; it has been said, that lands which come by escheat, or forfeiture might be aliened; but that the antient inheritance of the Crown, or that which came by Act of Parliament could not; and he said, that the law did not make any difference in any book between the antient inheritance of the Crown, or lands settled by Act of Parliament, and lands which came by forfeitures or escheats: he said that it appeared by Domesday Book, that there were antiqua dominica, and the tenants of those lands were by their tenure to plow and sow the lands of the King, and to pay such rents in provisions for the King's house; and for this reason they had diverse privileges, as not to be sued out of their manor, not to pay toll, or to be contributory to the expences of knights of the shire, &c. and these services and tenures were an advantage to the rest of the subjects, in respect that the King being so served, he had not occasion for purveyance; and yet these lands, the antient inheritance of the Crown, were alienable; and if these lands were alienable, he demanded what lands are not alienable? and that they are alienable appears, N. B. 11, 12, for writs of right close are to be directed to the bailiffs of subjects; and if the law has made a provision by an original writ, that right be done in these manors being in the hand of a subject; this is an argument that they are alienable; and he did not know any reason for a difference between the antient lands of the inheritance of the Crown and other estates which the **[605]** King has, which are of an higher nature, and called the flowers of the Crown, as waifs, strays, &c. 9 Rep. *The Abbot of Strata Marcella's case;* also hundreds might be aliened in fee, till for several inconveniences it was restrained by the statute of Edw. 3, and the King might erect a County Palatine, and separate it from the immediate Government of the King with a power to pardon, treasons, felonies, &c. till the statute of 27 H. 8, cap. 24, which reunites these liberties and privileges to the Crown.

It is objected that this revenue is given by Act of Parliament.

He answered, first, suppose a fee be given to a subject by Act of Parliament, he would have the same powers, as over another fee purchased from a subject? and for what reason shall it not be so in the case of the King? and if there be not any reason for a difference in the case of the King, and in the case of a subject, there is not any difference: but secondly, fee-simple estates given to the King by Act of Parliament have been actually aliened, though no power given by the Act to the King to alien; for he has it by consequence in law, as in the case of the monasteries which are all aliened.

Objection, that this rises out of the purse of the people.

He answered, though it be raised out of the purse of the people, yet it is the property of the King, and all one as if they never had it, and there is no difference if you pay to the King or his alienee, 21 Edw. 3, 47. Prinn upon 4 Inst. 245. Knighton 2684. 2 Inst. 530. Davis 7, 14, of the grant of the Cocket Custom to the Corporation of Waterford; and there is not any difference between a grant of customs, which rise out of the purse of the people, and a grant of the excise.

Objection, that they are not alienable, because they come in the place of an inheritance, which the King could not have aliened, as tenures in capite, purveyance, &c.

Suppose that they were not alienable, yet these inheritances are now at this day extinct, and therefore they cannot affect an inheritance of another nature newly granted; besides the King, though he may not grant **[606]** these inheritances to others, yet he may discharge or release them. Moor 833. 1 Roll, 146. 9 Rep. 123, *Loe's case.*

But it is said that by the old law, the antient revenues of the Crown are not alienable; and for this Britton 87, and Fleta L. 3, c. 6, are cited.

First, the practice is against these books; and secondly, Britton has not any such opinion, for he is to be understood that the King may not alien the prerogatives of his Crown, as to grant to another power of pardon, &c. which would be to devest himself of part of his princely authority; and as to Fleta, Selden questions if there ever was such a constitution in his dissertations upon Fleta 549, 552, but if there was such a constitution, it never was received in this realm, and therefore it cannot bind here, 2 Inst. 273, and he said, that no grant of the King ever was avoided, for want of power in the King, but in cases where the King has been deceived, &c. and the several Acts of Resumption which have been made, are so many proofs that the King had such a power, and that there was no other way to avoid the grant, as 6 Hen. 4, 14. Cotton's Records 439. 1 Rich. 2, 58. Cotton's Records 159, and Fleta in another place departs from what he had said; and the length of time is no bar, for the Book of Domesday will evince the contrary, and shew that the lands were the Kings; for this book is a record, and a certiorari lies upon it, and it is the only record which may be pleaded, it being before time of memory; also Bracton is econtra, and the Stat. de Bigamis is a proof of it, c. 2, that the grant of the King is good; and Fortescue in his book de Laudibus Legum Angliæ, where he instructs the prince in the nature of this Government; if the Crown be disabled to grant and dispose, he would not have omitted to acquaint his prince of it.

It is said, that the fee-farms have been granted by Act of Parliament; and this was because the opinion was that the grant was not good without an Act of Parliament.

The Act of Parliament was not necessary to enable the King to make a grant of these rents, but to encourage purchasors, and to give such privileges to the subject, which the King could not transfer without Act of Parlia-**[607]**-ment, and to cure and supply the defects of nonrecital or misrecital; and the Act itself is an authority that the King might alien, for the Act declares the letters patents good, which were granted before.

But it is said, that if the excise be alienable, that then the King's officers would be the officers of the subject, which would be absurd and inconvenient.

The officers may be the officers of the King, and collect the duty of the subject; as in the case of a gaol in the hands of a subject, he may sue in Chancery for a commission of gaol-delivery; in which case the justices shall be the justices of the King,

but they shall deliver the gaol of a subject; and so in the case of a forest in the hands of a subject; 1 Inst. 2. 12 Rep. 22, and he said that no intent appears in the Act to appropriate this revenue to the Crown, but only words of grant to the King and his heirs; but in the Act for hearth-money, there is a proviso, that the King may not alien.

It is said, that provision is made to restrain the Treasurer to make a lease beyond three years.

This restrains the Treasurer ex officio to lease beyond three years, but does not restrain the King; for that the Treasurer has such a power to make a lease is allowed in *Lane's case* 2 Rep. but no intent to restrain the King appearing, he could not think that he is restrained; as to that objection to the grant, that it is of an annual sum or rent which issues out of the thing in grant, and therefore it is not good; he said that an annual rent is a proper word for an annuity, but if the King grants an annuity, this does not charge his person, Fitzherb. Annuity 152, and the word pension is not so proper, and it is in the nature of a rent-charge, 2 Cr. 78, 79, and it is assignable over, and so in this case; it is objected that this grant is made in satisfaction of a debt of 4160000l. the which may not be, for how can this be a satisfaction for a debt due to another? the King takes notice that he was in debt, and that the debt was stated at such a sum, so that the King was not deceived; also it is a consideration passed, and therefore it shall not avoid the grant, 10 Rep. *St. Saviour's case*, for the consideration being passed, every thing shall be intended to be done to make the grant good, Com. 554, **[608]** and for these reasons he concluded that the grant of the King in this case was good.

As to the remedy, he held also that the patentee and assignee had taken a proper remedy; he said that all his brothers had agreed that here the assignee, &c. had a legal right, and therefore there is a legal remedy, and it is in vain to have the one without the other; and he said, first, that monstrans de droit, and petition of right were the remedies in such case at the common law; and the monstrans de droit is enlarged by several statutes, and except in a few cases a traverse lies, 4 Rep. 54. 2 Inst. 688. Stamf. Prerogat. 74, but this case is not within any of the statutes, but is at common law; and the party in this case is not put to his petition of right, but monstrans de droit is his proper way; a petition of right is not necessary, though the party may admit himself out of possession, as in the case of a tenant in tail of a rent, who may have a formedon, and then a warranty would bar him, but this is not necessary; so here if the party will admit himself out of possession, he might have a petition of right. Secondly, a petition of right is not necessary, because a petition of right is grounded upon a matter of fact suggested, upon which a commission issues to enquire of the truth of this suggestion, except the Attorney General confesses the truth of the matter suggested, as in a petition of dower, 3 Inst. 215. Moor 639. Co. Ent. 462. 9 Hen. 4, 4, but here no matter of fact is to be inquired of, but his title is by letters patent which are matter of record; it is true that Williamson claims under Sir Robert Viner, but he claims by deed enrolled directed by the patent; neither does the patentee go to destroy the title of the King; but this is in affirmance of the King's title, and in all cases of a petition to the King, this is to controvert the title of the King; the case might have been so, that a petition might have been necessary; as if Sir Robert Viner had been attainted before the assignment inrolled, and after the grant made, and a seisure had been made into the King's hand, the party ought to go by way of petition; for in no case is the party put to his petition, but when he controverts the title of the King; but here the annuity is not put to a right; nothing **[609]** is done to turn the subject's title to a right, and therefore there is no reason to have a petition; also as a petition is not necessary, so the remedy here pursued is proper, scil. a monstrans de droit, which is a remedy at common law; Kell. 178. 4 Rep. 55, and if it be demanded when is such remedy to be pursued, it may be answered when the title appears upon record, as suppose an inquisition found a title for the King, as also one for the party, as in the case of an alienation in mortmain by a disseisor; *Sadler's case* 4 Rep. And that a monstrans de droit lies in the Exchequer appears in *Sheffeild's case*, and is admitted in the Com. 186. Coke's Entr. 205 [though 26 E. 3, does not mention the Exchequer,] for it lies in some cases there by the common law; and at this day a monstrans de droit lies only in Chancery and the Exchequer, except in a special case.

As to the authorities which have been cited, he said that Ryly 251, is an authority for him, and proves first, that the Exchequer might hold plea in an annuity of the grant of the King, secondly, that the Court of Exchequer may compel the Treasurer and Chamberlain to make payment to the patentee; but it has been objected against this case, first, that the petition was to the King in Parliament, which was the ground of this proceeding; secondly, that there was a liberate upon which the Exchequer might hold plea; thirdly, that it was not directed to the Barons alone, but to the Treasurer and Barons.

As to the first, he denied that the proceeding was upon the petition; there are several ways of petition; as a petition of right preferable in Parliament, as well as out of Parliament, as Ryley 257. Stanf. Prerog. 72, but the petition in the case above was only by way of complaint, and this appears by the answer indorsed, which was, go into the Exchequer, and shew your charter to the Barons, and they will do right; and it is not the petition which impowers the Barons. As to the second objection, that there was a liberate in that case, but no such writ here; he answered, that a liberate is but a writ of allowance, which may give credit, but no jurisdiction, Registr. 192, 193, and in the old time when the King's charters were pleaded, there was a writ of **[610]** allowance; and now by the statute of Rich. 2, cap. 9, the Court of Exchequer ought to proceed without such writs; 4 Inst. 110. As to the third objection, that the Parliament in that case directed that a writ be sued to the Treasurer, and therefore the Barons could not proceed, for they had not a jurisdiction upon the Treasurer; he answered, that if the Barons have not a jurisdiction, there is no jurisdiction, for the Treasurer has none, and these matters are to be determined before the Barons only; and though writs are directed to the Treasurer and Barons, yet the Treasurer has not any jurisdiction, for the cursitors would not alter their course, as in the case upon the Statute of West. 2, of a parte talis; and therefore the form of the direction of writs is no argument, for it is communis error, Regist. 137. N. B. 129 b. and if the Treasurer has not jurisdiction in the Court of Pleas, this suit is well brought before the Barons, and the peers take notice of the jurisdiction which the Barons have. Ryly 262.

And he said that 9 H. 6, 13, is not a mean authority; and the question there was, if the grant there charged the person of the Queen, or issued out of the custom; and such a grant as this was taken to be good then; and he said that such a proceeding as here, is not a stranger to Westminster Hall; but he agreed with what is said in *Walker's case*, 3 Rep. 23, that he suspected the legitimacy of a case, which never had another case of kin to it; and as to this he cited Coke's Ent. 93, where the King grants fines and amercements, and to be quit of toll, &c. and if the King might make such a grant in the case of a liberty, for what reason may he not do it in the case of a rent? Term 25 Car. 2, R. B. Lady Broughton was convicted of extortion from the prisoners in the prison of the Gatehouse at Westminster, and fined, and the office seised into the hands of the King, and the sheriff had the custody of the prisoners; the Dean and Chapter of Westminster had the inheritance, and came and claimed the prison, and prayed an amoveas manus; and upon this the Attorney General came and confessed their plea; and it was adjudged that the King's hands be amoved, and the prisoners were delivered to the custody of the dean and chapter; and this was a monstrans de droit, and brought in R. B. because the record of the conviction and sei-**[611]**-sure were there; so here the monstrans de droit is proper in the Exchequer, because the treasure is here; and this is the usual Court.

It is objected, that the Office of Receipt is distinct from the Court of Exchequer, and that money issues without the direction of the Barons, which is as much as to say, that they have nothing to do in this matter; he answered, that though this in fact be so, yet he questioned if it be of right, or no; for the judicial power is in the Barons, and the issuing out of money is as much part of the power of the Barons, as the receipt; and upon the accounts of the auditors, it is to be determined by them, if the treasure be duly issued or not, for the Barons are the supreme auditors; 4 Inst. tit. Exchequer, and Gervasius Tilburiensis; but it is said, that the Barons are auditors for the King's profit, to bring in his revenue, that they may adjudge for his profit, and give orders to bring his revenue in, but they cannot issue it out; this is as much as to say, that they may determine for the King, but not against him; but the Barons

may determine all matters concerning the revenue, and they and the King have a privilege to sue in this Court, and not the officers of the Court only, 2 Inst. 550, 551, besides, this judgment is not an issuing of the revenue, but a determination of a right; the revenue is issued under the Great Seal, and by this the subject gains a property, the Barons only determine if the letters patents bind and are legal; as if judgment be given upon an obligation, the obligor disposes of the property, the judgment only determines the right; but say they, it is incongruous that the Barons should command the Treasurer who is a superior officer: the Treasurer has precedency before all the Barons, as the Chief Baron in respect of the other Barons; but he is subject to the judgment of the Court; he ought to submit to the King's writ as well as another.

As to the cases and authorities upon which he grounded his opinion, he relied upon *Sir Thomas Wroth's case*, in the Com. 458, as a clear authority not impeached by any objection; for though it was objected that this grant was under the seal of the Court of Augmentations, the which being united to the Exchequer, **[612]** they may proceed there as the Court of Augmentation might have done, and therefore as to this purpose the Court of Exchequer is as a Court of Augmentation; and the Statute of 1 Queen Mary directs payments by the Court to which the Court of Augmentations was united, or by any other Court of Revenue; yet he answered and said, first, that this notwithstanding, the Court of Augmentations never was united to the Exchequer, Dyer 216 a. where it appears that the uniting of the Court of Augmentations to the Exchequer was a void union; for the Court was dissolved by letters patents dated Jan. 23, and united to the Court of Exchequer by letters patents dated the next day after, which was impossible; and therefore the reason of the judgment in *Sir Thomas Wroth's case* was not because the Court of Exchequer proceeded as a Court of Augmentation, for this Court was not united to the Exchequer; and therefore supposing that the Court of Augmentation had such a power; yet this Court being dissolved, and gone, the lands return and are under the survey and government of the Exchequer by the common law. Secondly, the Act says, that in default of payment by the Court of Augmentation, it shall be paid by any other Court of Revenue; the annuity ought to be paid by the Treasurer of the Court of Augmentation but that Court being gone, the party has no other remedy, but the proper and natural course in the Exchequer; and the Act does not alter the remedy, but directs the payment. Thirdly, it does not appear that the Court of Augmentations had any such power to relieve grantees of rent; and if it be so, he demanded how came it to pass, that the Court of Augmentations had such a way of proceeding; for nothing of this nature is in the Act which erects this Court; and therefore he said, that instead of the Court of Exchequer, proceeding as a Court of Augmentations, the Court of Augmentations had proceeded as a Court of Exchequer, and it is made, by the words of the Act, a Court of Revenue, and the Exchequer discharged of such things, which they have under their jurisdiction, but no method is directed for their proceedings; they have the power to proceed by consequence in law, and therefore he said all the precedents in the Court of Augmentations are precedents for him; and it is in the same manner as in **[613]** other Courts; as in the Court of Wards, and Court of Survey, they proceed as a Court of Exchequer; and it was the constant course there, that if the grantee of a rent came there, and claimed a rent-charge upon the land of a ward to relieve him; and this was an intermeddling as a Court of Revenue and Exchequer, to sever that which belonged to the King, from that which belonged to a subject; 2 Cr. 78, yet he did not find where the Court of Wards had any such authority: also the Court of Survey proceeds in the same manner, as before is mentioned, and have given relief, per 33 Hen. 8, and these new Courts having such an authority in this manner to relieve, not by any express words of the Act, but by consequence in law, by the same reason the Court of Exchequer may proceed in the same manner; so the objection to *Wroth's case* is answered, and this stands a plain authority for us: *Nevil's case* in the Com. 377, was upon a grant by another upon land, which came to the Crown, in which case no distress lay, but his remedy is to come to the receipt of the Exchequer, which is the place where the subject ought to receive and pay; if a tally be struck, the Exchequer is discharged, and the party ought to resort to the person, upon whom the tally is struck; and therefore in *Nevil's case* he ought to come to the

receipt which is the proper place, and his proper remedy; and Plowden makes an observation at the end of the case, which is a demonstration that he approved of it.

The records which have been cited are, Mich. 1 Eliz. in Rem. Offic. Rot. 218, *Sir Richard Sackvill's case;* this was upon a sale of a manor charged with a rent, and there were covenants from the King, that the alienee shall be discharged; *Morse's case*, 1 & 2 Phil. & Mar. Trin. Rem. Offic. Rot. 294, this precedent is above all exception, because never entred in the Court of Augmentations. Hill 1 & 2 Phil. & Mar. Trin. Rem. Offic. Rot. 104. Trin. 1 Mar. Rot. 23. Mich. 1 & 2 Phil. & Mar. Rot. 88. Trin. 1 Phil. & Mar. Rot. 126, 191, 225.

It may be objected, that a monstrans de droit is not proper, because the parties here intitle themselves by grants from the subject; but in all cases a grantee may maintain a monstrans de droit, where lands came to the King by matter of fact, as upon a vacancy of a bishoprick, **[614]** &c. and he need not resort to a petition, because his title is as high as that of the King; but if the King's title be by matter of record, and the title of the party does not appear by matter of record, there at common law the party was put to his petition of right, but where the King comes to lands by act of law; this is in the manner as before-mentioned.

It is objected, that diverse of the precedents were upon attainders of treason, and therefore not maintainable; he answered, that they may be maintained in the same manner as in *Nevil's case;* for by 33 Hen. 8, the King is in actual possession, and this justifies the proceeding in *Nevil's case*, and also the 33 Hen. 8, has a saving for the rights of strangers; and it is as if a special office had been found, and in such case he might have his monstrans de droit, 3 Rep. 11, if it be demanded what shall be done in the case of a conveyance, he answered that there shall be the like remedy; for he cannot convey more than he has, and his conveyance cannot put the rent to a right; but in the case of an office found it is otherwise, for if a man be attaint of treason, and be found to be seised of the land of another, the person is put out of possession, and before the statutes which gave a traverse, he had no remedy, but a petition of right; for an office is found upon oath, and is a judicial proceeding, where the party who has a title, has a sufficient notice to come and make it appear; but now diverse statutes have given a traverse; but the case in question is at common law.

It is objected, that this doctrine opposes a fundamental rule of law, scil. that money in the Exchequer never returns, Registr. 193, he said, that there are two cases, where money paid into the Exchequer shall not be returned, though the party has a right to it, as in the case of a judgment reversed upon an outlawry, and the case of mesne profits, and this for good reason, because first, when the judgment is reversed in R. B. they cannot send a writ to the Treasurer and Barons to make restitution, for this ought to be done upon the judgment, and the Barons cannot do it, because they have not the judgment; and when the monies were paid to the King, he had a right to receive it, and such is the King's prerogative, that he shall not be over-reached by a rela-**[615]**-tion; for when the outlawry is reversed, now by relation the money was the property of the party all the time, but such relation does not over-reach the prerogative of the King; and so in the case of mesne profits, at common law, there was no restitution; for the remedy at common law was a petition of right, which was a real action in its nature, where damages are not to be recovered; and in such case the King had not a greater privilege than a subject, 7 Ed. 4, 17. 35 H. 6, 2, the King may not be a disseisor as a subject may, but by Articuli super Cartas, c. 19, mesne profits shall be rendred to the subject, though paid to the Exchequer. Trin. 1 Mar. Rem. Offic. Rot. 126. Hill. 13 El. Rem. Offic. Rot. 143. Pasch. 2 El. Rem. Offic. Rot. 145. Mich. 13 Eliz. Rot. 347. Pasch. 1 Eliz. Rot. 108.

There is another objection, suppose the judgment good, what execution can we have? He answered, that so many judgments which have been given, are not to no purpose; but there are writs of execution; and when the writ is delivered to the Treasurer and Chamberlain, so much money in their hands is become the property of the subject, and they are discharged for so much to the King, and become debtors to the party, 2 Hen. 7, 8, Old Entries, the last case; and it is the same case as upon a fieri facias, upon which monies are levied by a sheriff, the defendant is discharged, and the sheriff becomes debtor; and this is a writ grounded upon a judgment upon the right determined, and is an execution, and debt would lie upon it.

As to the judgment he held it to be good, but he had not seen the letters patents, and tho' it be objected that the money is directed to be paid by the Commissioners and Chamberlain of the Treasury, and the payment is to be made after the charge of the management, and the particular sums payable to the Queen, and the Duke of York, where it ought to be general; he answered, that this must be understood of the receipt of the Treasury, and that the things objected are for the advantage of the King, and therefore cannot be assigned for error; also the levying of tallies might have been spared, but it is surplusage and not error, but it would have been better omitted; yet if the judgment be erroneous, the remedy however being proper, the Treasurer and Keeper ought to give a **[616]** new judgment, 21 E. 3, cap. 9, as in the case of *The King and Sainthill*, where the error was as to costs, and the judgment for this reversed, and a new judgment given; and upon debate upon error in Parliament, it was resolved that the error being only in the judgment of the Barons, the Court here might give a new judgment.