To the Honourable His Majesty's Justices of the Superiour Court of Judicature, for the Counties of Plymouth, Barnstable, &c.

Nathanael Matson is Plaintiff,
Nathanael Thomas Defendant. in the Original of this Suit.

Arguments for the Defendant on a Special Verdict in this Cause in Answer to the Plaintiffs Reasons and Arguments.

THe Defendant at present takes the Case as it is stated or opened by the Plaintiff, in the first Page of his Print. And also agrees with what is affirmed, That the Honourable the Judges advised on the Special Verdict till the next Superiour Court; and that the Partys in the mean time should give in their Arguments to the Clerk of the Court: but how is this Rule observed? The Plaintiff was to file his first some Months before the Court. Be pleased to observe his manner of doing it just a Week before the Court: having Printed at the same time above 100 Copies, with what viewer design is no difficult matter to imagine. This is such an unjust contemptuous and illegal proceeding as is not to be tollerated. It is unlawful to Print any Wans private Case while it is depending in any Court of Judicature before it comes to Judgment, because 'tis an Appeal to the People: and that was my Lord Chief Justice *Hales* opinion in Col. *Kings* Case; for the ill consequences of such proceedings are many & dangerous, the purpose is to surprize your Honours, and the Defendants Council, to protract the Judgment, and during a further respit by spreading the Prints about the Country, to influence the Ley-Gents. *Et dare,* not *dicere Legem,* for the determination of this and many Actions of the same kind stirred, and depending within the Government.

Mr. *Sol. Finch* in his Argument of the Quo-Warranto Tryal *Arguendo.*

After these remarks & before I proceed to Answer the Bulk of the Arguments, as they appear heaped & stiched together, I beg leave to premise, The *Plymouth* Laws are mis-recited, the Precedents mistaken, and not truly Stated, the Arguments not fairly deduced, nor applicable to the Laws and Case in Judgment, as in the course of this Answer will be plainly detected.

The first thing the Plaintiff advances is, That upon the Junction or Incorporation of the Colonies of *Plymouth*, and the *Massachusetts*, in the Year 3690. All the Laws of the Colony of *Plymouth* Expired with that Colony, and from thence to be governed by the *Massachusetts* Province Laws, as to their Descents and Settlements.

This is answered & confuted by the Saving in the Charter of the Province of the *Massachusetts-Bay*. "*Provided nevertheless*, That such Lands, " Tenements, or Hereditaments, and all other Estates which any person " or persons or Bodies Politick or Corporate Towns, Villages, Colleges or " Schools do hold & enjoy, or ought to hold & enjoy under any grant or " Estate duly made or granted by any General Court formerly held, or by " virtue of Letters Patents, or by any other lawful Rights or Titles whatso- " ever, shall by such person and persons, Bodies Politick & Corporate. " Towns, Villages, Colleges or Schools, their respective Heirs, Successors " and Assigns for ever hereafter, be held & enjoyed according to the pur- " port and intent of such respective Grant, under the Rents, &c. any mat- " ter or thing whatsoever to the contrary notwithstanding.

But says the Plaintiff, It matters not what the Laws of Descent of inheritances were in 1651. for it is not what the Laws were at the time of making the Devise, but what the Laws were at the time of the Descent, that shall Rule in the Descent of the Inheritance, nor matters it what the Laws of Inheritance in the late Colony of *Plymouth* were at all since they Expited with the Colony, and can therefore have no effect or operation upon Inheritances or Descents cast under the *Massachusetts* Laws, as the last Descent in this Case: So that it would be sufficient to shew, That by the *Massachusetts* Laws the Inheritance of such a Devise shall not descend to the Eldest Son. And because this Argument and distinction is often mentioned and almost resum'd in every Printed Page; and the word Descent Ingeminated and much relyed on, as the very Pillar & Butress of the Plaintiffs cause; to avoid prolixity, it may receive a full Answer here, and wherever its afterwards met with in the said Print.

This Argument then proceeds upon a three-fold mistake:

1. That *Plymouth* Laws expired with the Colony, and have now no operation on Inheritances cast under the *Massachusetts*, &c. but this stands Convicted by the CHARTER, as has already been observed.

2. That it matters not what the Laws were at the time of the Devise, but at the time of the Descent.

3. That by the *Massachusetts* Laws the Inheritance of such a Devise shall not descend to the Eldest Son.

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As to the Second Mistake, that's partly Evinced by the before recited Saving in the *Charter*. And further the Distinction is not sound & Legal, nor his foundation good: For the true Question or Inquiry is, When and under what Laws or Constitution was this Estate created? No matter when the Descent was Cast, since I take it for granted (because by and by I will prove it.) (1.) That at the time of this Devise by the Laws Usages and Constitution of the Colony of *Plymouth*, they could and did frequently Entail their Lands. (2.) That the Case in the Verdict is an Estate Tail General. (3.) That this Estate it not spent but has continuance legally in the general Heir alone, *viz.* The Original Defendant in this Action & can't be divided. But I pass by to proceed and observe upon their Second Mistake, the Law is, That Ancient Acts and Grants must be taken as the Law was holden at the time they were made. 1*st*. *Ventris* 401. We must put that Exposition on Ancient Charters as should have been put in those days wherein they were made. Whence I infer that Ancient Charters, Deeds or Grants, or the Estates therein Created are not to be Expounded by the Laws of the time when Descent are Casts, but we must look back and have regard to the time of their *Creation*, to know what the Law is upon any doubt or question arising upon or out of them.

1. Inst Sect. 170.
2. Inst. 282.
Co. Rep. 835.

Then the case is, *William Thomas, Anno* 1651. by his Will devises the Land to his Son *Nathanael*, the Testator dyes, *Nathanael* the Donee Tenant in general Tail enters, Enjoys it 22 years, dyes Intestate leaves Issue, *William* & *Natbanael* Sons, and *Elizabeth, Bethia* & *Mary*, Daughters. After the death of *Natbanael, William Thomas* the next Heir in Tail enters and possesses the Land 44 years, and then dyes, after his death *Nathanael* the next Heir in Tail enters & dies Seized; Then the Plaintiff his Heir in Tail enters, & now comes *Matson* the Plaintiff sole Issue of *Mary*, one of the Daughters of the said *Aathanael* the Donee, for a part of this Land in his Mothers Right and brings his *Ejectione Firmæ* against the Defendant.

The Case.

This being the Case, The Son and Grand-sons in an uninterrupted Possession of this Estate Tail for about 70 years together, Why must this Estate after upon the death of the last Tenant in Tail? and by what Law does *Matson* the Plaintiff come in upon a Colateral Claim in Right too of one of the Daughters to Oust the Defendant, the Right Heir in Tail *per Formam Doni*, the Estate Tail evidently unspent.

If this be Law, and also that an Estate Tail may be mangled and divided till it comes to a Point of Earth against the Nature and Quality of

these Estates, which by the design of the Law in their Constitution are to be kept entire Oescendible to the Heir, *i. e.* to him who is the most worthy of blood. Then it will follow, That if one of the hundred Heirs in Tail dy without Issue, his part or rather point of Land shall revert to the Heirs of the Donor, as his Fee Simple Estate in Reversion; and yet for all that, it seems the 99 are to be Tenants or Heirs in Tail upon the same Original Creation of the Estate Tail; Strange Doctrine! That the Estate Tail should so be spent and subsist at the same time; but thus it is when Men assume a Knowledge or Learning Superiour to the Laws. *Dato uno absurdo Multa sequntur! Misere servitus ubi jus est vagum aut Incognitum Vel Incurtium!* What? an Estate Tail and Dividable? is *Opposuum in Objecto;* 'tis to affirm Contradictions *viro flatu,* and the Law maxim is *Contraria Allegans non est. Audiendus.* To prove that this Estate Tail is not spent or run out so as to subject it to a Division as a Fee Simple reverted, let a little room be made for these Authorities.

Co. Fol. 7. B,

Co. Rept. Shellys Case 44.

Every Heir Male begotten of the Body of the Heir Male of *E. S.* is in Construction of Law an Heir Male of the Body of *E. S.* himself.

Pollexfen.

Arguendo.

In Law or Common Parlance, a Man cannot say another is dead without Issue, or that there is want of Issue of him as long as there is a Grand-child, or any Posterity descended of him in being.

Irim.

There can be no Case put where the word Heirs does not carry an Inheritance, for tho' there can be but one Heir living at a time, yet the Succeeding Heirs which in time shall be, are all Comprehended, they are in *Presenti* Parcel of, and in the Loins of the Ancestor, and he or they are one *Hæres est pars Antecestoris,* and the Ancestor during his Life has all his Heirs in his Body; so say the Books *per Pollexfen Arguendo.*

Polexfen Reports.

3 Modem 267.

Curia.

There is Moderne Case (*In Ejectione Firmæ*) A Man has a Son called *Robert, Robert* has a Son likewise called *Robert:* The Grand-father deviseth the Lands in Question to his Son *Robert,* and his Heirs: *Robert* the Devisee dyeth in the Devisors life time, &c. but by a Codicil the Land is given to the Son. *Curia.* The Grand-child is not directly within the Words of the Will, but they are applicable to him, he is a Son tho' he be not begotten by the Body of the Devisor himself, he is a Son with a Distinction. Our Saviour is called *Son of David, tho'* there were Generations between *David* and Him.

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But that I may hot be thought to beg the Question. I come now to maintain my first Point, *viz.* That at the time of this Devise by the Laws and Usage of the Colony of *Plymouth*, Lands were Entailed, and in doing this I shall Extricate the Laws from Misrecitals, and rectify the Precedents Cited.

The Plaintiff says, That because much stress (and he says truly) has been laid on those Laws, he thinks on his Impartial view; he has made it appear beyond reply, There was no Law in force in that Colony whereby this Estate should have Descended to the Eldest Son, but the contrary; as appears by a Law of the said Colony revised in 1672. which he thus Partially recites, That the Eldest Son should not he Instated in all the Lands, unless the Court should see cause. 1. Point.

Whereas the Law is thus: And it is further Enacted, That when any Man dyeth Intestate, and leaves divers Children, the Eldest Son shall have a double Portion with what he has already received from him of his Estate both Real and Personal (but shall not be Instated in all the Lands, (unless the Court see Cause) and the rest of the Children shall Inherit as Copartners, unless the Court upon good ground shall otherwise dispose.

It is sufficient to observe, That this is the Case of an Intestate, and that Exposes the Misapplication as well as Misrecital of this Law to the Case at Bar, without any further Comment.

He goes on and says, That was the Law under which the first and only Descent on this Estate happened, being two years before the Descent, *viz.* The Demise of the Donee, here the Donee is Complimented with a Term that only and properly belongs to a Soveraign Prince, but 'tis with Intent to Impoverish the Heir or petty Prince.

The only Law (says he) of Inheritances to be found before this is *Numb. 2.* made in 1636. *Whereby 'tis Enacted*, That all Inheritances should Descend according to the Custom and Manner of *East Greenwich* in the County *of Kent* in the Realm *of England.*

Whereas the Law runs thus, "It is Enacted by the Court and the Authority thereof, That Inheritances shall Descend according to the commendable Custom of *England*, and hold of *East Greenwich.*

That is now in free and common Sockage, and not at all to his purpose: for by the Statute of 31 *H.* 8. a great part *of Kent* is made Descendable to the Eldest Son, according to the course of the Common Law; for that by the means of that Custom divers ancient and great Families after a few Descents came to very little or nothing. Co. Litt. 141. B.

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This was Enacted long before that Colony or this had a being, and our *Charter* runs on the same tenure.

But if he had Glanced his Eye to the next Paragraph, he might have read, "*It is Ordered and Declared by this Court and the Authority thereof,* " That all Lands heretofore Entailed and that shall be Entailed hereaf- " ter, shall Descend and Enure as by the Law of *England,* the same ought " to do.

And even before that he might have read, if the Trouble were not too great.

"It having been the usual Manner & Custom of this Court, as much as " may be, to have recourse to Commendable Laws of *England,* in such " Case wherein there is no other Law by this Court provided more sui- " table to our Condition.

And again in Page the 1st. of the general Fundamentals, *It is Declared,* That no person in the Government should suffer in respect of Life, Liberty or Estate under Colour of Law, but by virtue of some Express Law of the Colony, or the good and equitable Laws of our Nation suitable for us in Matters which are of a Civil Nature (as by the Court hath been accustomed) wherein we have no particular Law of our own.

Anno 1636.

However he concludes upon his own Law which every one knows (Meaning the Mannor of *Greenwich)* was not to the Eldest Son only, but Divides both Fee Simples and Fee Tails; but this has been already Exploded by what was said under the first part of his Law; and upon the Statute of the 3d *H.* 8. However, I will throw in a Case into the bargain. Since he seems to fancy the Law to be now as to that Tenure as he supposes formerly; And if I make it out, That even then, if it was not left to Descend according to Custom, but depended on a Deed or Settlement, the Special Heir or Customary Heir should not take it, but the Heir at Common Law: What then will become of his Argument? 'Tis the Case of *Counden V. Clerk. Hobt.* 31.

Hob. 31.

The Younger Son in *Burrough English* is Heir and all the Sons in *Gavel Kind,* whereof the reason is, because the Custom is, and *so must be pleaded,* That the Custom of those Lands is, That they must Descend to the Youngest Son, or all the Sons, so they are Heirs *Secundum quid,* of those Lands in point of *Descent;* or when they *Desend,* for then they are within the Custom that gives the Inheritance, *Tum Demum scimus cum per Causas scimus.* But now make the Limitation of Land of that Nature to Heirs in point of Descent, and it will be clearly otherwise.

For this purpose Vid Co. Litt. Fol. 175 B.

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As for Instance. And therefore if I give Lands in *Gavel Kind,* or *Borough English* to one for Life, the remainder to the right Heirs of *J. S.* the true Heirs shall take it, for this is out of the Case of Custom, and so must run *to the heir at* Common Law. 37 & 38 *H.* 8. *B. Descents* 53 and *Dor. S.* 42.

And now I desire the Plaintiff to consider, That we are in the Case of a Will, and that brings us strongly Allyed to *Counden* in *Hobart* alas! for our Friends & Cousins at *East Greenwich* in *Kent.*

But why, or to what purpose are we to be told that all our Laws Expired with the Colony of *Plymouth,* upon its union with this Government, when if the Plaintiff firmly believes himself he asserts, There was not a Law while the Colony Subsisted that could support our Title, or else he must be mistaken.

The Plaintiff next proceeds to a mighty behold! but nothing to be seen, tho' me thought I had a Glimpse of one of his precedents following the *Laws as he has lately Cited them.* The Case of the Settlement of and state by the Court of *Plymouth* in the Year 1677. Given to *James Barnaby* and his Wife and the Heirs of their two Bodies lawfully begotten in 1673. (as he purs it) "Which said *James Barnaby* left Issue two " Sons only, and the said Court after the death of the said *James,* Setled " the Lands on his Widow till the Children came both to the Age of " Twenty-one Years, that when they come of Age they both Sold it.

This Case is mistaken, The Estate it seems was a mixt Estate consisting of Fee Simple and Fee Tail Lands, nor did the Persons know any part of it was Entailed, till but lately and long after the Sale, to their great present trouble and astonishment; and there was no other Settlement at all (for I have perused the Precedent) more than that *Nelson* who Married *Barnaby's* Widow was to hold the Estate till the Children were 14 in order to their bringing up.

I observe by the way, This is the Case of Intestation, and both Mistaken and Foreign to the Case at Bar. But before I leave this I would add, That Precedents in matters of Practice and Process, they are of Authority, but in point of Law, unless they have been upon Debate are of little Authority to prove what the Law is.

Polexfein the Quo Warranto Arguendo.

Again, The Law consists not in particular Instances, but in the Reason that Rules them.

Ld Chief Justice Holt in the last Mod. Reports.

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To mistake or make use of old Precedents, the Grounds or Reasons whereof cannot now be known, to subvert any Law or Government Established, is neither advisable nor commendable.

But to this Precedent may be Objected *Stetsons* Case, refused to be Settled by the Governour and Council, because Entailed Lands, besides the Precedent of the very Case in Question, and divers other Cases ready to be produced; and many Scores of Heirs in Tail who have under the Law Constitutions and Usages of *Plymouth* Colony enjoyed and sat quiet as Heirs in Tail to this day, and what an Inundation of Misery must Inevitably follow if this New Springing Notion should obtain.

The Plaintiff in his 4th Page confounds and will allow no Distinction between Fee Simples and Fee Tails; he lays it down as an undeniable proposition, That it is not the Laws which are in force at the time of Devise being made, that shall rule the Descent, but the Laws that are in force at the time of the Descents being Cast. This is the burthen of his Argument, and his main hope and stay, which has already been sufficiently refuted, only I desire time to take notice, That this is an Entailed Estate, not spent, for the Heir is in Possession and must continue so by Law, till run out, dock'd, am off, or destroyed by Act of Parliament: and thus I will Interchange an undeniable proposition with him.

He says indeed his Proposition is Material to the present Case, if it were but as undeniable, it would I confess be of admirable use to him. The case he puts don't come up to the case at Bar, the Alterations he speaks of were by Statutes, and what cannot an Act of Parliament do? The Law Cited in the 7th Page, and so on relate to Intestate Estates.

☞ The Act he mentions *Numb.* 1. is answered & Explained by divers other Laws, and where the Colony Laws were silent. The Laws of *England* should be observed is a Law of the Colony, and that will bring in the Statute of Entails, had they not a Law of their own; "but they came English-men into the Colony, had the *English* Laws as their Birth-right, and that Law was firm & strong, That their Lands Entailed or to be Entailed should Enure as by the Law of *England*, the same ought to do, that is, That the Eldest Son should be the Sole Heir, and Estates Tail not subject to a Division; this shews what their Practice had been: and it looks backward only to affirm their Laws & Usage, and to remove all doubts which never was raised, till some troubled heads in the Colony

There are Statutes in Affirmance as Well as Introductory Statutes.

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of *Plymouth* drew the matter into question by the procurement of this Suit: It is a standing Law, and in force, and we must and do rely upon it, and the other Laws.

'Tis true, some Statutes of *England* they did partly Enact, but generally because they had Occasion to vary and mould them to their Condition and Circumstances. He argues, That Fee Tails do ever descend as Fee Simples do in *England; Quid Sequitur,* They can't do so here, for the Law he is so fond of under which the last Descent happened, *viz.* our *Intestate Act,* will not serve him: Doubtless if ever an Estate Tail in the apprehensions of the Country descended intirely to a Single Heir (as it certainly did) by the Common Law, it always must do so till the Common Law is Altered by some Statute or Act of the Legislature. For 'tis a Maxim of Law, says my Lord *Cooke, Lib.* 2. *Chap.* 10. *S.* 170. at the close of his Comment on *Littleton.* Whatsoever is at the Common Law and is not Ousted, and is not taken away by any Statute, remaineth still. Now this of Descents of a Estate Tail to the Heir in Tail solely, or to the Eldest Son of the Tenant in Tail, is so; and has not been Ousted by an Act of the General Court of either Colonies, the Notion of its being taken away by the Act under consideration, *viz.* For Setling of Intestate Estates, is directly contrary to the Letter, as well as the Reason of that Act. Its plain, That only such Estates as are Devisable by the last Will of any one are to be divided by that Act. Now no Estate Tail is Devisable by a Will. See *Cooke, Littleton S.* 167. and therefore it is added, Such as are Seized in Fee Simple by which Fee Tail Estates are Excluded. *Cooke Sect.* 165. last clause of his Commentary compared with the aforesaid *Sect.* 167. and. the beginning of the Commentary upon it declares the Addition or Expressing of Fee, (*Secundum Excellentiam*) is exclusive of Fee Tail, and there can be no argument drawn from Descents in *Gavel Kind* or *Burrough* English, to prove the Division of Entailed Estates, because Fee Simples are dividable by the Act aforesaid. As is plain from *Coundens* case, before cited in *Hobart.* This being the Case of a Will, and a long possession thro' divers Descents has virtue enough to denominate and establish it an Estate Tail.

It was omitted to observe, That the Tenure of *Gavel-kind* was never customary here, for how came we to give the Eldest Son a double Share, and the Daughters single Shares, where the Ancestor dies Seized in Fee Simple, quite contrary to that pretended Tenure and Custom; then after this Rate of arguing our Charter is forfeited, for making Laws repugnant to the Custom or Laws of *England.*

It is obvious thro' the whole Argument, That the Plaintiff applies the Laws that respect the Setlement and Distribution of Intestate Estates, which cannot concern the question, for want of making proper distinctions.

So he observes, That by the Statute *Stat.* 32 *H.* 8. commonly called the Statute of Wills, Men might Devise Estates Tail, that is not Law, and that Explanatory Act was only made to remove all doubts, and to declare there could be no such meaning (because indeed 'tis the utmost absurdity) to suppose the Act ever Impowred the Tenant in Tail to Devise his Lands.

What the Plaintiff cites of the Statutes of Wills of uses, and *de Donis conditionalibus,* not reaching hither, not pertinent. The Laws of *Plymouth* Warrant this Case and Title. However since I have followed him out of the way, I will give him a Taste of my Lord *Vaughans* Opinion, *Page* 300. *Craw V. Rumsey,* The English Plantations are Dominions belonging to the Realm of *England,* tho' not within the Territorial Dominion or Realm of *England,* but follow it, and are a part of its Royalty.

Vide, Plea Sir *E Northeys* opinion which came to hand after I had made my Argument.

The second part of the Plaintiffs book is Historical, declaring what Fee Simples conditional are, how the Statute *de donis* came in, the mischiefs of Perpetuities, the method of Introducing Fines and Recoveries being as he says, No regular proceedings on the foundation of Justice, but a Criticism in the Law, where Collusion is winked at, makes nothing for his case; and I beg pardon for taking notice of it, and will dismiss the matter, with my Lord *Cookes,* & the Opinion of the rest of the Judges of *England* in this matter which is his report 142. Common Recoveries by a benign Interpretation of Law ought to be maintained, because they are the common assurances of Land. And my Lord *Chancellour Nottingham's* Declaration is, That the Rules of Law to prevent Perpetuities, are the Policy of the Kingdom, and ought to take place in any Court.

Note, There are many hard things in the Plaintiffs opinion, & yet for all that, is Law & must be so till the Legislature thinks fit to alter it.

Chancery Cases fol 20.

The Plaintiff is very angry at the least mention of the Statute *de donis,* (for he does not like it.) It has been in force now near 400 years & stands unrepealed in full virtue, it was made the 31 of *Edward* I. and tho' in a manner it Created Perpetuities, and the same continued about 200 years; but in the 12th year of *Edward* the 4th, by the Resolution of all the judges, It was Resolved, That by a Common Recovery the Estate Tail shall be Barred.

Note, Cook Rept. 63.

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The Statute *de Donis* was a Nurse and no Mother of Estates of Inheritances in Tail, and tho' it preserved the Estates of Inheritances in Tail, yet it did not beget or procreate Estates Tail, which were not Fee Simples conditional before, which may be worth the Plaintiffs notice and Rectify his Notions in these matters. It may much therefore be questioned if any such Estate as a Fee Simple conditional remains, since the Statute *de Donis,* which was in affirmance of the Common Law, *Quoad,* that, for to say it is Common Law still, tho' taken away or Involved, or Affirmed by a Statute is what I can't assent to. Then what if this Estate in Question to please the Plaintiff, should for the *Nonce,* be called a Fee Simple conditional, I doubt it will go hard with him, even then. For tho' the Tenant having Issue might aliene, but what if he did not? Why then the next Heir in Tail would take it by Descent; and I don't find on the strictest inquiry, Thatsinceour Estate Tail was created, That any Alienation has been; and because I often meet with the favourite word *Descent* in his Book, which I perceive is much at heart with the Plaintiff. Ibid.

I Note, A Descent is wrought and Vested by Act of Law and right of Blood unto the Worthiest of the Blood and Kindred to the Ancestor. Descents only keep theHeir in possession, &c. I leave the Plaintiff to apply these cases if they can be pressed into the Service. Cooke 137. Cooke 238. 1 Institues

As to what has been so largely Insisted on,as the Plaintiffs learned Reading upon the Statute of Intestate Estates, it has I humbly conceive already received an answer. I add further, That if it should be the Opinion ofthe Honourable Judges, That an Estate Entailed which might be Created since the Act for Distribution should be dividable, yet that could not upon due consideration Induce any body to be ofthe Opinion,That Estates Tail that were made so before the Act, could be deemed to be lyable to such a Division; Especially not by the Law, Usage and Constitution of *Plymouth* (by which this Case is to be governed.) Estates in Fee Tail shall not be lyable to a Division, but the Edlest Son should be Sole Heir: That is, Such Estates shall descend and enure as they do in *England,* according to the Law of *England.* It is plainly so saved, Inasmuch as that Paragraph is placed before that which makes all the Sons Heirs, and capable of Inheriting an Estate in Fee Simple, and constant practice of the Colony of *New-Plymouth* so interpreted the Law.

I humbly conceive your Honours were pleased lately in open Court to repel and discountenance the very Arguments now Printed, of Included

Estates Tail within the Intestate Act; for I take it with great Submission, That the Case of a Deed or Will is Entirely out of that Act; for it has nothing to Operate upon, and that all Questions arising upon either shall be Expounded by the Law of *England;* and surely it is an Erronious Opinion in the Plaintiff to Assert, That Fee Simple and Fee Tail are both Inheritances alike, and shall descend on the same manner: Why! Because you can Devise your Fee Simple Estate, but can't Dispose by Will of the Fee Tail, as before is affirmed to be Law.

And it can never be Law, That tho' the Descents of Entails are not altered in *New-England,* for they shall go as Lands in *England,* yet do differ as to Heirs has been sufficiently Exploded. We are not to be ruled by Customs of *Gavel-kind* or *Borough English,* because we have a particular Act which makes Provision for the Distribution of a Mans Estate who neglects to Settle it himself in his life time: This Law makes a Will for him.

It is very presumptuous in the Plaintiff to Affirm in his Print That the Honourable Judges of the Superiour Court, have determined in the County of *Essex* in Col. *Saltonstalls* Case, That Intailed Estates ought to Descend as Fee Simples, and according to the Laws of this Province be divided, when that great Point is yet *Sub Judice;* and I doubt not the Reverend Judges will Vindicate the Honour of their Justice from this great abuse. But was that so, What mighty Comfort can it be to the good Men of *Kent* in *Plymouth-shire?* But certain it is the Judges did in that Case determine, That Estates Tail, are Estates known and allowed in *New-England;* and that answers what the Printed book faintly Endeavours to maintain.

Mr. *Reed* also runs into the same Mistake, by affirming. That the Court adjudged Col. *Saltonstalls* two Fifths on the Special Verdict.

The Case was, The Plaintiff brings Ejectment for two Fifths of a Farm: I argued. That if he was Heir or Tenant in Tail, he ought to have the whole. I was answered, That if it was so surely he might bring his Action and had a good right to two Fifths. The Jury found the Fact as alledged in the Writ, and the single Question with the Court on that Verdict was, *Whether it was an Estate Tail?* And Judgment was in the Affirmative. The second Point (about Division) was not referred to them, but is now pending and under Advisement upon another Verdict, upon the very same Title.

Sir *Edward Northeys* Opinion which the Plaintiff produced in said Case is, "That Estates Tail have been in all times so Limited from the

Plan-

Plantation of this Province by the *English*, and tho' of it self, the statute *de Donis* made in *England* does not Extend to the Plantations, yet being a Law in force in *England* when the *English* Settled in *New-England*, and being received by the Inhabitants there on their Setling, which is Evident by their Limiting Estates in Tail, it became a Law there: And so it was adjudged in a Case of Entails in *Barbadoes*.

(This mull needs be out of doubt as to the Laws and Settlement of *Plymouth*.) And further his Opinion is, That the Land Descends only to the Eldest Son, the Descent there being according to the Common Law of *England*, no express Law in that Plantation being made to alter the Descent. The Act made in the 4th of King *William* and Queen *Mary*, for the Settlement and Distribution of Intestate Estates did not Extend to the Case where a Man made a Will, but only to the Estates of Persons dying Intestate; and the Power declared by Persons to Dispose of Real Estates by Will in that Act being only Expressly where the Devisors are "Siezed in Fee Simple, when the Eldest Son is only to have two Shares "in Case his Father dyed Intestate, which (as I'm infor- "med) the Eldest Son offered to Accept in this Case, tho' "thereby he parted with part of his Right, but this not "being accepted, he has a light to the whole by Descent.

Signed,
Edward Northey.
April 12.1719.

I Appeal to the Honourable Judge *Dudley* for the Truth of what is recited, to have been spoken or declared as his Opinion *Arguendo*.

It is pretty extraordinary, That in the putting off Four Cases not one should come home to the Business. I shall be brief in my further remarks, having had but a short time to consider things; and least I tire your Patience and Gravity in hearing.

1. To his first Case (for I will not recite them; I answer, The Children of *B*. cannot take since *B* had himself by the Devise only an Estate for Life, or if he had a Fee Simple, What is that to this Case?

2. To the second, The Children shall not take by the Act, besides there is no particular Estate to support the Remainder (as the Case is put) without which the Remainder can't be good.

5. To the third, The Uncles, &c. Aunts are within the Letter of the Statute, for they are next of Kin to the Intestate in equal degree.

4. To the fourth, A Lease being but a Chattle Real may be Sold for payment of Debts, &c. His Argument a *Simili* and conclusion is a *Non Sequitur*.

As to his other Precedent of *Row* and *Bucknam*, It was thus, *John Row* by

by his Guardian Sues *Bucknam* in Ejectment for Lands in *Charlestown* under an Entail Created by his Father *Elias Rows* Will. The Defendant pleaded in Abatement, that the Widow *Row*, (who had half the Estate given to her during Life) by Will, the Plaintiffs therefore could not Sue for the whole: This Plea was over-ruled by the Inferiour Court, but upon the Appeal at the Superiour Court, there was a *Nil capiat* entred and the Writ did not abate, for the Reasons now assigned by the Plaintiff: For that Point was not moved, nor any such Plea saved. I was then joyned with the Honourable Judge *Dudley* of Council for the Plaintiff, and know it to be so; and We afterwards brought a New Writ against *Bucknam* at the Suit of *John Row* and his Sister *Ruth*; but this was our own Voluntary Act and Benevolence, to give our Sister a part, when we might have had the whole.

It is pretty bold to Averr that the Statutes of *England* could not heretofore, or can any be made hereafter to Effect us: We being under the Privilege of a CHARTER to make Laws to govern our Selves & Estates, agreeable to what he Asserts, *Page* 14. Neither did the present Government of the *Massachusetts* ever in the least think themselves governed by the Statutes of *England*, &c.

'My second Point has been spoken to fully incidently under the first, and cannot be denyed, That the Case in the Verdict is an Estate Tail General.

My third Point is self-evident, For the Defendant is now in possession as Heir in Tail General, and therefore convinces the Plaintiff of the third Mistake. I noted in the beginning of this Argument, and that the Inheritances of the said Devise is well descended and Vested.

The Verdict is plain and not to be wrested, as is attempted, and we humbly move for Your Judgment upon it.

Our Law-books say it is an Estate Tail General: The Laws & Practise of the Colony of *Plymouth* tell us who ought to take it. (For *Optimus Legum interpres consuetudo*) the Defendant is lawfully in possession, and we hope our Land shall not be taken from us, but that we shall have your Honours Judgment for the Reversal of the Judgment of the Inferiour Court Appealed from, which will finally Determine this Cause and Title: *All which is humbly submitted to Your Honours great Wisdom and Justice, by Your Honours*

Most Obedient Humble Servant,
John Valentine *Attorney per Defendant.*

While

While the aforegoing Argument and Answers were preparing for the Clerks File, there came into his Office in distinct Papers, the Arguments of Mr. *Auchmuty*, and Mr. *Reed pro Quer.* additional to *Isaac Littles*, the Third Attorney in this case (whose hand they had before used in Print) A practice like others in the course of this Debate, but since they argue much for us in some of their Arguments or Pleadings. I do not heartity object to their Reception, least they should be defiled or dismissed upon the Score of our having Three Attorneys on our side, when the Law permits but Two. *Vide* Gounden Case.

I will say of the appendant Arguments, which come *ex visceribus*, of the Point.

Talia recitasse est Consutasse.

I beg leave *ex abundanti*, agreeable to a Clause in Sir *Edward Norths* Opinion, to conclude with a few farther observations on the Printed Arguments.

Tis Objected, That the Statute *de Donis* should not extend to this Province, because *Magna Charta*, and the other Old Statutes could not obtain (as it is expressed) in *Ireland*, until *Poynings* Law introduced them.

1. 'Tis an enslaving Notion, That *Magna Charta* should not be thought to follow *English-men* into *New-England*, because it did not extend to *Ireland* before introduced by *Poynings* Law.

2. The Print gives a quite different turn by the wording ofthat Story than Sir *Edward Cooke* intends, from whom they had taken it. "That says, the Statutes of *England*, could not obtain in *Ireland*, till a Special Act of Parliament made there, &c. As if it were a favour to *England* that they would admit the beneficial Statutes of *England* in *Ireland*. Whereas my Lord *Cooke* expresses the matter thus. "This *i. e.* the Sta- "tute of *Magna Charta* at the making of it Extended not to *Ireland*, nor to any of the Kings Foreign Dominions, but by the Law of *Poynings*, *Anno* 11. *H.* 7, All the Laws and Statutes of this Realm of *England* before that time had or made do Extend to *Ireland*, so as now *Magna Charta* does extend into *Ireland*, That is, In *Hen.* 7. Reign *Ireland* was favoured tho' really a Foreign and Conquered Nation, with the benefit of *Magna Charta*, and other the Ancient and Advantageous Statutes of *England*. And now behold the Reason that must be in the Insinuation afore.

afore-mentioned, because *Ireland* could not pretend to that favour, but by the Kings Grant; for the Acts of Parliament of *Ireland* are finished by the Royal Assent, therefore *English-men* who are born to all the Rights and Privileges that any of the Kings Free Subjects in *England* are born to, and wherever they go they carry their Birth-right with them; have not those Rights unless by New Acts of Parliament, &c. or by Special Grants from the King: But suppose it were so, yet

5. It so happens that notwithstanding what they say, That no Institutions in our Charter have provided for this matter, nothing is more certain than that the Charters of the Colony of the *Massachusetts*, and of this Province; and as I have been informed by what the Colony of *New-Plymouth* had when they removed hither, do say as much as this, *viz.* That all and every of the Subjects of us our Heirs and Successors, which shall go to and inhabit within our said Province or Territory, and every of their Children which shall happen to be born there, &c. shall have and enjoy all Liberties and Immunities of Free and Natural born Subjects, within any of the Dominions of us, &c. to all Intents, Constructions and Purposes whatsoever, as if they and every of them were born within our Realm of *England;* so that we are born to the self same Right to *Magna Charta*, and the other Ancient and Beneficial Statutes, as our fellow Subjects that are born in *England* are born to, even to all the Common Law, and the Amendments thereof that were made by the Sage Kings of that Realm.

John Valentine,

A True Copy of the Original
Filed in the Office,

April 21st. 1720.

Examin'd *per* Benjamin Rolfe, *Clerk.*

To

To the Honourable the Judges of His Majesty's Superiour Court of Judicature Holden at Plymouth, *on the Last Tuesday in* April, 1720.

Nathanael Matson Plaintiff and *Nathanael Thomas* Defendant.

Some Reasons, Precedents & Arguments why Judgment should be enter'd up for Nathanael Thomas *the Original Defendant.*

William Sherman of *Marshfield per* Deed, dated 1678 Entails an Estate to his Son *William Sherman*, and to the Heirs of his body Lawfully begotten, and to be begotten; the Son *William* dyes Intestate in the Year 1681. The Court in that Year Settled all his Estate, but that Intailed Estate by Deed, which could be for no Other reason but that it was already Intailed & Settled by the said Deed, for tho' the Intestate had several Children: The Eldest Son Intail enter'd & solely enjoys it to this day, exclusive of the Other Children

John Bown of *Marshfield* in 1684. dyes, but by a Will Intails part of his Farm upon his Son *Thomas*, who enter'd and dyed in 1704 and left 5 or 6 Children but makes a Will and takes Notice, That because his Eldest Son would have that Estate Tail, he gives him only a Feather bed, and devises other his Lands among his other Children. Which shews the Notion of Estates Tail is Ancient Settled and known in the Colony of *Plymouth*, and a Great Number of Estates Tail are so subsisting to this day, were it needful to Multiply more Precedents: And no Instance can be given by the Gentleman on the other side to the contrary: For there is no Weight or Solidity in their Arguments; but all tends to Amusement & Sophistry, which the Defendant assures himself, will not avail while he considers the Judgment is Your Honours.

As to what is said by Mr. *Auchmuty* of the Mischiefs of Perpetuities it must retort upon himself: For while there is a Law of Intails, there must be Perpetuities, till the Tail determines; but how does he avoid it? Why by the Intruduction of Greater Mischiefs than ever were heard of before; That is, By Branching the Estates Tail into 500 Channels, when they ought Legally to run in One. This is Fetter upon Fetter, *ad Infinitum*, with this further Inconvenience, that not One of the 500 can Sell, for notwithstanding his doctrine of Division, the Estate Tail nevertheless Continues.

Suppose a Man dies Intestate under this Colony of *Plymouth* Seized of an Estate Tail Created before the Incorporation or Junction of this with the *Massachusetts* Colony, and the Administrator should apply to this Honourable Court for leave to Sell the Estate to pay Debts; doubtless Your Honours

would dismiss the Petition, for that no Order for Sale could be made of such Estate Tail. And further, I would suppose that a Sheriff should Levy an Estate Tail in Execution, and Record it, yet it would be no Title to the Creditor, for the reason alledged in the other Case.

By all which, and what has been so well and fully answered and urged on the Defendants behalf, he doubts not but he shall obtain a Reversal of the Judgment of the Inferiour Court.

Nathanael Thomas.

A True Copy Examined per Samuel Tyley *Clerk.*

Plymouth sc. Anno Regni Regis GEORG II nunc Magnæ, Britanniæ, Franciæ *et* Hiberniæ, Sexto.

At His Majesty's Superiour Court of Judicature, begun and held at Plymouth *for the Counties of* Plymouth, Barnstable & Dukes County, *on the last Tuesday of* April, *being the Twenty-sixth day of the said Month,* Annoque Domini, 1720.

Nathanael Thomas of *Plymouth in* the County of *Plymouth,* Esq; Appellant, and *Nathanael Matson* of *Charlstown* in the County of *Middlesex,* Marriner, only Child and Heir of *Elizabeth Matson* heretofore of *Boston* within the County of *Suffolk,* Deceased, one of the Sisters and Coheirs of *William Thomas,* late of *Marshfield* in the County of *Plymouth* aforesaid, her Brother Deceased, Appellee. From the Judgment of an Inferiour Court of Common Pleas begun and held at *Plymouth* aforesaid, on the first Tuesday *of March* 1718-19. when and where the Appellee was Plaintiff, and the said *Nathanael Thomas* was admitted Defendant in the room and Head of *John Weston* and *Richard Louden* Husbandmen, and *Deborah Croad* Widow, all of *Marshfield* within the County of *Plymouth;* aforesaid, the Terr-Tenants named Defendants in the Writ. In a Plea of Trespass and Ejectment, for that the said *John Weston, Richard Louden* and *Deborah Croad* have illegally entred into and do refuse to deliver unto the said Plaintiff, the Possession of One fourth part of all that Messuage or Tenement Farm, or Tract of Land Situate, lying and being in *Marshfield* aforesaid, containing by estimation Twelve Hundred Acres of Land, Meadow and Pasture, be the same more or less, with the Appurtenances, being bounded to the South-West by *Duxborough* Line, towards the South East by Lands and Meadows,, late

late the Estate and Inheritance of Col. *Nathanael Thomas,* late of *Marshfield* aforesaid, Deceased, and by the highway that leads from the H[eirs] of the said late Col. *Nathanael Thomas* to *Duxborough,* or however [the] same is now butted or bounded; which said Tract, Farm or Parcel [of] Land was heretofore the Estate of *William Thomas* heretofore of *Marshfield* aforesaid, Gent. Deceased, Grand-Father of the afore mentioned *William Thomas,* last Deceased, who in and by his last Will and Testament, bearing Date the ninth Day of *July* in the Year 1651. among other things gave and bequeathed the aforesaid Farm, or Tract of Land unto his Son *Nathanael Thomas,* late of *Marshfield* aforesaid, Gent. Deceased, (the Plaintiffs Grand father) and to the Heirs of his body lawfully begotten; which said *Nathanael Thomas* last mentioned, dyed Intestate, leaving behind him the said *William Thomas* the Plaintiffs Uncle, the said Col. *Nathanael Thomas, Mary, Elizabeth,* (the Plaintiffs Mother) and *Bethia;* and the said *William Thomas,* the Plaintiffs Uncle, dyed seized in Fee of the before-mentioned Farm or Tract of Land, without Issue of his Body and Intestate; whereby the same now descends and comes to the said Col. *Nathanael Thomas* and his Heirs and to the Heirs of the said *Mary, Elizabeth* and *Bethia,* in equal Shares or fourth parts, and one fourth part thereof now of Right and by Law, belongs and appertains to the said [illegible] [Nathnael Matson] Plaintiff, as the only Child and Heir of the said *Elizabeth,* and one of the Nephews and Coheirs of his late Uncle the said *William Thomas* last Deceased; yet the said *John Weston, Richard Louden* and *Deborah Croade,* altho' often thereunto requested, the Possession of one fourth part of the aforesaid Messuage or Tenement, Farm or Tract of Land, with the Appurtenances, to the said Plaintiff to deliver, hath hitherto refused and still refuseth to deliver the Possession of the same to him. To the Damage of the said *Nathanael Matson,* as he saith, the Sum of Fifteen Hundred Pounds. At which said Inferiour Court, Judgment was Rendered for the said *Nathanael Matson,* the Estate Sued for, and Costs of Suit, *viz.* Five Pounds three Shillings and six Pence. This action was entred at the Sessions of this Court, begun and held at *Plymouth* aforesaid, on the last Tuesday of *April* last past, when and where both Parties appeared, and after a full Hearing of the Writ, Judgment, Reasons of Appeal, Evidences, Pleas and Allegations of each Party; the case was committed to the Jury, who were sworn according to Law, to try the same, and returned their Verdict therein upon Oath; *That is to say,* They find specially, *viz.* If Land lying in the Late Colony of *New-Plymouth,* given by Will bearing Date and proved

Anno Domini, 1651. to a Man and to the Heirs of his Body, lawfully gotten, by Law doth Descend to the Eldest Male Heir, from Generation to Generation, and if in case a Man (being one of said Heirs) hath several Sons, and the Eldest Decease without Issue, the said Land descend to the next Eldest Son. Then the Jury find for the Appellant *Nathanael Thomas,* Esq, Reversion of the former Judgment and Costs of Courts; but if otherwise, then the Jury find for the Appellee Confirmation of the former Judgment and Costs of Courts. Upon which special Verdict the Court advised until this time; and now after a full Hearing of both Parties, and MATURE Deliberation on the Case, it's CONSIDERED by the Court, That the former Judgment be and hereby is Reversed, and that the said *Nathanael Thomas,* Esq; shall Recover against the said *Nathanael Matson* Costs of Courts.

A True Copy as appears of Record
Examin'd
per Benjamin Rolfe *Clerk.*

The CASE of
Nathanael Matson
against
Nathanael Thomas.