A PROMISE MADE IS A DEBT UNPAID[1]: THE CASE OF *ORCHARD V CURTIS*, SUPREME COURT OF VAN DIEMEN'S LAND, 12 JULY 1833[2].

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The case of Orchard v Curtis[3] heard in the Supreme Court of Van Diemens Land in 1833 may possibly be the first case of its kind in a British penal colony in Australia. The case involves the capacity of a promise made in a document to endure. In tandem with twenty-first century academic authority and principles of common law, Orchard v Curtis[4] can also be taken as a salient reminder of the seriousness of an undertaking given by one to another.

I INTRODUCTION

The paper firstly identifies the facts of the case. The two types of evidence - documentary and testamentary - presented to the court are considered. The notions of deed and trust are critically examined in the light of common law principles. Finally aspects of the judgment are considered. The underlying premise of the paper is that contemporary press reports of law cases reveal the facts as perceived from the viewpoint of the ideal predominant values of the society at that time.

II METHOD AND SOURCES

The method is analytical investigation of the case as reported in three newspapers: *The Tasmanian* of 12 July 1833 and 26 July 1833 and *The Hobart Town Courier* of

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1 ' A promise made is a debt unpaid and the trail has its own stern code,' Robert Service, *The Cremation of Sam McGee*, a poem.

2 Supreme Court of VDL 12 July 1833, *Tasmanian* 12 July 1833 and 26 July 1833 and *Hobart Town Courier* 19 July 1833 and in Stefan Petrow and Bruce Kercher, *Decisions of the 19th century Tasmanian Supreme Courts*, www.law.mq.edu.au/sctas/html/1833cases/OrchardvCurtis,1833.htm last accessed 24/4/2009

3 ibid

4 ibid

19 July 1833. Judgment was given for the defendant. This decision is considered in the light of relevant common law and equitable principles, including estoppel.

III THE CASE

A *The plaintiff, Mr Orchard*

The plaintiff is Mr Orchard, an elderly retired soldier, who owned 40 acres of land at Kangaroo Point[5]. Mr Orchard was apparently in debt to Mr Curtis.

It is more than likely that Mr Orchard was one of England's military personnel who became willing settlers in Van Diemens Land through the scheme whereby former soldiers were given remission for land according to their years of service[6]. Military pensioners were considered highly suitable settlers because it was considered they would:

- help guard the country against the natives ;
- train volunteers in rifle and other practice;
- use any sapper skills they may have to help in exploring, surveying and engineering and
- assist as magistrates[7].

B *The defendant, Mr Curtis*

The report of the case indicates that the defendant was Mr Curtis. He was a settler and had an assigned servant. It can be deduced that he cut wood. It emerges that Mr Orchard was in debt to him.

C *The facts of the case*

While Mr Orchard was ill, a document was prepared by a clerk. This document gave Mr Curtis the property of Mr Orchard for 150 pounds[8]. Mr Orchard signed the document.

Also while Mr Orchard was ill, Dr Crowther, medical attendant to Mr Orchard, made a will for him at the sick bed. In the will, Mr Orchard left all of his property to his wife, with the specific instruction that his widow pay all of Mr Orchard's debts before she could have possession of the property[9].

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5 *Tasmanian*, 12 July 1833, para 1
6 Rae Sexton, *The Deserters*, (South Australia: Australasian Maritime Historical Association, 1984), p4
7 ibid
8 *Tasmanian*, 12 July 1833, para 4
9 *Tasmanian*, 12 July 1833, para 7

The witnesses to this will were Mr Curtis, Mr Kenworthy, who was a visitor of sick people, and an assigned servant of Mr Curtis[10].

In due course Mr Orchard miraculously recovered. He did not want to continue with the undertaking to sell his property to Mr Curtis for 150 pounds[11]. However, Mr Curtis relying on the document, and alleging he had discharged Mr Orchard's outstanding debts to the value of 150 pounds[12], considered he was the owner of the property. Consequently, Mr Curtis began using Mr Orchard's property in accordance with his ownership: in particular, he was cutting and removing wood from it[13].

Mr Orchard engaged a legal practitioner, Mr Horne, to bring an action of trespass against Mr Curtis[14]. Mr Curtis engaged the legal practitioner, Mr Gellibrand, to mount his defence[15].

The question before the Court was whether or not the undertaking to sell the property as evidenced in the document was valid[16].

IV THE EVIDENCE

The will could not be put in evidence because Mr Kenworthy admitted he had subsequently obtained the will and destroyed it[17]. He stated that Mrs Orchard gave him the will on instructions from her husband[18].

A *Documentary*

The promissory document, referred to as a deed[19]was put in evidence[20], it being a promise by Mr Orchard to transfer his property to Mr Curtis[21].

The delivery of the deed was proved by Mr Kenworthy's testimony that he was present when the deed was delivered to Mr Curtis[22].

The consideration required for the transfer of Mr Orchard's property was stated as being 150 pounds[23]. However, Mr Curtis did not pay the 150 pounds

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10 *ibid*
11 *Tasmanian*, 12 July 1833, para 4
12 *ibid*
13 *Tasmanian*, 12 July 1833, para 2
14 *Tasmanian*, 12 July 1833, para 1
15 *Tasmanian*, 12 July 1833, para 9
16 *Tasmanian*, 12 July 1833, para 1
17 *Tasmanian*, 12 July 1833, para 3
18 *ibid*
19 *Tasmanian*, 12 July 1833, paras 1,2, 4, 6, 10, 12, 18, 19
20 *Tasmanian*, 12 July 1833, para 2
21 *Tasmanian*, 12 July 1833, para 4
22 *Tasmanian*, 12 July 1833, para 5
23 *Tasmanian*, 12 July 1833, para 4

consideration[24]; instead, he alleged he paid the debts of the plaintiff and furnished him with certain goods[25].

B *Testimony*

Various witnesses provided testimony about the monies allegedly owed by Mr Orchard and the monies allegedly paid by Mr Curtis to clear the debts. For example:

- Dr Crowther, medical officer, testified that Mr Curtis paid Mr Orchard's medical accounts of between 6 and 7 pounds[26];
- Mr McRobie, baker, testified that he had supplied bread and flour to Mr Orchard on orders from Mr Curtis, approximately 18 or 19 months previous[27]. However, he did not keep separate accounts, and thus could not provide details of either the amounts or goods[28];
- Mr William Todd, clerk and shop supervisor to David Lord, butcher of Elizabeth Street, testified that he knew meat had been delivered to Mr Orchard, following orders placed by Mr Curtis, within the previous 2½ years[29]. He thought the value of this meat was about 15 pounds[30];
- Mr John Clarke, clerk to Mr Stocker, butcher, remembered that Mr Orchard owed Mr Stocker 18 pounds[31] and that Mr Curtis promised to pay Mr Orchard's account; however apparently Mr Curtis did not pay the account because Mr Stocker seeks payment from Mr Orchard[32];
- Messrs. Bodry and Farrell testified they had delivered goods to Mr Orchard, on orders from Mr Curtis, during 1832 – neither the nature nor the value of the goods was specified [33];
- James Gilbert, Mr Curtis' apprentice, testified that 4 bullocks were delivered to Mr Orchard, presumably from Mr Curtis[34]; that Mrs Orchard washed for Mr Curtis, and Mr Orchard was in the habit of supplying Mr Curtis with fire-wood, spokes and charcoal[35], but actual amounts were not stated.

None of these witnesses provided written records of the alleged business transactions. It must be concluded from an examination of their testimony that, at best, witnesses were vague in their recollections about Mr Curtis' payment of Mr Orchard's debts.

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[24] *The Tasmanian and Southern Reporter*, No 234, 26 July 1833
[25] *Tasmanian*, 12 July 1833, para 9
[26] *Tasmanian*, 12 July 1833, para 8
[27] *Tasmanian*, 12 July 1833, para 11
[28] *Tasmanian*, 12 July 1833, para 13
[29] *Tasmanian*, 12 July 1833, para 14
[30] *ibid*
[31] *Tasmanian*, 12 July 1833, para 15
[32] *ibid*
[33] *ibid*
[34] *Tasmanian*, 12 July 1833, para 17
[35] *ibid*

V THE VERDICT

After 20 minutes deliberation, His Honour Chief Justice Pedder, returned a verdict for the defendant, based on the fact that the deed had not been obtained by fraud[36]. Consequently, Mr Curtis gained ownership of the 40 acres at Kangaroo Point.

VI DISCUSSION OF THE CASE

There were two types of evidence in the case: documentary and testimony.

A *Documentary evidence in the case*

The deed was the sole documentary evidence tendered in the case and it was tendered by the defendant. It was fortunate for Mr Curtis' defence that he had retained the deed because following the rule in *Pigot's* case (1615) 11 Rep 266 as referred to by Lord Ellenborough in *Robertson v French* (1803) 4 East 130 @ 136:

> '....a party who has the custody of an instrument made for his benefit is bound to preserve it in its original state[37]'.

The deed was prepared by Mr Nicholl, a clerk in a legal practitioner's office[38]. However, there was no evidence that the document had been scrutinised by a legal practitioner[39]. Mr Nicholl was examined at length about the drawing of the deed, and in particular, the peculiar impression of the seal on the deed[40].

A seal is a symbol of authenticity[41]. Before the growth of literacy, a seal was considered essential for a deed at common law; However with the expansion of literacy and the corresponding ability of a grantor to affix his own signature to authenticate the instrument as his own act and deed, a seal gradually disappeared from the requirements of the law[42].

It can be argued that the document drafted by Mr Nicholl, and indeed the transaction relied upon by Mr Curtis, was evidence of a trust. Her Honour Justice Kiefel noted in *Kennon v Spry; Spry v Kennon* [2008][43] that case law shows it has been sufficient for the establishment of a trust that property is impressed with a trust

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36 *Tasmanian*, 12 July 1833, para 19
37 C. E. Odgers, *The Construction of Deeds and Statutes*, (London: Sweet and Maxwell), p13
38 *Tasmanian*, 12 July 1833, para 4
39 *The Tasmanian and Southern Reporter*, No 234, 26 July 1833
40 *Tasmanian*, 12 July 1833, para 6
41 William S. Anderson, *Ballentine's Law Dictionary*,(New York: The Lawyers Co-Operative Publishing Company, 1969), p1147
42 William S. Anderson, ibid, relying on 47 AM J1st Seals 8
43 HCA 56 @ para 190

obligation, as for example, in *Baldwin v Commissioner of Inland Revenue*[1965][44] and *Tucker v Commissioner of Inland Revenue*[1965][45].

If the interpretation of trust, in its widest sense is taken to ground the existence of a fiduciary relationship, that is, a matter of confidence[46], it becomes apparent that Mr Curtis saw a fiduciary relationship existing between himself as the beneficiary, and Mr Orchard, as the trustee, with the subject matter of the trust being Mr Orchard's farm.

Underlying legal principles then, as now, acknowledge that while a transaction involving land must be in writing, no particular form for the transaction is required. Consequently, while the clerk, Mr Nicholl apparently did not use the formal language which a legal practitioner would probably have used, practically any informal writing may be evidence of the existence of a trust[47]. In instances when a settlor '…has been his own conveyancer'[48], the court endeavours to give effect to the settlor's intention as the court can derive it from the instrument as a whole, *Glenorchy v Bosville* (1733)[49].

In fact, the writing may consist of correspondence - even a series of items of correspondence if on their face they can be connected[50]- it being sufficient if only one document in the series is signed, *Forster v Hale* 1798[51]. The recent High Court of Australia decision of *Kennon v Spry; Spry v Kennon* [2008][52], indicates the survival of the series of documents principle in Australian law. In that case, following a parol trust declared by the settlor and trustee in 1968, subsequent documents dated 1981, 1983 and 1998 were held to be grafted on to the original trust.

In the case of *Orchard v Curtis*, Mr Orchard made an express promise resulting in an express trust. For the creation of an express trust the creator's language must express an intention to create a trust; the language used must explicitly or impliedly express that intention[53]. Clearly, there was no uncertainty in Mr Orchard's deed regarding his intention.

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[44] NZLR 1 at 6, per Macarthur, J, referring to *Underhill's Law Relating to Trusts and Trustees*, (1959) @ 3

[45] NZLR 1027 @ 1030, per Woodhouse, J

[46] William S. Anderson, *Op. Cit*. p1302

[47] J.D.Heydon & M.J.Leeming, Jacob's Law of Trusts in Australia, (NSW: LexisNexis Butterworths,c2006). p91 para 708

[48] *Edgerton v Lord Brownlow* (1853) 4HL Cas 1 @ 210, 10 ER 359 @ 443; *Sexton v Horton* (1926) 38 CLR 240 @ 248; 38 ALR 376, in J.D.Heydon & M.J.Leeming,, *Op.Cit*. p108 para 804

[49] Cast Talbort; ER 628, [1558-1774] All ER Rep 328 in J.D.Heydon & M.J.Leeming, Op.Cit. p109 para 810

[50] J.D.Heydon & M.J.Leeming, *Op.Cit*. p91 para 708

[51] *Forster v Hale* 1798, 3 Ves 696, 30 ER 1226

[52] [2008] HCA 56

[53] J.D.Heydon & M.J.Leeming, *Op.Cit*. p44 para 306 , (relying on Scott and Fratcher, *The Law of Trusts*, 4th edn., Vol 1, 23)

Following the judgment of Lord Ellenborough CJ in *Robertson v French* (1803)[54] in cases of doubt about meaning, the technique for the court to use is based upon the notion that:

> '.....the written words are the immediate language and terms selected by the parties themselves for the expression of their meaning'.

Applying this principle, it is clear that the words of Mr Orchard's deed clearly expressed the promise to transfer his property to Mr Curtis for 150 pounds.

In the case of *Orchard v Curtis*, the three essentials indicating the existence of an express trust involving land were met, that is, there was:

- a written document,
- the identification of beneficiary, subject and property and
- the valid signature of the person legally able to declare the trust.

These essential principles for an express trust where land is involved[55] survive in legislation in Australian jurisdictions today. For example, s23C(1)(b) *Conveyancing Act* 1919 (NSW), is duplicated in other Australian jurisdictions.

In *Orchard v Curtis* the document contained all terms of the trust, these principles being identified in *Morton v Tewart* (1842)[56] and *Ryder v Taylor* (1935)[57] as:

- the identification of the beneficiary - Mr Curtis [58] -
- identification of trust property - Mr Orchard's farm [59]-
- the nature of the trust - the absolute sale of Mr Orchard's property to Mr Curtis for 150 pounds[60].

The VDL colonial newspaper reports of the case omit information regarding the date when the deed was signed, however common law authority establishes the principle that the date of the writing is immaterial, *Forster v Hale* (1798), *Rochefoucauld v Boustead* [1897] and *Ryder v Taylor* (1935)[61] .

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[54] 4 East 130 @ 136 in C.E.Odgers, *The Construction of Deeds and Statutes* , (London: Sweet and Maxwell, 2nd edn), p13
[55] J.D.Heydon & M.J.Leeming, *Op.Cit.* p91 para 708
[56] *Morton v Tewart* (1842) 2Y and C Cas Ch @ 80, 63 ER 29 @ 35
[57] *Ryder v Taylor* (1935)36 SR(NSW) 31
[58] *Tasmanian*, 12 July 1833, para 1
[59] *ibid*
[60] *Tasmanian*, 12 July 1833, para 4
[61] *Forster v Hale* (1798) 30 ER 1226, *Rochefoucauld v Boustead* [1897] 1 Ch 196 @ 206, *Ryder v Taylor* (1935) 36 SR(NSW) 31

Mr Orchard signed the document[62]. A signature is taken to be the name or mark of a person, inscribed or printed by himself, or by his direction[63]. The newspaper reports of the case do not state how Mr Orchard signed the deed, but in any case, that is immaterial because a signature need not be the full name of a person; in fact, in the law of contract, the signature to a memorandum may be any symbol made or adopted with an actual intention to authenticate the writing as that of the signer[64]. It is well-established that in commercial paper transactions, a signature is made by use of any name, including any trade or assumed name, upon an instrument, or by any word or mark used in lieu of a written signature[65].

Mr Orchard was the person in lawful possession of the 40 acre land grant at Kangaroo Point; consequently he was the person enabled by law to declare the trust, *Tierney v Wood* (1854), *Ryder v Taylor* (1935), and *Di Pietro v Official Trustee in Bankruptcy* (1995)[66].

Any sufficiently defined beneficial interest stipulated will suffice to be the subject of a trust, *Bannister v Bannister* [1948], *Bahr v Nicolay* (No.2) (1988) and *Sharp v Anderson* (1994)[67]; clearly, the absolute possession of the property sufficed in this regard.

The delivery of a deed is a condition of the operative effect of the instrument[68]. Mr Kenworthy, the person who prayed at sickbeds, testified that he observed the deed being delivered to Mr Curtis [69]. His Honour Chief Justice Pedder was critical of the witness Mr Kenworthy.[70] Clearly visitation of the sick by lay people was acknowledged by His Honour as an activity that required understanding of the vulnerability of sick people to suggestion. It was a fact that Mr Orchard was in a distressed and weak condition during the visits of Mr Curtis; indeed, it may never have occurred to Mr Orchard to transfer his farm to Mr Curtis had it not been for the suggestion by Mr Kenworthy.

Be that as it may, the document had been duly executed. That being so, its delivery, testified to have occurred by Mr Kenworthy, was sufficient to fulfil the requirement that the instrument was transferred from the grantor to the grantee or the grantee's agent or to a third person for the grantee's use, in such a way as to deprive the

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62 *Tasmanian*, 12 July 1833, para 1

63 Wesley Gilmers, *The Law Dictionary*, 'Restatement (Second) of Contracts 134,' (Cincinnati: Anderson Publishing Co., 1973) @ 302

64 ibid

65 ibid

66 *Tierney v Wood* (1854) 19 Beav 330, 52 ER 377, *Ryder v Taylor* (1935) 36 SR(NSW) 31 @ 51, *Di Pietro v Official Trustee in Bankruptcy* (1995) 59 FCR 470 @ 481

67 *Bannister v Bannister* [1948] 2 All ER 133, *Bahr v Nicolay* (No.2) (1988) 164 CLR 604 @ 654, 78 ALR 1 @ 36, *Sharp v Anderson* (1994) 6 BPR 13,801

68 William S. Anderson, *Op. Cit*. p329

69 *Tasmanian*, 12 July 1833, para 5

70 *ibid*

grantor of the right to recall it at his option, and with intent to convey title, *Marshall v Marshall* [71].

Mr Orchard did not reserve any power of revocation in the deed; consequently, the promise was not revocable[72].

The issue of revocable mandates was considered in detail by Sir George Turner VC in *Smith v Hurst* (1852)[73] who distinguished them thus:

> "The authorities appear to me to result in this, that in cases of deeds vesting property in trustees upon trust for the benefit of particular persons, the deed cannot be revoked, altered or modified by the party who has created the trust…'

His Honour continued with his explication[74]:

> '…the trust being well created, the property in equity belongs to the *cestui que trust* as much as it would belong to them at law if the legal interest had been transferred to them…'

Applying this rationale to the deed signed by Mr Orchard, on its face it had no other object than to benefit Mr Curtis. Thus, the document itself left no doubt about the intention of its creator.

The effect of an express declaration of trust, without the reservation of the power to revoke, is emphasised in *Re Gardner* [1923][75]. In that case the testator was held to have absolute, unfettered owner ship of her property at the time of executing a will or memo, because she had not executed a prior document without a power of revocation. However, the court made it clear that the woman would have immediately diminished the effect of her testamentary disposition, if, at the time of executing her will, her absolute ownership of the property had been fettered by her having previously disposed of some of her interest in land in a prior document without reserving a power of revocation.

B *Testimony of the witnesses*

The lack of business records kept by the witnesses could well be expected to have presented a stumbling block for the defence. However, it did not work in that way. The total consideration set in the deed was 150 pounds. The defence called

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[71] *Marshall v Marshall*, 140 Cal App 2d 475, 259 P2d 131 in William S. Anderson, Op. Cit. p329

[72] J.D.Heydon & M.J.Leeming, *Op.Cit.* p104 para 734

[73] 10 Hare 30 @ 47, 68 ER 826 @ 833

[74] ibid

[75] 2 Ch 230 referred to in J.D.Heydon & M.J.Leeming, *Op.Cit*, p103 para 734. This case of *Re Gardner* [1923] establishes the principle that a prior secret trust without the power of revocation can defeat any subsequent disposition.

witnesses to answer the plaintiff's suit of trespass by a rejoinder of something approaching set-off through the testimony of witnesses.

Mr Clarke, clerk to Mr Stocker, the butcher, testified that while Mr Curtis had promised to pay Mr Orchard's account of 18 pounds, he had not done so, and Mr Stocker continued to seek payment from Mr Orchard.

Dr Crowther testified that Mr Curtis had paid Mr Orchard's medical accounts of approximately 6 or 7 pounds.

The testimony of Mr Curtis' apprentice James Gilbert's[76] that he remembered 4 bullocks being delivered to Mr Orchard from Mr Curtis is another unascertainable amount. At most, if each animal had a value of approximately 20 pounds, the total value of the 4 beasts would have been approximately 80 pounds.

According to Mr Todd, clerk to Mr Lord, also a butcher, Mr Curtis had ordered on behalf of Mr Orchard meat to the value of approximately 15 pounds over a period of approximately 2½ years. The reports of the case do not indicate whether Mr Curtis had actually paid the 15 pounds.

According to the witnesses, then, the following approximate amounts were paid by Mr Curtis for Mr Orchard:

- To Crowther 6 or 7 pounds
- To Mr Lord 15 pounds

The addition of the approximate value of the 4 bullocks from Mr Curtis contributes another 80 pounds.

Consequently, addition of the total allegedly contributed by Mr Curtis for Mr Orchard reveals that the actual amount of consideration that could be proved by the evidence is no more than 102 pounds. This leaves a shortfall of 48 pounds of required consideration which is not accounted for.

In addition, James Gilbert testified that Mr Orchard regularly supplied Mr Curtis with firewood and Mrs Orchard did Curtis' washing[77]. No attempt to take account of this bounty from Mr Orchard to Mr Curtis was made.

VII CONCLUSION

The decision in *Orchard v Curtis* can be seen to uphold the principle that a promise is a serious undertaking, its seriousness deriving from the fact that the promisee

[76] *Tasmanian*, 12 July 1833, para 17
[77] *ibid*

believes and relies upon it. This is the underlying principle of the legal doctrine of estoppel[78].

An early definition of estoppel as 'a bar which stoppeth a person or closes up his mouth to allege or plead what actually may be the truth,'[79]developed into being 'a bar which precludes a person form denying or asserting anything to the contrary of that which has, in contemplation of law, been established as the truth, either by the acts of judicial or legislative officers, or by his own deed or representation, express or implied[80].

Estoppel is not consensual: hence if another party relies upon a representation, and changes his or her position accordingly, the person responsible for the misleading will not be permitted to deny the truth of his own implied or expressed statements[81]. The denial of Mr Orchard could not have been valid because it would have been estoppel by deed: in this principle there is a bar which precludes one party to a deed from asserting as against the other party any right or title in derogation of the deed, or from denying any of the material facts asserted in it[82].

Additionally, as Mr Curtis was said to have been a creditor of Mr Orchard the principle in *Biron v Mount* (1857)[83] - that the disposition to creditors is irrevocable because of estoppel - would have been applicable.

Clearly, then, *Orchard v Curtis* can be taken as an example of the seriousness of making a promise to another. It is a salient reminder to those making written undertakings to others where property is involved to include a clause of revocation. The clause of revocation is probably the safest way to protect oneself – and innocent others – from the unpleasant and potentiality litigious ramifications which can result if a person subsequently changes his or her mind about the content of his or her promise.

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78 P. G. Osborn, *A Concise Law Dictionary*, (London: Sweet and Maxwell, 1964), p126
79 2 Coke, Littleton 352a in William S. Anderson, Op. Cit. p421
80 ibid
81 ibid
82 ibid
83 24 Beav 642, 53 ER 506